SUPREME COURT OF QUEENSLAND

CITATION:	*Ambrey v Oswin* [2005] QCA 112
PARTIES:	**WILLIAM JOHN AMBREY** (plaintiff/appellant) **v** **JUDITH MARGARET OSWIN** (defendant/respondent)
FILE NO/S:	Appeal No 7368 of 2004 SC No 567 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	15 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2005
JUDGES:	McPherson JA, Jerrard JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal** **2. The respondent be restrained from taking any further part in the hearing and determination of disciplinary proceedings against the appellant pursuant to the Notice to Show Cause dated 28 April 2003** **3. The respondent pay the appellant's costs here and below**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS FOR REVIEW – PROCEDURAL FAIRNESS – BIAS – APPREHENSION OF BIAS – whether wording of show cause notice and subsequent conduct raises questions of bias on behalf of delegate respondent – whether investigating officer should be restrained from pursuing the matter further *Crime and Misconduct Act* 2001 (Qld), s 15, s 38(2) *Judicial Review Act* 1991 (Qld), s 20, s 21 *Public Service Act* 1996 (Qld), s 87, s 88, s 90 *Public Service Regulation* (Qld), s 16(d) *Public Service Sector Ethics Act* 1994 (Qld), s 12 *Whistleblowers Protection Act* 1994 (Qld), s 118 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337,

applied
Johnson v Johnson (2000) 201 CLR 488, distinguished
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70, cited
Vakauta v Kelly (1989) 167 CLR 568, cited

COUNSEL: A J H Morris QC, with A W Collins, for the appellant
J A Logan SC for the respondent

SOLICITORS: Dempseys Solicitors for the appellant
Crown Solicitor for the respondent

[1] **McPHERSON JA:** I agree with the reasons proposed by White J.

[2] It is unfortunate that the respondent expressed herself in such unqualified terms in the portion of the show cause notice that is rendered in italics in para 16 of the reasons of White J. Considered objectively as it must be, it can hardly avoid raising a suspicion in the mind of a fair-minded observer that the respondent had already formed a conclusion that the applicant was the perpetrator of the sexual assault on Mrs M that was the subject of the investigation. That made and makes it inappropriate that she should continue to be the one who carries out the final step in the investigation. We were led to understand that there are others who may be qualified or authorised to undertake the task.

[3] It would be regrettable if, as a result of this decision, future show cause notices become unduly complex or even evasive; but it should not be difficult, without sacrificing simplicity of form and language, to avoid creating or conveying the impression that the delegate has already reached a view on the very matter to be decided.

[4] I agree with the orders formulated by White J.

[5] **JERRARD JA**: In this appeal I have read and respectfully agree with the reasons for judgment of McPherson JA and White J, and the orders White J proposes. I add that the respondent was obliged by Queensland Transport HR Policy and Procedures for Discipline, at step 3 thereof as described in the judgment of White J, only to determine if there were grounds for a continuation of the disciplinary process. If the respondent was so satisfied then it was appropriate for the respondent to inform the appellant of the fact of her determination that there were grounds for a continuation of that disciplinary process. The respondent was not obliged at the conclusion of step 3, and before taking step 4, to make a finding on the balance of probability as to whether either of the category 1 or category 2 allegations against the appellant (reproduced in the judgment of White J) had been established. The respondent was required to do that at step 5 of the process, and not before.

[6] Yet the Show Cause Notice issued to the appellant unambiguously expressed the view that he was the person who sexually assaulted by the complainant. That was without hearing from him, and in circumstances in which the investigation appeared to establish that the appellant was wearing a blindfold at the relevant time, as was another person who only moments before the incident had accidentally burnt the complainant with a cigarette. A fair minded observer would expect that the

respondent would follow the required procedures and not reach a finding until after the appellant had been given the opportunity to respond.

[7] There was also the respondent's correspondence of 21 July 2003 in which the respondent informed the appellant's solicitors that:

> "On the balance of probabilities, the available evidence establishes a prima facie case against Mr Ambrey. This is the very basis for the Show Cause."

