Corey v CEO Department of Education & Anor [2017] NTSC 69

PARTIES:	COREY, CHRISTOPHER v CHIEF EXECUTIVE OFFICER, DEPARTMENT OF EDUCATION AND: NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	85/2016 (21639831)
DELIVERED:	30 August 2017
HEARING DATES:	28 October 2016, 18 November 2016
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

JUDICIAL REVIEW – decision to transfer teacher under s 35 of the *Public Sector Employment Management Act* – application for order of certiorari or declaration that the decision is void and of no force and effect – bias rule applies to decisions made under s 35 – content of the bias rule – no reasonable apprehension of bias – no waiver of right to invoke claim of apprehended bias.

Public Sector Employment Management Act (NT) ss 16, 35, 46, 49C.

Annetts v McCann (1990) 170 CLR 596; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Franklin v Minister of Town and Country Planning* [1948] AC 87; *Golden v V'landys* [2016] NSWCA 300; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438; *Isbester v Knox City Council* (2015) 255 CLR 135; *Keating v Morris* [2005] QSC 243; *Kioa v West* (1985) 159 CLR 550; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507; *R v Watson*; *Ex Parte Armstrong* (1976) 136 CLR 248; *Smits v Roach* (2004) 60 NSWLR 711; *Smits v Roach* (2006) 227 CLR 423; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509; *Webb v The Queen* (1994) 181 CLR 41, referred to.

"Natural Justice", Employment Instruction Number 3, 14 December 2011.

REPRESENTATION:

Counsel:

Plaintiff:	D Baldry
First & Second Defendant:	M Grove

Solicitors:

Plaintiff:	Northern Legal Services
First & Second Defendant:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	BLO 1708
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Corey v CEO Department of Education & Anor [2017] NTSC 69
No. 85/2016 (21639831)

BETWEEN:

CHRISTOPHER COREY
Plaintiff

AND:

CHIEF EXECUTIVE OFFICER, DEPARTMENT OF EDUCATION
First Defendant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Second Defendant

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 30 August 2017)

Introduction

[1] By Amended Originating Motion the plaintiff, a teacher employed by the second defendant, seeks an order in the nature of certiorari to call up and quash a decision made by the first defendant on 27 July 2016 to transfer him from Kalkarindji[1] School to Alawa School. In the alternative, the plaintiff

[1] The current spelling of Kalkarindji is used throughout these reasons, save for citing documents that have used the former, "Kalkaringi".

seeks a declaration that the decision is void and of no force and effect. A number of consequential or related orders are also sought. The challenged decision to transfer the plaintiff was made under s 35 of the *Public Sector Employment Management Act* (NT) (PSEMA). The defendants filed a summons seeking an order for judgment for the defendants and for the Amended Originating Motion be struck out.

[2] The plaintiff claims the first defendant's delegate's (the decision-maker) decision to transfer him was made in breach of the rules of natural justice as the circumstances in which the decision was made gave rise to a reasonable apprehension of bias.[2]

[3] The plaintiff put forward a number of reasons or circumstances particularised in the Amended Originating Motion[3] to support the claim that there existed a reasonable apprehension of bias. The first particular said to give rise to the reasonable apprehension of bias was abandoned at the hearing.

[4] Of the remaining particulars, it was first contended that the decision-maker did not give any consideration to the plaintiff's explanation of the circumstances of an incident that occurred at Kalkarindji School on 3 March 2016. The plaintiff contends that an allegation was made against him of improper behaviour as a result of the incident. It is claimed that prior to the decision of 27 July 2016 to transfer him, no adverse finding had been made

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2 Amended Originating Motion, 27 September 2016, para 1.
3 Paras 1(b) and (c).

against him as a result of disciplinary proceedings initiated by the Department of Education arising from the complaints made about his behaviour during the incident of 3 March 2016. The plaintiff says the primary reason for the decision was the allegation of improper behaviour during the incident of 3 March 2016.

