QCAT

Queensland Civil and Administrative Tribunal

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F52063VS

PARTIES:	Mr Scott Alexander Volkers v Commission for Children and Young People and Child Guardian
APPLICATION NUMBER:	CSR135-09
MATTER TYPE:	Children's matters
HEARING DATE:	19 April 2010
HEARD AT:	BRISBANE
DECISION OF:	J Cowdroy – Presiding Member R Joachim - Member
DELIVERED ON:	31 May 2010
DELIVERED AT:	BRISBANE
ORDERS MADE:	The decision to issue a negative notice to the applicant is confirmed
CATCHWORDS :	Blue Card, exceptional case, non conviction, charges for serious and disqualifying offences, alleged sexual behaviours, unacceptable risk of harm, protective and risk factors

APPEARANCES and REPRESENTATION (if any):

APPLICANT :	Mr Scott Alexander Volkers represented by Mr A.J. Flynn, SC, instructed by Ms P White of Peter Shields Lawyers
RESPONDENT:	Commission for Children and Young People and Child Guardian represented by Ms K.C. McMillan instructed by Mr C Capper from the Commission

REASONS FOR DECISION

Background to the Application:

1. The applicant in these proceedings is Scott Alexander Volkers, a well known swimming coach who has trained many Olympic champions. He wants the Tribunal to make a decision to grant him a blue card so that he is able to work in child related employment. To this end, he sought review of a decision of the Commissioner for Children and Young People and Child Guardian ("the Commissioner") dated 1 June 2009 in which she determined that he was to be issued with a negative notice and refused to issue him a blue card. This review application was to the former Children Services Tribunal.

2. On 6 March 2009 the Commission received an application from Swimming Queensland, on behalf of the applicant, on the basis that the applicant was a paid employee under the category 'sport and active recreation' pursuant to section 199 of the *Commission for Children and Young People and Child Guardian Act 2000,* as amended ("the Act").

3. An earlier application had been made by the Queensland Academy of Sport on behalf of the applicant, however it was ultimately determined that as the Academy was part of the Department of Local Government, Sport and Recreation it fell within an exemption under the then Act and the Commissioner did not have jurisdiction to conduct employment screening relative to the applicant's employment with the Academy.

4. Before that application had been determined, the Commissioner had been provided with information about the applicant's criminal history by the Queensland Police Service. It revealed that the applicant had been charged with seven counts of indecent treatment of children under 16 occurring between 1 October 1984 and 31 December 1987.

5. In response to the application by Swimming Queensland, employment screening was again conducted and on 31 March 2009 the Queensland Police Service confirmed its earlier advice in relation to the applicant's criminal history, in the terms outlined in paragraph 4.

6. The Commissioner also received material from the Office of the Director of Public Prosecutions and a Crime and Misconduct Commission report – The Volkers Case – Examining the conduct of the police and prosecution (March 2003).

7. The applicant was invited to make submissions as to why the Commissioner should not issue a negative notice, and the applicant indicated that he wished to rely on the materials lodged with the Commissioner when the application from the Queensland Academy of Sport was being processed.

8. On 1 June 2009 the applicant was issued with a negative notice and a blue card was refused. The applicant sought review of that decision on 26 June 2009.

9. Preliminary conferences were conducted on 24 July 2009 and 3 November 2009 whereby arrangements were made for certain material to be made available to the Tribunal via notices to produce; certain material was released to the parties and arrangements made for the parties to have access to the remainder of the materials.

Hearing:

10. The hearing took place in Brisbane on 19 April 2010. Mr Volkers was present. He was represented by Mr A J Glynn, SC, instructed by Ms P White of Peter Shields Lawyers. The Commissioner was represented by Ms K C McMillan, SC, instructed by Mr C Capper from the Commission. No evidence was taken and the hearing consisted of submissions on the written material. The volume of that material was considerable. It consisted of documents from the Queensland Police Service, the Crime and Misconduct Commission and the Queensland Director of Public Prosecutions. The material included transcripts of recorded conversations with the applicant, some of which was hard to follow due to difficulties in the recording process.

What is the relevant legislation?