Reaching a conclusion on the balance of probabilities – if a conclusion is available – should occur at step 5, not step 3. The respondent did express the position correctly in cross-examination, namely that her role to date had been only to decide if there was sufficient information to issue a show cause notice. Unfortunately that appropriate description had been preceded by those earlier statements; and while the respondent is undoubtedly very clear now about what is and what is not required at step 3, and would no doubt be very fair in any final decision, it is not appropriate that she should make it.

[8] **WHITE J:** The appellant is employed under the *Public Service Act* 1996 as an officer in Queensland Transport in Townsville and has been so employed for some 20 years.

[9] Queensland Transport arranged what was described as a team building workshop for some of its officers over several days at Mission Beach in Far North Queensland.

[10] In the afternoon of 9 October 2002 the participants were engaged in an activity which involved some of them being blindfolded. Mrs M was one such participant. She alleged that she was sexually assaulted by another staff member in the course of the activity. She was unable to see who had done so. Mrs M made a written complaint in relation to the incident on 2 December 2002. The matter was referred to the Crime and Misconduct Commission as required under the *Crime and Misconduct Act* 2001, s 38(2), as the conduct possibly was "official misconduct" within the meaning of s 15 of that Act. The Crime and Misconduct Commission referred the matter back to Queensland Transport for investigation.

[11] Mr Noel Rumble, Regional Director (Northern) Queensland Transport, retained Michael Jacobs, principal of an investigation company external to Queensland Transport, to investigate the complaint.

[12] The investigator interviewed witnesses. The appellant was identified by some as the perpetrator, two opining an accidental touching and two that it was deliberate. Another witness recalled a conversation after the assault in which the appellant allegedly implicitly admitted the assault.

[13] On 17 February 2003 Mr Rumble informed the appellant of the complaint. It seems he had not known of it prior thereto or of the external investigation. The appellant was asked to attend an interview with the investigator. Pending the outcome of the investigation the appellant was notified of his transfer to another office in Townsville. He was provided with a copy of Queensland Transport's Human

Resources Policy and Procedures for Discipline ("HR Policy and Procedures for Discipline"). Mr Rumble added in his letter of 17 February,

> "In the interests of natural justice, it is appropriate for Queensland Transport to gather all the relevant information before putting the details of the allegation to you. I can assure you that I am aware of your rights to natural justice and will ensure that these rights are observed."

[14] The appellant consulted with his solicitors promptly. They accompanied him to the interview with Mr Jacobs but in the absence of details of the complaint the appellant on advice declined to be interviewed. The solicitors sought those details from Mr Rumble which he provided with a summary of the evidence by letter dated 11 March 2003. The appellant's solicitors sought copies of the statements of the witnesses referred to by Mr Rumble. Mr Rumble said he did not propose to release any records of any interviews making reference to the *Whistleblowers Protection Act* 1994.

[15] Mr Jacobs provided the report of his investigation to Mr Rumble on 4 April 2003. In it he identified four persons who said they saw the appellant's hand touch Mrs M near her vaginal area over her clothes during the workshop activity. Two said that it was an intentional touching, two that it was an accidental bump. Three persons were identified who were part of a group conversation including the appellant which took place after the activity where the incident was discussed. The conversation suggested that the appellant had intentionally touched Mrs M and the appellant had not dissociated himself from this suggestion. Mr Jacobs concluded that based on the accounts of these witnesses there was a strong indication that the appellant had touched Mrs M and it was intentional.

[16] The respondent, Ms Judith Oswin, Executive Director (Services Group) Queensland Transport, the delegate of the chief executive, received a copy of the investigator's report about 4 April 2003. Attached to the report were the witness statements. The respondent issued a Notice to Show Cause ("the Notice") directed to the appellant dated 28 April 2003. It is this document which the appellant contends demonstrates that the respondent has pre-judged the issue and, as a consequence, he is likely to be denied natural justice when the respondent considers whether he has contravened provisions of Queensland Transport's Code of Conduct and the relevant provisions of the *Public Service Act*. The Notice states, relevantly,

> "**TAKE NOTICE** that in accordance with the disciplinary provisions of the *Public Service Act 1996*, namely section 87(1), I call upon you to show cause why I should not be reasonably satisfied that you contravened without reasonable excuse provisions of Queensland Transport's Code of Conduct ("the Code") and the *Public Service Act 1996* in that –
>
> **Category 1 – basis of allegation about breach of the Code.**
> It is alleged that you breached Principle 2 (Respect for Persons) of the Code, in particular –
>
> - paragraph 2.2.2 (Respect for the Dignity, Rights and Views of Others) in that in dealing with another public employee, you

did not treat that other employee in a reasonable, equitable, respectful, courteous and fair manner;

The above breach constitutes a ground for disciplinary action under subsection (f) of section 87(1) of the *Public Service Act 1996* namely, a contravention, without reasonable excuse, of a provision of the Code.

