SUPREME COURT OF QUEENSLAND

CITATION:	*Cuttler v Browne & Anor* [2010] QCA 346
PARTIES:	**JASON SHANE CUTTLER** (applicant/appellant) **v** **J R BROWNE** (first respondent) **DEPUTY COMMISSIONER KATHY RYNDERS** (second respondent)
FILE NO/S:	Appeal No 8074 of 2010 SC No 12422 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave/Judicial Review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2010
JUDGES:	Holmes, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The time within which a notice of appeal may be filed be extended to 29 November 2010.** **2. The appeal be dismissed with costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – HEARING – NOTICE TO PERSONS AFFECTED – second respondent conducted a disciplinary hearing in the absence of applicant police officer – second respondent made adverse findings against applicant and ordered applicant be dismissed from the Queensland Police Service – second respondent had unsuccessfully attempted to effect personal service on applicant – applicant submitted he was denied the right to appear and be heard – applicant submitted that primary judge erred in ruling that there had been no breach of the rules of natural justice – whether primary judge so erred ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – GENERALLY – applicant appealed against second respondent's decision to the Misconduct Tribunal – Tribunal ordered the appeal be dismissed – applicant sought a statutory order of review of the Tribunal's decision – primary judge dismissed application

– appellant submitted primary judge erred in concluding there was no merit in the service argument – appellant submitted that the Tribunal was obliged to hear and determine all issues before the second respondent irrespective of whether they were within the scope of the grounds of appeal – whether primary judge erred in concluding there was no merit in the service argument – whether Tribunal obliged to hear and determine issues outside the scope of the grounds of appeal

POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – second respondent did not comply with service requirements contained in an internal manual – applicant submitted that compliance with the manual was a pre-condition to the exercise of second respondent's jurisdiction – applicant submitted that primary judge erred in ruling that second respondent acted lawfully in conducting the disciplinary proceeding – whether primary judge so erred

Misconduct Tribunals Act 1997 (Qld) (repealed), s 18, s 20, s 23, s 26
Police Service (Discipline) Regulations 1990 (Qld), s 10(f)
Police Service Administration Act 1990 (Qld), s 4.8, s 4.9, s 4.10
Statutory Instruments Act 1992 (Qld), s 7(3)
Uniform Civil Procedure Rules 1999 (Qld), r 746, r 747, r 765

Aldrich v Ross [2001] 2 Qd R 235; [2000] QCA 501, cited
Australian Securities Commission v Bell (1991) 32 FCR 517; (1991) 104 ALR 125; [1991] FCA 565, applied
Bhamjee v Forsdick (No 2) [2004] 1 WLR 88; [2003] EWCA Civ 1113, cited
Cocker v Tempest (1841) 7 M & W 502;[1841] EngR 242, applied
Harpur v Ariadne Australia Ltd (No 2) [1984] 2 Qd R 523, cited
Hope v Hope (1854) 4 De G M & G B 328; [1854] EngR 805, applied
Howship Holdings Pty Ltd v Leslie (1996) 41 NSWLR 542; (1996) 133 FLR 307; [1996] NSWSC 314, cited
Minister for Immigration and Citizenship v SZIZO (2009) 238 CLR 627; [2009] HCA 37, applied
Parklands Blue Metal Pty Ltd v Kowari Motors Pty Ltd [2003] QSC 98; [2004] 2 Qd R 140, cited
Pino v Prosser [1967] VR 835, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, applied

COUNSEL: S J Hamlyn-Harris for the applicant
L Byrnes for the first respondent
G Long SC, with S McLeod, for the second respondent

SOLICITORS: Richard Gray & Associates for the applicant
Crown Solicitor for the first respondent
Queensland Police Service Solicitor for the second respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and with the orders he proposes.

[2] **MUIR JA: Introduction**
The second respondent, the Deputy Commissioner of Police, having conducted a disciplinary hearing in the absence of the applicant police officer, made a series of adverse findings against the applicant and ordered that he be dismissed from the Queensland Police Service pursuant to s 10(f) of the *Police Service (Discipline) Regulations* 1990 (Qld) with effect from 4 pm on 14 July 2008.

