SUPREME COURT OF QUEENSLAND

CITATION:	*Berenyi v Maynard & Anor* [2015] QSC 370
PARTIES:	**MARGARET THERESA BERENYI** (applicant) **v** **IAN GRAHAM MAYNARD, DIRECTOR-GENERAL, QUEENSLAND HEALTH** (first respondent) **AND** **SUE RICKERBY, DIRECTOR-GENERAL, THE DEPARTMENT OF SCIENCE, INFORMATION TECHNOLOGY, INNOVATION AND THE ARTS** (second respondent)
FILE NO:	SC No 7058 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2014, 18 December 2014, 13 January 2015, further submissions by the applicant dated 15 January 2015, further submissions by the respondent dated 22 January 2015, further submissions by the applicant dated 23 January 2015, 31 March 2015, further submissions by applicant dated 28 September 2015, further submissions by respondent dated 14 October 2015
JUDGE:	Philippides JA
ORDER:	**The applications filed 31 July 2014 and 21 January 2015 are dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – GENERALLY – where the respondent initiated disciplinary process and made disciplinary findings against the applicant – where the respondent purported to terminate the applicant's employment pursuant to a contractual clause – whether the

termination was in the exercise of a contractual or a statutory power – whether the respondent's decision to terminate is judicially reviewable

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the respondent made three allegations specifying acts or omissions by which the applicant failed to discharge her professional responsibilities – whether the respondent failed to sufficiently particularise the acts or omissions which gave rise to the applicant's alleged breach of discipline – whether natural justice was afforded

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where the applicant relied on the expertise of others in her decision making – where the applicant was found not to have turned her own mind to and made her own enquiries about the bases upon which her decisions were made – whether it was a relevant consideration that the applicant relied on the expertise of others – whether the respondent failed to take that consideration into account

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – where the respondent considered it necessary to attribute responsibility for the failure of the project the applicant was involved in – whether that was an irrelevant consideration

Corporations Act 2001 (Cth), s 180
Public Service Act 2008 (Qld), s 5, s 8, s 9(1), s 96, s 96(1), s 113, s 113(5), s 114, s 114(1), s 114(3), s 122, s 122(8), s 123(1)(a), s 187, s 187(1)(a), s 188, s 190, s 190(1), s 192, s 216(1)(b), s 216(2), s 218, s 218(1), s 218(2), s 219, s 219(3)

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10, cited
Bennett v Human Rights & Equal Opportunity Commission (2003) 134 FCR 334; [2003] FCA 1433, cited
Blizzard v O'Sullivan [1994] 1 Qd R 112, applied
Bruce v Cole (1998) 45 NSWLR 163, cited
Bryne v Auckland Irish Society Inc [1979] 1 NZLR 351, cited
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393, cited
Commissioner of Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576, cited
Commissioner of Taxation v Day (2008) 236 CLR 163; [2008] HCA 53, considered

Craig v State of South Australia (1995) 184 CLR 163; (1995) 184 CLR 163, considered
Director-General of Education v Suttling (1987) 162 CLR 427; [1987] HCA 3, cited
Dovey v Cory [1901] AC 477, cited
Etherton v Public Service Board of New South Wales [1983] 3 NSWLR 297, considered
Gardiner v Land Agents Board (1976) 12 SASR 458, cited
Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149; [1996] HCA 44, cited
Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44; [2005] HCA 50, cited
Khan v Minister for Immigration & Ethnic Affairs (1987) 14 ALD 291, cited
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1, cited
Law v National Greyhound Racing Club Ltd [1983] 1 WLR 1302; [1983] 3 All ER 300, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, cited
Murphyores Inc Pty Ltd v Commonwealth (1976) 136 CLR 1; [1976] HCA 20, cited
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476; [2003] HCA 2, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, [1998] HCA 28, cited
Public Service Board (NSW) v Etherton (1985) 1 NSWLR 430, considered
R (Arthurworrey) v Haringey London Borough Council [2001] EWHC Admin 698, cited
R v British Broadcasting Corporation; Ex parte Lavelle [1983] 1 WLR 23; [1983] 1 All ER 241, considered
R v Criminal Injuries Compensation Board; Ex parte Lain [1967] 2 QB 864, cited
R v Little; Ex parte Fong [1983] 1 VR 237. cited
Re City Equitable Fire Insurance Co Ltd [1925] Ch 407, cited
Reynolds & Co Pty Ltd v Australian Stock Exchange Ltd (2003) 174 FLR 311, considered
Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363, cited
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152; [2006] HCA 63. cited
Whitehead v Griffith University [2003] 1 Qd R 220; [2002] QSC 153, considered

COUNSEL: R W Haddrick for the applicant

S E Brown QC with J K Carter for the respondents

SOLICITORS: Fisher Dore for the applicant
Minter Ellison for the respondents

The originating application

[1] Ms Berenyi (the applicant) was an employee of the Department of Public Works from 6 February 2009 and, subsequently upon its creation in 2012, an employee of the Department of Science, Information Technology, Innovation and the Arts (DSITIA).

[2] From 9 August 2011, she was employed as the General Manager, Queensland Shared Services (QSS) pursuant to a written contract of employment made between the applicant and the Chief Executive for a three year term. The applicant was involved in the roll out of Queensland Health's Payroll System. The applicant's designated role at the time of the roll out was Executive Director (General Manager) of CorpTech, a business or administrative unit within the DSITIA.

[3] The applicant filed an originating application for judicial review in the Supreme Court's inherent supervisory jurisdiction seeking orders against Mr Maynard, the then Director-General, Queensland Health (the first respondent) and Ms Rickerby, Director-General of DSITIA (the second respondent) as follows:

(a) the decision of the first respondent to terminate the employment of the applicant dated 5 November 2013 be declared void;

(b) a declaration that the applicant remains an employee of the second respondent pursuant to the *Public Service Act* 2008 (Qld) (the PSA); or

(c) alternatively orders in the nature of *certiorari* and *mandamus* in respect of the applicants continued employment by the second respondent.

[4] The respondents argued that the application should be dismissed on the basis that:

(a) The decision to terminate the applicant's employment was an exercise of contractual power and was not amenable to judicial review.

(b) The decision to terminate was not constrained by, or at variance with, the PSA and would not be subject to prerogative or declaratory relief so as to render it amenable to the Court's inherent supervisory jurisdiction.

(c) In any event, there was no jurisdictional error made by the decision maker when terminating the applicant's employment.

Background

The Queensland Health Payroll System Commission of Inquiry

[5] The roll out became the subject of the Queensland Health Payroll System Commission of Inquiry (the Inquiry), which was required to have regard to previous reviews of the failed implementation of the Queensland Health Payroll System, in particular the Auditor-General's Report '*Information Systems Governance and Control, including the Queensland Health Implementation of Continuity Project 2010*' to the Parliament of Queensland and review by KPMG into the implementation of the Payroll System.

[6] On 31 July 2013, the Commission of Inquiry delivered the Queensland Health Payroll System Commission of Inquiry Report (the Report). The first respondent was given

delegated responsibility from the then Chief Executive of the Department for making decisions in relation to disciplinary actions arising out of the Report.

Letter of 22 August 2013 advising of possible grounds for discipline

[7] On 22 August 2013, the first respondent (the then Commission Chief Executive of the Public Service Commission), acting pursuant to the delegation, wrote to the applicant advising her that, having reviewed the information available to him, he considered that the applicant may be liable for discipline under the PSA. Referring to various findings of the Inquiry and notifying her of four allegations, the first respondent advised that, in respect of each allegation, he considered that, if proven, the allegation could constitute a ground for discipline under s 187(1)(a) of the PSA – performance of the applicant's duties carelessly, incompetently or inefficiently.

[8] The applicant was invited, within seven days of receipt of the letter, to respond in writing as to why a disciplinary finding should not be made against her in respect of each of the allegations.

The applicant's letter of 5 September 2013 in reply

[9] On 5 September 2013, the applicant provided submissions as to why a disciplinary finding should not be made on the disciplinary ground set out in s 187(1)(a). The submissions included detailed responses to each of the allegations and also attached materials prepared for and considered by the Inquiry.

Letter of 4 October 2013 as to disciplinary findings

[10] By letter, dated 4 October 2013, the first respondent (at that time the Director-General of Queensland Health and acting under a new instrument of delegation) wrote to the applicant advising that allegations one to three had been found to be proven or substantiated (the fourth was dismissed).

[11] The first respondent stated that, in accordance with s 188 of the PSA, he was considering whether to impose disciplinary action in the form of termination of the contract of employment but stressed that no final decision had been made and invited the applicant to make submissions as to what disciplinary action should be taken. It was also stated that ch 7 of the PSA permitted appeal avenues against the disciplinary findings (a statement which the respondents' counsel accepted was incorrect: see s 218 of the PSA).