Category 2 – basis of allegations about misconduct.
You have also engaged in behaviour which constitutes misconduct under s 87(1)(b) of the *Public Service Act 1996.*

Misconduct includes –

- disgraceful or improper conduct in an official capacity; or
- disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the public service.

GROUNDS IN SUPPORT OF CONTRAVENTION OF CODE – Category 1 allegations

The grounds on which it is intended to rely in support of my being reasonably satisfied of the contraventions of provisions of the Code described above are –

- On 9 October 2002 at the Mission Beach Resort, you allegedly sexually assaulted a female, [Mrs M] in the presence of other departmental employees[.]

GROUNDS IN SUPPORT OF ALLEGATIONS OF MISCONDUCT – Category 2 allegations

The grounds on which it is intended to rely in support of my being reasonably satisfied that you engaged in misconduct consist of an allegation of sexual assault upon a female, of which the following are the particulars –

On Wednesday, 9 October 2002, at Mission Beach Resort, during the course of a Queensland Transport workshop that consisted of a team building exercise, it has been alleged by [Mrs M], that without any consent on her part, she was sexually assaulted.

Following an investigation by an independent person, Michael Jacobs of M.S Jacobs & Associates, Investigative Services, engaged by Queensland Transport, *I am of the view that you were the person who sexually assaulted Mr [sic] [M]*." (italics added)

[17] The Notice set out Mrs M's allegations and a summary of the evidence of some of the witnesses. At page 9 the following appeared under the heading "Further Progress of this Show Cause Notice"

> "In accordance with the principles of natural justice, no determination has been made, or will be made in relation to these allegations until you have had the opportunity, now given, to formally respond to these allegations."

The appellant was invited to reply in writing within 14 days stating whether he admitted or denied the allegations or offered any evidence or explanation in support of his position. He was notified that if he did not respond action would be taken to make a determination of the allegations based on the material in the possession of the respondent.

[18] By a letter dated 13 May 2003 the appellant's solicitors wrote to Mr Rumble stating that the appellant denied sexually assaulting Mrs M. They complained about deficiencies in the material relied upon by the respondent and the failure to provide the appellant with all statements and interviews made by witnesses upon whom the delegate relied when issuing the Notice. The respondent replied pointing out that while s 90 of the *Public Service Act* 1996 required natural justice to be accorded to the appellant when deciding to discipline him that obligation was applicable only to the decision making process but not to the investigation process. The respondent declined to provide the statements or records of interview on the ground that the Department was not obliged to make them available because they fell within an exclusion contained in s 16(d) of the *Public Service Regulation* 1997, that is, they were documents concerning suspected official misconduct.

[19] The HR Policy and Procedures for Discipline stipulates that where the delegate determines that there are grounds for continuing the disciplinary process (the show cause process) the delegate provides the employee with a copy of all the material before the delegate including the investigation report and supporting evidence.

[20] The appellant's solicitors argued for the provision of the actual statements upon which the respondent had relied when issuing the Notice and the respondent was invited to withdraw the Notice. By her letter of 11 June 2003 the respondent agreed to provide the witness statements.

[21] The appellant's solicitors were provided with the transcripts of interviews conducted by Mr Jacobs with some 11 people. On 23 June 2003 a copy of the investigation report was sought and the withdrawal of the Notice. It is accepted by the appellant that the failure to provide him with the investigator's report when the Notice was issued was an oversight and the respondent had intended to do so with the Notice. The report was received on about 24 June 2003.