[5] It is further claimed both defendants had an unstated primary reason for making the decision to remove the plaintiff, namely, a desire to remove him from his teaching position at Kalkarindji School because he had made complaints about the school principal and another teacher. Those complaints alleged inappropriate conduct on the part of those persons when interacting with students. A further complaint was made against another teacher alleging bullying and intimidating behaviour towards the plaintiff. The plaintiff contends those complaints were not "investigated to the stage of the second defendant's department deciding whether all or some of those complaints by the plaintiff were based upon the investigator's review of the evidence concerning each complaint, properly made by the plaintiff."[4]

[6] At the commencement of the hearing, I raised with counsel for the plaintiff a concern that it seemed that the features said to give rise to the apprehension of bias merged or conflated a number of concepts drawn generally from the rules of natural justice or procedural fairness. Counsel's submission was along the lines that reasonable apprehension of bias may be shown if the decision-maker had not made reference to those matters in her decision or

[4] Amended Originating Motion, para 1(c).

had not indicated in some way that those matters were taken into account. In turn, it was said to be a basis for a reasonable observer to conclude there existed an apprehension of bias by virtue of the fact that those matters had not been dealt with. Counsel confirmed the plaintiff's case was solely concerned with reasonable apprehension of bias. It was acknowledged there was no evidence of actual bias in the sense there was no evidence the transfer was for an undisclosed improper purpose, however it was argued the decision being made in the circumstances of unresolved issues concerning the plaintiff gave rise to an apprehension of bias.

[7] On behalf of the defendants, the first contention was that the rules of natural justice do not apply to s 35 of PSEMA when that section is considered in its proper statutory context and proper consideration is given to its purpose. Secondly, if the rules of natural justice do apply, taking into account the position of the decision-maker, the matters raised on behalf of the plaintiff fail to ground an apprehension of bias. In general terms, it was submitted that none of the factors raised by the plaintiff identify any logical connection between any particular factor and the decision. Further, it was argued the plaintiff should be taken to have waived the right to involve a claim based on apprehended bias as he clearly had the opportunity to raise the relevant issue with the decision-maker.

[8] These arguments will be discussed further below.

Background Facts and Circumstances

[9] Many of the background facts are non-contentious. I proceed on the basis that, as set out in his Affidavit of 31 August 2016, the plaintiff had taught at Kalkarindji School on a previous teaching assignment, prior to events associated with these proceedings. He attests to possessing significant teaching experience in regional or remote schools, especially teaching Aboriginal students. There is no reason not to accept that claim. Indeed there was material before the decision-maker of a very positive kind in relation to the plaintiff's teaching performance, qualifications and extracurricular good deeds, principally, although not solely, from the Maningrida Community Education Centre.[5]

[10] For relevant purposes, the plaintiff re-commenced teaching at Kalkarindji School in 2015, initially as a senior middle boys' teacher. At the time of the hearing he was on miscellaneous leave.

[11] As a teacher employed in a remote location, he is entitled to a number of allowances for living in a remote community, such as airfares. Further, he and his wife live in a four bedroom house at Kalkarindji, provided as part of his salary package by the Northern Territory Department of Education.

[12] The plaintiff's affidavit states that he is aware that in 2014 a then anonymous complaint was made against the Kalkarindji School principal, Jeff Parker, by a woman, employed at the Kalkarindji School's

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5 Decision Book at 62-82.

Administration Office. According to the plaintiff, the complaint alleged that the school principal had taped the legs of a female student to her desk when she asked to be allowed to go to the lavatory. The plaintiff states he was unaware of the outcome of that complaint. I have had regard to this and a significant amount of other material, primarily by way of background. It is likely the decision-maker was aware of this issue. She acknowledged during her brief evidence that she was aware of relevant press reports. She was also aware of certain Legislative Assembly briefings[6] and briefs to the Minister of Education about complaints that had appeared in the media and that an external investigator had been appointed.

[13] On 18 August 2015, the plaintiff sent an email letter to the principal complaining about alleged incidents of bullying behaviour towards students by a teacher, Anthony Knights. I allowed this evidence as background evidence, as it gives context to why the plaintiff raises the issues that he does. The decision-maker was aware generally of this and other complaints made by the plaintiff about colleagues. There are various summaries in other correspondence in the decision book that refer to this and other complaints made by the plaintiff. Through no fault of any party, it may be observed there is considerable duplication of much of the material.