11. The primary legislation is contained in the *Commission for Children and Young People and Child Guardian Act 2000* ("the Act"). Since the time the application was received and the decision under review was made, that Act has been amended following enactment of the *Queensland Civil and Administrative Tribunal Act 2009* ("the QCAT Act").

12. The QCAT Act, pursuant to sections 247, 269 and 19, abolished the Children Services Tribunal and its enabling Act and substituted QCAT in place of the former Tribunal. It directed that the Tribunal must decide the review in accordance with the QCAT Act and the enabling Act under which the reviewable decision was made. Section 271 of the QCAT Act states that QCAT only has the functions that the former entity, (the Children Services Tribunal) had under its Act.

13. Consequently, in conducting its review, the Tribunal was guided by section 37 of the repealed *Children Services Tribunal Act* ("the CST Act"), which provides as follows:

> *37 Tribunal to decide matters afresh*
>
> *(1) For reviewing a reviewable decision the Tribunal is to-*
>
> *(a) decide afresh the matter to which the reviewable decision relates, unaffected by the reviewable decision; and*
>
> *(b) take all reasonable steps to ensure it has all relevant material before it.*
>
> *(2) Without limiting subsection (1), the Tribunal may have regard to relevant material that was not available to the decision maker*

14. Section 492(2) of the amended Act provides that where a person applies for review of a decision prior to commencement of the QCAT Act and the review has not been decided at its commencement, then the Tribunal must apply the amended Act. In this context, a negative notice issued under the unamended Act is taken to be a negative notice issued under section 220(b) of the amended Act.

15. Generally, a person who wishes to work with, or coach children either in a paid capacity or as a volunteer requires a blue card under the Act. In determining a person's suitability, the Commissioner must have regard to section 221 of the Act. It provides that where a person has been charged with but not convicted of a disqualifying offence the Commission must, and upon review the Tribunal, must issue a positive notice to the applicant unless satisfied that the applicant's case is an exceptional one in which it would not be in the best interests of children to issue a positive notice.

16. The offences with which the applicant was charged are serious and disqualifying offences, however he was not convicted of any of those offences. Consequently a positive notice must be issued unless the Tribunal is satisfied that the applicant's case is exceptional.

17. In deciding whether there is an exceptional case, the Tribunal must have regard to the criteria set out in section 226 of the Act, namely:

(a) in relation to the commission, or alleged commission, of an offence by the person-

(i) whether it is a conviction or a charge; and

(ii) whether the offence is a serious offence and, if it is, whether it is a disqualifying offence; and

(iii) when the offence was committed or is alleged to have been committed; and

(iv) the nature of the offence and its relevance to employment, or carrying on a business, that involves or may involve children; and

(v) in the case of a conviction – the penalty imposed by the court and, if the court decided not to impose an imprisonment order for the offence or not to make a disqualification order under section 357, the court's reasons for its decision;

(b) any information about the person given to the commissioner under sections 318 or 319;

(c) any report about the person's mental health given to the commissioner under section 335;

(d) any information about the person given to the commissioner under section 337 or 338;

(e) anything else relating to the commission, or alleged commission, of the offence that the commissioner reasonably considers to be relevant to the assessment of the person.

18. The Act and the CST Act outline principles for their administration. Both state that it is to be administered under the principle that the welfare and best interests of a child are paramount. It is this principle that the Tribunal must apply.

19. The Act does not define what is meant by an exceptional case. In *Kent v Wilson* (2000) VSC 98, Hedigan J of the Victorian Supreme Court stated that each case must be judged on its own merits. At paragraph 22 he stated:

The facts must be examined in the light of the Act, the legislative intention, the interests of the prosecuting authority, the defendant and the victims. It may be that the circumstances amounting to be exceptional must be circumstances that rarely occur and perhaps be outside reasonable anticipation or expectation.

20. The focus on the Act is the protection of children from harm and to promote the child's wellbeing. In the *Commissioner for Children and Young People and Child Guardian v Maher & Anor* (2004) QCA 492, it was recognised that this principle is the consideration to which all others must yield.

Circumstances of the Alleged Offences

21. The applicant was charged with seven counts of indecent dealing with three female children, who at the time were aged between 12 and 14 years. The girls were coached by the applicant in the 1980's.