The applicant's letter of 16 October 2013 in reply

[12] By letter, dated 16 October 2013, the applicant replied, stating that she disputed the disciplinary findings and that without the particular "actions and inactions" upon which the findings were based being specifically outlined, she was unable to respond in a fully informed way. The applicant also made submissions as to what disciplinary action should be taken if the first respondent did not reconsider his findings.

The letter of 5 November 2013 terminating the contract of employment

[13] On 5 November 2013, the applicant was provided with a letter from the first respondent advising of his decision to terminate the applicant's contract pursuant to cl 7(2)(a). Under the heading "Purpose", it was stated that the purpose of the letter was "to record my decision in relation to disciplinary action, as foreshadowed by my letter of 4 October 2013".

[14] Under the heading "Decision", it was stated:

> "My decision is to terminate your contract of employment dated 26 August 2011 pursuant to clause 7(2)(a) of that contract. I am required to provide you with one month's notice of termination of employment. Accordingly, your employment will terminate on 5 December 2013.
>
> Although no reason is required for the termination of your employment under your contract (see clause 7(2)(b)), it is appropriate for me to give reasons for my decision, and they are set out in this letter".

[15] The letter then referred, by way of background to the Inquiry's Report, the letter of 22 August 2013 setting out the allegations, the applicant's response, the decision that allegations one to three were substantiated and the applicant's submissions in relation to the issue of proposed disciplinary action.

[16] Under the heading "Reasons" a summary of the first respondent's reasons for deciding to terminate the applicant's contract of employment was then set out referring to the Report's findings to the effect that the Payroll System Project was a catastrophic failure and the first respondent's determination that three allegations were substantiated. The first respondent stated:

> "In accordance with these findings, my conclusions in relation to the appropriate disciplinary action in light of these findings are as follows:
>
> (a) By 6 February 2009 you held the role of Executive Director of CorpTech, which was a role with responsibility for the management of the Project and the contractual relationship with IBM.
>
> (b) Under the governance structure associated with the Project, there were also two bodies with a critical decision making authority in relation to the Project. These were the Project Directorate and the Project Board (and its predecessor, the Executive Steering Committee).
>
> (c) You were a senior member of the Project Board.
>
> (d) The Report made adverse findings in relation to decisions of the Project Board. I refer in particular to the findings in the Report which I have identified and taken into account in the correspondence referred to above.
>
> (e) You have submitted, and I accept, that in making these decisions you and other members of these bodies relied on the support and advice of others, including people with specialist expertise. However if I accepted that this absolves you from all accountability

in relation to the decisions which were made (which, as the Report found, had catastrophic consequences) then I would have to accept that no-one should bear responsibility for decisions which are made collectively or on the basis of advice. I do not accept that as a valid proposition.

(f) To the contrary, I believe the failures of administration identified in the Report and which were the subject of the allegations in my letter to you of 22 August 2013 reflect significant failures of leadership in your role as Executive Director of CorpTech and in the role you held on the Project Board. As stated in my letter of 4 October 2013, I have accepted, consistent with the Report, that decisions were made with catastrophic consequences. I have also concluded, consistent with findings in the Report, that the exercise of proper leadership, having regard to the information which was available at the time, should have led to the making of different decisions.

(g) Given the seniority of your roles relevant to the Project, I believe it is reasonable for you to be held accountable for those decisions, including the catastrophic consequences which followed."

[17] Under the heading "Other circumstances", the first respondent stated that he was "required to consider what disciplinary action [was] reasonable in the circumstances", stating that those circumstances included his having found that the applicant performed her duties carelessly, incompetently or inefficiently, as well as the following:

"(a) The time which has elapsed since the conduct occurred and the statements made by your then Chief Executive Officer in July 2010 which you have drawn to my attention in relation to his consideration of disciplinary action at the time, as well as the comment in the Report observing that there was a legitimate reason why you may have been treated more favourably than other officers involved in the Project.

(b) The matters related to the impact on your personal circumstances which you have drawn to my attention.

(c) The significant role you played in assisting to stabilise the QH Payroll System after the 'go-live' date.

(d) Your record, which I accept, has involved strong performance as a public servant in Queensland, and the references you have provided in that regard."

[18] The first respondent dealt with those matters as follows:

"*The time elapsed since the conduct occurred and the absence of a prior disciplinary response*

It is only in unusual circumstances that disciplinary action, particularly termination of employment, would take place several years after the

events giving rise to the disciplinary action have occurred. I also acknowledge that your then Chief Executive Officer did not take disciplinary action at the time, and has indicated publicly that, at the time, he could identify no basis to do so.

However in this case the Report was not provided to the Premier until 31 July 2013. The terms of reference under which the Inquiry was established included:

a. *the adequacy and integrity of the procurement, contract management, project management, governance and implementation process;*

b. whether any laws, contractual provisions, codes of conduct or other government standards may have been breached during the procurement and/or implementation process and who may be accountable.

The Commissioner having made findings related to these terms of reference in his Report, I believe it is my role as the responsible delegate to make the findings I believe are appropriate, notwithstanding the time which has elapsed since the relevant events occurred.

I also believe that it is only as a consequence of the detailed analysis of the relevant events in the Report that it has been possible to give proper consideration to who, if any, should be accountable for the relevant decisions.

Although I have noted that the Commissioner made a comment (recorded at paragraph 6.60) that there was a 'legitimate reasons' (sic) why you might have been treated more favourably than other officers, I do not regard this comment to be of significant relevance to my decision. The Commissioner's role was to make findings in relation to the adequacy and integrity of the relevant processes and to see whether Government standards may have been breached. He has done so, and, in my view, those findings reflect a failure by you to meet the standard required under the *Public Service Act 2008*. Having made this finding, it is my responsibility to decide what disciplinary response is appropriate.

I have taken these comments into account, but I have also taken into account the Commissioner's comments (at paragraph 6.59) that 'leaderships (sic) was required and the "signs of distress" should have been acted on' which is consistent with my own view. Given the seniority of your leadership roles in relation to the Project, I must hold you accountable for the failure to appropriately exercise that leadership at the relevant times.

I can identify no unfairness to you in terms of your capacity to respond to the allegations which has been caused by the time elapsed since these events.

The personal impact on you of a termination decision

I acknowledge and accept that a decision to terminate your employment, having regard to your personal circumstances as explained to me, is likely to have a significant adverse personal impact on you. You have pointed out some particular circumstances which may result in an impact which is greater than might be the case in other termination situations.

Against these mitigating circumstances, however, I must weigh the gravity of the failures which I have identified in your performance and the consequences of them. Having balanced these issues, I do not believe these (and other) mitigating circumstances should lead to a decision which is more lenient than termination of employment.

Significant role in stabilising the QH Payroll System

I acknowledge the very significant input by you (as well as many others) in this regard. It is clear that your contribution was significant and contributed to the eventual stabilisation of the system. However, although this is relevant and I have given it weight, I am unable to regard this as a sufficient reasons not to take the proposed disciplinary action in relation to the identified findings. It is a fact that many employees made significant sacrifices in the process of rectifying the failings of the QH Payroll System, and this is in fact one of the consequential costs of those failings.

Your achievements

I have considered, and accept, your submissions in relation to your own achievements as a member of the Public Service over many years which are strongly supported by the references you have supplied. I accept them as powerful mitigating factors, and I have taken them into account and given them significant weight.

However, against these achievements, I must weigh the significance of the performance failures and the consequences of them.

Even taking into account these achievements, and giving them the significant weight they deserve, I still believe termination of employment is the appropriate response."

[19] After dealing with each of those matters, the first respondent stated his belief was that "termination of employment was the disciplinary action which is reasonable" and that his delegated decision making role was complete, referring the applicant to her Director-General or delegate for detail as to how his decision would be implemented.

Subsequent events

[20] Thereafter, the applicant's position was initially held vacant, with the Assistant Director-General, QSS assuming her duties. No one was appointed to replace or to act in the applicant's position.

[21] On 1 February 2014, a new DSITIA organisation structure was implemented. On 7 February 2014, the PSC approved the change of the position of General Manager, QSS to the role of Assistant Director-General, Strategic ICT Division. The applicant's

former position no longer exists and the functions of the former role have been absorbed into the role of Assistant Director-General, Shared Corporate Services.

The contract of employment

[22] The contract provided that "the basis of employment" was that the applicant accepted "appointment as a senior executive on [the] contract from the commencement date until the termination date": cl 1. The contract specified the commencement date as 9 August 2011. The "termination date" was "the completion date or the date on and from which the employment of the executive under [the] contract is terminated". The completion date was 8 August 2014.