[3] The applicant appealed to the Misconduct Tribunal pursuant to s 18 of the *Misconduct Tribunals Act* 1997 (Qld)[1] on 9 October 2009. After a preliminary hearing on 24 July 2009, the Tribunal rejected a contention by the applicant that the second respondent lacked jurisdiction to determine the disciplinary charges against him and determined that the matter should be listed for the hearing and determination of the substantive issues raised by the applicant in his notice of appeal. The appeal was listed for hearing on 13 November 2009. On the hearing, the Tribunal considered and rejected an application by the applicant's legal representatives that the hearing be "de-listed" on the basis that the applicant had sought judicial review of the Tribunal's decision of 9 October 2009. The legal representative of the applicant was given leave to withdraw.

[4] Counsel for the second respondent submitted that the proceedings should be dismissed for want of prosecution and the Tribunal ordered that "the notice of appeal filed in the tribunal on 10 July 2008 be dismissed". The Tribunal also ordered that the applicant pay the second respondent's costs of the application fixed at $6,400.

[5] The applicant filed an application for a statutory order of review of the Tribunal's decision on 6 November 2009. The matter was heard on 27 May 2010 by a judge of the trial division of the Supreme Court who ordered that the application be dismissed with costs. The applicant applies for an extension of time within which to appeal from that decision.

The grounds of appeal

[6] The grounds of appeal in the draft notice of appeal filed in support of the application for an extension of time are that the primary judge erred in law:

> "(a) in dismissing the appellant's application for judicial review on the grounds that the Misconduct Tribunal (the first respondent) would have dismissed the appellant's appeal to it from the decision of the Deputy Commissioner (the second respondent) because it lacked merit;
>
> (b) in ruling that the second respondent acted lawfully in conducting the disciplinary hearing and her decision was a valid one on the basis that the second respondent as

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1 Repealed by *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 243.

a Deputy Commissioner was entitled to proceed in the absence of service as required under the manual;

(c) in finding that in the particular circumstances there had been no breach of the rules of natural justice in the disciplinary proceedings conducted by the second respondent."

The factual background

[7] Before addressing the grounds of appeal and the arguments advanced in support of them, it is useful to review the relevant facts. On 22 February 2008 the Misconduct Tribunal set aside a disciplinary decision made in respect of the applicant on 14 July 2006 and remitted the matter to a different decision-maker. The second respondent issued a direction to the applicant to attend a disciplinary hearing on 28 April 2008 but attempts made to serve the applicant personally had failed. A copy of the direction to attend a disciplinary hearing was also forwarded to the applicant's solicitors, who declined to accept service.

[8] The second respondent wrote to the applicant on 9 May 2008 giving a fresh direction and notice to attend a disciplinary hearing at 9.30 am on Tuesday, 10 June 2008. The applicant was directed to respond to the notice dated 9 May 2008. The letter detailed the unsuccessful attempts which had been made by the second respondent to effect service on the applicant. Reference was made to the forwarding of correspondence including the letter of 9 May 2008 to the applicant's last known address by registered mail and to the placing of an advertisement concerning the matter in the Courier Mail newspaper of 13 May 2008. The letter stated:

> "As a result of these actions I am of the opinion that all reasonable attempts have been made to notify you of the direction to attend before me for the purposes of conducting the relevant discipline hearing and I consider this notice served. I also consider the notice to extend your probation to be served as well."

[9] A copy of the letter was sent to the applicant's solicitors under cover of a letter of 12 May 2008.

[10] In an affidavit sworn on 6 June 2008 in a previous judicial review proceeding, a solicitor acting for the applicant in the proceeding swore:

> "19. On 9 May 2008, the Deputy Commissioner K Rynders issued correspondence and Direction to Attend a Disciplinary Hearing – Misconduct. Attached and with the letters GLH 7 is a copy of the correspondence and Direction to Attend a Disciplinary Proceeding.
>
> 20. I verily believe and am informed by the applicant that he has not been personally served with the correspondence and Direction to Attend a Disciplinary Hearing in accordance with Human Resources Manual. Attached and with the letters GLH 8 is a copy of Section 18.3 HRMM of the Queensland Police Service."