22. The totality of the allegations is not repeated but the more pertinent aspects are set out below. In respect of the first complainant, she was coached by the applicant from about 1981 to 1988. She alleged that when she was 14 years of age, whilst at the applicant's home and awaiting collection by her parents, the applicant began rubbing her shoulders. She alleges the applicant invited her to lie on the floor for the purposes of massaging her back. The applicant massaged her buttocks, not her back and his hands went under her shorts and underwear and he massaged her bare buttocks and the inside of her leg.

23. When she was 15 years old whilst the applicant was driving her to training, he began rubbing her right leg and moved his hand towards her vagina. She alleges that he moved his left hand until he was rubbing her vagina over the top of her swimmers for "virtually the whole trip". She also alleges that there was an occasion when the applicant pulled her close and was licking her ear.

24. The second complainant alleged that when she was 12 years old she was asked to visit the applicant's home to help babysit his young daughter. Whilst sitting on the floor watching TV, the applicant commenced massaging her neck despite her protests; he then removed her t-shirt and massaged her back and arms, at the same time sticking his tongue in her ear, as well as caressing her stomach and her breasts with both hands. She also alleges that the applicant would stick his tongue in her ear every now and again and seemed to treat it as a joke.

25. The third complainant alleges she was told to lie on a table on her back in the massage room, following which the applicant started massaging her shoulders and then moved down to her breasts. On another occasion she was told to lie on her stomach and asked to pull her togs down to her waist and the applicant massaged her back before requesting her to roll over exposing her breasts and the applicant began to feel her breasts. On another occasion when she visited him at his on-site caravan at the swim centre the applicant told her to lie on the bed for a massage; the applicant's hands went up under her shorts and rubbed her vagina.

26. All girls allege that the applicant engaged in sexualised conversations with them: to the first complainant he made a comment that her mother had said she was going to be a frigid Brigit; he referred to reincarnation and told her he would like to come back

as her pool buoy, he called her "hot pants", "buns" and "Roy"; in respect to complainant 2, he spoke to her about the size of her backside and made reference to the size of her breasts, which he called "tits"; commenting that she had "big tits and arse"; complainant 3 alleges the applicant made a comment about her being frigid, and referred to the size of her breasts.

27. The applicant was committed for trial in relation to the seven counts on 25 July 2002. In addition to the allegations which formed part of those charges, two other girls alleged sexual behaviour by the applicant, in respect of which no charges were laid. The first related to a 17 year old girl who complained of inappropriate touching whilst she and the applicant were in the car Through a solicitor, she indicated that she was not willing to have the matter further investigated.

28. The second girl reported that the applicant began making sexualised comments to her about her mother when she was about 15, and in 1997 made comments about whether it was okay for a swimmer and a coach to have a relationship. She was invited to the applicant's home where he indicated he would give her a massage; she was lying on the table with a towel covering her; he massaged her breasts and used a vibrating tool on her clitoris. This was identified as occurring in 1999.

29. As a decision had been made to discontinue the seven charges against the applicant, it was determined that there was insufficient evidence to proceed against the applicant in regard to the two further complainants.

30. The decision not to proceed and the subsequent investigation into the conduct of the Queensland Police Force and the Office of the Director of Public Prosecutions were the subject of intense media scrutiny.

31. Mr Volkers was interviewed in relation to the charges by the Queensland Police and denied the behaviour which was the subject of the seven charges against him. He did admit, in pretext conversations with one of the complainants that was recorded by the police that he massaged her leg whilst driving and acknowledged making the comment about returning in the next life as her "pool buoy".
A pool buoy, as the Tribunal understands it, is a floatation device which swimmers place between their legs to keep them buoyant in the water.

32. As to the claim that he used a massage stick on a complainant in respect of which no charges were laid, the applicant told the police that he massaged her and used a trigger massager, but denied using this on her vagina.

Applicant's Submissions

33. The charges against the applicant were discontinued on the basis that there was no reasonable chance of securing convictions. This was on the basis of some inconsistencies in the complainant girls' statements, the unreliability of the evidence, as well as the lack of particularisation and the age of the charges (letter from the ODPP dated 24 September 2008).

