SUPREME COURT OF QUEENSLAND

CITATION:	*Sheridan v Local Government Association of Queensland Inc & Ors* [2006] QSC 395
PARTIES:	**LEIGH SHERIDAN** (applicant) v **LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND INC** (first respondent) and **CRIME AND MISCONDUCT COMMISSION** (second respondent)
FILE NO:	7069/06
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	15 December 2006
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	14 November 2006
JUDGE:	Douglas J
ORDER:	**Declare that the referral by the second respondent of the complaint of the applicant to Mr Reg McCallum, mayor of the Nanango Shire Council, by its letter of 6 April 2006, to be dealt with by Mr McCallum, and Mr McCallum's referral of the complaint to the first respondent by his letter dated 15 June 2006 was ineffective on the ground that Mr McCallum was not a relevant public official within the meaning of those words in s 35(1)(b) of the Crime and Misconduct Act 2001.** **Liberty to apply.** **Respondents to pay 60% of the applicant's costs of and incidental to the application, including reserved costs if any.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – STATUTORY POWERS AND DUTIES – EXERCISE – DELEGATION OF POWER CONFERRED BY STATUTE – where complaint made to the Crime and Misconduct Commission ("CMC") about local council employees – where the CMC referred the complaint to the mayor of the council – where

the mayor implicated in the complaint and delegated the handling of the complaint to the Local Government Association of Queensland – whether the referral by the CMC and the delegation by the mayor were valid

Crime and Misconduct Act 2001, s 5(3), s 20, s 33(b), s 34, s 34(c), s 35(1)(a), s 35(1)(b), s 35(1)(e), s 35(1)(g), s 45(1)
Local Government Act 1993, s 35, s 1132, s 1135(3), s 1142

Birmingham v Corrective Services Commission of NSW (1988) 15 NSWLR 292, cited
Carltona Ltd v Commissioners of Works [1943] 2 All ER 560, cited
Dainford Pty Ltd v Smith (1985) 155 CLR 342, applied
Ebner v Official Trustee in Bankruptcy (2001) 205 CLR 337, cited
Gascor v Ellicott [1997] 1 VR 332, cited
Greyhound Racing NSW v Cessnock and District Agricultural Association [2006] NSWCA 333, cited
Livesey v NSW Bar Association (1983) 151 CLR 288, cited
Minister for Immigration v Jia Legeng (2001) 205 CLR 507, cited
O'Reilly v State Bank of Victoria Commissioners (1983) 153 CLR 1, cited
R v Secretary of State for Trade; ex parte Perestrello [1981] QB 19, cited
Thompson v Goold & Co [1910] AC 409, cited
Tokyo Mart Pty Ltd v Campbell (1988) 15 NSWLR 275, cited
Vine v National Dock Labour Board [1957] AC 488, cited

COUNSEL: R E Reed for the applicant
J A Logan SC for the first respondent
D C Rangiah for the second respondent

SOLICITORS: Kerin & Co Lawyers for the applicant
King & Co for the first respondent
Official Solicitor Crime and Misconduct Commission for the second respondent

[1] **Douglas J:** The applicant was a librarian for the Nanango Shire Council. She alleges that Council employees visited her home and engaged in intimidatory conduct at the behest of its chief executive. The applicant asked the Crime and Misconduct Commission to investigate her complaint of official misconduct by those Council officers.

[2] The CMC, by a letter dated 6 April 2006, referred the complaint to the Council mayor, relying partly on s 34 of the *Crime and Misconduct Act* 2001, but the mayor was already on the public record in support of the chief executive and against the applicant. Consequently the CMC, in a letter of 2 June 2006, encouraged the mayor to ask the first respondent, the Local Government Association of Queensland Inc ("LGAQ"), to "deal with" the complaint on his behalf. The words "deal with"

reflect the language of s 35(1)(a) of the *Crime and Misconduct Act* to which I shall refer shortly.

[3] The mayor wrote to the LGAQ by a letter dated 15 June 2006. It asked the LGAQ to undertake the investigation referred to in the CMC's letter of 6 April 2006 which itself had asked Mr McCallum to deal with the matter. His conduct in asking the LGAQ to conduct an investigation on behalf of the Council was ratified by the Council on 8 November 2006. That ratification does not, on its face, refer to the possibility of the LGAQ dealing with the matter finally. I was not satisfied that the evidence supported the applicant's submission that the CMC, not the mayor, had referred the complaint to the LGAQ.

[4] The LGAQ's history began in 1896, first as an unincorporated body and later as a corporation. It was recognised by the *Local Government Act* 1936. The *Local Government Act* 1993 also recognises it and deals with its role between s 1194 and s 1199. Its constitution and rules says that its objects include acting as a peak body representing the interests of "the local government industry" and providing its members with professional advice.