[14] The letter details staff discussions in which the attitude and comments of the teacher concerned are commented on as well as his attitude to a student. The plaintiff perceived the student to be having difficulties. The plaintiff said he

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6 Exhibit P1, Legislative Assembly Briefing No 1, 30 March 2016.

felt the issue needed the principal's intervention. The letter then advises the principal that the plaintiff feels the actions of the teacher are at odds with Department of Education and Government anti-bullying, Occupational Health and Safety, and Anti-discrimination Policies. It is also suggested the teacher may need assistance with developing alternate behaviour management strategies. The letter states that the plaintiff is not a senior teacher and that his "opinions and experience seem to not be welcomed by [the teacher]". He expresses the view he has a duty to alert the principal, as earlier in the year the teacher was threatened by a mother who felt he was acting inappropriately towards her son. The plaintiff states he feels that that the teacher does not show empathy towards children.

[15] The principal replied on 13 August 2015, stating that the plaintiff's concerns had been noted and he would be meeting with all staff individually. The principal's reply was not before the decision-maker but the fact of ongoing dissatisfaction on the part of the plaintiff with colleagues was referred to in a number of documents in the decision book.

[16] Until December 2015 the plaintiff stated he had not received any further communication from the principal about the complaint he had made.

[17] On 30 November 2015, the plaintiff received a draft timetable indicating he was to act as a release teacher. This was a change to his status. A release teacher has no permanent class; the role is to teach students in any class during periods when other teachers are released. This matter was not

directly before the decision-maker but is referred to in the history given by the plaintiff to Dr Majoor.[7]

[18] On 3 December 2015, the plaintiff sent an email to the principal concerning the plaintiff's approach to the behaviour of children, especially his understanding of what is important when dealing with Indigenous students. In that letter the plaintiff wrote substantially about his experiences in other schools, followed by a number of detailed concerns he had about various colleagues and their treatment of students. He emphasised the need for the school to examine its behaviour management policy and a culture of control on the part of some staff that the plaintiff claimed may not only be inappropriate, but also illegal. He pointed out that the principal may be contributing to this. He pointed out a number of behavioural issues he considered to be of concern on the part of the principal. He wrote of how he and another member of staff obtained legal advice about the issues as he perceived them. He finished the letter describing examples of alleged bullying that he said had caused him much distress, and that "now you have the responsibility of dealing with this issue because I have alerted you as my line manager." The plaintiff's dissatisfaction with dealing with the principal over various issues appears in a number of documents in the decision book, but not to the particular level of detail as set out in the plaintiff's Affidavit.

[19] The plaintiff's Affidavit of 31 August 2015 also refers to a newspaper article of 15 August 2015 bearing the headline "NT Police investigate

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7 Decision Book at 21.

principal after student allegedly taped to desk". He stated that article refers to the principal's behaviour that was the subject of anonymous allegations referred to above. Thereafter the plaintiff referred to a string of detailed emails between the principal and himself over whether the plaintiff could properly plan and carry out classroom duties, suggestions by the principal of how being a release teacher might lessen the burden for him and how he could make that into an opportunity. A number of the plaintiff's concerns detail allegations about how the principal had not kept certain agreements and the plaintiff made suggestions about how their disputes could be resolved. Further detailed email correspondence concerned a dispute with another teacher, and a letter to that teacher ended with the suggestion that the teacher had made an error of judgement, that the letter would be forwarded to the principal and other senior staff, and that the plaintiff would seek that they direct the teacher to apologise and explain certain defamatory comments. The plaintiff alleged he had been confronted inappropriately by the teacher. The plaintiff advised the teacher that he would be seeking legal advice on how to proceed. On 27 January 2016 the plaintiff complained to the principal and requested the principal direct the teacher to apologise. The decision-maker was aware of this material; there are references in similar, albeit in summary terms to the letter in the decision book about other teachers' conduct.

[20] The plaintiff further stated he performed his duties up until an incident at the school on 3 March 2016. On 9 March 2016 he was placed on paid

miscellaneous leave until the findings of any medical examination were known. It is not necessary to make findings about the incident, but what was before the decision-maker may be gleaned from a number of sources that are before the Court from the materials tendered by both parties. Various descriptions are given in documents forming part of Exhibit D1 (the decision book). These represent the bulk of materials that were before the decision-maker. Other sources of information included parts of Legislative Assembly briefing notes and some acknowledgement that the decision-maker had seen, at some stage, press reports in relation to issues at the school. In my opinion, having heard brief evidence from the decision-maker about other information she may have had access to, it is reasonable to infer the decision-maker had some knowledge of the issues between the plaintiff and his colleagues, but the substantial parts of the history are included, by way of summary, in the decision book. The decision-maker was aware there were documents relating to previous complaints by the plaintiff on the TRIM records that were titled "GMHR Chris Corey complaints and allegations of bullying", "22 complaint, bullying", "19 further complaints", "12 complaints to ED", "Five complaints" and "Three allegations of bullying". The decision-maker did not access those particular files.