[23] Clause 7 of the contract is entitled "Termination".[1] Clause 7(2) states:

> "(a) The employment of the executive may be terminated by the chief executive prior to the completion date by notice given to the executive not less that one (1) month before the termination date.
>
> (b) A notice under paragraph (a) need not give any reason for the termination of the executive's employment.
>
> (c) The executive may, within seven (7) days of receipt of a notice under paragraph (a), submit in writing to the Public Service Commission Chief Executive reasons why the executive's employment should not be terminated.
>
> (d) The Public Service Commission Chief Executive must confer with the chief executive, in relation to a submission under paragraph (c), within seven (7) days of receipt of the submission.
>
> (e) The chief executive may revoke a notice under paragraph (a) before it takes effect."

[24] Clause 8 is concerned with service and separation payments. It provides:

> "(1) This clause does **not** apply to the executive if –
>
> …
>
> (d) termination of employment occurs **as a result of** –
>
> (i) disciplinary action against the executive **under the Act**; or
>
> …
>
> (2) If the executive's employment as a senior executive and this contract expire on the completion date under clause 7(1), the executive must be paid on the completion date, in addition to other

[1] Clause 15(3) states that clause headings are not to be used as an interpretation aid.

payments and benefits to which the executive is entitled, a service payment.

(3) If the employment of the executive is terminated prior to the completion date **under clause 7(2)**, the executive must be paid on the termination date, in addition to other payments and benefits to which the executive is entitled, a service payment and a separation payment." (emphasis added)

[25] Clause 9 states:

"(1) Where the employment of the executive is terminated in accordance with this contract –

(a) the provisions herein as to the payments to be made to the executive constitute the whole of the entitlements of the executive under this contract;

(b) the executive must not, except where the executive has an express statutory right to do so, institute any proceedings for compensation for loss of office, injunctive relief, reinstatement or appeals;

(c) payments paid under clause 8 are deemed to be liquidated damages which each party acknowledges are a realistic assessment of any detriment which the executive may suffer following a termination of this contract; and

(d) payments due by way of statutory entitlement are to be calculated, where relevant, by reference to the superannuable salary at the termination date.

(2) Should a termination of this contract be determined by a court or a tribunal to be unlawful, any entitlement the executive may have is limited to the amount of payments paid under clause 8 as liquidated damages, as if termination had been lawful."

The Scheme of the PSA

[26] Chapter 1 of the PSA deals with certain basic concepts. Section 5 provides that the "Queensland Public Service consists of the persons who are employed under this Act, called public service employees". A "public service employee" is defined generally in terms of s 9(1) of the PSA,[2] which provides that a person is a public service employee if the person is employed under the PSA *inter alia* as a "public service officer". That term means a person employed under the PSA as a chief executive or a senior executive or an officer of another type: s 8 of the PSA.

[27] Chapter 4 of the PSA is entitled "Chief executives, senior executives and senior officers". It deals with the establishment of those positions and other matters such as

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[2] See Dictionary, sch 4.

appointments, the contractual basis of employment and the term of appointment (as to public service officers on a fixed term contract, see s 122(8) of the PSA).

[28] For chief executives and senior executives, the contractual basis of employment is provided for in s 96 and s 113. A written contract of employment must be entered into (s 96(1)). The "conditions of employment are governed by this Act, any relevant directives by the commission chief executive and the contract" (s 113(5)). The term of appointment for senior executives is regulated by s 114 which provides for a fixed term contract of no more than five years (s 114(1)). It also provides for termination of the senior executive's appointment and contract of employment on one month's notice (s 114(3)).

[29] Chapter 6 of the PSA establishes a comprehensive procedure for disciplinary action for public service employees. Section 187 provides for the discipline of an employee by the chief executive on satisfaction of one of the disciplinary grounds specified therein. Section 188 deals with the disciplinary action that may be taken. It specifies that, in disciplining a public service employee, the chief executive may take the action, or order the action to be taken (the disciplinary action), that the chief executive considers reasonable in the circumstances. Termination is listed as an example of such disciplinary action. Section 190 sets out the procedural requirements for disciplinary action; s 190(1) states that a chief executive "must comply with this Act, any relevant directive of the commission chief executive, and the principles of natural justice". Section 192 provides for additional procedures in respect of suspension or termination and requires notice to be given in the case of termination of the day the termination takes effect.

[30] Chapter 7 of the PSA is entitled "Appeal and reviews". Part 3 of ch 7 provides for the exclusion "of particular matters from jurisdiction under other Acts". Importantly, s 218 of the PSA provides:

> "**Exclusion for Judicial Review Act 1991**
>
> (1) A decision about an excluded matter can not be challenged, appealed against, reviewed, quashed, set aside, or called in question in another way, under the *Judicial Review Act 1991*.
>
> (2) However, subsection (1) does not apply to a decision about a senior officer."

[31] An "excluded matter" includes "the contract of employment of, or the application of this Act or a provision of this Act to… a senior executive": s 216(1)(b) of the PSA.

Basis of the originating application

[32] It was common ground that, as the applicant was a senior executive officer and not a "senior officer", s 218 of the PSA excluded the availability of the *Judicial Review Act* 1991 as the source of the Court's power to judicially review the decision of the first and second respondents; given that s 218(1) applied and s 218(2) does not. It was also common ground that the effect of s 218 of the PSA (because of the definition of "decision" in s 216(2) of the PSA) was that, although it excluded the application of

the *Judicial Review Act* 1991 (Qld) to decisions made by the first and second respondents, it did not (and could not) exclude this Court's jurisdiction to judicially review the decisions of the first and second respondents for jurisdictional error in the inherent supervisory jurisdiction in accordance with the reasoning in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531. Hence, the nature of the review sought by the applicant was pursuant to the Court's inherent supervisory jurisdiction to review for jurisdictional error.

[33] The originating application for review was premised on the basis that the contract of employment was terminated pursuant to the statutory power in s 188 of the PSA to take disciplinary action considered reasonable in the circumstances. Judicial review was stated in the applicant's submissions as being sought in respect of four decisions, being the first respondent's decision to dismiss the applicant on 5 December 2013 and each of the first respondent's decisions to make a disciplinary finding in respect of allegations one to three.

[34] The applicant acknowledged that, in relation to the dismissal decision, a question arose as to the source of the power that was exercised given the respondent's contention that the power exercised was a contractual one and therefore not properly the subject of judicial review. The applicant argued that while issue had consequences for the relief sought in respect of the dismissal decision, the same did not apply in relation to the disciplinary findings, which it was said were able to be judicially reviewed in the *Kirk* sense.

How should the decision to terminate be characterised?

The applicant's submissions

[35] In disputing the respondents' argument that the decision to terminate was made pursuant to a contractual entitlement rather than a statutory power pursuant to ch 6, pt 2 of the PSA, the applicant made the following submissions.

[36] It was contended that cl 7(2)(a) merely restated, in contractual form, the statutory requirement for the giving of notice specified in s 114(3); that is the procedural right associated with a termination under the PSA. Chapter 6, pt 2 provided a detailed code and set out a comprehensive procedure for the taking of disciplinary action against a public servant, including the power in s 188 to terminate employment.

[37] To the extent that cl 7 purported to provide otherwise, it was invalid since there was no basis for concluding that employees under s 122 contracts were excluded from the regime in ch 6, pt 2. Under a s 122 contract, the conditions of the public service officer's employment were governed by the PSA, any relevant directive and the contract. The long followed rule of construction that applied was set out in *Director-General of Education v Suttling* (1987) 162 CLR 427 at 437:

> "If the relationship is contractual, the contract must be consistent with any statutory provision which affects the relationship. No agent of the Crown has authority to engage a servant on terms at variance with the statute. To

> the extent that the statute governs the relationship, it is idle to inquire whether there is a contract which embodies its provisions."

[38] The purpose of that type of contract was to provide the Crown with a fixed term contract, permitting the Crown to dispense with the service of that particular public servant without having to absorb that employee into another position or role at the expiration for the contract. That was made evident by s 123(1)(a) of the PSA, which provided for the transfer of a public servant onto tenure in circumstances where "the contract is terminated other than by disciplinary action".

[39] It was thus argued that the power to terminate in the present case arose solely from s 188 of the PSA. The approach taken by the respondents involved adopting the disciplinary process under ch 6, pt 2 leading up to the decision to terminate but then changing the basis of the decision to terminate to a purported contractual right. Moreover, that the termination was made by the first respondent acting under delegated authority to exercise "the chief executive's functions under an Act", also pointed to a termination under the PSA, rather than under the contract which required termination by the chief executive.