[11] At 8.26 am on 10 June 2008 the applicant's then solicitor forwarded a facsimile letter to the second respondent advising that the solicitors had instructions to act for the applicant with respect to the disciplinary proceeding. The letter asserted that the

applicant had not been properly served and requested that "any disciplinary hearings be adjourned until [the applicant] has been properly served and a time negotiated to examine the material to be supplied". The solicitors recorded their understanding that the disciplinary hearing was "to be heard at 9.30 pm" that day and they informed the second respondent that they did not hold instructions to accept service.

[12] In a letter dated 12 June 2008 to the applicant's then solicitors, the second respondent acknowledged receipt of the facsimile of 10 June 2008. The letter stated, inter alia:

> "As you are aware, the Service has made various attempts to contact the Constable through his previous legal representatives, his last known address, and through the media. I also note in your Affidavit of 6 June 2008 you acknowledge that the Constable was aware of the scheduled disciplinary hearing and rely upon Section 18.3 of the Human Resource Management Manual (HRM Manual) relevant to the disciplinary process for the proceedings to be adjourned.
>
> I advise that I have the delegated powers of the Commissioner and therefore am not strictly bound by service policy where I consider in the interest of the Service to exercise my discretion to fulfil my prescribed responsibilities of the Police Service Administration Act 1990.
>
> In the present case and, having regard to the efficient and proper administration, management and functioning of the Service in accordance with the law, I do not consider it necessary to strictly comply with Section 18.3 of the HRM Manual in order to progress these disciplinary proceedings.
>
> Accordingly, in line with your request I have adjourned the disciplinary proceedings to be heard in my office, tomorrow **Friday 13 June 2008 at 11.30 am.**
>
> At that time the Constable should attend and receive the relevant papers and make submissions for my consideration concerning the allegations against him or whether a further adjournment is necessary."

[13] The letter made it plain that the disciplinary hearing would proceed on 13 June unless the second respondent was persuaded that a further adjournment was necessary.

[14] The applicant did not attend the disciplinary hearing on 13 June or make any submissions to the second respondent concerning the merits of the allegations or the adjournment of the matter. The second respondent proceeded with the hearing. On 30 June 2008 she found 10 charges against the applicant established. The sanction imposed in respect of each of seven charges was dismissal from the Police Service.

The notice of appeal to the Misconduct Tribunal

[15] The grounds of appeal stated in the applicant's notice of appeal to the Misconduct Tribunal were:

> "1. A denial of natural justice.
>
> 2. There was an abuse or misuse of the disciplinary power of the *Queensland Police Service Administration Act* 1990 and subordinate legislation and rules.

3. There was an exercise of power that did not accord with the reality of the disciplinary cases.

4. There was a failure to comply with the rules which govern the disciplinary process which afforded natural justice.

5. There was a failure to properly serve a Notice of the Hearing and that the service of such notice is mandatory in accordance with the disciplinary process.

6. That no evidence or material relied upon by the prescribed person was served upon or given to the Appellant.

7. That no fair hearing was held and there are no provisions to allow a hearing to be held without the Appellant being present.

8. The sanctions imposed were manifestly excessive in all the circumstances or disproportionate to the misconduct found."

[16] It will be seen that none of these grounds addressed the merits of the charges against the applicant.

The judicial review application

[17] The grounds listed in the application for statutory order of review were:

"1. That a breach of the rules of natural justice happened in relation to the making of the decision;

2. That the making of the decision was an improper exercise of power conferred by the enactment under which it was purported to be made;

3. That the decision involved an error of law;

4. That there was no evidence or other material to justify the making of the decision;

5. That a breach of the rules of natural justice has happened, is happening, or is likely to happen, in relation top (sic) the conduct;

6. That an error of law –

   (i) has been, is being, or is likely to be, committed in the course of the conduct; or

   (ii) is likely to be committed in the making of the proposed decision

7. That the respondent failed to take into account material placed before the tribunal;

8. That the decision is both legally and administratively flawed;

9. That the respondent took into account irrelevant and prejudicial material and was said to be prejudiced by the material before the tribunal;

10. That the making of the proposed decision would be otherwise contrary to law;

11. That the respondent erred in law"

[18] Again, the grounds of appeal were not concerned with the merits of the Tribunal's decision beyond the assertion that the evidence did not justify the making of the decision.