[5] The LGAQ decided to use one of its employees, a Ms Walsh, as an investigator. She was a colleague of, but not answerable to, another LGAQ employee who had advised the Council about the recruitment of its chief executive about two years before. She had not spoken to him about the investigation and did not know of his involvement in the recruitment of the chief executive until the applicant's solicitor raised the issue. The CMC did not wish to conduct the investigation itself.

[6] Three issues arise. Was it possible for the CMC to refer the complaint to the mayor to be dealt with by him? Was it possible for the mayor or the Council to delegate that role to the LGAQ? Is there a valid argument that Ms Walsh should be disqualified as the chosen investigator on the ground of actual or apprehended bias?

[7] Not all of those issues are raised in precisely that manner in the relief sought in the amended application, an issue I shall deal with later when I consider what orders I should make.

Referral of the complaint to the mayor

[8] The statutory regime controlling the CMC's powers to investigate under the *Crime and Misconduct Act* needs to be examined. Section 45(1) gives the CMC primary responsibility for dealing with complaints about official misconduct. Section 5(3) provides that "the commission is to help units of public administration to deal effectively, and appropriately, with misconduct by increasing their capacity to do so while retaining power to itself investigate cases of misconduct, particularly more serious cases of misconduct." Section 33(b) provides that it has the function "to ensure a complaint about, or information or matter involving, misconduct is dealt with in an appropriate way, having regard to the principles set out in section 34."

[9] Section 34(c) expresses Parliament's intention that the CMC apply a principle of devolution when performing its misconduct functions. It says "subject to the cooperation and public interest principles and the capacity of the unit of public administration, action to prevent and deal with misconduct in a unit of public administration should generally happen within the unit."

[10] Section 35(1)(b) then provides that the CMC may perform its misconduct functions by "referring complaints about misconduct within a unit of public administration to a relevant public official to be dealt with by the public official."

[11] "Public official" is defined in Schedule 2 to mean:

> "(a) the ombudsman; or
>
> (b) the chief executive officer of a unit of public administration, including the commissioner of police; or
>
> (c) a person who constitutes a corporate entity that is a unit of public administration."

[12] The CMC did not refer the complaint to the chief executive of the Council because he was one of the people whose conduct was attacked. Instead, it referred the complaint to the mayor, apparently in reliance on s 1142 of the *Local Government Act* 1993.

[13] It takes the view that a "public official" as defined in the *Crime and Misconduct* Act has to be a natural person, such as the ombudsman or a chief executive of a unit of public administration. Where the definition also refers to a "person who constitutes a corporate entity", the submission was made that the person should be understood as a corporation sole, where a natural person also holds an office that is constituted as a corporate entity, such as the commissioner for railways or the public trustee; see s 504 of the *Transport Infrastructure Act* 1994 and s 8 of the *Public Trustee Act* 1978. This construction is advanced on the reasonable basis that the word "person" in that context should not be construed as including a corporation as it would create the tautology of a corporation which constitutes a corporate entity.

[14] That is one reason why the CMC did not wish to maintain any position that it had actually referred the complaint to the Council as a "corporate entity that is a unit of public administration." It would appear to be such a corporate entity; see the *Crime and Misconduct Act* s 20 and the *Local Government Act* s 35. Nor did the CMC argue that it was dealing with the complaint or assuming responsibility for and completing the investigation in cooperation with the Council as a unit of public administration pursuant to s 35(1)(e) or s 35(1)(g) of the *Crime and Misconduct Act*.

[15] Instead it relied on s 1142 of the *Local Government Act* as justifying it in referring the matter to the mayor of the Council. That section provides:

> **"1142 Disclosure of employee's interest in particular issues**
> (1) An employee of a local government who has a material personal interest in an issue to be, or being, dealt with by the employee in the course of the employee's duties—
> (a) must immediately inform the chief executive officer, in writing, of the interest; and
> (b) must not deal with, or further deal with, the issue except under the chief executive officer's written directions.
> Maximum penalty—35 penalty units.

> (2) If the employee mentioned in subsection (1) is the chief executive officer, the references in paragraphs (a) and (b) to the chief executive officer are taken to be references to the mayor.
> (3) In this section—
> *employee* of a local government includes—
> (a) a person who provides services to the local government under a contract; and
> (b) a person prescribed by regulation."

[16] If the complaint had been referred to the chief executive of the Council then s 1142(2) would have dictated that he should have immediately informed the mayor of his personal interest in the investigation into his alleged behaviour and not dealt with it except under the mayor's written direction. That section of the *Local Government Act* does not, however, justify an expansion of the definition of "public official" in the *Crime and Misconduct Act* to include "mayor" instead of "chief executive officer" when a situation of the type envisaged by s 1142 arises.

