SUPREME COURT OF QUEENSLAND

CITATION:	*Ambrey v Oswin* [2004] QSC 224
PARTIES:	**WILLIAM JOHN AMBREY** (Applicant) **v** **JUDY OSWIN** (Respondent)
FILE NO/S:	S567/03
DIVISION:	Trial
PROCEEDING:	Application for Statutory Order to Review
ORIGINATING COURT:	SUPREME COURT
DELIVERED ON:	27 July 2004
DELIVERED AT:	TOWNSVILLE
HEARING DATE:	21 July 2004
JUDGES:	CULLINANE J.
ORDER:	**The application is dismissed with costs to be assessed**
CATCHWORDS:	ADMINISTRATIVE LAW – STATUTORY REVIEW – whether conduct of respondent caused reasonable apprehension of bias to a reasonable observer – whether wording of show cause notice raises questions of bias on behalf of delegate respondent - whether investigating officer should be restrained from pursuing the matter further. *Public Service Act 1996* (Qld) s.87(1)(b) *Judicial Review Act 1991* (Qld) s.21 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337. *Barker v Queensland Fire and Rescue Authority* (2000) QSC 395. *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287
COUNSEL:	Mr Morris QC for the Applicant Mr Horneman-Wren for the Respondent

SOLICITORS: Dempseys Solicitors for the Applicant
Crown Law for the Respondent

[1] This is an application for a statutory order to review.

[2] The circumstances out of which the matter arises concern disciplinary proceedings under the *Public Service Act* 1996. The respondent is the delegate appointed to deal with the matter.

[3] The applicant is an officer of Queensland Transport. On 9th October 2002 a workshop for Queensland Transport staff was held at Mission Beach.

[4] In the course of the workshop on that day certain team building activity was engaged in. This, it appears, involved participants being blindfolded and placed into certain delineated areas whilst other employees guided them orally to another area.

[5] The complainant, one Loretta Muller, was at the time blindfolded. She says that she was indecently assaulted in the course of this exercise. Some witnesses present identify the applicant as the person who indecently assaulted her.

[6] Following her complaint an investigation was undertaken in the course of which an independent investigator was engaged to investigate the matter and prepare a report.

[7] Subsequently by a document dated 28th April 2003, the respondent gave to the applicant a notice to show cause why disciplinary action should not be taken. I will return to this in a moment.

[8] At a relatively early stage after the complaint was made, the applicant consulted solicitors and his solicitor and counsel were present with him when it was sought to interview him. There was correspondence between Queensland Transport and the applicant's solicitors. This is exhibited to the affidavit of Mr Dempsey, the applicant's solicitor. In a letter of 11th March 2003 Queensland Transport provided a summary of what is said to have occurred and what certain witnesses are said to have stated.

[9] Queensland Transport has in place a policy and procedures in relation to disciplinary matters. This formed the basis for proceedings in this case. A copy of the relevant document is part of Exhibit A to Mr Dempsey's affidavit.

[10] Although the application raises three grounds, the applicant pursued only one of these.

[11] This in summary is a claim that the conduct of the respondent would raise a reasonable apprehension of bias in the mind of an observer and that she should be restrained from further pursuing the matter.

[12] Step 4 headed "show cause process" of the policy and procedures provides for the holding of a disciplinary meeting after the show cause notice has been given. It is said that the purpose of this is to provide the employee with an opportunity to meet with the delegate and respond verbally to the allegations which have been made

against him and have been included in the show cause notice. This meeting is said to supplement and not replace the show cause process. It countenances the presence of somebody with the employee (described as a "support person") who can provide support but is not to represent or advocate on behalf of the public service employee.

[13] Some dispute arose about the right to have his solicitor appear or whether the applicant had been denied such a right.

[14] Nothing it seems to me turns on this. In the result the applicant did not attend the meeting, having been advised not to do so.

[15] A claim that the conduct of the respondent gives rise to a reasonable apprehension of bias is primarily based upon what appears at the bottom of page 2 of the notice to show cause.

[16] The notice refers to two matters. One is a breach of the department's code of conduct and the other relates to an allegation of misconduct under s.87(1)(b) of the *Public Service Act* which includes disgraceful or improper conduct either in an official capacity or in a private capacity which reflects seriously and adversely on the public service.

[17] In each case the breach is constituted by the same action, namely the alleged sexual assault upon Loretta Jane Muller.

