



ANU LAW STUDENTS' SOCIETY

LAWS2201 Administrative Law 1st Semester 2008

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Question 1

78/100

a)

Can Mr B seek an order of review under s5(1)(a) of ADJR?

Must have:

Standing (ss5, 6)

Person must be aggrieved s3(4) a person whose interests are adversely affected by conduct should be given broad construction and applied special interest test.

Clearly Mr B has a special interest in there decision to withdraw application it effects livelihood, career reputation (ACF).

Therefore standing

ss5(3)(1) requires a *decision of an administrative character* under an enactment. ✓

Decision very broad s3(2) includes doing or refusing to do any action or thing.

At CL 'decision' must be final and operative and substantive (Bond) ✓

Here the decision to withdraw offer is operative and final no apparent review within act and no recognised next step.

It is not judicial or legislative (*Lam*) directed towards individuals etc.

Decisions made under cycling act

Therefore can apply to ADJR.

The relevant ground of review

Is natural justice s 5(1)(a). Whether this is made out depends on several facts.

Firstly, it must be established that there is a right interest or LE.

Here, B could argue he has a pecuniary interest in det.- determining future income and a reputation interest both recognised (*Kioa, Annetts*) ?

However, as it relates to a prospective right- may need to argue in the alternative that there was a legitimate expectation (*Haoucher*) ✓

Must be reasonably based, more than mere hope and arise from some conduct of DM (*Kioa, Cole*).

Here, clearly there is a LE of employment – negotiating terms of appointment etc.

The offer is clear condition part of Dm to induce expectation.

Further, in the analogous case of Cole there was a LE in the case of an initial application which was rejected. Based on prejudicial information which should have been discussed. (*Cole*)

Therefore first element established.

Now, must consider whether this had direct impact- clearly effected him in a way different from the public (*Kioa*)

Therefore presumption that the council was obliged to afford NJ.

Presumption can be displaced by consideration of the below factors:

Nature of the DM (*O'Shea*)

Here though the council is made up of experts and court may defer to their wisdom (*Enfield*) here the obligation to afford NK is sufficiently fundamental that more is required- e.g. Cabinet (*O'Shea*)

Thus not displaced. ✓

Impact of the decision may indicate against displacing presumption (FAI). Here grave impact- whilst doesn't relate to liberty related to reputation and livelihood which are taken very seriously by the courts (*Kioa, FAI, Annetts*) ✓

Nature of power another factor- working against NJ. Statute is discretionary – council may make appointment as it thinks fit (Peko). However, this alone will not be sufficient to displace considering the abovementioned factors.

Statute does not disclose any clear intent to displace the duty to afford NJ (*Miah?*)

Thus duty exists.

Content

Hearing rule

What was the council required to have done in making their decision?

Under the hearing rule, the minimum requirements are:

Prior notice decision will be made, disclosure of outline on substance of information, opportunity to comment.

Here the second two elements are most relevant.

First has some significance- as the email was probably not adequate notice. It did not provide notice that the decision would be made, merely notified that it had already been made unless B rebutted.

Thus did not provide sufficient time to prepare a case (*Thames?*)

2 days does not give opportunity to quietly consider and collect information (*Ansell v wells*)

Content of notice:

Also insufficient- told him he had contrary views, not that there was a rumour about past misconduct.

He is entitled to hear- even if previously known- if a fact is to be considered adversely (*Kioa*)

Arguably the notice revealed there was a case against him and what the charge was (Dixon in *Johnson v Mit...*) but its content may not have been sufficient as it did not outline the specific allegation. (*Kioa*) ✓

Disclosing information not inconsistent with purpose of act- as in *Kioa*- not seeking to investigate him etc.

Therefore- there was an obligation on the part of the council to notify B of details of allegation and to provide adequate opportunity to comment and prepare case. ✓

Bias

The 4th other relevant aspect of NJ that may have been breached is bias.

Here the best approach is apprehended bias- easier to prove.

Ebner test: Whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the facts.

Two elements:

- Possible institutional bias- prejudgment due to political ...
 - Claim less likely to succeed. Argument that all members perceived to adhere to particular viewpoint difficult to prove (Laws) (?)
 - Unlikely that evidence from a 'contact' would be sufficient to demonstrate predisposition prevented impartial judgement (?)
- Chair of council- pecuniary interest.
 - Here there is a pecuniary interest on the part of the head of the council in making decision- which minister has directed on
 - Thus *Ebner*.
 - Reasonable apprehension that Dm may not be impartial.
 - Here- must be possibility that there was impartial mind, actual bias need not be shown (*Hot Holdings*)
 - Here the logical connection- (*Ebner*) between decision and influence is that the chair is dependant on ministerial approval for income. And that the minister has indicated what she approves of and as a result- council has made sudden decision against applicant.
 - Here- the person involved is the chair of the council- this must be regarded as significant because they probably make the final decision or at least have a large impact on proceedings.
 - Given logical link, it appears there is a strong case for bias- will hinge on evidence and may be rebutted if council had evidence of applicant drug involvement.

Other avenues available:

Ombudsman: s5 can investigate action relation to matter of administrative ...OR in respect of complaint.]

Advantage- holds sway with media and could exert pressure on council and minister to reconsider or provide evidence supporting claim.

Cannot legally compel action however.

HC:

S75(v) unlikely to be met because not officer of the Cth (why not?)

FC: s39(B)

Appeal under any laws of the Cth thus clearly fits in with J. V

Power to award broad remedies like HC and FC under ADKER can compel new decisions. Etc

HREOC- similarly exerts pol pressure.