[17] Such a construction would require me to read words into the *Crime and Misconduct Act*. In the past, the view was that, in the absence of clear necessity, it was wrong to read words into an Act; *Thompson v Goold & Co* [1910] AC 409, 420. That view may not now hold as much sway as used to be the case, a point I shall touch on presently. Although the *Crime and Misconduct Act* may be defective in failing to have a regime that deals explicitly with the referral of complaints about a public official to some other person, where that official is a subject of the complaint, I cannot say with certainty what words Parliament would have used to overcome the omission, if indeed it is an omission.

[18] Parliament might have taken the view that the CMC should not refer such complaints but deal with them itself. Alternatively, if there were thought to be an omission, the definition of "public official" in the *Crime and Misconduct Act* might be expanded, for example, to add "and the mayor of the Local Government in the circumstances described in s 1142 of the *Local Government Act*." Parliament might have thought, however, that a more general solution than one simply adapted to local government was preferable. Even in the local government context it may have been of the view that, if the complaint were referred to the chief executive, then s 1142 would come into play effectively.

[19] The issue in the *Crime and Misconduct Act* revealed by these facts seems to me to be one of those cases where, even on a more liberal view of my powers of interpretation, I cannot assume what words Parliament would have used to deal with the situation. The consequence is that I should not interpret the words "public official" to allow them to refer to the mayor instead of the chief executive; cf *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275, 283; *Birmingham v Corrective Services Commission of NSW* (1988) 15 NSWLR 292, 302 and see Pearce & Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) at pp 51-53 para [2.29].

[20] As a result I have formed the view that the referral of the complaint to the mayor of the Council to be dealt with by him was not a valid exercise of the CMC's statutory power under s 35(1)(b) of the *Crime and Misconduct Act* because the mayor was not a relevant public official.

Could the mayor delegate the reference?

[21] As the CMC was not able to refer the investigation of the complaint to the mayor it is axiomatic that the mayor could not deal with it himself by delegating the investigation to the LGAQ. Nor could the Council make a delegation as it similarly had no power to deal with the complaint. On the present facts the ability of the chief executive to delegate the investigation of the complaint does not arise, as the complaint was not referred to him.

[22] If there had been a valid delegation to the mayor, the LGAQ's submission was that he could delegate the investigation to the LGAQ pursuant to the *Carltona* principle*;* see *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 and *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, 11-12. Had the mayor been referred the complaint by his chief executive under s 1142 of the *Local Government Act* could he have delegated his functions to the LGAQ or have directed the chief executive to do that? The issue does not arise on these facts but it may be useful to examine the ramifications for the future handling of this complaint.

[23] Even though the chief executive must not deal with the issue except at the mayor's direction under s 1142, it still remains a complaint for the chief executive to deal with pursuant to s 35(1)(b) of the *Crime and Misconduct Act.* It is one, however, that he should not deal with because of his interest in the outcome. Nor should the mayor be involved because of the stance he has already taken.

[24] On the assumption, however, that neither the chief executive nor the mayor were biased or affected by the perception of bias, could the complaint have been "dealt with" by the LGAQ? As the CMC's delegate may the chief executive delegate that process himself to the LGAQ or be directed to do so by the mayor? In that context it may be necessary to heed the discussion by Gibbs CJ in *Dainford Pty Ltd v Smith* (1985) 155 CLR 342, 349 where his Honour said:

> "I am not convinced that recourse to the maxim delegatus non potest delegare is of much assistance in deciding upon the validity of an exercise of statutory powers. It is simpler to ask directly whether the power has been exercised by the person upon whom it has been conferred and whether it has been exercised in the manner and within the limits laid down by the statute conferring the power."

[25] It may be, for example, that the investigation of the complaint could be delegated but not its resolution. Under the *Crime and Misconduct Act* the power to deal with a complaint includes the power to investigate but also allows the taking of action to address the complaint; see the definition of "deal with" in Schedule 2. If the intention were to be that the LGAQ should not only investigate but also take action to address the complaint in a quasi-judicial role then there may be an issue about the ability of the chief executive or the mayor to further delegate dealing with the complaint in that sense, considering the nature of their power to deal with the matter and the CMC's role as the primary disciplinary body; see, e.g., *Vine v National Dock Labour Board* [1957] AC 488, 499, 502, 505,-506, 509, 512 and Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) at pp 306-307.