34. The basis for the Commission's refusal to grant the applicant a blue card were based on concerns that were held about alleged behaviour; behaviour that had not been substantiated.

35. The applicant has always maintained his innocence and a range of referees from a wide cross section of the community, including coaches, administrators, parents and swimmers: all attest to the fact that the applicant's conduct has always been exemplary. Many of the referees have had a long association with the applicant, extending back to the time when the alleged offending is said to have occurred.

36. The allegations against the applicant were "very public" and the referees all indicate their awareness that the applicant was charged with sexual offences against young women.

37 Issue was taken with the Commission's statement that the applicant has not demonstrated remorse. This is an irrelevant consideration, given that the applicant has consistently denied the behaviour which forms the basis of the charges.

38. No weight should be given to the research study document tendered by the Commission. (Objection had been taken in regard to its admissibility at the commencement of the proceedings and the Tribunal had ruled that it was admissible and it would decide what weight it should attach to it). The assertions in that document are dangerously misleading and are designed to try and establish the likelihood of risk of a person engaging in sexual behaviour involving children by a statistical form of profiling.

39. Similarly, the Tribunal should place no weight on the Commission's Points Assessment System in considering a person's criminal history for the purposes of assessing the likelihood of a person offending, as the assessment process on which it was based is seriously flawed.

40. The applicant acknowledged he massaged a girl's leg whilst in his car. The admission was made in a pretext conversation in which he responded to the allegation put to him by one of the complainants. He "didn't know it was going to be used against him. When someone is accused of a certain action, there is an obvious focus in responding to it." There was nothing sinister about his action – he gave massages to other swimmers in a range of contexts, consequently it would be erroneous to assume that his behaviour was inappropriate.

41. Effectively, the Commissioner has elevated that admission to an assumption of the truthfulness of the allegations of misconduct. The incident when the applicant rubbed the girl's leg "perhaps ... reflects casualness, but no more". The DPP was aware of the admission however it decided not to proceed because of the unreliability of the evidence.

42. It is reasonable to assume that since 2002 the applicant has been subjected to greater scrutiny by those with whom he interacts. Despite that higher level of scrutiny, the referees all attest to his high degree of professionalism and his exemplary behaviour towards children and young people.

43. The oldest of the charges relate to conduct which occurred some 22 years ago. With the exception of the allegation of sexual behaviour towards a female swimmer in 1999, there has been no hint of inappropriate behaviour for a long time.

The Commissioner's Submissions:

44. The young girls who made allegations against the applicant had not reported the offending to police at first instance. Disclosures had been made to their parents or to a medical practitioner. Generally, the delay in not complaining was because of the applicant's position as a highly respected, high profile swimming coach and doubt as to whether they would be believed.

45. In the case of one complainant, the complaint was laid after police approached her. In the case of the woman who complained after the discontinuance of the criminal charges, she did not want the matter investigated and her solicitors threatened legal action if the police pursued it.

46. There is a common theme in the type of behaviour complained of: the hand on the leg, the remarks about the girls' physical characteristics, particularly the emphasis on breast and buttocks, the massages which lead to sexual misconduct and touching the girls whilst driving to or from training.

47. The applicant acknowledged that he massaged one of the complainant's legs whilst driving; he acknowledged a comment he made about returning as a pool buoy. He acknowledged that he used a massage stick at his premises.

48. Contrary to the applicant's submission, the Commissioner's decision was not primarily predicated on two bases: that decision referred to a plethora of evidence which lead to the view that the applicant posed an unacceptable risk. The Tribunal's task is to start afresh, not just having regard to the Commissioner's reasons. The primary submission of the applicant related to an attack on those reasons, however there is a great deal of evidence relevant to the issue of unacceptable risk.

49. There was no motive for any of the complainants to fabricate their allegations. They were not disgruntled swimmers; when the complaints were made they were mature women; some of whom only revealed the abuse at the hands of the applicant when directly approached by police.

50. In the case of some of the complaints, no charges could be laid because of the lack of particularity regarding the time frame in which the event occurred. Although there was sufficient evidence to support a decision to proceed with one charge involving the rubbing of a girl's breasts, it was determined not to proceed because the alleged offending was judged to fall within the lower magnitude of offending in the criminal field. Such behaviour is not of a lower magnitude when viewed in the context of the protection of children.