The respondents' submissions

[40] The respondents submitted that, even though the statutory process under the PSA was utilised in relation to the making of disciplinary findings, it was not relied upon in terminating the applicant's employment (although it was open to do so). The immediate or approximate source of power exercised by the State in terminating the applicant's employment was the contract, not the exercise of a power under the PSA. In those circumstances, the disciplinary findings were not the decisions that had a discernable or apparent legal effect upon rights and as such they were not amenable to relief by way of *certiorari* (see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [18]). The operative decision was the decision to terminate the applicant's employment; the disciplinary findings were not a pre-condition to the exercise of the contractual right: *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

[41] Clause 7 of the contract provided a basis for termination that was complementary to the provisions of ch 6 of the PSA. While those provisions created *prima facie* conditions for the protections of public service employees otherwise liable to termination on disciplinary grounds under s 187, they did not constitute an exhaustive code as to the termination of employment. That was apparent from s 219(3) of the PSA, which specified that the right or power of the State recognised at common law to dispense with the services of a person employed in the public service was "not abrogated or restricted by any provisions of this Act". Clause 7(2) of the contract, which provided for termination upon notice (and with the opportunity to be heard) but without reason, was not at variance with the PSA. It accorded with the ambit of the right or power of the State recognised at common law where public servants held their offices during the pleasure of the Crown, which was considered in *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44. While there was a question as to whether the common law right or power was conditioned upon affording procedural fairness, it was not necessary to consider that issue, given the express terms of cl 7 of

the contract, which provided for the making of submissions as to why the termination should not take effect. Procedural fairness had been afforded in the present case.

[42] The fact that the PSA made provision for the regulation and enforcement of private conduct of public servants in certain respects, did not render otiose the private contractual relationship that existed between the State and a senior executive employed under a written contract. An ordinary employer/employee relationship subsisted between the body politic and the civil servant: see *Bennett v Human Rights & Equal Opportunity Commission* (2003) 134 FCR 334 at [117].

[43] It was thus submitted that the source of the State's termination of the applicant's employment derived from cl 7 of the contract, notwithstanding that the State might additionally have had a statutory right to terminate the applicant on disciplinary grounds under s 188 of the PSA or to dispense with the applicant's services at common law as preserved by s 219 of the PSA. The powers pursuant to the contract and at common law were both unfettered.

[44] The termination letter made it clear that the termination was pursuant to the contract. As for the applicant's argument regarding conclusions to be drawn from the fact that the first respondent was acting under delegated authority to do acts under the PSA, the respondents argued that the chief executive, as the authorised agent of the State, entered into the contract so that the State was a party. The State may properly act through any of its agents in exercising its right to terminate under cl 7 of the contract. Absent proof that the Director-General (Health) was not authorised to exercise the power to terminate or do acts that culminated in termination of the contract, there was a presumption of fact that he was so authorised.

[45] The decision to terminate, being made pursuant to the contract and not in the exercise of any statutory power under the PSA, was not one that was amenable to review under the Court's inherent supervisory jurisdiction, such as a decision to terminate under s 188 was accepted to be.

[46] In advancing its arguments, the respondents referred to a line of authority to the effect that disputes arising under private contracts that govern the relationship between an employer and employee, do not give rise to a justiciable controversy, notwithstanding that the employer is a body politic. They are not amenable to judicial review, where no public or governmental decision is in question. In that respect, reference was made to *R v British Broadcasting Corporation; Ex parte Lavelle* [1983] 1 WLR 23, where Woolf J determined that judicial review was not available to an employee of the BBC, who complained that she had not been afforded procedural fairness, in accordance with regulations and instructions included as terms of her contract (through the incorporation into the contract of the BBC's regulations). Woolf J stated (at 30, 31):[3]

> "Those [prerogative] remedies were not previously available to enforce private rights but were, what could be described as, public law remedies.

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[3] See also *Law v National Greyhound Racing Club Ltd* [1983] 3 All ER 300; and *R (Arthurworrey) v Haringey London Borough Council* [2001] EWHC Admin 698.

> They were not appropriate, and in my view remain inappropriate remedies, for enforcing performance of ordinary obligations owed by a master to his servant. An application for judicial review has not and should not be extended to a pure employment situation. Nor does it … make any difference that what is sought to be attacked is a decision of a domestic tribunal such as the series of disciplinary tribunals provided for by the B.B.C.
>
> … the application for judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character. The disciplinary appeal procedure set up by the B.B.C. depends purely upon the contract of employment between the applicant and the B.B.C., and therefore it is a procedure of a purely private or domestic character."

[47] The termination, it was contended, remained one exercised under the contract and concerned a private right, even though the first respondent may have had regard to the disciplinary findings. That did not change the character of the decision. In that regard, there was a parallel to be drawn with *Blizzard v O'Sullivan* [1994] 1 Qd R 112, where the termination of the Deputy Police Commissioner was found to be pursuant to the contract of employment and not the terms of the *Police Service Administration Act* 1990 and consequently not under an enactment. There was thus no justiciable controversy in the present case.

Consideration

[48] It is trite that not every decision of an executive decision maker is amenable to judicial review. The source and nature of the power being exercised will usually be decisive as to the availability of judicial review: *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 867 per Lloyd LJ. As was observed by Spigelman CJ in *Chase Oyster* at [10], "The critical issue is whether the relevant decision-maker is exercising public power, relevantly, a statutory power".

[49] The difficulty with the respondents' submission is that it fails to appreciate that it is not definitive of the nature of the decision to terminate to describe it as being made pursuant to cl 7(2) of the contract. That is because the contract itself contemplates that prior to the completion date a notice of termination under cl 7(2) may be given both where termination does and does not occur as a result of disciplinary action under the PSA. That follows from cl 8(1). It excludes from the operation of cl 8(3) (which is expressed to apply where employment is terminated "under cl 7(2)") a termination that occurs as a result of disciplinary action under the PSA. Clause 8 thus presumes that where the termination is **for** disciplinary action under the PSA, a notice under cl 7(2) is still to be given. There would be no cause for the exclusion in cl 8(1) if it was not envisaged that a cl 7(2) notice extended to the situation where termination followed disciplinary action.

[50] There is an additional difficulty in the respondents' argument in that it assumes that because cl 7(2)(b) states that a cl 7(2)(a) notice of termination need not provide reasons for the termination, the giving of reasons can be of no import. However, the

fact that reasons for termination are not mandated under the contract and thus may, in fact, not be given, does not render reasons that are given for a decision to terminate inconsequential. Where the reasons given indicate that the termination is as a result of disciplinary action under the PSA, there are contractual consequences that follow: see cl 8. Nor can the fact that such reasons are given mean that they are inconsequential in terms of whether the decision is properly to be characterised as one where governmental power pursuant to a statutory power to terminate is being exercised.

[51] In the present case, the decision to terminate was preceded by a disciplinary process resulting in disciplinary findings. The termination letter stated that its purpose was to record the first respondent's "decision in relation to disciplinary action" as foreshadowed in his letter of 4 October 2013 (which annexed a pro forma s 188 letter). Although the decision to terminate was expressed to be made pursuant to cl 7(2), and it was stated that no reasons were required, reasons were given by the first respondent based on the disciplinary findings that had been made against the applicant. Moreover, while s 188 of the PSA was not expressly invoked, the first respondent concluded the termination letter by stating, "I believe termination of employment is the disciplinary action which is reasonable". That reflected the terminology of s 188 which provides that, in disciplining a public service employee under s 188, the disciplinary action is that which the chief executive considers reasonable in the circumstances.

[52] Thus, even though the termination letter stated that the decision to terminate was made pursuant to cl 7(2)(a) which required no reasons to be given, the first respondent did provide reasons, the purpose of which were "to record [his] decision in relation to disciplinary action" and his conclusion that "termination of employment is the disciplinary action which is reasonable."

[53] The line of authority referred to by the respondents to the effect that disputes arising under private contracts between an employer and employee do not give rise to a justiciable controversy and are thus not amenable to judicial review, notwithstanding that the employer is a body politic, is not apposite to describe the decision to terminate in the circumstances of the present case. In *Blizzard*, Thomas J, in refusing the Deputy Commissioner's application for judicial review, explained the correct approach in determining whether a decision is made pursuant to statutory or administrative power and thus amenable to judicial review, stating (at 118-119):

> "… under Acts where there are statutory provision for the creation of positions and for transfer, promotion, retirement and dismissal of officers, with the establishment of appeal boards and provision for enquiries to review disciplinary action and review of promotions, 'decisions made by those Boards or Committees under the authority conferred by sections of the *Public Service Act* or the *Broadcasting and Television Act* may be susceptible of review under the *Judicial Review Act'* … By contrast, in cases where the authority has a general power to make a contract which becomes the charter of the rights of the parties concerned, and where no particular administrative power (as distinct from the contract itself) is the basis of the challenged decision, the decision is normally regarded as being made under the contract and in turn not being made under an Act."