[22] The solicitor's response to the Notice on 27 June 2003 was put on two bases, namely, the lack of procedural fairness in reaching the assertion of concluded fact that the appellant was the person who had sexually assaulted Mrs M (the italicised words in the Notice in [16]) and that the evidence obtained was not probative of that assertion. The appellant's statement dated 16 March 2003 provided to the respondent effectively described an accidental touching whilst blindfolded. The solicitors concluded

> "It is clear from the tenor of the Show Cause Notice that a decision about [the appellant's] guilt has already been made. Such a finding is completely contrary to the rules of Natural Justice and flies in the

> face of the evidence and the conduct of the participants after this alleged assault."

[23] The respondent spoke with the appellant by telephone on 14 and 17 July. In a memorandum to him of 17 July 2003 setting out her recollection of the substance of their conversations she noted that on 14 July she had offered to meet with the appellant prior to finalising her decision on the Notice. The appellant wished to consult his solicitors and on 17 July he advised the respondent that he had taken their advice and, as the respondent described it, "have refused the meeting". She concluded

> "I intend to make my decision based on the advice that I currently have on this matter."

[24] The appellant responded immediately by email

> "I am well aware of the procedural system involved in the 'SHOW CAUSE', it is in fact my right in this legal procedure, and CAN be used to supplement the procedure. It is very sad to read the implied threat in your response, if you believe the contrived 'evidence' before you Judy then I have little to gain by speaking to you personally over the 'issues'.
>
> If you are judging me on the basis of what has been submitted to you, without consultation with departmental solicitors or a barrister, then this matter cannot be resolved at this level, and this is unfortunate, not only for me.
>
> You seem annoyed at my not complying with your request, can you understand how I feel – the frustration and stress of uncertainty in future and life. I have had ONE sick day in over six months, I have not run away from my responsibility or duty. It has been more than a nightmare and what support has this department offered me – none! Judy make your decision, I know I am INNOCENT of the charges you had already declared me as having committed, RE: SHOW CAUSE."

[25] The respondent replied promptly that she would have preferred to speak with the appellant before making her decision but as he did not wish to do this she could only make a decision based on all the information that she had available including that provided by the appellant and his solicitor. She added

> "I reiterate what I have stated before that the Show Cause process is not a decision. The response that you and your solicitors have provided me will be taken in to account in my decision which I anticipate making within the next week.
>
> I appreciate the stress that this process has caused you and would urge you to make use of the departmental employee support service."

[26] In a further letter dated 17 July 2003 the appellant's solicitors wrote that the respondent was compromised because she had pre-judged the issue and that she

should stand aside. The respondent denied that she had any personal interest in the outcome, could not be accused of bias and had done nothing to compromise her objectivity. She concluded that she had no intention of discontinuing the disciplinary proceedings and would proceed to the next phase. The solicitors had only asked that she withdraw from further involvement not that the proceedings be discontinued and that they would willingly commence a dialogue with a superior officer of the Department.

[27] The appellant filed an application for a statutory order of review on 22 July 2003 based on three grounds, namely, that he was likely to be denied natural justice by the respondent because the respondent had made a finding of fact concerning an allegation which was the focus of the disciplinary procedure and that decision was made without the appellant being given an opportunity to be heard properly; that he had been denied natural justice by the refusal to provide copies of tapes of the interview which deprived him of a fair opportunity to address and contradict the evidence brought against him; and that the respondent's decision to refuse to discontinue disciplinary proceedings and disqualify herself meant that a breach of the rules of natural justice was likely to occur.

[28] On the hearing before Cullinane J in the Supreme Court in Townsville the respondent and Mr Rumble were both cross-examined. The respondent had given instructions to another officer to draft the Notice but she read it and adopted it by signing it and affirmed that adoption in the witness box, including the impugned passage. Yet she clearly understood what was involved in a show cause process.

[29] As the matter developed before the learned judge below there were two issues for decision. The respondent contended that there was no decision to which the *Judicial Review Act* 1991 applied. His Honour considered it unnecessary to make a finding in light of his conclusion on the principal issue whether the conduct of the respondent gave rise to a reasonable apprehension of bias. Before this Court the respondent was content to assume jurisdiction in the Court below and here. Where the ground for review is an apprehension of bias if a decision maker were to embark on the decision making process, s 21(1)(a) of the Act would operate; there would not be a "decision to which this Act applies" in the strict sense of s 20(1). But in view of the approach to the appeal it is unnecessary to make further comment.