The relevant statutory framework

[19] Sections 4.8, 4.9 and 4.10 of the *Police Service Administration Act* 1990 (Qld) ("the PSAA") relevantly provide:

> "(1) The commissioner is responsible for the efficient and proper administration, management and functioning of the police service in accordance with law.
>
> (2) Without limiting the extent of the prescribed responsibility, that responsibility includes responsibility for the following matters—
>
> …
>
> (l) discipline of members of the service;
>
> …
>
> (3) The commissioner is authorised to do, or cause to be done, all such lawful acts and things as the commissioner considers to be necessary or convenient for the efficient and proper discharge of the prescribed responsibility.
>
> (4) In discharging the prescribed responsibility, the commissioner—
>
> …
>
> (b) subject to this Act, is to ensure compliance with the requirements of all Acts and laws binding on members of the police service, and directions of the commissioner; …
>
> …
>
> **4.9 Commissioner's directions**
>
> (1) In discharging the prescribed responsibility, the commissioner may give, and cause to be issued, to officers, staff members or police recruits, such directions, written or oral, general or particular as the commissioner considers necessary or convenient for the efficient and proper functioning of the police service.
>
> (2) A direction of the commissioner is of no effect to the extent that it is inconsistent with this Act.
>
> (3) Subject to subsection (2), every officer or staff member to whom a direction of the commissioner is addressed is to comply in all respects with the direction.
>
> …
>
> **4.10 Delegation**
>
> (1) The commissioner may delegate powers of the commissioner under this Act or any other Act to a police officer or staff member.

> (2) Without limiting subsection (1), the commissioner may also, under subsection (1), delegate powers of the commissioner to discharge the prescribed responsibility."

[20] Section 18.3, paragraph 4.2 of the Queensland Police Human Resource Management Manual ("the Manual") relevantly provides:

> "**4.2 Disciplinary Hearing Following an Investigation**
>
> A written 'Direction to Attend Disciplinary Hearing' in the prescribed format is to be:
>
> (i) served personally by a member of the Service upon the subject member;
>
> (ii) served not less than 14 clear days before the commencement date of the hearing; (unless special circumstances exist – the Assistant Commissioner, ESC should be advised prior to any departure from this policy): and
>
> (iii) endorsed by the member effecting service and returned to relevant Professional Practices Manager."

[21] It was submitted by counsel for the applicant and not contraverted by counsel for the second respondent, that the Manual was published by the Commissioner of Police and issued pursuant to s 4.9 of the PSAA. The primary judge held, uncontroversially, that the second respondent, by virtue of a delegation of powers from the Commissioner of Police dated 3 April 2008, was empowered to exercise the Commissioner's powers under s 4.9 of the PSAA. It was not contested on appeal that the second respondent had been delegated all relevant powers of the Commissioner.

[22] I now turn to the grounds of appeal.

The applicant was denied natural justice - the applicant's contentions

[23] It is submitted that the primary judge erred in finding that there had been no breach of the rules of natural justice because "a fair opportunity had been given to [the applicant] to attend and he had chosen not to do so simply in order to try to take advantage of a technicality". Counsel for the applicant argued that there was no obligation on the applicant "to be available to be served with lawful process". Even if there was such an obligation, it was submitted, the applicant, through his solicitors, made it plain that he was not trying to avoid the disciplinary process but merely seeking time to participate properly and defend himself. The hearing was said to be procedurally unfair because the applicant was not given the time he sought to prepare his case and he was entitled to expect that the hearing could not take place lawfully in his absence without his first being duly served.

Denial of natural justice - consideration

[24] The evidence makes it abundantly plain that the applicant was avoiding service. Apart from the evidence as to the considerable lengths to which the second respondent resorted, unsuccessfully, to effect personal service, the mere fact that solicitors acting on his behalf in proceedings in the Supreme Court had instructions not to accept service of the Direction to Attend a Disciplinary Hearing makes it obvious enough that the applicant was avoiding service.