[26] Nor does the power of a minister or "officer of the State" to delegate their powers under s 55 of the *Constitution of Queensland* 2001 appear to extend to the mayor or

the chief executive of a local government. The power to delegate given to a local government chief executive by s 1132 of the *Local Government Act* is to another employee of that local government although that may include a person who contracts with the local government to provide services to it; see s 1132(6)(a). Similarly a mayor may ask for reasonable help or advice from any employee pursuant to s 1135(3), which again includes a person who contracts with the local government to provide services to it.

[27] There is still likely to be an issue, however, about how far any quasi-judicial "dealing with" the complaint may be sub-delegated from the chief executive even if he were not otherwise disqualified from dealing with the matter because he was a subject of the complaint.

Bias or the perception of bias

[28] In the circumstances it is not strictly necessary for me to resolve the issue whether the proposed investigator is affected by bias or any perception of bias. Nothing that has been said in favour of that argument, however, justifies the view that Ms Walsh should be disqualified from conducting the investigation simply because she is employed by the LGAQ in a similar capacity to the other employee who had advised the Council about the recruitment of its chief executive. If LGAQ were otherwise able to be appointed to deal with the complaint to some extent at least, its objects justified its use as an independent investigator where the Council's mayor and chief executive were compromised by their conflict with the interests of the applicant.

[29] In my view, no fair minded observer, acting reasonably, should apprehend that Ms Walsh might not bring an unprejudiced mind to bear on her tasks simply on the basis that she was a work colleague of the officer who advised the Council about the recruitment of its chief executive some two years before; cf *Livesey v NSW Bar Association* (1983) 151 CLR 288, 293, 294; *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337, 344 at [6] and *Gascor v Ellicott* [1997] 1 VR 332, 342. That may be the test to apply if Ms Walsh were to be the decision maker in deciding how to deal with the complaint, but if her role is limited to that of an investigator then the rule may be simply that she should act fairly rather than that she be unbiased or free from the apprehension of bias; see Aronson, Dyer and Groves at 604; *R v Secretary of State for Trade; ex parte Perestrello* [1981] QB 19 and *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507, 563 at [181]. On neither approach is there reason to doubt her likely performance.

Orders

[30] One of the submissions for the CMC was that the issue whether there had been a valid referral of the complaint when it was sent to the mayor of the Council did not arise in the application. Part of the relief claimed is a prohibition order that the first respondent cease dealing with the applicant's complaint to the CMC. It seems to me that that application necessarily involves the consideration of whether the first step in the process of the referral of the complaint by the CMC to the mayor was valid. If it was invalid, as I have concluded, then the mayor was not able to deal with it, whether by referring it to the LGAQ or by dealing with it himself, because of the fact that he is not a relevant public official for the purposes of s 35(1)(b) of the *Crime and Misconduct Act*. Accordingly, the LGAQ has not been properly

authorised to investigate the complaint or deal with it otherwise and should cease doing so.

[31] Mandamus was also sought requiring the CMC to conduct the investigation itself. That may be a practical result of my decision but there may be other possibilities open to the CMC under s 35(1) including, perhaps, dealing with it in cooperation with a unit of public administration on the basis that the LGAQ is an appropriate unit of public administration for the performance of that role; see s 1194 and s 1195 of the *Local Government Act* and s 20(1)(e) of the *Crime and Misconduct Act.* Another possible view may be, however, that the appropriate unit of public administration with which to cooperate is the one employing the complainant rather than another body such as the LGAQ.

[32] Accordingly it does not seem to me to be desirable that I prescribe a particular way by which the CMC should respond to the complaint made against it.

[33] It seems appropriate, however, to declare that the referral by the second respondent of the complaint of the applicant to Mr Reg McCallum, mayor of the Nanango Shire Council, by its letter of 6 April 2006, to be dealt with by Mr McCallum, and Mr McCallum's referral of the complaint to the first respondent by his letter dated 15 June 2006, was ineffective on the ground that Mr McCallum was not a relevant public official within the meaning of those words in s 35(1)(b) of the *Crime and Misconduct Act* 2001.

[34] Because such an order had the potential to affect the interests of Mr McCallum where he was not a party to this application I thought it appropriate that he be informed of that possibility; see, e.g., *Greyhound Racing NSW v Cessnock and District Agricultural Association* [2006] NSWCA 333 at [133]. That has occurred and the Court has been informed through his solicitors that neither he nor the Nanango Shire Council wished to seek leave to be joined as a party to the proceedings or to make further submissions.

[35] If necessary that declaration could be supported by a prohibition order against the first respondent but I expect that step might not be required.

[36] I further order that the parties have liberty to apply.

[37] I further order that the respondents pay 60% of the applicant's costs of and incidental to the application, including reserved costs if any.