[54] That approach was applied by Chesterman J in *Whitehead v Griffith University* [2003] 1 Qd R 220 in dismissing the application for judicial review brought by an academic employed under an agreement made with Griffith University in relation to a decision by the Vice-Chancellor censoring an employee and revoking an earlier decision to convene a misconduct panel. Adopting the analysis of Thomas J as directly apposite, Chesterman J noted that the respondent university, through its Vice-Chancellor, was not exercising statutory powers; the relevant Act establishing the university and permitting it to enter into contracts did not contain any specific grant of power to investigate allegations of misconduct. The respondent was merely exercising powers conferred by the contract, which were entirely in the "domestic or private" realm rather than the public, in the sense of governmental.

[55] Applying the analysis in *Blizzard* to the present case, it is evident that the letter of termination, although expressed to be made under cl 7(2)(a), was for the reasons stated in the termination letter, a termination as a result of disciplinary action. Where a contract of employment is terminated as disciplinary action taken for disciplinary grounds, the termination is properly characterised as the exercise of statutory power under s 188 of the PSA. Bearing in mind the comprehensive nature of ch 6, pt 2, it is evident that s 188 of the PSA provides the sole basis for termination on disciplinary grounds. So much is recognised in cl 8(1), which refers to termination "as a result of" disciplinary action "under the Act".

[56] It is clear from the terms of the letter that the termination was "as a result of … disciplinary action … under the Act". In my view, the first respondent, in making the decision to terminate the contract under cl 7(2)(a) for the reasons provided in the letter, was exercising the statutory power in s 188 of the PSA to take disciplinary action, which the contract recognised in cl 8 may be a basis for termination under cl 7(2)(a). It follows that the decision is one that is amenable to review for jurisdictional error pursuant to the Court's inherent supervisory jurisdiction in accordance with the reasoning in *Kirk.*

Jurisdictional error

[57] In *Kirk,*[4] the High Court endorsed the classic formulation of jurisdictional error as stated in *Craig v State of South Australia*:[5]

> "If… an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

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[4] (2010) 239 CLR 531 at 572 [67] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[5] (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

[58] *Craig* does not provide a rigid taxonomy of the categories of jurisdictional error.[6] In addition to the jurisdictional errors listed in *Craig*, denial of natural justice or procedural fairness has been recognised as involving failure to comply with a condition of the exercise of decision making power and amounting to jurisdictional error.[7]

[59] The applicant argued that there were three jurisdictional errors:

1. The first error alleged is that the first respondent failed to particularise the acts or omissions that were said to give rise to the applicant's liability for breach of each allegation said to amount to a breach of discipline.

2. Secondly, the first respondent failed to take into account a relevant consideration when deciding whether to make a disciplinary finding and in deciding the appropriate disciplinary action to be taken; namely, the applicant's ability "to rely upon the differing backgrounds, expertise and professional skill sets of those who were involved in collective decision-making".

3. Thirdly, the first respondent took into account an irrelevant consideration when deciding the "appropriate disciplinary action to take; namely, the perceived need by the decision-maker (in the consideration of the disciplinary allegations) to attribute responsibility for decisions which were made collectively".

[60] The applicant also contended that each of the three errors alleged were, in addition to the specific grounds of error advanced in the submissions, contrary to the requirement that the decision must comply with the principles of natural justice mandated in s 190 of the PSA. The applicant submitted that had made a request for particulars and that there was no evidence that that was considered nor that there had been consideration of the effect of that request on the impugned decision.

Disciplinary findings as to the substantiated allegations

[61] Before turning to the jurisdictional errors alleged, it is convenient to set out the allegations as stated in the letter of 22 August 2013, which were found to be substantiated, and the disciplinary findings concerning them as stated in the letter of 4 October 2013.

[62] In the letter of 22 August 2013, under the heading "Matter One", the first respondent stated that he had considered the following facts set out in the Inquiry's Report. By 18 February 2009, the applicant held the role of Executive Director of CorpTech (para 4.57, p 109). That role included responsibility for the management of the system project and the contractual relationship with IBM, as well as authorising contract variations (para 4.5, p 101). The letter then set out the first allegation as follows:

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6 *Kirk* at 574 [73] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

7 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [25] per Gleeson CJ; see also at [45] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

> "It is alleged that in your capacity as the Executive Director of CorpTech, you failed to appropriately discharge your responsibilities for the project by facilitating the progression of the project despite continuing serious issues relating to the project's scope and deliverables."

[63] In respect of that allegation the applicant was referred "in particular, to the following sections of the Report", namely paras 4.75-4.76, pp 112-113.

[64] Under the heading "Matter Two", the first respondent stated that he had considered the following facts set out in the Inquiry's Report. As part of the governance structure for the project, an Executive Steering Committee was established of which the applicant became a member. The Committee's responsibilities included "strategy, schedule and changes and managing key issues and risks" (para 2.19, p 94). As a result of changes in June 2009, a Project Board was established at the peak of the project's governance structure, of which the applicant was also a member (para 2.24, p 95). Payroll performance testing criteria were established for the system for the purpose of being the "sole basis on which … [the parties would] decide whether to continue the project or stop work" (para 5.95, p 128).

[65] Allegations two and three were set out as follows:

> "It is alleged that on or around May to December 2009 you reclassified, and/or supported the reclassification of defects identified in user acceptance testing (UAT), downgrading their severity to enable the testing of the system to progress, despite the pre-established entry and exit criteria".
>
> "It is alleged that in your capacity as a member of the Project Board, you failed to discharge your responsibilities by not ensuring appropriate UAT and/or auditing prior to going live with the system, despite considerable defects having been identified during earlier testing".

[66] In respect of each allegation, the applicant was referred "in particular, to … sections of the Report", as follows:

(a) As to allegation two: paras 5.22-5.38, pp 116-119.

(b) As to allegation three: para 5.82, p 125, paras 5.91-5.94, p 127, paras 6.46-6.47, p 151.

The disciplinary findings

[67] In the letter dated 4 October 2013, the first respondent dealt with allegations one to three which were found to be substantiated as follows:

[68] As to allegation one, the first respondent found:

> "During the life of the project and since that time, you have been engaged by the Queensland Government as a member of the senior executive service at the SES3.5 level.

I acknowledge that your appointment as Executive Director with CorpTech commenced in February 2009 and that a great deal of planning and work went into the project prior to your start. However, there were many critical decisions made in relation to the project while you were in a significant and influential leadership role within the project governance and within your agency, from the time of your appointment to March 2010 and beyond the decision to go-live.

I accept that on your appointment, your then Director-General indicated a strong desire for the successful implementation of the project and a 'commercial' outcome to the challenges which had emerged to that point. I also accept the findings of the Report that, the delivery of the project was a catastrophic failure. In particular, it is my view based on the findings in the Report that there were multiple occasions, including while you occupied critical leadership roles relevant to the project, that the project should in fact not have been progressed, but should have been halted, delayed or modified until it was clear that there was a significantly greater likelihood of success.

In this regard, I do not accept your response to the effect that at the critical point when the decision was made to proceed you could have reasonably believed the new payroll system would work. I believe that even taking into account the fact that I am able to view events with the benefit of hindsight, it should have been apparent at the time from the many signs of distress that there was a high risk of the catastrophic failure that in fact occurred.

In recognition of the public trust placed in us all as public service employees, you are required to direct your work performance and personal conduct towards, among other requirements: *achieving excellence in service delivery; and providing sound and impartial advice to the Government* (section 26 *Public Service Act* 2008).

Given the catastrophic failure of the project and your intimate association with its management and decision making, I am satisfied that Allegation 1 is substantiated by your actions or inactions and warrants a disciplinary finding being made against you for the performance of your duties in a careless, incompetent or inefficient manner (s187(1)(a)).”

[69] As to allegation two, the first respondent found:

“You were a member of the Project Board which accepted the recommendations of the Project Directorate to reclassify and downgrade defects.

I note that in your response you state that you relied on advice from the Project Directorate, KJ Ross and Queensland Health employees in relation to the assessment of system defects and the reclassification of those defects; and that CorpTech had no involvement in this process.

You reported to your then Assistant Director-General in your brief dated 27 July 2009 that –

> *The agreed condition for milestone to be met is that there are no Severity 1 or Severity 2 errors or as determined by the Project Board. Queensland Health, IBM and CorpTech have reviewed the Severity 2 defects and have agreed that a number be reclassified to Severity 3, Priority 0 classification. This will allow IBM to concentrate on the priority Severity 2 defects for UAT, and then to have the Severity 3 Priority 0 defects rectified as an exit criteria for UAT.*

You provided no justification or analysis in your briefing to the Assistant-Director General (sic) to explain the reclassification and downgrading of severity of defects.

I accept the findings of the Report that you (and others on the board) made this decision notwithstanding the clear criteria established at the outset for entry and exit to and from UAT.

I do not accept your submission that you were relying on the skills of others to provide advice on the reclassification and downgrading of defects. Your role as a member of the Project Board and your very senior role within your agency required you to be sufficiently acquainted with the business needs of the project to competently acquit yourself as a member of the committee and to perform your role within your agency. Failure to do so contributed to the overall failure of the project.