[25] The second respondent gave the applicant ample notice of her intention to proceed with the disciplinary hearing. There is good reason to believe that the applicant was aware of the matters he needed to address in relation to the disciplinary hearing by early May 2008. He left it until the morning of the day on which the disciplinary hearing was to take place before requesting, by his solicitors, an adjournment of the hearing. The second respondent adjourned the hearing until 11 am on 13 June 2008. In her communication with the applicant's solicitors, she left it open to the applicant to seek a further adjournment. He did not do so. In those circumstances, the applicant was not denied a right to appear and be heard. He merely failed to exercise such a right. There was no denial of procedural fairness.

The failure to serve the applicant pursuant to s 18.3.4.2 of the Manual made the second respondent's disciplinary decision unlawful - the applicant's contentions

[26] It was submitted by counsel for the applicant that strict compliance with the service requirements of s 18.3.4.2 was a pre-condition to the exercise of jurisdiction by the second respondent as or by virtue of:

(a) the proceeding was disciplinary in nature and could result in sanctions which included dismissal;

(b) the prescriptive nature of the service requirements;

(c) the detailed requirements of the notice document (s 18.3.4.2.1);

(d) the provisions of s 18.3.4.3 which specifically defined the circumstances in which there could be a disciplinary hearing in the absence of the subject officer.

[27] Reliance was placed also on the statement in Pearce & Geddes, *Statutory Interpretation in Australia*[2] that:

> "A longstanding view often stated is that enactments laying down the procedure to be followed in commencing or prosecuting an action in a court produce invalidity in the event of non-compliance. The view is supported by substantial authorities."

Failure to serve in accordance with the Manual's requirements - consideration

[28] The general directions in the Manual concerning service, made pursuant to s 4.9 of the PSAA, as directions considered "necessary or convenient for the efficient and proper functioning of the police service", cannot deprive the Commissioner of the powers and authorities vested in him under s 4.8 of the PSAA. In particular, s 18.3.4.2 of the Manual cannot deprive the Commissioner of statutory authority in a particular case to do "all such lawful acts and things as the commissioner considers to be necessary or convenient for the efficient and proper discharge" of the commissioner's responsibility for the "discipline of members of the service".

[29] Section 4.9(2) expressly acknowledges that a direction of the commissioner is of no effect to the extent that it is inconsistent with the Act.

[30] The requirement in s 4.8(4) that "[i]n discharging the prescribed responsibility, the commissioner … is to ensure compliance with the requirements of all … directions of the commissioner" is made "subject to this Act".

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2 6th ed, 2006, at 11.25.

[31] The evidence referred to above establishes that the second respondent, as the Commissioner's delegate, considered it at least desirable for the proper discharge of her duties in disciplining a member of the service to dispense with strict compliance with s 18.3.4.2. The applicant had frustrated the attempts to serve him and the further delay of the disciplinary hearing was incompatible with the "efficient and proper administration" of the police service.

[32] Accordingly, the second respondent acted lawfully in proceeding with the disciplinary hearing notwithstanding non-compliance with s 18.3.4.2 of the Manual. Because of this conclusion it is unnecessary to consider the merits of the primary judge's approach or the question, not expressly considered by the primary judge, of whether, assuming the second respondent was bound to comply with s 18.3.4.2 in the circumstances under consideration, her failure to do so invalidated her decision.

[33] In deference to the arguments advanced by counsel in respect of the latter point, I will make some brief observations on it. I will assume for the purposes of argument that the manual is a statutory instrument within the meaning of the *Statutory Instruments Act* 1992 (Qld) notwithstanding that the Manual may be distinguished from most, if not all, of the types of instruments listed in s 7(3) of the *Statutory Instruments Act* as the Commissioner may, without any formal notice or procedure, vary or revoke any part of the Manual at any time and from time to time. The Commissioner's powers, by virtue of which the Manual was produced and applied, may be delegated. And, significantly, for the reasons given above, the contents of the Manual cannot operate to restrict the power of the Commissioner to do, or cause to be done, all such lawful acts and things as the Commissioner considers to be necessary or convenient for the "efficient and proper discharge of the [commissioner's] prescribed responsibility".

