SUPREME COURT OF QUEENSLAND

CITATION:	*Freier v Jordan and the State of Queensland* [2002] QSC 385
PARTIES:	**MARK DAMIEN FREIER** (applicant/respondent) **v** **C WILLIAM JORDAN** (first respondent/first applicant) **and** **STATE OF QUEENSLAND** (second respondent/second applicant)
FILE NO/S:	SC No 9735 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application for judicial review of determination and cross-application for dismissal of that application
DELIVERED ON:	22 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2002
JUDGE:	de Jersey CJ
ORDER:	**1. Dismiss the cross-application brought by the respondents.** **2. Adjourn the applicant's application for directions, pending the submission, through my Associate, of a form of directions, in the event that that can be agreed among the parties, or alternatively, the re-listing of the application for orders by the Court.** 3. **That the costs of the applicant's application be reserved, but that the respondents pay the applicant's costs, to be assessed, of their unsuccessful cross-application.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – GROUNDS FOR REVIEW OF DECISION – BREACH OF RULES OF NATURAL JUSTICE – where determination of liability to discipline under *Public Service Act* 1996 – where allegation that decision maker was biased – whether application for judicial review should be dismissed or stayed because of a possible subsequent public service appeal or proceedings in the Industrial Relations Commission – consideration of *Judicial Review Act* 1991 ss 13, 48

Industrial Relations Act 1999
Judicial Review Act 1991 (Qld), s 4, s 13, s 29, s 48
Public Service Act 1996 (Qld), s 87, s 89, s 93, s 94

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, followed

COUNSEL: P Sacre for applicant/respondent
P J Flanagan for the first and second respondents/first and second applicants

SOLICITORS: Burns Jameson for the applicant/respondent
Crown Solicitor for the first and second respondents/first and second applicants

[1] **de JERSEY CJ**: The applicant is employed as a solicitor in the Legal Services Unit, Legal and Legislation Branch, Corporate Governance Division, Queensland Transport. He is subject to disciplinary proceedings, and entitled to be treated in accordance with the law. He contends he is not being treated in accordance with his legal rights.

[2] On 15 April 2002, Mr C J Jordan, the Executive Director (Corporate Governance), suspended the applicant from duty, on full pay, under s 89(1) of the *Public Service Act* 1996. On or about 10 May 2002, Mr Jordan provided the applicant with two notices, under s 87 of the Act, calling on the applicant to show cause why disciplinary action should not be taken against him.

[3] One of the notices alleged the applicant's contravention of a direction that he enter his legal work for February 2002 into timesheets within a workflow management system, and separately, a failure to treat a co-worker Mr Hirn in a reasonable way. The applicant had allegedly used obscene language towards Mr Hirn.

[4] The second notice alleged the applicant telephoned Ms Hemerik and spoke to her, without sufficient reason, about her complaint that Mr Hawthorne had dealt inappropriately with her sexually during an office workshop weekend.

[5] On 4 July 2002, the complaints in relation to the time recording were withdrawn, inferentially in the hope the applicant may withdraw or moderate his opposition to that regime.

[6] The applicant challenged Mr Jordan's determining the show cause proceedings, essentially on the ground of perceived bias.

[7] Mr Jordan was actively involved at a managerial level, in the promotion, within the division, of time costing. The applicant was, at the employee level, a vocal critic of the proposal. He had organized his co-employees, with the support of the Queensland Public Service Union, to oppose its introduction. Faced with that opposition, Mr Jordan failed to secure the timely implementation of the proposal, to the point where it was necessary to involve a higher level officer, Mr Hunt.

[8] Against the applicant's strong objection, of which Mr Jordan was well aware, Mr Jordan proceeded to determine the proceedings, and on 21 August 2002 found the complaints in relation to Ms Hemerik and Mr Hirn established.

[9] The applicant appealed to the Public Service Commissioner, against Mr Jordan's determination, on 26 August 2002. But because Mr Jordan had not got to the point of determining to discipline the applicant, s 94(1)(b) of the *Public Service Act* did not apply, so that the appeal was incompetent. The Commissioner's delegate advised the applicant of this on 23 October 2002. On 24 October 2002 the applicant applied to this Court for relief under the *Judicial Review Act* 1991.

[10] Does the decision fall within the purview of the Act? Mr Jordan's decision, finding that those two complaints were established, and that the applicant is consequently "liable to disciplinary action under s 87(1)(b) and (f) of the *Public Service Act*" (cf. his letter of 21 August 2002), is a decision of an administrative character made under the *Public Service Act* (s 4 *Judicial Review Act*). It is "final…operative and determinative…in a practical sense, of the issue in fact falling for (his) consideration" (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337). That it is the precursor to further decision making, in relation to discipline, does not rob it of the character which renders it susceptible of review under the *Judicial Review Act*. There was no substantial contention to the contrary.

[11] The applicant has applied for a stay of any proceedings under Mr Jordan's decision, under s 29(2)(b) of the *Judicial Review Act*, to ensure that until this application is determined, no subsequent decision to discipline the applicant (which could theoretically include termination of his employment) will be made. He also seeks directions as to the future conduct of the application. Counsel for Mr Jordan and the State confirmed to me that no attempt will be made to proceed further in relation to Mr Jordan's determination until the respondents' cross-application is determined.