I do not accept your submission that you were diligent in the performance of your board duties. As a member of the Project Board, the overarching governance group for the project, and a very senior officer within your agency with responsibility for the project, you must be held accountable for your failure to discharge the responsibilities of your role on the board and within your agency.

In summary, I find that Allegation 2 is substantiated by your actions or inactions and warrants a discipline finding being made against you for the performance of your duties in a careless, incompetent or inefficient manner (s187(1)(a)).”

[70] As to allegation three, the first respondent found:

> “Your response to this allegation, similar to your response to Allegation 2 relies heavily on your claim that you were relying on the skills of others to provide advice to the board. I do not accept your claim that because your evidence before the Commission of Inquiry (CoI) was not challenged that I should rely on it in total; I must have regard to all of the evidence and information before me.
>
> I cannot accept your submission that you were diligent in the performance of your board duties. I accept the Report findings that there was significant

information concerning the 'functional deficiencies in the system' available to decision makers including the final UAT Report.

You state in your response that –

> *I was not aware prior to go-live of the extent to which QH had centralised the payroll system processing or of the potential impact that the payroll business model change may have when coupled with implementation of the Solution.* (para 17 p 30).

I cannot accept that a senior executive level officer, in a role critical to CorpTech and Queensland Health in the governance and implementation of the project, would not have been alerted to the above, or made the connection of its significance to the overall performance of the system implementation. I see this statement as a demonstration of your failure to acquit your responsibilities as a senior executive member of the board and your agency.

As a member of the Project Board, the overarching governance group for the project, and a very senior officer within your agency with responsibility for the project, you must be held accountable for your failure to discharge the responsibilities of your role on the board and within your agency.

In summary, I find that Allegation 3 is substantiated by your actions or inactions and warrants a discipline finding being made against you for the performance of your duties in a careless, incompetent or inefficient manner (s187(1)(a)).''

Want of procedural fairness

[71] It is useful to return to the relevant provisions of ch 6, pt 2 of the PSA in more detail.

[72] Section 187 in setting out the grounds for discipline relevantly provides:

> "(1) A public service employee's chief executive may discipline the employee if the chief executive is reasonably satisfied the employee has—
>
> (a) performed the employee's duties carelessly, incompetently or inefficiently; or
>
> …
>
> (f) contravened, without reasonable excuse—
>
> …
>
> (ii) a standard of conduct applying to the employee under an approved code of conduct under the *Public Sector Ethics Act 1994*; or
>
> …

(2) A disciplinary ground arises when the act or omission constituting the ground is done or made.

…"

[73] The disciplinary action that may be taken against a public service employee is then set out in s 188:

"**Disciplinary action that may be taken against a public service employee**

(1) In disciplining a public service employee, the employee's chief executive may take the action, or order the action be taken, (***disciplinary action***) that the chief executive considers reasonable in the circumstances.

Examples of disciplinary action—

- termination of employment
- reduction of classification level and a consequential change of duties
- transfer or redeployment to other public service employment
- forfeiture or deferment of a remuneration increment or increase
- reduction of remuneration level
- imposition of a monetary penalty
- if penalty is imposed, a direction that the amount of penalty be deducted from the employee's periodic remuneration payments
- a reprimand

…

(5) In acting under subsection (1), the chief executive must comply with this Act and any relevant directive of the commission chief executive.

(6) An order under subsection (1) is binding on anyone affected by it."

[74] The "procedure for disciplinary action" is set out in s 190:

"(1) In disciplining a public service employee or former public service employee or suspending a public service employee, a chief executive must comply with this Act, any relevant directive of the commission chief executive, and the principles of natural justice.

(2) However, natural justice is not required if the suspension is on normal remuneration."

[75] If an employee is to be terminated or suspended by the exercise of powers under the PSA, s 192 of the PSA provides that:

> "(1) If a chief executive decides to suspend or terminate the employment of a public service employee, the chief executive must give the employee notice of the suspension or termination.
>
> (2) The notice must state—
>
> (a) for a suspension—
>
> (i) when the suspension starts and ends; and
>
> (ii) the remuneration to which the employee is entitled for the period of the suspension, under a decision mentioned in section 191(1) or, if no decision has been made under section 191(1), under section 191(2); and
>
> (iii) the effect that alternative employment may, under section 191, have on the entitlement; or
>
> (b) for a termination — the day when it takes effect."

[76] Although s 190(1) of the PSA specifies that the principles of natural justice are to be complied with, no content is given as to what that entails. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, the High Court unanimously endorsed the statement of principle in *Commissioner of Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591:

> "It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material."

[77] Bearing in mind that statement of principle, I now turn to consider each of the grounds of error alleged. It is apparent for the reasons that follow that in relation to the decision making process resulting in the disciplinary findings and the disciplinary action, I do not consider that the applicant has demonstrated that there was a want of procedural fairness in given her an opportunity to be heard, ascertaining the relevant issues or the nature and content of the adverse material as complained.

Alleged error one – failure to particularise

[78] The first error alleged by the applicant is that the first respondent failed to particularise the acts or omissions that were said to give rise to the applicant's liability for breach of each allegation said to amount to a breach of discipline.

[79] The applicant argued that the first respondent was under a duty to give such particulars, especially as to allegation three, which was couched in terms of the applicant's membership of the "Project Board", and which it was said effectively

required her to answer an allegation based on collective guilt. The need to identify the specific acts or omissions was reinforced by the terms of s 187(2) of the PSA which stated that a disciplinary ground arose "when the act or omission constituting the ground is done or made".

[80] There can be no doubt that natural justice imposes an obligation on an administrative tribunal hearing a disciplinary charge, where dismissal may result on the charge being made out, to furnish particulars of the charge of breach of discipline: see *R v Little; Ex parte Fong* [1983] 1 VR 237. As Street CJ observed in *Public Service Board (NSW) v Etherton* (1985) 1 NSWLR 430 at 432 (endorsing the decision of Hunt J in *Etherton v Public Service Board of New South Wales* [1983] 3 NSWLR 297 at 307[8]), the requirements of natural justice impose an obligation on a prosecuting authority (in that case the Public Service Board hearing disciplinary charge) to furnish such particulars as will fairly enable the accused person to understand and to meet the case being made against him. Likewise, Samuels JA (at 434) stated, "I know of no ground in principle or authority which exempts the Public Service Board from compliance with those principles of natural justice which entail that an accused person must be informed of the nature of the case which is sought to be made against him".

[81] The applicant placed particular reliance on *Etherton* as apposite to the present case. There the breach of discipline charged under the *Public Service Act* 1979 (NSW) was that the applicant was "negligent, careless, inefficient or incompetent in the discharge of his duties". The only particulars of the breach provided were that the applicant "failed to carry out [his] duties as a senior district officer … in a satisfactory manner". The Public Service Board conceded that no precise statement of the specific acts or omissions relied upon in respect of the alleged breach was provided but, in disputing that there was an obligation to do so, contended:

> "… it is not a requirement of natural justice in relation to administrative tribunals that a person charged with a disciplinary offence is entitled to particulars of that charge. It is sufficient, the Board says, that the plaintiff is told of the charge itself and of the general nature of the case against him and that he is given in advance of the hearing copies of all the documents to be tendered against him (as was the plaintiff on this occasion). But the Board is not obliged … to identify the precise acts or omissions of the plaintiff upon which it relies to establish the charge or to affix a label to each such act or omission in order to identify to which part of s 85(e) […is negligent, careless, inefficient or incompetent in the discharge of his duties…] it is said to relate."

[82] After a detailed review of the relevant authorities, Hunt J held (at 306) that the Board was required "to identify with precision" what was said to have been the "negligent, careless, inefficient or incompetent discharge of the officer's duties. In that context, it was said (at 307):

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[8] See also Walters J in *Gardiner v Land Agents Board* (1976) 12 SASR 458 at 470-471.

> "In my view, therefore, the plaintiff was entitled to particulars of the specific acts or omissions relied upon to establish the charge against him and to have identified for him specifically whether he is alleged in relation to each such act or omission to have been negligent, careless, inefficient or incompetent."

[83] The applicant argued that the letter of 22 August 2013, which set out the allegations and stated that the first respondent considered that each allegation, if proven, "could constitute a ground for discipline under s 187(1)(a) PSA – performance of [the applicant's] duties carelessly, incompetently or inefficiently" did not meet the degree of particularisation articulated by Hunt J in *Etherton*. It was argued that to say that the conduct "could" constitute a ground for discipline under the PSA because it was performed "carelessly, incompetently or inefficiently" did not articulate to the applicant what the allegation was. It was contended that it was necessary to identify the individual allegations, coupled with the acts or omissions that constituted each allegation.

