

# SUPREME COURT OF QUEENSLAND

CITATION: *McInnes v District Manager, Rockhampton Health District & Anor* [2003] QSC 396

PARTIES: **NARELLE McINNES**  
(Applicant)  
v  
**DISTRICT MANAGER, ROCKHAMPTON HEALTH DISTRICT**  
(First Respondent)  
and  
**DIRECTOR GENERAL, DEPARTMENT OF HEALTH**  
(Second Respondent)

FILE NO: S296 of 2002

DIVISION: Trial Division

DELIVERED ON: 21 November 2003

DELIVERED AT: Rockhampton

HEARING DATE: 20 August 2003

JUDGE: Dutney J

ORDERS: **Application dismissed with costs**

CATCHWORDS: JUDICIAL REVIEW – BREACH NATURAL JUSTICE – CONSIDERATION OF IRRELEVANT MATTER – FAILURE TO CONSIDER RELEVANT MATTER – UNREASONABLENESS - where disciplinary penalty and demotion imposed upon applicant – where investigation conducted and report prepared regarding allegations against the applicant – where applicant asked to respond to allegations but material provided to her had names of complainants and sections of the report deleted

*Judicial Review Act 1991 (Qld)*  
*Public Service Act 1996 (Qld)*, s 87(1)(a), (b) and (f), s 90, s 94

*Kioa v West* (1985) 159 CLR 550, followed

*Minister for Immigration and Ethnic Affairs v Wu*  
 (1996) 185 CLR 259, cited  
*Minister for Aboriginal Affairs v Peko Wallsend Ltd*  
 (1986) 162 CLR 24, cited  
*O'Rourke v Miller* (1984) 58 ALR 269, cited  
*Re Solomon* [1994] 2 Qd R 97, referred to

COUNSEL: RN Alldridge for the Applicant  
 SA McLeod for the Respondent

SOLICITORS: John Murphy & Co for the Applicant  
 Crown Solicitor for the Respondent

- [1] The applicant seeks an order under the *Judicial Review Act 1991* reviewing the decision of the first respondent, dated 24 May 2002, and made under the *Public Service Act 1996*:
- (a) to impose a disciplinary penalty against the applicant;
  - (b) to demote her to a level 2 position with the Rockhampton Hospital (excluding the Perioperative Service/CSSD) or Rockhampton Health Service District; and
  - (c) that the penalty be effective from 21 days from the date she received the letter advising of the penalty.
- [2] The applicant held the position of Level 3, Nursing Co-ordinator with the Rockhampton District Health Service and was based at the Rockhampton Hospital.
- [3] By a letter dated 13 September 2001 the first respondent advised the applicant that he had instigated an investigation into the extent of interpersonal conflict within the perioperative services at the Rockhampton Hospital. The terms of reference of the investigation accompanied the letter.
- [4] A report was subsequently prepared by the investigation officers.
- [5] By a letter dated 21 January 2002, the first respondent advised the applicant that “a number of serious allegations regarding your workplace behaviour and management abilities are outlined in the report”. A copy of some sections of the report, said to be the relevant sections, accompanied the letter. The

applicant was asked to respond to a series of allegations set out in the letter within fourteen days.<sup>1</sup> In addition, the applicant was suspended pending the outcome of the investigation.

- [6] The letter went on to direct the applicant not to discuss the allegations with any other staff member, or contact staff members who had made allegations against her.
- [7] The letter was accompanied by large sections of the report. This was supported by a number of statements. The report and statements comprised several hundred pages. The documents were censored to prevent identification of any complainant against the applicant. Those sections of the report not provided were said not to be relevant to allegations against the applicant. The deletions from the statements made it difficult, for me at least, to follow some of the incidents alleged by the complainants. However, the substance of most of the specific incidents alleged could be readily understood.
- [8] Notwithstanding the deletions, the applicant did prepare a response in which she made a number of assumptions about particular incidents which she believed to have given rise to complaints and provided her alternate version. In relation to some incidents, the respondent indicated that she did not know of the matters complained of and made general denials.
- [9] On 20<sup>th</sup> March 2002 the first respondent wrote to the applicant in relation to an incident alleged to have occurred on 19 December 2001 and not covered by the investigation previously undertaken. A response was requested both to that issue and a number of others. The applicant responded on 18 April 2002.
- [10] After considering the applicant's responses, the first respondent wrote on 2 May 2002 advising that he found the applicant liable for disciplinary action pursuant to s 87(1) (a), (b) or (f) of the *Public Service Act* and requesting her

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<sup>1</sup> The specific allegations are set out in paragraph [19] below.

to show cause why a disciplinary penalty should not be imposed. Again, the applicant responded. As a result of this response the first respondent reconsidered his original intention to dismiss the applicant and made the decision which the applicant seeks by this application to review.

[11] The principal ground of review is that the applicant has been denied natural justice.<sup>2</sup> The particulars of this ground are set out in paragraphs 19 to 21 of the application. In essence, they relate to the:

- failure to raise the complaints with the applicant before embarking on the investigation; and
- the failure to give a complete and uncensored copy of the report and supporting material to the applicant to enable her to respond, in circumstances where the decision maker had stated an intention to base the decision on all the material.

[12] What is necessary to provide procedural fairness must be judged by the circumstances of the case. In *Kioa v West*<sup>3</sup> at 584-585, Mason J stated:

“Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute ... What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision maker is acting ...