[30] His Honour concluded that if the document were read as a whole it would be appreciated that the delegate had not reached any final conclusion about the appellant's breach of the Code of Conduct or alleged misconduct notwithstanding "erroneous and unfortunate" expressions in it. His Honour thought that nothing about the respondent's conduct as a witness would support a claim of apprehended bias either alone or with other evidence. Mr Morris QC for the appellant conceded that he would have difficulty challenging a finding of credit based on the learned judge's observations of the respondent in the witness box.

[31] The issue for this appeal is whether, as a consequence of the expressions used in the Notice and other conduct by the respondent thereafter, the appellant could have a reasonable apprehension that the respondent would not bring an unbiased mind to the decision which she was required to make, that is, whether the appellant had contravened without reasonable excuse provisions of the Code of Conduct of Queensland Transport and the *Public Service Act*.

[32] The *Public Sector Ethics Act* 1994 sets out ethics principles for public officials and requires codes of conduct to be prepared for public sector entities which include a department of government. The subject Code of Conduct provides standards of conduct for public officials consistent with the ethics obligations set out in the *Public Sector Ethics Act*, s 12.

[33] The *Public Service Act* 1996 provides that the employing authority, in this case the appellant's chief executive, may discipline an officer if reasonably satisfied that the officer has been guilty of misconduct or has contravened without reasonable excuse a provision of the *Public Service Act* or a code of conduct, s 87(1). A code of conduct under the *Public Service Act* is a code of conduct approved under the *Public Sector Ethics Act* 1994. The *Public Service Act*, s 87(2), defines "misconduct" to mean

> "(a) disgraceful or improper conduct in an official capacity; or
> (b) disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the public service."

Relevantly, the ethical principle concerning respect for persons is applicable and employees are expected to treat their co-workers in a reasonable, equitable, respectful, courteous and fair manner.

[34] Queensland Transport's HR Policy and Procedures for Discipline which was provided to the appellant by Mr Rumble when he first informed him of the complaint applies to all of Queensland Transport's public service employees employed pursuant to the *Public Service Act*. Clause 9.2 sets out seven steps which will be undertaken in the disciplinary process referred to in s 88 of the *Public Service Act*. Step 1 concerns initiating the disciplinary process, in this case, by complaint. Step 2 involves notifying the public service employee of the complaint. Step 3 is the investigation stage. Where the ground for disciplinary action relates to alleged unacceptable personal conduct the delegate may nominate an investigator who must be independent to investigate the allegations. Once the delegate has the investigation report the delegate is required to consider it and determine if there are grounds for a continuation of the disciplinary process.

[35] Step 4 is the show cause process. The HR Policy and Procedures for Discipline direct

> "If the delegate determines that there are grounds for a continuation of the disciplinary process, the delegate provides the public service employee with a copy of all the material that is before the delegate, including the investigation report (and supporting evidence) which outlines the allegations and the supporting evidence. The public service employee is invited to respond in writing to 'show cause' why disciplinary action should not be taken."

[36] In this part of the process a disciplinary meeting may be convened in order to provide the employee with an opportunity to meet the delegate and respond verbally to the allegations in a notice to show cause. This meeting is said to supplement but not replace the show cause process. This meeting, if it occurs, is chaired by the delegate and attended by the employee, the employee's manager or supervisor and any support person the employee may choose but who may not represent or

advocate on behalf of the employee. An employee may elect not to attend the meeting and rely solely on a written response to a show cause notice.

[37] The process came to an end for the parties when the application for review was filed. The next stage is step 5 where the delegate considers all the material, reaches a finding and decides on the appropriate action to be taken. It is this step which the appellant seeks to restrain the respondent from taking because of his apprehension that he will not be accorded natural justice because she has already prejudged the issue of his guilt.

[38] The appellant contends that looking at the progress of this matter from his receipt of the Notice with its assertion of his guilt, the failure to provide the supporting evidence as required by the Department of Transport's HR Policy and Procedures for Discipline, together with the resistance by the respondent to its provision and the various reasons given for not doing so (not ultimately persisted in), leads him reasonably to apprehend bias in the respondent if she moves to the next step in the disciplinary process.