[18] After setting out the grounds in support of the contravention of the code, the notice goes on to refer to the grounds in support of allegations of misconduct. It is desirable if I set out this part of the document, at least up until the point at which the accounts of the complainant and witnesses are set out in detail:

> *"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 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 Loretta Jane Muller, 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 Ms Loretta Jane Muller."*

[19] It is the last of the above paragraphs upon which the applicant focused his challenge.

[20] After setting out in substantial detail what various witnesses are said to have stated the notice goes on.

> *"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.*
>
> *Accordingly, you are invited to reply to these allegations, in writing within fourteen (14) days of receiving this notice by stating whether you admit or deny the allegations made against you, or by furnishing any explanation or evidence in support of your case in relation to these matters. If you do not respond to this notice within the period of fourteen 914) days, action will be taken to make a determination of these allegations based on the material presented to me."*

[21] It is said that the respondent had, by the language she used in the above passage, predetermined the matter and that these words indicate that she had reached a conclusion that the applicant had sexually assaulted the respondent.

[22] The applicant whilst objecting to the conduct of the respondent of which he complains has in fact forwarded a document which is intended to be a response to a show cause notice.

[23] These proceedings were instituted on the 22nd July 2003.

[24] On the day prior to that the respondent had forwarded a letter to the solicitors for the applicant responding to a number of the matters raised by the applicant's solicitors.

[25] The letter went on to state that if the applicant did not present any fresh evidence or other material before her by 23rd July 2003 she intended continuing with the "disciplinary process in accordance with the *Public Service Act* 1996."

[26] In the course of that letter, the following passages appear**:**

> *"On more than one occasion, you have accused me of having already found your client guilty of misconduct, and suggest that he has been denied natural justice. You refer to the statement contained in the Show Cause notice, 'I am of the view that you were the person who sexually assaulted..Loretta Jane Muller'.*
>
> *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. This is why your client has been given the opportunity to admit or deny the allegation or to furnish any explanation or evidence which might assist me in arriving at my final decision."*

[27] When the notice to show cause was issued, it was accompanied, it would appear, by the report of the investigator who had been appointed but not by any of the evidence.

[28] In Step 4 "show cause process" contained in the policy and procedures document to which I have referred the following appears:

> *"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."**

[29] It is common ground that no supporting evidence in addition to the investigation report was provided. However the statements were subsequently provided. Although this was the basis for one of the claims in the application it has not been pursued separately as a ground of challenge but is one of the matters relied upon also as a matter relevant to the claim of reasonably apprehended bias.

[30] The respondent contends that there is no decision to which the Act applies, something which is necessary to ground a statutory order of review.

[31] It is said that in so far as the respondent decided to issue a show cause notice this is not sufficient.

[32] A decision must, for the purposes of the act be one which is "final --- operative and determinative --- in a practical sense of the issue in fact falling for --- consideration." See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337.

[33] Reliance was placed on the judgment of White J in *Barker v Queensland Fire and Rescue Authority* (2000) QSC 395.

[34] In that case the person whose function it was to frame the disciplinary charges (in that case relating to the Queensland Fire and Rescue Authority) and to hear and determine them had, it was alleged, stated that he did not propose to examine the credibility of witnesses. It was said that this was pursuant to s.21 of the *Judicial Review Act*, conduct engaged in for the purposes of making a decision to which the Act applied. Her Honour said at paragraph 17: "There must therefore be a close correlation between a decision to which the Act applies and the conduct."

[35] She went on in paragraphs 18 and 19:

[36] *"**[18]** For a decision to be reviewable under the Judicial Review Act it must have a quality of finality, not being a step taken on the way to the possible making of an ultimate decision. It must have the essential quality of being a substantive as distinct from a procedural determination, per Mason CJ at 336 and following. It is accepted that an intermediate step can be a decision in its own right if it relates to a matter of substance and is specifically indicated in the relevant Act. In Hill v Green (1999) 48 NSWLR 161 Fitzgerald JA quoted with approval a passage from South Australia v O'Shea (1987) 163 CLR 378 at 389 that*

> *'…where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if the decision-making process, viewed in its entirety, entails procedural fairness' at 193.*

[37] ***[19]*** *What Mr Gilbert proposes to do is essentially a procedural step along the way to the ultimate or final decision, namely, whether the charges of misconduct are made out against Mr Barker and, as s33 of the Act requires, that ultimate decision must be taken after according Mr Barker natural justice.*

[38] The applicant, on the other hand, contends that the proper way in which to view the matter is to see the giving of the notice to show cause as conduct engaged in for the purposes of the ultimate decision, namely whether the applicant had been guilty of the misconduct alleged. It is said that the conduct constituted as it was by the apparent conclusion that he had sexually assaulted the complainant was sufficiently closely connected with the ultimate decision to permit the court to statutorily review the matter.

