SUPREME COURT OF QUEENSLAND

CITATION:	*Whitehead v Griffith University* [2002] QSC 153
PARTIES:	**DOUGLAS WHITEHEAD** (Applicant) **v** **GRIFFITH UNIVERSITY** (Respondent)
FILE NO:	2059 of 2002
DIVISION:	Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	30 May 2002
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2002
JUDGE:	Chesterman J
ORDER:	**1. That the application for review filed 24 April 2002 be dismissed** **2. That the applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – Where applicant sought review of decision made under private contract of employment – whether court had jurisdiction to review decision *Griffith University Act* 1998, s 4, s 6, and s 32 *Judicial Review Act* 1991, s 13, s 41, s 43 and s 48 *Police Service Administration Act* 1990 *Workplace Relations Act* 1996, s 170LT and s 170M *Blizzard v O'Sullivan* [1994] 1 Qd R 112, (followed) *McCasker v Queensland Corrective Services Commission* [1998] 2 Qd R 261, (distinguished) *R v British Broadcasting Corporation ex parte Lavelle* [1983] 1 WLR 23, (followed) *R v Criminal Injuries Compensation Board ex parte Lain* [1967] 1 QB 864, (applied) *R v Panel on Take-overs and Mergers*, *ex parte Datafin Plc* [1987] 1 QB 815, (cited)
COUNSEL:	Mr A. Boe for the applicant Mr T.J. Bradley for the respondent

SOLICITORS: Boe Callaghan Lawyers for the applicant
Minter Ellison Lawyers for the respondent

[1] **CHESTERMAN J:** The applicant is employed by the respondent Griffith University as a senior lecturer in the School of Computing and Information Technology. On 26 March 2001 the Head of the school handed him a letter which set out a number of complaints about his occupational performance. The most serious of these was that he had revised the mark given to one of his students following an examination in the subject of eCommerce. The student had initially been awarded a credit but the grade was increased to a distinction. The complaint was that the alteration occurred after the student had asked to be given the higher mark to improve his chances of retaining financial sponsorship from the Thai Government which was assisting him to study at the university.

[2] The applicant was employed under the terms of the *Griffith University – Academic Staff Certified Agreement* 2000-2003 ("the agreement") made between the respondent and the National Tertiary Education Union. It was certified in accordance with s 170LT of the (Commonwealth) *Workplace Relations Act* 1996 by the Australian Industrial Relations Commission ("the Commission") on 21 August 2000. The agreement is, by s 170M, binding on applicant and respondent. Clause 35 of the agreement sets out "*Procedures for Misconduct or Serious Misconduct*." Clause 35.2 provides:

> "If the Vice Chancellor considers an allegation of misconduct . . . warrants further investigation, the Vice Chancellor will notify the employee in writing and in sufficient detail to enable the employee to understand the nature of the allegations and to . . . respond . . .
>
> 35.4 If the allegation is denied . . . the Vice Chancellor shall give due consideration to the response . . . and:
> . . . . . .
>
> 35.4.1 the Vice Chancellor may counsel or censure the employee and take no further action or
> 35.4.2 the Vice Chancellor may refer the matter to a Misconduct Panel."

Clause 11 of the Agreement is entitled "*Disputes Avoidance and Settlement Procedures*". It provides that in the event of any disagreement about the interpretation, application or implementation of any part of the agreement the following procedures should apply:

> (a) First a representative of the union and of the university should attempt to resolve the dispute.
> (b) If the dispute cannot be resolved in that manner it is to be referred to a committee which should attempt to resolve the dispute within 21 days.
> (c) If the matter still cannot be resolved it may be referred to the Commission which may resolve it by conciliation and/or arbitration or, in cases where the Commission does not have jurisdiction to arbitrate it could proceed pursuant to s 111AA of the *Workplace Relations Act*.

In addition to these procedures Clause 22 of the agreement obliges the respondent to adhere to an individual grievance resolution procedure which is in five stages. The first is a consultation or discussion between the parties personally. The second is involvement of the head of the department. The third stage is conciliation. The next stage is the referral of the dispute to a Grievance Investigation Committee and the final stage is the referral of the dispute to the Commission.