[12] Mr Jordan and the State, by way of cross-application, seek the dismissal of the applicant's application, under s 13 or s 48(1) of the *Judicial Review Act*.

[13] Section 13 provides that if an application is made to the Supreme Court to review a "reviewable matter" (here, the current decision of Mr Jordan), and provision is made under some other law "under which the applicant is entitled to seek a review of the matter by another…tribunal, authority or person", then the court must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so.

[14] Mr Flanagan, who appeared for the respondents, relied on the prospect that the applicant might appeal to the Public Service Commissioner under s 93 of the *Public Service Act* should he be disciplined, or to the Queensland Industrial Relations Commission under the *Industrial Relations Act* 1999 should his employment be terminated – as he would contend, unfairly. But neither of those prospects enlivens s 13. That is because neither provides an avenue for review of "the matter", in terms of s 13(b), being Mr Jordan's current determination. Each envisions no more than future possibilities

[15] The other provision relied on by Mr Flanagan, s 48(1)(a) provides that the court may stay or dismiss an application, such as has been brought by the applicant, if the

court considers that "it would be inappropriate…for proceedings in relation to the application…to be continued".

[16] The argument runs that the *Public Service Act* provides a mechanism intended and well suited for the determination of such proceedings, and that the process instituted under that Act should not now be interrupted, but allowed to run its course, bearing in mind especially that any appeal to the Public Service Commissioner is conducted as a hearing de novo, with the theoretical possibility, even, of judicial review proceedings from the Commissioner's determination should it be felt that matters have gone awry. One immediately wonders why, if things have gone seriously wrong already, a proper determination of the applicant's position should be set so prospectively far into the future.

[17] Whether the court exercises the power to stay or dismiss under s 48 is discretionary in nature, depending upon a view whether it would be "inappropriate" for the instant proceedings to continue.

[18] The case set up by the applicant involves strong basis for a contention that Mr Jordan should not have dealt with the proceedings against the applicant, because Mr Jordan's doing so would give a reasonable ground for a perception of bias. Put bluntly, an objective outside observer may feel Mr Jordan could have been tempted to deal harshly with the applicant, to remove him as a source of powerful opposition to an initiative he, Mr Jordan, was vitally concerned to implement. I will say no more about that because it goes to the heart of this application, and I acknowledge that Mr Jordan has not yet filed affidavit material. I have however had the benefit of some of Mr Jordan's central views through the many letters and memoranda which have been exhibited, and it should be noted the respondents had the opportunity to respond to the applicant's material but did not do so. That may suggest there was nothing they could advance to rescue them from my preliminary scepticism.

[19] If I stop this judicial review proceeding now, the issue of the applicant's determined liability to disciplinary action will likely progress to the Public Service Commission against a perception on the part of the applicant that the primary decision maker was biased. It is fundamentally important that the matter go to the Commission, as necessary, free of that burden.

[20] Inevitably the decision of the primary decision maker would assume at least preliminary significance before the Commissioner. In the interests of a proper effectual appeal before the Commissioner, he or she should desirably confront a determination not attended by seriously arguable claims of perceived bias. It is not a sufficient answer to say this point may be considered afresh by the Commissioner. He or she should be entitled to reconsider a decision on the merits, by way of review, being a decision reached, in fact conscientiously, and apparently conscientiously, by a person free of bias, or perceived bias.

[21] Of course I am taking this approach on the basis a perception of bias is strongly arguable. There are peculiar aspects of this case, only some of which I have mentioned, which put this special case into that category.

[22] The Department may feel that in the best interest of the management of public resources, the matter should best be reconsidered now by another, but that is only

my preliminary view – on the basis of the applicant's material only, and it is in no way binding on the respondents, who must feel free to proceed as they are best advised. But I am sure this intimation will be accorded due weight.

[23] For those reasons, I am not persuaded that I should, because of the prospect of an appeal under the *Public Service Act* (or, for that matter, the prospect of proceedings under the *Industrial Relations Act* 1999), deny the applicant his prima facie right to have this court determine the application under the *Judicial Review Act*. In other words, that other prospect does not, in my view, in the particular circumstances of this case, render it appropriate that these proceedings be stopped.

[24] Consistently, there should under s 29 of the *Judicial Review Act* be an order staying proceedings under Mr Jordan's decision until the determination of this application.

[25] There will be an order dismissing the cross-application brought by the respondents. I adjourn the applicant's application for directions, pending the submission, through my Associate, of a form of directions, in the event that that can be agreed among the parties, or alternatively, the re-listing of the application for orders by the Court.

[26] It seems to me appropriate, at this stage, that costs of the applicant's application be reserved, but that the respondents pay the applicant's costs, to be assessed, of their unsuccessful cross-application. Its fate arose, I note, in the context of sworn material to which the respondents apparently chose not to respond. Further submissions and argument aside, I expect the draft minutes submitted to me will reflect those proposed orders.