[84] The applicant further submitted that the respondents misconstrued the combined operation of s 188 and s 190 of the PSA, which required that, in according the applicant her natural justice rights under s 190, the s 188 power necessitated that the applicant be given an opportunity to be heard in respect of the allegations and the allegations be particularised to a degree which afforded her an opportunity to be heard as to the acts and omissions said to be grounds for disciplining her. The proceedings were infected by the breach of natural justice perpetrated by the refusal to give particulars. The misconstruction of the legislation constituted jurisdictional error in that the first respondent "asked itself a wrong question" or "reached a mistaken conclusion" as did the failure to provide natural justice and procedural fairness. Relying on *Etherton*, it was submitted that the failure to provide proper particulars gave rise to the availability of prerogative relief (in the form of a constitutional writ) to correct errors in public service disciplinary proceedings.

[85] The respondents submitted that, in the present case, unlike the situation in the *Etherton*, the applicant was aware of all of the issues in the Inquiry before the first respondent made the allegations; the applicant was given leave to appear before the Inquiry and was represented by counsel;[9] statements by the applicant were tendered at the Inquiry;[10] and that it may be inferred from references throughout the Inquiry Report that the applicant gave evidence at the hearings of the Inquiry and her legal representatives made submissions on her behalf.[11] However, while it is true that the applicant was represented at the Inquiry, and made submissions, as was observed by Vautier J in *Bryne v Auckland Irish Society Inc* [1979] 1 NZLR 351 at 359, in a passage cited by Hunt J in *Etherton* (at 304), it has long been recognised that the necessity for giving a precise notice of the nature of the charge "may exist even in

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[9] See appendix 7 of the Inquiry Report, p 247.

[10] See appendix 8 of the Inquiry Report, p 248 and ff.

[11] Inquiry Report, p 150.

a case where it is clear from the circumstances that the [individual concerned] knew exactly what was to be alleged".

[86] Nor do I consider that the respondents' submission that the present case may be distinguished from *Etherton* because the adversarial and criminal court-like context that existed there did not exist in the present case is particularly persuasive. The observations of Hunt J in *Etherton* (at 303, 305), as to the critical importance to the officer of the disciplinary inquiry, given the potential for his future as a member of the public service, are also pertinent in the present case.

[87] It is instructive, however, as the respondents submitted, to have regard to the distinction between a charge and the particulars of it. The respondents referred to *Reynolds & Co Pty Ltd v Australian Stock Exchange Ltd* (2003) 174 FLR 311 (which adopted the approach espoused in *Etherton*). As Campbell J there explained, a charge is the allegation that a particular norm of conduct, which binds the person charged, has on a particular occasion or over a particular period been broken. Particulars are a statement of precise circumstances in which it is alleged the norm has been broken. The respondents argued that, with respect to each allegation, the binding norm of conduct that the applicant was alleged to have broken, over the period the applicant held the role of Executive Director of CorpTech, was that she performed her "duties carelessly, incompetently or inefficiently". The respondents submitted that the allegations themselves were "better and properly characterised as particulars" of the acts or omissions, which if proven, established the ground of discipline under s 187(1)(a).

[88] As already stated, in the letter of 22 August 2013, the first respondent set out certain findings made in the Inquiry Report and the allegations against the applicant which were expressed as follows:[12]

- Allegation one - It is alleged that in your capacity as the Executive Director of CorpTech, you failed to appropriately discharge your responsibilities for the project by facilitating the progression of the project despite continuing serious issues relating to the project's scope and deliverables.
- Allegation two - It is alleged that on or around May to December 2009 you reclassified, and/or supported the reclassification of defects identified in user acceptance testing (UAT), downgrading their severity to enable the testing of the system to progress, despite the pre-established entry and exit criteria.
- Allegation three - It is alleged that in your capacity as a member of the Project Board, you failed to discharge your responsibilities by not ensuring appropriate UAT and/or auditing prior to going live with the system, despite considerable defects having been identified during earlier testing.

[89] The respondents argued that the allegations were particulars of conduct (acts or omissions) said to constitute a ground of discipline under s 187(1)(a). In respect of each allegation, the first respondent provided further particularisation ("I refer you, in

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[12] Reference is only made to the allegations found proven.

particular to") by reference to sections of the Inquiry's Report that informed the allegation. I accept the submission that the letter of 22 August 2013 in setting out allegations, which the first respondent considered could constitute a ground for discipline under s 187(1)(a) of the PSA, if proven, did particularise sufficiently to the applicant the case being made against her. It identified the acts or omissions that allegedly gave rise to a liability for breach of discipline.

[90] I cannot accept the applicant's contention that the particulars were not effective to put her on notice as to the case that she had to meet. Some store was placed by the applicant on the position taken in *Etherton* by Hunt J, that simply asserting by way of the compound allegation that the public servant there was "negligent, careless, inefficient or incompetent in the discharge of his duties" was insufficient. But it is to be recalled that in that case the phrase merely reflected the nature of the charge itself and nothing further was furnished by way of particulars of the case to be answered.

[91] In those circumstances, I do not consider the ground of error alleging failure to particularize amounting to breach of natural justice is made out. Nor was it shown that there was there a misconstruction of legislation amounting to jurisdictional error.

Alleged error two – failure to take into account a relevant consideration

[92] The discretionary power under s 187(1) to discipline an employee, upon reasonable satisfaction that a particular act or omission is done or made, does not in terms require the chief executive, as the decision maker, to take any particular considerations into account. Deane J in *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375, stated the correct approach in such a case:

> "…where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide."

[93] In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39, Mason J explained the pertinent principles as follows:

> "(a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account in making that decision: *Sean Investments Pty. Ltd. v. MacKellar*; *CREEDNZ Inc. v. Governor-General*; *Ashby v. Minister of Immigration*. The statement of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, that a decision-maker must take into account those matters which he 'ought to have regard to' should not be understood in any different sense in view of his Lordship's statement on the following

> page that a person entrusted with a discretion 'must call his own attention to the matters which he is bound to consider'.
>
> (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act." (citations omitted)

[94] Mason J (at 41) continued:

> "It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power: *Sean Investments Pty. Ltd. v. MacKellar*; *Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd.*; *Elliott v. Southwark London Borough Council*; *Pickwell v. Camden London Borough Council*. I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'. This ground of review was considered by Lord Greene M.R. in *Wednesbury Corporation*, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it." (citations omitted)

[95] As mentioned, the applicant alleged that the first respondent failed to take into account a relevant consideration when deciding whether to make a disciplinary finding in respect of each allegation that was proven, and, if so, what disciplinary action was appropriate. The relevant consideration, that was not taken into account but ought to have been, was said to be the applicant's reasonable expectation, as a senior executive officer and as a member of a collegiate governance body (the Project Board), "to rely upon the differing backgrounds, expertise and professional skill sets of those who were involved in collective decision-making".

[96] The applicant's assertion that the first respondent was bound to take into account the consideration asserted to be "relevant" proceeded on the basis that allegation three linked the applicant's culpability to her "capacity as a member of the Project Board". The need to take into account the consideration as a relevant one was said to be implicit in the nature of the Project Board, "a multi-disciplinary, multi-departmental collegiate body of public servants and private sector individuals". In arguing that that

matter was a relevant consideration, the applicant sought to draw an analogy with principles developed in the context of corporate governance in relation to the law concerning a company director's duties, in particular, the "business judgment rule" expressed in s 180 of the *Corporations Act* 2001 (Cth) and the common law as developed in authorities such as *Dovey v Cory* [1901] AC 477 at 486.[13]

[97] The applicant argued that the disciplinary provisions of the PSA were directed to providing a legal basis for disciplining an individual servant of the Crown and liability for disciplinary action was to be measured against the skills, expectations and duties of the individual public servant. Allegation three necessitated consideration of what responsibility the applicant had for her contribution to the decision making of the Project Board, in contradistinction to that of the other members. The applicant submitted that it was reasonable for her to rely on the skills, expertise and experience of others on the Project Directorate and Project Board in the governance of the project to the extent that she did not possess those skills, expertise and experience. In those circumstances, the first respondent was bound to consider how and to what degree the applicant was entitled to rely on the skills, expertise and experience of other members.

[98] The applicant thus submitted that, in respect of the Project Board, her duties were to conduct her functions and responsibilities as a member of the Project Board with reasonable care and diligence and to exercise reasonable care and diligence to ensure that those around her on the Project Board had the necessary skills, expertise and experience to contribute to the multi-disciplinary decision making process; it was not to have those skills, expertise and experience herself. Further, as a member of the Project Directorate, also a multi-disciplinary and interdepartmental working group, the applicant "was entitled to rely on those staff who were seconded from Queensland Health … [and] to rely upon advice received from the representative of IBM as to the ability, or otherwise, of the supplier (IBM) to deliver on various aspects of the project, both in terms of timeliness and technically". It was submitted that in that sense the applicant did "competently acquit herself as a member of the committee".