51. On any view, the behaviour of the applicant denotes a serious breach of trust.

52. There were other statements obtained by the police which alleged inappropriate behaviour by the applicant. One such complainant, who, as a young girl, was trained by the applicant at a swim school for about two years, (CCYPCG195-201), refers to the applicant driving her to training at least a couple of dozen times. When driving with him, the applicant would place his left hand on her leg and also touch her shoulder. She knew that the applicant liked "bums" as he would always comment on them. When she was older and no longer in his squad, he drove her to training about half a dozen times and on one such occasion he talked about the size of her breasts. Her statement about the applicant's conduct is a snapshot of inappropriate behaviour.

53. There has been no evidence in relation to protective factors. Whilst the applicant has denied inappropriate behaviour, there is no evidence to indicate that he has revised or adopted strategies when working with young people. This is particularly significant, given his awareness of the fact that he has been the subject to greater scrutiny.

54. There has been no admission by the applicant that he engaged in inappropriate behaviour with the young girls and no indication of an awareness that there was a gross imbalance of power.

55. The gravity of the risk and the lack of protective factors make the applicant an unacceptable risk to children.

The Tribunal's View:

56. In considering the evidence before it, the Tribunal was mindful of the central focus of the Act which is the protection of children. In accordance with the Act, an applicant's criminal history includes "every charge made against a person for an offence", according to the definition of criminal history in Schedule 4 of the Act. The Tribunal is able to take into account charges for an offence and any relevant surrounding circumstances, irrespective of the outcome.

57. In these reasons, the Tribunal is not required to refer to all of the evidence before it, however it identified what it considered to be the relevant considerations. In making its decision, the Tribunal placed no weight on the research paper tendered by the Commission, Child Sexual Abuse: Offender Characteristics and Modus Operandi, Smallbole, S and Wortley, R (2001) or the Points System Assessment which purports to consider an applicant's criminal history for the purposes of identifying if a person may potentially be a risk to children.

58. It is not this Tribunal's function to adjudicate upon whether the applicant is, in fact and at law, guilty or not guilty of the non conviction charges in question. The relevant function involves an analysis and evaluation of risk. It is not concerned with the proof of offences which the applicant may have committed previously, but with the prevention of future potential harm *Chief Executive Officer, Department for Child Protection v Grinrod (No 2)* (2008) WASCA 28 at paragraph 84.

59. Essentially the question for the Tribunal is to decide whether there is an 'unacceptable risk' that the applicant might cause harm to children. "The analysis and evaluation of risk must be based on all the information and other material properly before the CEO. That material may include, in a particular case, the depositions and evidence of witnesses at trial. It will be necessary, no doubt, for the CEO, in deciding whether, for the purposes of section 12(5), there is an 'unacceptable risk', to rely partly on facts and partly on reasonable suspicions. The weight to be accorded to particular facts or reasonable suspicions will depend on all the circumstances, including the apparent probative value of those facts or suspicions". Buss JA with whom Newnes AJA agreed, in *Chief Executive Officer, Department for Child Protection v Scott (No 2)* (2008) WASCA 171. The Tribunal adopts this approach.

60. The Tribunal had regard to the following matters under Section 226 of the Act:

There were seven charges of indecent treatment of children under 16 in relation to three young women, occurring between 1982 and 1987;
(a) The offences are categorised as serious and disqualifying offences
(b) All of the allegations related to events which occurred in the course of child related work, swim coaching

61. In respect to section 226(e) – anything else relating to the commission, or alleged commission, of the offence that the commissioner reasonably considers to be relevant to the assessment of the person:

(a) It is not the case that the seven charges against the applicant were discontinued because of a finding that the conduct alleged did not occur. The decision was based on a range of factors. These related to the difficulty in prosecuting matters alleged to have occurred many years ago, the problems involved in particularising the dates upon which those events occurred; the uncertainty about the age of the complainants at the time the events occurred and perceived inconsistencies in the evidence, all of which ultimately led to the view that, with the exception of one count, there was not a reasonable prospect of securing conviction.