[34] To my mind, these matters, which provide the general context in which the Manual was promulgated, tend to suggest that it is unlikely that it was the intention of the Commissioner, as the author of the Manual, that any failure to comply with s 18.3.4.2 would result in the invalidity of a disciplinary hearing.

[35] In *Project Blue Sky Inc v Australian Broadcasting Authority*,[3] it was said in the joint reasons:

> "The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals." (citations omitted)

[36] Dealing with the question of whether non-compliance with the provisions of an Act regulating the exercise of a power resulted in invalidity, their Honours said:[4]

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3 (1998) 194 CLR 355 at 381, 382.

4 At 388, 389, 390.

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.
>
> Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory. In *Pearse v Morrice*, Taunton J said 'a clause is directory where the provisions contain mere matter of direction and nothing more'. In *R v Loxdale*, Lord Mansfield CJ said '[t]here is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory'. As a result, if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity. However, statements can be found in the cases to support the proposition that, even if the condition is classified as directory, invalidity will result from non-compliance unless there has been 'substantial compliance' with the provisions governing the exercise of the power. But it is impossible to reconcile these statements with the many cases which have held an act valid where there has been no substantial compliance with the provision authorising the act in question. Indeed in many of these cases, substantial compliance was not an issue simply because, as Dawson J pointed out in *Hunter Resources Ltd v Melville* when discussing the statutory provision in that case: 'substantial compliance with the relevant statutory requirement was not possible. Either there was compliance or there was not.'" (citations omitted)

[37] There are indications in the text of s 18.3 that non-compliance with the requirements of s 18.3.4.2 is not necessarily productive of invalidity. The written "'Direction to Attend Disciplinary Hearing' in the prescribed format **is to be** … served personally by a member of the Service upon the subject member". The more emphatic words "must be" or "shall be" are not used. The direction to be served is one "in the prescribed format". That format appears in paragraphs (i) to (xi) inclusive of s 18.3.4.2.1. The list provided by those paragraphs is extensive and it is unlikely

that any failure to include some of the items listed at the time of service, regardless of their relevance or other notice the subject officer might have of them, invalidates the Direction.

[38] Sub-paragraph (ii) of s 18.3.4.2 contemplates that service may not be effected within the prescribed time where "special circumstances exist". It is also unlikely that the failure to return the written direction to the "relevant Professional Practices Manager" would result in invalidity.

[39] More significant for present purposes is the requirement that service be "by a member of the Service". It is a departure from the general principle that "[t]he means by which [the intended recipient] obtains the document are usually immaterial" and that service of a document is taken to have been effected when the person to be served receives the document.[5]

[40] In *Hope v Hope*,[6] Lord Chancellor Cranworth observed:

> "The object of all service is of course only to give notice to the party to whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required."

[41] Were it not for the requirement that the personal service be by "a member of the Service", personal service would have been proved by the evidence referred to earlier. The reasons for this unusual requirement are unclear. It may have to do with economy, reliability, confidentiality, or perhaps with maintenance of *esprit de corps* (the treatment of an officer with due respect even though disciplinary proceedings have been instituted against him or her). Whatever the reason, it is unlikely that it was intended that the disciplinary proceedings would miscarry if the subject officer had full notice of the re-hearing and of the allegations against him, particularly if he participated in the hearing and no denial of natural justice occurred.

[42] The requirement of service by a "member of the Service" is peripheral to the central purpose of s 18.3.4.2. To borrow from the reasons of the Court in *Minister for Immigration and Citizenship v SZIZO*,[7] "the *manner* of providing timely and effective notice of hearing is not an end in itself". Section 18.3.4.2 is procedural in nature and, together with other provisions, is directed at ensuring that officers subjected to disciplinary proceedings are given due notice of the allegations they have to meet, the possible consequences of those allegations being made out, and that procedural fairness is observed.