[3] On 18 June 2001 the Vice Chancellor wrote to the applicant advising him of the allegations of serious misconduct and asked for a response. On 30 July 2001 the applicant responded. On 18 September 2001 the (acting) Vice Chancellor wrote to the applicant advising him that the allegations would be referred to a Misconduct Panel.

[4] Instead the Vice Chancellor wrote a letter dated 1 February 2002 which formally censured the applicant, not for revising the student's grade, but for failing to cooperate in the university's investigation of the allegation and, in particular, for not producing evidence to support his denial of the charge. The Vice Chancellor asserted that had the applicant responded responsibly:

> "the matter would not have continued to progress in the way in which it did. . . . I reprove you for the approach you took to this matter."

[5] The applicant was also informed that no Misconduct Panel would be convened.

[6] By an amended application filed 24 April 2002 the applicant claims:

(i) a declaration that the decision not to convene a Misconduct Tribunal (sic) denied him natural justice.
(ii) a declaration that the decision to censure him was reached after a denial of natural justice.
(iii) a declaration that the decision to censure him was so unreasonable that no reasonable decision maker could have made it.
(iv) a declaration that the decision to censure him is invalid.
(v) an order quashing the decision to censure him.

The original application sought judicial review of the decisions not to appoint a Misconduct Panel and to censure the applicant on the ground that they were administrative decisions made under an enactment, the *Griffith University Act* 1998 by which the applicant was aggrieved. The applicant no longer contends that the decisions are those to which Part 3 of the *Judicial Review Act* 1991 applies. Instead, by the amended application, he invokes the jurisdiction conferred by s 41 and for s 43 of the Act. Section 41 provides that:

> "(2) If, before the commencement of this Act, the court had jurisdiction to grant any relief or remedy by way of a writ of . . . *certiorari*, the court continues to have the jurisdiction to grant the relief or remedy, but must grant the relief . . . by making an order . . . in the nature of, and to the same as, the relief . . . that could . . . have been granted by way of such a writ."

[7] The respondent has applied for orders pursuant to sections 48(1) and 13 of the Act that the applicant's application for review be dismissed.

Section 10 of the Act provides that the right to judicial review is in addition to any other rights an applicant may have to seek a review of the decision complained about. Section 13 is in these terms:

> "Despite s 10, but without limiting s 48, if –
>
> (a) an application under s . . 43 is made in relation to a review of a matter; and
>
> (b) provision is made by a law, other than this Act, under which the applicant is entitled to seek review of the matter by another court or tribunal, authority or person;
>
> the court must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so.

Section 48 provides that:

> "(1) The court may stay or dismiss an application under s . . 43 or a claim for relief in such an application, if the court considers that –
>
> (a) it would be inappropriate –
>
> (i) for proceedings . . . to be continued; or
>
> (ii) to grant the application or claim; or
>
> (b) no reasonable basis for the application or claim as disclosed; or
>
> (c) the application or claim is frivolous or vexatious; or
>
> (d) the application or claim is an abuse of the process of the court."

[8] The respondent has two points. The first is that the Vice Chancellor's decision not to convene a Misconduct Panel and to censure the applicant are not amenable to judicial review: they are not decisions in respect of which the court would have exercised jurisdiction before the Act to issue a writ of *certiorari*. Accordingly the application is vexatious in the technical sense no matter how genuinely the applicant believes he has been mistreated. If the point is made out no doubt it would be inappropriate for the proceedings to continue.

The second point is that the applicant may take his grievance to the Commission which has ample powers to redress it. The result is that the court must dismiss the application if, in the curious wording of s 13, it is satisfied that it should do so.

[9] Before dealing with the arguments some background facts should be stated to assist an understanding of the submissions.

[10] By sections 4 and 6 of *Griffith University Act* 1998 the respondent was established and given all the powers of an individual to enter contracts, own and deal with property and do anything necessary or convenient to perform its functions. Division 2 provided for a Council to be the respondent's governing body with power to appoint staff and to manage and control its affairs and property. By s 32 there is to be a Vice Chancellor who is the chief executive officer and who exercises the powers and performs the functions conferred on him by the Council.

[11] The applicant submits that the court has jurisdiction to entertain his application for review because:

(a) The respondent is a public institution operating under a statute and that the allegations were serious and received notoriety amongst the university's staff and students.