(b) The applicant acknowledged to the complainants in the pretext conversations that certain actions did occur:

(i) giving a massage in his home to one of the girls, using a massage stick;

(ii) making a comment to one of the complainants about returning as her pool buoy, which he regarded as a joke

(iii) rubbing the leg of a complainant whilst driving;

(iv) when challenged by the second complainant about rubbing her vagina, he is recorded as saying that he was "trying to, you know, rubbing your legs on both sides"; in a further pretext conversation when asked by the complainant to explain rubbing her vagina or rubbing her private parts over her two pairs of togs and querying whether that was normal behaviour, the applicant responded: Well, I – like okay, I was driving along. I remember just rubbing your leg. I remember – I do remember it was very – it was high, right up in the groin area and I may have been – or something. I don't know, but I am not saying you're a liar, but I am telling you that I didn't try to finger you";

(v) when challenged by a complainant after admitting he rubbed her leg on both sides, stating that he was the adult and he should have been aware of the boundaries, he said: " I do – I do now – and I've had opportunities to – you know – look at that area. There's no doubt and I (?) maybe I shouldn't have";

(vi) apart from the above comment which could be construed as some admission by the applicant that he had acted inappropriately, no insight has been demonstrated that he was aware of his obligations, in his role as a coach and mentor to ensure that he did not abuse the position of trust he held in respect to the girls he was coaching;

(c) the complaints have a degree of similarity in the sense that the sexualised behaviour followed, or was part of a massage; more than one complainant referred to inappropriate touching whilst driving in the applicant's car;

(d) there are allegations from two other girls of sexualised behaviour, with the second complainant referring to behaviour in 1999

62. The Tribunal identified potential risk factors and potential protective factors following the example in *Maher's case*. The potential risk factors are summarised as:

(a) The alleged offending occurred over a period of years and was not an isolated incident; they involved a number of complainants;

(b) Not all allegations of improper behaviour became the subject of criminal charges;

(c) The applicant was in a position of trust in relation to those whom he coached;

(d) Apart from inappropriate touching he regularly engaged in crude sexually slanted conversations with a number of young women;

(e) Because of his high profile and the esteem in which he was held in the coaching field, the complainants were of the view that any complaint they made was likely to be disbelieved;

(f) The applicant's behaviour caused harm to the complainants, including ongoing psychological difficulties extending into their adulthood. However the applicant has not demonstrated any awareness, other than in a very limited manner, (see paragraph 61(b)(iv) and (v)), of the affect of his behaviour on the complainants

(g) Despite the charges being laid and the aftermath that ensued, the applicant has not demonstrated that he has engaged in any protective strategies ie chaperoning, a change of practice when coaching/interacting with young people

63. The potential protective factors are:

(a) All the referees, many of whom could be described as high profile athletes, persons of considerable influence and commanding respect in both the swimming fraternity and the community in general, strongly hold the belief that he did not commit the offences with which he was charged. Some of them have known the applicant for many years. Having said that, it is not clear as to the extent of their knowledge about the charges or whether they have any knowledge that the allegations extended beyond what constituted the seven charges against him.

(b) The charges relate to events which allegedly occurred many years ago and since 1999 there has not been any allegation or hint that he has engaged in inappropriate conduct with young people.

64. In the Tribunal's view the protective factors do not outweigh the potential risk factors. In fact, they are grossly disproportionate.

65. Although the allegations relate to offences committed many years ago, they are of such a repetitive and serious nature that time does not detract from their seriousness. Significantly also is the fact that there have been other allegations made which do not form the basis of charges. His admitted behaviour transcends a certain "casualness of approach" viewed in the context in which it occurred and by any interpretation, it could not be regarded as innocent.

66. When viewed in totality, and upon a close analysis of the evidence, the Tribunal is satisfied the applicant conducted himself inappropriately and not protectively with young women to whom he had a significant responsibility in his position of trust. Consequently, it is satisfied that the applicant poses an unacceptable risk to children.

Conclusion:

67. The Tribunal finds that the applicant's case is an exceptional one in which it would not be in the best interests of children for him to be issued with a positive notice and blue card. Consequently, the decision not to issue a blue card is **confirmed**.