The primary judge's determination that even if the Tribunal was obliged to hear the appeal to it on the merits, had it done so it would have dismissed the appeal and the Court on the judicial review application should not intervene

[43] Counsel for the applicant referred to the reasons of the primary judge in which his Honour expressed the provisional view that "when an appellate body such as the tribunal is seized of a matter, it has a duty to exercise the jurisdiction conferred

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5 *Howship Holdings Pty Ltd v Leslie* (1996) 41 NSWLR 542 at 544; *Pino v Prosser* [1967] VR 835 and *Parklands Blue Metal Pty Ltd v Kowari Motors Pty Ltd* [2003] QSC 98.

6 (1854) 4 De G M & G B 328 at 342 and see also *Kistler v Tettmar* [1905] 1 KB 39 at 45.

7 (2009) 238 CLR 627 at 639.

upon it in relation to the matter". Reference was made also to his Honour's observation that there was no provision authorising the Tribunal to dismiss for want of prosecution. The primary judge doubted that such power existed. His Honour said:

> "My provisional view [is] that [it] was incumbent upon the tribunal to deal with the ground of appeal [the failure to effect due service of the direction to attend a disciplinary hearing] and make a decision on it."

[44] It was contended that the primary judge erred in concluding that there was no merit in the service point and that, in consequence, the primary judge erred in dismissing the application on that basis. For the reasons given above, the primary judge did not err in this regard and there is no need to consider the applicant's argument that the Tribunal has no power to dismiss a matter for want of prosecution. The argument goes further and contends that because the appeal to a tribunal lies by way of re-hearing on the evidence given in the proceeding before the original decision-maker, the Tribunal was obliged to hear and determine all the issues before the second respondent irrespective of whether those issues were within the scope of the grounds of appeal. Although in view of previous findings it is not strictly necessary to deal with these arguments it is, I think, desirable to do so lest they be given some credence in future.

[45] Under s 18(1) of the *Misconduct Tribunals Act* 1997 (Qld), which I will refer to as ("the Act") in this part of the reasons, an appeal may be commenced:[8]

> "(a) by filing a notice of appeal with the director–
>
> (i) identifying the decision to which the appeal relates; and
>
> (ii) stating clearly the grounds for the appeal; and
>
> (b) by giving a copy of the notice to each other party to the appeal."

[46] There is no reason to suppose that the notice of appeal required by s 18 of the Act is not intended to serve the function of notices of appeal under r 746 and r 747 of the *Uniform Civil Procedure Rules* 1999 (Qld), namely to initiate the appeal, identify the decision appealed against and the grounds to be relied on by the appellant on the appeal so as to identify and give notice to the respondent, at least in a general way, of the issues for determination on the appeal. If, as the applicant contends, an appellant is not bound by the grounds of appeal, s 18 of the Act serves little purpose.

[47] Section 23(3), (4), (5) and (6) of the Act relevantly provides:[9]

> "(3) However, the tribunal must comply with this division and any procedural rules.
>
> (4) If the tribunal is exercising appellate jurisdiction, the appeal is by way of rehearing on the evidence (***original evidence***) given in the proceeding before the original decision-maker (***original proceeding***).

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8 Reprint 2B, repealed by *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 243.

9 *Misconduct Tribunals Act* 1997 (Qld), Reprint 2B.

> (5) However, the tribunal may give leave to adduce fresh, additional or substituted evidence (***new evidence***) if the tribunal is satisfied—
>
> (a) the person seeking to adduce the new evidence did not know, or could not reasonably be expected to have known, of its existence at the original proceeding; or
>
> (b) in the special circumstances of the case, it would be unfair not to allow the person to adduce the new evidence.
>
> (6) If the tribunal gives leave under subsection (5), the appeal is—
>
> (a) by way of rehearing on the original evidence; and
>
> (b) on the new evidence adduced."

[48] It is s 23(4) which is relied on by the applicant for the contention that the Tribunal is required to determine the substantive merits of the appeal even if it proceeded in the absence of an appellant. The submission is misguided. For the reasons just given, the ambit of the appeal is determined by the notice of appeal. The Tribunal is not obliged to go outside the grounds of appeal and, indeed, ought not do so without the express or implied consent of the respondent in the absence of the grounds being enlarged, expressly or impliedly by the Tribunal, for good reason.