[21] Some of the documents in the decision book include lengthy descriptions of the background to the 3 March 2016 incident. Certainly the incident of 3 March 2016 was known to the decision-maker; it was an incident of concern that led to the plaintiff being required to be examined by a psychiatrist. I do

not think the further material referred to in the decision-maker's further affidavit of 30 September 2016 added a great deal of substance to what is contained in the decision book. The decision-maker had also seen Legislative Assembly briefing notes referred to already about various reports and issues at the school. The letters and documents annexed to the plaintiff's solicitor's affidavit have been admitted as background material only. The material is useful in terms of setting out the chronology of events. Some is duplicated in the decision book. Otherwise there is no evidence that the decision-maker had access to the balance of individual documents. I disallowed hearsay evidence said to be a response to the proposed transfer from the principal of Alawa School. The material not directly before the decision-maker is of limited, or marginal, weight.

The incident of 3 March 2016

[22] Before the decision-maker were a number of documents describing or making reference to the 3 March 2016 incident from a variety of perspectives.

[23] A letter delivered to the plaintiff on 9 March 2016 from Anthony Roberts, the Acting Executive Director of Schools North, directing the plaintiff to attend an examination by the psychiatrist Dr Majoor refers to the incident in the following terms:[8]

[8] Decision Book at 8.

> On Thursday 3 2016, an incident occurred at Kalkaringi School during which it is alleged that you appeared distressed and subsequently began to shout loudly in the presence of other staff, students and parents. Consequently the Katherine Regional Director Mr Laurie Andrew and Assistant Katherine Regional Director Mr Russell Legg attended in person at Kalkaringi to ensure the safety and wellbeing of yourself and other staff following the incident.

[24] The plaintiff's response to Mr Roberts' letter[9] indicated, subject to an issue with the date, he was happy to attend the examination. The plaintiff wrote of being grateful for Mr Roberts' concern for his wellbeing, the respect the plaintiff and his wife have in the community, and that as the plaintiff at that time was not at the school, he did not need to be in contact with the staff he had complained about. He stated he thought he would be vindicated with respect to the concerns he had raised about the school. He also wrote of his concerns if he was to be requested to leave the community; that he has access to counselling and other services at the community and there would be significant disadvantage to himself and his family if required to leave. He also wrote of concerns he had about some staff at the school which he stated was at the heart of the incident and he suggested the incident could not be treated in isolation. He suggested another teacher's behaviour, who he had complained about for abusing and humiliating him, had not been placed under the same scrutiny as his own behaviour. He referred to another teacher, who he said students had told him had put a bin over a student because the student was not behaving. He felt obliged to speak to the students and their parents about it, and reported it to the principal. He said

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9 Noted in the Decision Book as received on 11 March 2016; Decision Book 10-12.

the principal accused him of unprofessional behaviour, bullying and disregarding cultural sensitivities. He stated he was subject to victimisation and discrimination because of his decision to report issues concerning student welfare. He also stated any proposal to remove him from the community would cause stress and disadvantage, both to himself and his family, and it would be premature if his own complaints against others were not investigated or dealt with.

[25] In the referral letter to Dr Majoor from Fiona Upstill of 28 March 2016,[10] the 3 March 2016 incident is set out as follows:[11]

> - The Acting Principal Kalkarindji School, Mr Greg Burke, was dealing with a student matter and directed a student to leave the school with his mother.
>
> - Mr Corey intervened and allegedly placed his arm around the student's shoulder and allegedly advised the student that he would look after him.
>
> - Mr Burke advised Mr Corey that his actions were inappropriate, that the matter had been dealt with and that the student needed to leave the premises with his mother.
>
> - Mr Corey then allegedly began loudly yelling "You're all liars, You're all bullies, Parents rise up, rise up, these guys are bullying your kids, you need to stand up to them".
>
> - It is alleged that Mr Corey entered the school staffroom and was extremely agitated, breathing heavily, red faced and banging things around as he berated two staff

[10] Decision Book at 42-45.
[11] Decision Book at 42-43.

members for not standing up against a culture of bullying in the school.