[39] If the relevant decision is the decision to give a notice to show cause then I think that this is not a decision to which the Act applies but is rather a decision of the kind which White J was discussing in Barker's case. The matter of whether the respondent has been guilty of conduct which gives rise to a reasonable apprehension of bias would fall for consideration by reference to her conduct overall in her dealing with the matter up until and including the final determination of the merits of the matter.

[40] It is, given the view that I take of the merits of the claim unnecessary for me to finally determine this issue. It is sufficient if I say that I have substantial reservations about the applicant's argument on this point but am content to assume that the court has the jurisdiction claimed.

[41] I do not think that it is possible to accept the claim that the passage at the bottom of page 2 of the notice to show cause can be regarded as demonstrating that the respondent has reached an adverse conclusion on the issue to the applicant or that a reasonable person would apprehend from this that the respondent was biased.

[42] It is trite to say that the document must be read as a whole.

[43] It would, obviously enough, be at odds with the very nature of the show cause process for a final conclusion as to guilt to be expressed in a notice to a show cause.

[44] There are passages in the notice which are frankly inconsistent with any such conclusion having been reached.

[45] The purpose of the impugned part of the notice is, it would seem, to notify the applicant why he is the person receiving the notice in relation to this matter, that is, the breach of section 87(1)(b) of the *Public Service Act* 1996.

[46] I think that a reasonable person in considering the document as a whole and taking into account its nature and purpose would appreciate that the author was, notwithstanding an erroneous and unfortunate choice of words, informing the applicant that witnesses identified him as the person who had sexually assaulted the complainant.

[47] This it would have been reasonably understood was the very matter he was being asked to answer and provided with the opportunity to do so.

[48] There should be no artificial approach to the question of the effect of the document overall or any of its parts nor to use the language of the Full Court of the Federal Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 should the document be "construed minutely and finely with an eye keenly attuned to the perception of errors."

[49] Nor do I think that taken alone or viewed with the passage set out above what is complained of in the letter of 21 July 2003 (set out in paragraph 26 above) provides any support for a claim of apprehended bias.

[50] It is true that in the second paragraph of the extract from that letter, there appears to be some mixing of concepts. However there is nothing to suggest that the respondent did not understand what the nature of the show cause process involved. Its language is in fact inconsistent with the claim that a conclusion had been reached. It of course must be borne in mind that this is a letter from the respondent rebutting allegations made against her by the solicitors for the applicant that she had denied him natural justice.

[51] Similarly the failure to provide the supporting evidence at the time the show cause notice was issued does not in my view, assist the applicant in his claim of reasonably apprehended bias.

[52] The respondent says that she did not provide the supporting evidence at the time of issuing the notice after having discussed the matter with officers in the Human Resources and the Legal and Legislation Branch of the department. It appears that there were some concerns about privacy. I accept her explanation.

[53] The statements were subsequently provided and as I have said, the ground which was based upon this is not pursued.

[54] I do not accept that there is anything in the conduct of the respondent in relation to this which might taken alone or together with the other matters relied upon provide any support for the claim of reasonably apprehended bias.

[55] Finally, some reliance was placed upon what was said to be the respondent's refusal or reluctance to answer questions under cross-examination by senior counsel for the applicant.

[56] There were undoubtedly a number of exchanges between them in which the respondent was inclined to stand on what she had said in an earlier answer and did not directly answer the question, at least initially.

[57] The respondent showed some degree of unhappiness about having her conduct impugned in the way that it has been and this I think is reflected in the way in which she answered questions. However there was nothing in her conduct as a witness, which tended to support the claim of apprehended bias or which could, with other evidence lead to an adverse conclusion against her on this issue.

[58] The matter has now been delayed for substantially in excess of a year. The allegations are very serious and no doubt the applicant, as a long serving member of the Department of Transport, is concerned about his position. It is plainly in the

interests of everybody that the matter not be further delayed. There is no basis in my view for granting the relief which is sought.

[59] The application is dismissed with costs to be assessed.