(b) The decisions sought to be reviewed are public in character relating to allegations of misconduct made publicly and are said to affect the interests of the student whose mark was to be increased.

(c) The decision to censure the applicant having been made after a decision to convene a Misconduct Panel was beyond the respondent's power.

(d) The applicant was denied procedural fairness.

The third and fourth grounds do no more than recite that the applicant has been disadvantaged. They do not address the question whether the court has, or should exercise, jurisdiction to exercise its prerogative powers. The only argument advanced in favour of jurisdiction is that the impugned decisions were public in nature involving the performance of a public duty or the exercise of public powers.

[12] The applicant principally relies upon the decision of the Court of Appeal in *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] 1 QB 815 for his submission that the respondent exercised public duties and is therefore amenable to the regulation of public law. The Takeover Panel, one of whose decisions was sought to be reviewed, was described as a self-regulating body, being "a group of people, acting in concert, (who) use their collective power to force themselves and others to comply with a code of conduct of their own devising." (p 826) Its role was summarised by Donaldson MR (835):

> "As an act of government it was decided that, in relation to takeovers, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where E.E.C. requirements called for statutory provisions."

In his review of the authorities which led to the conclusion that the Panel was amenable to prerogative remedy the Master of the Rolls referred to *R v Criminal Injuries Compensation Board ex parte Lain* [1967] 2 QB 864 at 882 in which Parker LCJ said:

> "Private or domestic tribunals have always been outside the scope of *certiorari* since their authority is derived solely from contract, that is, from the agreement of the parties concerned . . . We have . . . reached the position when the ambit of *certiorari* can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially."

In the same case Diplock LJ said (884):

> "The earlier history of the writ . . . shows that it was issued to courts whose authority was derived from the prerogative, from Royal Charter, from franchise or custom as well as from Act of Parliament.

> Its recent history shows that as new kinds of tribunals have been created, orders of *certiorari* have been extended to them too and to all persons who under authority of the Government have exercised *quasi* judicial functions . . . If new tribunals are established by acts of government, the supervisory jurisdiction . . . extends to them if they possess the essential characteristics."

[13] At 838 Donaldson MR echoes this synthesis:

> "In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."

Accordingly it was held that the panel was amendable to judicial review. Although it had no direct statutory powers, it exercised a function of government, namely the regulation of corporations and financial institutions. In *Lain* the Criminal Injuries Compensation Board also exercised a governmental function. It was the creature not of statute but of the executive arm of government. It distributed public money to victims of crime.

[14] The judgment of Lloyd LJ stressed the source and nature of the power being exercised by the tribunal or person whose decision is sought to be reviewed as determining the availability of judicial review. He said (847):

> ". . . The source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: . . . but in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. . . . The essential distinction, which runs through all the cases . . . is between a domestic or private tribunal on the one hand and a body of persons who were under some public duty on the other."

[15] Applying this principle I cannot see that the respondent was in any way exercising any of the powers or functions of government in acting to censure the applicant and to revoke an earlier decision to constitute a Misconduct Panel. It was exercising powers conferred by the contract of employment between the parties. It appears to be entirely in the "domestic or private" realm rather than the public, in the sense of governmental. A case referred to with evident approval by Lloyd LJ points to the same result. In *R v British Broadcasting Corporation ex parte Lavelle* [1983] 1 WLR 23 Woolf J decided that judicial review was not available to an employee of the BBC who was accused of theft and treated, she thought, unfairly by her employer. The corporation was established by Royal Charter with the principal object of providing radio and television broadcasting services to the public. The Charter gave it power to appoint and remove employees and to determine conditions of employment. See *Halsbury's Laws of England* 4th ed. vol 45 para 517, 521. The case is therefore similar to the present. Ms Lavelle's terms of employment

incorporated the BBC's regulations which, it seems, in turn incorporated a number of staff instructions. The complaint was that she had not been afforded procedural fairness in accordance with the regulations and instructions. Woolf J said (30,31):

> "Those (prerogative) remedies were not previously available to enforce private rights but were, what could be described as, public law remedies. They were not appropriate, and in my view remain inappropriate remedies, for enforcing performance of ordinary obligations owed by a master to his servant. An application for judicial review has not and should not be extended to a pure employment situation. Nor does it . . . make any difference that what is sought to be attacked is a decision of a domestic tribunal such as a series of disciplinary tribunals provided for by the BBC.
>
> . . . The application for judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character. The disciplinary appeal procedure set up by the BBC depends purely upon the contract of employment between the applicant and the BBC and therefore it is a procedure of a purely private or domestic character."