In this respect the expression “procedural fairness” more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, ie, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations ...”

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<sup>2</sup> Paragraph 18 of the application.  
<sup>3</sup> (1985) 159 CLR 550

[13] The statutory power under which the first respondent purported to act was s 87 of the *Public Service Act*. That section provides in sub-section (1) that:

“The employing authority may discipline an officer if the authority is reasonably satisfied that the officer has –

- (a) performed the officer’s duties carelessly, incompetently or inefficiently; or
- (b) been guilty of misconduct; or
- ...
- (f) contravened, without reasonable excuse, a provision of this Act or a code of conduct.”

[14] Section 90 of the *Public Service Act* requires the employing authority to comply with the rules of natural justice. Section 94 allows a person aggrieved by a disciplinary decision an appeal on the merits to the Commissioner.

[15] Compliance with the rules of natural justice requires the applicant to be given an opportunity to deal with the substance of adverse allegations made against her.<sup>4</sup>

[16] Mr Alldrige for the applicant submitted that the failure to provide an uncensored copy of the report together with the failure to supply twenty-two statements and the deletion of the names from those statements in fact provided fell short of giving the applicant a proper opportunity to respond, particularly when the allegations themselves went back in some cases to 1998 and 1999. It was submitted that if the incidents complained of had been specifically identified they may have been explicable and referable to a limited number of isolated events. The explanation provided for not supplying the 22 statements was that they related to persons other than the applicant and were not relevant to the issues with which she was required to deal.

[17] While the incidents in the part of the report provided to the applicant were numerous they ranged from relatively trivial to more serious. The

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<sup>4</sup> *Kioa v West* (supra) at 628 per Brennan J; *O’Rourke v Miller* (1984) 58 ALR 269 at 276-277 per Gibbs CJ.

respondents' counsel submitted that the governing principle was reflected in the following passage from the judgement of Ambrose J in *Re Solomon*<sup>5</sup>:

“In my view it is not the law that procedural fairness requires an administrative tribunal to provide to a person whose rights will or may be affected by its decision with copies of all material which it has under consideration or indeed the names and addresses of all persons who have given statements which the tribunal may consider. Natural justice can be said to require such a tribunal to bring to the notice of a person who might be affected by its determination, the issues or factors which it considers to be critical to its determination.”

[18] The rules are not rigid. In some cases it will be necessary to give information as to the identity of the person making the complaint. In others it will not. In this case, the investigation was not one into particular events or incidents. The terms of reference for the report of the investigation officers identified the concerns to be investigated as follows:

- “Extent and causes of any interpersonal conflicts within perioperative service.
- Identify the effect of any existing conflict on the provisions of service.
- Determine based on evidence, if the behaviours / actions of any employee/s could be constituted as breaching the Queensland Health Code of Conduct.”

[19] Upon receipt of the report the applicant was asked to address four allegations:

- “That you are responsible for the existence of unacceptable levels of conflict and bullying within the Perioperative Services due to poor people management skills and management practices;
- That your management practices include the fostering of an organisational climate and culture of fear, blame, intimidation, humiliation and the alienation of individual staff members from their peers;
- That there is inadequate planning and management as required by your role of NPC; and
- That you have breached the Queensland Health Code of Conduct.”

[20] The background facts include an earlier report sent by the applicant to the first respondent and dated 31 August 2001, dealing in general terms with the same type of allegations the applicant was asked to address in January 2002. The applicant's own response to the investigative report exceeded fifty pages

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<sup>5</sup> [1994] 2 Qd R 97 at 108.

although in many places it confined itself to being critical of the vagueness of the allegations being made by the anonymous complainants. Nonetheless it seems clear to me that what the applicant was being asked to comment on and respond to were allegations of systemic problems for which she was said to be responsible. The individual incidents alleged were themselves merely examples of the wider problem. In such circumstances it does not seem to me to be necessary to identify the individual complainants when the substance of most of the individual complaints was clear, as it was here. Indeed, the findings made against the applicant by the decision maker were of a general nature rather than referable to specific incidents. The findings were that the applicant had failed to develop, implement and monitor management systems that met the principles of best practice from a human resource, clinical and financial perspective for the operating rooms; that the applicant's management practices and interpersonal behaviour with staff had contributed to an organisational climate and culture of fear, intimidation, humiliation and bullying and that the Queensland Health Code of Conduct had been breached.

[21] In the circumstances I am satisfied that the respondents have afforded the applicant natural justice in relation to the allegations against her and that ground for review is not made out.

[22] The second ground for review was that the making of the decision was an improper exercise of the power conferred by the *Public Service Act*. This ground relied variously on taking into account irrelevant considerations, not taking into account relevant considerations and the unreasonableness of the decision. As to this ground, the complaint as particularised in the application was really one as to the weight given by the decision maker to various issues in coming to his decision. Questions of weight are not ordinarily reviewable since they concern the merits of the decision rather than the procedural steps leading to the decision.<sup>6</sup> Nothing is identified that the *Public Service Act* required to be taken into account which was not, and there is no evidence that the decision maker acted on any irrelevant basis. The decision was one which

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<sup>6</sup> See *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 291-292; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 41-42.

was open to the decision maker, even though views may differ on whether the action taken was warranted.

[23] Although error of fact or law was raised in the application, no such error was identified.

[24] In the circumstances I am not satisfied the decision the subject of the application was attended by reviewable error and the application is dismissed with costs.