- Mr Corey then allegedly verbally abused Mr Anthony Knights, a classroom teacher, and made threats. Mr Knights left the school. Mr Knights contacted the department by phone in a distressed state to report the incident and advised that he would be lodging a formal complaint.

- Mr Greg Burke reported to the department that school staff were shaken, fearful and upset by the incident.

- The Regional Director and Assistant Regional Director jointly conducted an investigation into the incident. At this time Mr Corey has not been requested to provide any response to the department regarding the events or his alleged behaviour.

[26] The request for a medical examination from Dr Majoor, referred to above, also included a summary of some of the historical material under the heading "Background".[12] This included reference to complaints by the plaintiff about inappropriate behaviour management by the classroom teacher Anthony Knights; inappropriate behaviour by the principal in relation to staff and students; and unfair treatment from the principal and another teacher towards him. It was noted the plaintiff had raised complaints with the department, the Australian Education Union, the Chief Minister and the Minister for Education. It is indicated he had been requested by Regional Directors to cease email communication given the large quantity and allegedly inappropriate nature of the emails. The letter advised that the complaints and allegations were under review.

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[12] Decision Book at 43-44.

[27] The purpose of the medical assessment was for the Department of Education to obtain an opinion on his fitness to fulfil ongoing duties and whether there was any illness or condition adversely impacting on his ability to perform his duties, including whether the plaintiff was fit to work and reside in a remote locality.

[28] The plaintiff has described the incident in various emails and letters. He answered certain of the allegations to the Acting General Manager of Human Resources of the second defendant. This is set out in the decision book as follows:[13]

> - ***I did not intervene in any incident*** between a teacher and a student. The only person making this claim is Mr Burke whose own witness statement and appalling opinions have now been discredited by two independent professional reports.
>
> - ***This student never approached Mr Knights to ask for a meal because the student was already eating his meal with my class.***
>
> - This boy's reaction to Mr Knights unprofessionally confronting him in front the school cohort resulted in him trying to save face by standing up and scooping his meal down quickly in an animated manner, this also demonstrates that ***there was no request by the student to Mr Knights for a meal***.
>
> - ***The claim this student had not been in class is wrong, as he had been in my class after I found him wandering the school unsupervised.***

[13] Decision Book at 38-39.

- There was ***no official policy at Kalkaringji school relating to withholding meals from students.***

- Mr Parker was away this day and ***I had been directed to have no contact with Mr Burke by Mr Parker*** so I took the student into my class until the matter could be dealt with.

- ***I was acting on my responsibility to this student to ensure he was safe and supervised.***

- I have a strong relationship with this boy and his family, and after seeking his mother's permission I attempted to walk him away to let him cool down after he had been publicly and inappropriately shamed in front of the whole school.

- ***I had in fact been following Mr Parker's directive to have nothing to do with Mr Burke and it was Mr Burke who did not abide by that instruction.***

  I direct you to return to work and fulfil your duties and have no personal contact with Greg Burke. This includes email. I have directed Greg Burke to have no personal contact with you. This includes email. (email from JP 29/116).

- I now believe Mr Burke used this incident to again attempt to discredit myself in front of my colleagues and the students as he did earlier in the year.

- Subsequently I now know that Mr Burke made defamatory and malicious accusations about my mental health to senior staff and my colleagues. This must bring into question why he did not abide by Mr Parker's directive in this instance.

- Ms McDowell's statement that I shouted abuse at my fellow classroom teacher is incorrect. The heated exchange that took place only involved Mr Burke and myself, Mr Knights was standing at a distance and not

involved. I was not going to allow Mr Burke to again bully me in front of the school cohort.

- This whole incident was the result of an inexperienced teacher trying to withhold a meal from this student without having the courtesy of first speaking with myself. ***This is precisely the sort of behaviour by some staff at this school that I have written about to senior staff.***

- Out of sheer frustration I did later berate two male colleagues in the staff room, not three staff as stated by Ms McDowell. Mr Chamber's witness statement states this.