[16] *Blizzard v O'Sullivan* [1994] 1 Qd R 112 supports the respondent. A section of the *Police Service Administration Act* 1990 provided that the Governor-in-Council might appoint executive officers of the Queensland Police Service. The conditions of appointment of such a person were to be approved by the Commissioner of the Service, accepted by the appointee, and were to be governed by a contract of employment made between the Crown and the appointee. The applicant Blizzard was appointed as a deputy commissioner on terms agreed in a contract made between him and the Crown. One of the terms was that his employment might be terminated by either party giving the other at least one month's written notice. His employment was terminated by notice. He sought a statement of reasons for his dismissal pursuant to Part 4 of the *Judicial Review Act* 1991 which obliges the maker of a "decision to which (the) Act applies" to give reasons. The relevant decisions are those made under an Act of Parliament or statutory instrument. In refusing the application Thomas J said (118-119):

> ". . . under Acts where there are statutory provisions for the creation of positions and for transfer, promotion, retirement and dismissal of officers, with the establishment of appeal boards and provision for inquiries to review disciplinary action and review of promotions, 'decisions made by those boards or committees under the authority conferred by sections of the *Public Service Act* or the *Broadcasting and Television Act* may be susceptible of review under the *Judicial Review Act*' . . . By contrast, in cases where the authority has a general power to make a contract which becomes the charter of the rights of the parties concerned, and where no particular administrative power (as distinct from the contract itself) is the basis of the challenged decision, the decision is normally regarded as being made under the contract and in turn not being made under an Act."

[17] This analysis is directly apposite. The respondent, through its Vice Chancellor, was not exercising statutory powers when it censured the applicant and declined to appoint a Misconduct Panel. It misstates the position to say that the respondent

"operates under statute". It is created by statute which gives it functions to perform and a very general conferral of power to discharge those functions. The particular power to discipline staff members for misconduct is not statutory but contractual. This appears un-contestable and was the apparent reason for the applicant discontinuing his application brought under Part 3 of the Act.

[18] The *Griffith University Act* does not contain any specific grant of power to the university or its council to investigate allegations of misconduct by staff members. Those powers are all found in the agreement which is the sole explanation for the existence of Misconduct Panels, their functions and powers. It is to be noted that clause 35.1 of the agreement provides that:

> "Disciplinary action against an employee for misconduct . . . shall only be taken under the terms of this clause."

[19] The applicant relies also upon the judgment of Pincus JA in *McCasker v Queensland Corrective Services Commission* [1998] 2 Qd R 261 at 272. His Honour's judgment was a dissenting one and the passage relied upon dealt with the question whether a decision maker's departure from departmental guidelines gave rise to a right to judicial review. The case, in my view, is not relevant to the present problem.

[20] There is no public or governmental element in the respondent's decisions which the applicant considers to be unfair. Those decisions are not amenable to judicial review. Accordingly the application is vexatious and/or an abuse of process. It is certainly inappropriate for it to continue.

[21] Additionally, it seems to me, the provisions of the agreement and the powers of the Commission entitle the applicant to seek a review of the decisions by "another . . . tribunal, authority or person". The applicant concedes this to be so with respect to the decision to censure him but claims the agreement gives him no redress with respect to the decision not to convene a Misconduct panel. I do not see why that decision, and the applicant's reaction to it, is not a disagreement over the implementation or application of the agreement, part of which authorises the respondent to convene a Misconduct Panel or censure a staff member.

[22] To the extent that the court has a discretion to entertain the amended application for declarations other than as an application for prerogative orders it is inappropriate to do so. There is ample alternative means of relief open to the applicant pursuant to the agreement. As well the applicant seeks an order in the nature of *certiorari* "quashing the decision to censure . . . the applicant" which is essentially prerogative relief which is, for the reasons expressed, unavailable.

[23] Accordingly I order that the application for review filed 24 April 2002 be dismissed and that the applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.