[49] The role of s 23(4) is to describe the nature of the appeal, that is, as an appeal by way of re-hearing on the evidence before the primary judge in which account may be taken of changes to the law occurring after trial,[10] as opposed to an appeal in the strict sense, in which case the question for the Court would be whether the judgment complained of was correct when given. Section 23(4) is thus similar in effect to r 765(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) which provides that, "An appeal to the Court of Appeal under … [Chapter 18] is an appeal by way of rehearing". The argument sought to draw some support from the observation of Thomas JA in *Aldrich v Ross,*[11] in which his Honour said:[12]

> "I have concluded that the appeal to the Misconduct Tribunal should not be taken to be limited by the principles of *House v The King*, or by the need to identify some error that the original decision-maker had committed. It is an appeal in which the appellate tribunal is entrusted with making its own determination on the evidence before it whether or not new evidence is received."

[50] That observation says nothing about the scope of the issues for determination on the appeal or the power of a court or tribunal to dismiss for want of prosecution or other reasons connected with the control by the Tribunal over its own processes. Although the Act contains no express power on the part of the Tribunal to dismiss for prosecution, s 20(1) does provide, "[a] misconduct tribunal may give the orders about a proceeding it considers appropriate". The Tribunal has power under s 23(2)(c) to decide the procedures to be followed by it in a proceeding. Section 26, perhaps provides some faint support for the applicant's argument. Sub-section (1) of that section provides:[13]

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10 *Harpur v Ariadne Australia Ltd (No. 2)* [1984] 2 Qd R 523 at 528.

11 [2001] 2 Qd R 235.

12 At 254, 255.

13 *Misconduct Tribunals Act* 1997 (Qld), Reprint 2B.

> "(1) A misconduct tribunal exercising appellate jurisdiction may make the following orders—
>
> (a) confirm the decision appealed against;
>
> (b) set aside the decision and substitute another decision;
>
> (c) set aside the decision and return the matter to the original decision-maker with the directions the tribunal considers appropriate."

[51] But even if, which I doubt, an order dismissing a proceeding for want of prosecution does not fall within s 26(1)(b), it does not appear to me that this provision, which enables the Tribunal to make certain orders which encompass all of the orders which would normally be made after a hearing on the merits, detracts from the power that tribunals have to control their own proceedings.

[52] The Court's power to protect its processes from abuse arising from the misconduct of those availing themselves of its processes was stated in the following terms in *Cocker v Tempest*[14] and approved by the Court of Appeal in *Bhamjee v Forsdick (No 2)*:[15]

> "The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion."

[53] That power, as the above passage makes plain, is not limited to courts of superior jurisdiction.[16]

[54] The principle extends to tribunals as explained in the reasons of Sheppard J in *Australian Securities Commission v Bell*:[17]

> "Unless there is a clear legislative intention otherwise, tribunals of all kinds will have the power to regulate and control their own proceedings. That power is implied into the statutory provisions pursuant to which a given tribunal is created. The power is implied because it is necessary that the tribunal have it in order to be able properly to discharge its functions: see D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (2nd ed), par 33, p 37. I refer also to the decisions of Lockhart J in *Re Sterling; Ex parte Esanda Ltd* (1980) 44 FLR 125 at 129-130 and Toohey J (when a judge of this Court) in *Re Briggs; Ex parte Briggs v Deputy Commissioner of Taxation (WA)* (1986) 12 FCR 310 at 310-312 …"

Conclusion

[55] I would extend time within which to appeal. The extension was not opposed by counsel for the second respondent. I would order that:

(a) The time within which a notice of appeal may be filed be extended to 29 November 2010;

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14 (1841) 7 M & W 502, 503-504.

15 [2004] 1 WLR 88 at 92.

16 *Bhamjee v Forsdick (No 2)* [2004] 1 WLR 88 at 92.

17 (1991) 32 FCR 517 at 528.

(b) The appeal be dismissed with costs.

[56] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the orders proposed by his Honour.