[39] The parties are in agreement about the applicable principles. Although the fundamental need for an independent and impartial tribunal finds its earliest expression in the common law in the context of the adversarial trial, as Gleeson CJ, McHugh, Gummow and Hayne JJ observed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343

> "The principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision making and decision maker. Most often it now finds its reflection and application in the body of learning that has developed about procedural fairness."

Their Honours cautioned that the application of the principle in connection with decision makers outside the judicial system must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making. Their Honours referred to the "rule of necessity" discussed in *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 89 and also that few administrative decision makers enjoy the degree of independence and security of tenure which judges have. Whatever may be the ambit of the somewhat unattractive "rule of necessity" it need not be considered here since there are other delegates available to decide the matter. The second factor mentioned by their Honours is not relevant although the outcome in cases involving judicial officers such as *Johnson v Johnson* (2000) 201 CLR 488, depends on those rather different considerations.

Their Honours said in *Ebner* of an apprehension of bias allegation at 344-5

> "... the governing principle is that ... a [decision maker] is disqualified if a fair-minded lay observer might reasonably apprehend that the [decision maker] might not bring an impartial mind to the resolution of the question the [decision maker] is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the

> tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle."

[40] In a passage which is apposite, their Honours made the following observation at 345

> "Deciding whether a [decision maker] *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the [decision maker] will in fact approach the matter. The question is one of possibility (real and not remote), not probability."

[41] Mr Logan SC, who appeared on behalf of the respondent, drew an analogy between the situation in *Johnson v Johnson* where the trial judge explained his comments to counsel following an application that he disqualify himself on the basis that he had prejudged an issue signified by his earlier comments and the cross-examination of the respondent which demonstrated her appropriate understanding of what a show cause process entailed. The respondent's cross-examination occurred well after the issues had been joined and was distant in time from the receipt of the Notice. The observations in *Johnson v Johnson* about exchanges between the judge and counsel where tentative views might be expressed are not apt in the case of a lay decision maker whose training and tradition is not the same as that of a judicial officer.

[42] With respect to his Honour, I think he endowed the reasonable bystander in this case with a greater capacity for abstract analysis than would be the case. Where, in a concluding paragraph of the Notice (set out at [17] herein), the respondent wrote that no decision had been made and the appellant was being given an opportunity "formally" to respond, an untrained but reasonable reader might well understand the process allowing the appellant to respond as a mere formality in light of the earlier statement of belief in the guilt of the appellant. In my view, such a person, in the position of an employee in the public service must have entertained a reasonable suspicion against the background of the statement in the Notice that the applicant was the perpetrator of the sexual assault, together with the progress of the matter thereafter, that the respondent might not bring an impartial mind to the resolution of the question to be determined. Subsequent statements by the respondent of her understanding of the proper processes involved in decision making would not operate to expunge the apprehension because, as Dawson J said in *Vakauta v Kelly* (1989) 167 CLR 568 at 575, "suspicion of bias may well be ineradicable".

[43] The appellant does not seek to have the matter commenced *de novo*. All he seeks is that the respondent not take any further part in the hearing and determination of the disciplinary proceedings against him. The question arose in the course of argument whether the delegate responsible for the disciplinary process must be the same person throughout. In cl 8 of the HR Policy and Procedures for Discipline "the delegate" is said to be responsible for all of the processes to final decision. Here, Mr Rumble engaged in the early steps and the respondent received the investigator's report as delegate. These procedures are not like a judicial hearing which starts and finishes with the one person hearing and determining the matter. Common sense would suggest that were a delegate by virtue of resignation, ill-health, death or for some other reason unable to participate further in a disciplinary process it need not be started again with the attendant disruption and expense involved. Waiver must also operate and where the employee himself does

not contend that the process is flawed there is nothing, in my view, which dictates another delegate cannot take up the task at step 5.

[44] The orders I would make are:

1. Allow the appeal.
2. The respondent be restrained from taking any further part in the hearing and determination of disciplinary proceedings against the appellant pursuant to the Notice to Show Cause dated 28 April 2003.
3. The respondent pay the appellant's costs here and below.