[99] It was therefore argued that the first respondent failed to take into consideration, in "an operative way", how the applicant was entitled to rely on the skills, expertise and experience of the others on the Project Board. In that regard, it was not sufficient for the first respondent to merely make reference to the applicant's argument in the reasons for making disciplinary findings and taking disciplinary action. Taking that into consideration necessitated that the consideration was "operational" upon the decision and not dismissed as an irrelevant consideration. Citing *Bruce v Cole* (1998) 45 NSWLR 163 at 185-186, it was argued that what was necessary was that "proper, genuine and realistic consideration" was given to the relevant matter.

[100] The respondents submitted that in respect of the discretionary power to discipline conferred on the chief executive by s 187(1) of the PSA, the jurisdictional fact that needed to exist before the statutory power was enlivened was the chief executive's "reasonable satisfaction" that the employee has done an act or made an omission that

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[13] See also *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 427.

constitutes a ground for discipline. The respondents argued that the principles developed in the context of corporate governance had no application or relevance in the present case. The complex and unique dynamics of company law render those decisions both inapplicable and distinguishable. It was pointed out that the first respondent expressly stated in both letters (as to the findings and disciplinary action) that the applicant "performed her duties carelessly, incompetently or inefficiently", that conclusion being based on the findings in the Report and after regard was had to the applicant's submissions both as to whether the allegations were substantiated and, upon concluding that the first three were, as to the appropriate disciplinary action to be taken in the result. The findings of the first respondent expressly rejected the applicant's submissions about collective responsibility and placed responsibility at her feet in her individual capacity having a particular role to perform as a member of the Project Board. Those factors demonstrated that the first respondent had the requisite state of mind to enliven the statutory power to discipline the applicant in the circumstances.

[101] In my view, the respondents' submissions should be accepted. The first respondent did take into account the consideration contended for by the applicant in reaching his view as to whether allegation three was substantiated. The real complaint is that because the chief executive did not accept the applicant's submission that it exonerated her did not mean there was a failure to consider the matter raised. The complaint by the applicant in relation to this error was in reality, as the respondents submitted, a complaint that the first respondent had not afforded sufficient weight to this consideration and has erred in reaching his findings.

[102] The applicant's submission that it was reasonable to rely on the skills and experience of others reflected her recorded position before the Inquiry: see for example para 6.39, p 149. In relation to allegation three, the applicant was referred, *inter alia*, to paras 6.46-6.47 of the Report's findings:

> "The decision to Go Live miscarried. What was regarded as an imminent failure of LATTICE overshadowed any measured and analytical assessment and weighing of the relevant factors. By the time the Project Directorate and the Project Board met to consider whether to Go Live, the members of those bodies had made up their minds that the only option was to proceed.
>
> To do so was to abrogate their responsibility to have proper regard to all options and to consider whether, in all the circumstances, the best option was to proceed. The Project Board, as the superior body, must bear primary responsibility for the decision which was made. *It may have acted on advice, and been entitled to do so, but that did not excuse its members from turning their own minds and making their own enquiries as to the bases upon which this important decision was to be made.*" (emphasis added)

[103] The finding at para 6.47 of the Report was also reflected in the view taken by the first respondent that the applicant had failed "to acquit [her] responsibilities as a senior executive member of the board and [her] agency".

[104] It was for the decision maker to attribute weight to the various relevant considerations. It may be accepted, as the respondents argued, that a disagreement that the decision maker afforded the appropriate weight to a particular consideration did not give rise to a jurisdictional error. In effect, the applicant's submissions were an attempt to invite the Court to consider the merits of the decision, which was clearly beyond the ambit of judicial review, especially in cases of jurisdictional error.

[105] In my view, this ground of complaint is not made out.

Error three – taking into account an irrelevant consideration

[106] The third error alleged by the applicant was that the first respondent took into account an irrelevant consideration when considering the appropriate disciplinary action to take. The error alleged was a perceived need by the decision maker (in the consideration of the disciplinary allegations) to attribute responsibility for decisions which were made collectively. The applicant relied on the following passage in the termination letter, concerning the first respondent's conclusion that termination was the appropriate disciplinary action:

> "You have submitted, and I accept, that in making these decisions you and other members of these bodies relied on the support and advice of others, including people with specialist expertise. However if I accepted that this absolves you from all accountability in relation to the decisions which were made (which, as the Report found, had catastrophic consequences) then I would have to accept that no-one should bear responsibility for decisions which are made collectively or on the basis of advice. I do not accept that as a valid proposition."

[107] The passage was said to indicate that an irrelevant consideration was taken into account – the perceived need ("… I would have to accept …") to find that someone "should bear responsibility for decisions which are made collectively"; ie by the Project Directorate and Project Board. That, it was submitted was an irrelevant consideration for the operation of ch 6 of the PSA, since the text, context and general policy (in the *Project Blue Sky* sense[14]). That was because ch 6 was enacted to facilitate the consideration of discrete allegations of acts or omissions that could constitute a ground of discipline against individual members of the public service; not to attribute collective responsibility against an identified class of public servants.

[108] Additionally, the passage was said to indicate a further jurisdictional error, namely that the first respondent had made "an erroneous finding" or had reached "a mistaken conclusion"[15], in that he mistakenly concluded that "if I accepted that this absolves [the applicant] from all accountability in relation to the decisions which were made (which, as the Report found, had catastrophic consequences) then I would have to accept that no-one should bear responsibility for decisions which are made

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[14] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [1998] HCA 28.

[15] *Craig v State of South Australia* (1995) 184 CLR 163 at [14] per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

collectively …". That conclusion was erroneous because it was wrong to assert that if the applicant could demonstrate that she was not responsible for the adverse outcomes of decisions taken on professional advice then "no-one should bear responsibility".

[109] The respondents argued that the passage did not reveal an irrelevant consideration, erroneous finding or mistaken conclusion given that the statement was made by way of response and a matter of comment to the submission of the applicant. Further, it was made in the context of the remaining passages of the paragraph in question which set out the basis upon which the applicant was found to bear responsibility for the decisions in question.

[110] The respondents submitted that since the terms of the PSA did not set out the matters to which the chief executive was to have regard, the applicant had not demonstrated, according to the accepted approach, what considerations were relevant to the exercise of the chief executive's broad discretion under s 187(1) to discipline the applicant. Without an assessment of what considerations were *relevant*, it was difficult to ascertain what considerations were *irrelevant.* The starting point, however, was Stephen J's statement in *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 12:

> "It will be seldom, if ever, that the extent of the power cannot be seen to exclude from consideration by a decision-maker all corrupt or entirely personal and whimsical considerations, considerations which are unconnected with proper governmental administration; his decision will not be a bona fide one since these considerations will, on their face, not be such as the legislation permits him to have regard to. In other instances the task for the court will be to discern what restraints, if any, the legislation places upon considerations to which he may have had regard."

[111] It was further submitted by the respondents that it was not alleged, nor could it properly be, that the first respondent's decision was assailable for such reasons unconnected with proper governmental administration. Further, the PSA did not in terms place any restraint on considerations that the chief executive, exercising the discretion to discipline under s 187(1), might have regard to. In any event, the proper construction of the PSA, especially having regard to the observations in *Commissioner of Taxation v Day* (2008) 236 CLR 163 at [34], affirmed rather than denied the relevance of "the perceived need … to attribute responsibility for decisions which were made collectively". The State's constitutional function in employing persons as civil servants mandated regard to the public interest as a relevant consideration. The first respondent, at various instances in his reasons for the decision to terminate the applicant's employment, premised the attribution of responsibility to the applicant on the "catastrophic failure" of the project, and "the public trust placed in us all as public service employees".

[112] I do not accept that there was error in taking into account an irrelevant consideration. The first respondent recognised that the applicant had relied on the support and advice of others. Additionally, she had worked as part of a group. But he considered that the fact she worked as part of a group did not have the result that all were necessarily to be relived of responsibility. I do not consider that the alleged error is made out.

Application to amend the originating application

[113] On 21 January 2015, the applicant filed an application for leave to amend the Originating Application in the matter pursuant to r 375(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) and a supporting affidavit, which sought to include "Damages for breach of contract" and "Interest payable on breach of contract" as relief sought under the Originating application. The application was subject to further written submissions by the applicant, filed on 28 September 2015, and the respondent, filed on 14 October 2015, and was opposed, on multiple bases.

[114] The application to amend, in any event, was premised on a finding that the termination was in the exercise of statutory power which was void for jurisdictional error. Given my conclusions that the termination was not pursuant to the contract, but a statutory power, and that no jurisdictional error ground was made out, I do not consider it appropriate to grant leave to amend the originating application.

Orders

[115] The applications filed 31 July 2014 and 21 January 2015 are dismissed.

[116] I will hear submissions as to costs.