- The further allegation that I "the verbally abused and physically threatened his fellow classroom teachers" is incorrect and is not detailed in the official allegations made by Mr Roberts, the witness's statements or my own response to those allegations.

- I did angrily confront Mr Knights with what I believe are unethical actions by him and again state that my claims can be corroborated. It was not verbal abuse it was publicly calling out his unethical behaviour and what I thought about it.

- ***At no point did I threaten him in any way and there are no witness statements that support this allegation.***

[29] The history leading up to the incident and the description of it taken from the plaintiff by Dr Majoor, that is reproduced in the Decision Book, is as follows:[14]

> He stated that the problems began in mid-2015. He stated that he became concerned about the behaviour of the principal and of another classroom teacher. He conveyed that he did not agree with the way they disciplined students or their behaviour

[14] Decision Book at 21-22.

towards students. Mr Corey stated that he believed that his wife witnessed the principal threatening a child with a cattle prodder. He stated that students told him that the teacher had put a rubbish bin on the child's head in anger. Mr Corey stated that when he raised this with the principal, it was explained as "a teaching exercise gone wrong" for which the teacher was counselled.

Mr Corey stated that in the mid-year holidays in 2015, he and his wife spoke to a lawyer as he was concerned about his duty of care and mandatory reporting. However, he said that he was advised that unless he had evidence, he would be unlikely to obtain support. He stated that he therefore attempted to contact previous staff over the next few months.

Mr Corey stated that he wrote to the principal on two occasions with his concerns about the school. He stated that he spoke to the principal about his concerns regarding the teacher and put the concerns in writing. He stated that he believes that this information did not remain confidential and that the principal informed the teacher that he had raised concerns. Mr Corey said that this teacher and the teacher's wife who also worked at the school, often photographed him around the school. Mr Corey stated that he was accused of being unprofessional and of attempting to discredit others.

Mr Corey stated that he believed that as a result of voicing his concerns, the principal began targeting his teaching practices. Mr Corey stated that he was accused of being a poor teacher and not fulfilling his responsibilities. He stated that at the end of 2015, he was taken off classroom duties and given a role as a relief teacher, without consultation. He stated that he did not want this position. Mr Corey stated that he asked for mediation and was "fobbed off". Mr Corey stated that on the first day back at school in 2016, he was given no instruction about his role. He stated that no-one spoke to him about what it would involve. He stated that on the second day at school he tried to get things cleared up but that the senior teacher verbally attacked him in front of everyone, which he found embarrassing. Mr Corey stated that he therefore made an official complaint to the department about the senior teacher and asked for an apology through the principal. Mr Corey stated that he removed himself from the workplace as he was finding everyone very hostile.

Mr Corey stated that he was off work for three weeks and during this time he had to go to Canberra for his father's funeral. Mr Corey stated that his first day back at school was a Sorry Day. He stated that usually the school is closed on a Sorry Day but on this particular day, there were a number of children outside the school. He stated that he therefore went outside and began talking with some of the children. He stated that he had a discussion about funeral business, as some of the children knew that his father had died. He stated that he had not been told that the school was closed. However, Mr Corey stated that the principal accused him of cultural insensitivity for talking to the students when the school was closed.

Mr Corey stated that one of his complaints had been with regard to children being locked out of classrooms for misbehaviour. He stated that on his last day at school, he saw a 13 year old boy whom he had taught the year before. He stated that the child had been "kicked out of class" by the particular teacher with whom Mr Corey had some concerns. Mr Corey stated that he was aware of the child's difficulties and that he did not want to go home. Mr Corey stated that he took the child to the library and allowed him to help him. He stated that he took the child to lunch and sat him with a younger class. Mr Corey stated that when the child's class room teacher saw him at lunch, the child's class room teacher said that he was not entitled to lunch, because he was not meant to be at school having been sent home earlier in the day. Mr Corey said that at that point, he realised that it was going to "get ugly".

Mr Corey said that the boy began crying and stood up defiantly with a shamed posture. Mr Corey said that everyone was watching and the boy's mother was present as she was a teacher's aide at the school. Mr Corey said that he went over and put his arm on the boy's shoulder and walked him away. He said that he told some boys to take him over to his house across the road, sit on the verandah and ask his wife to get them some drinks.

Mr Corey stated that he then had an argument with the senior teacher. He stated that the principal was not at the school on this particular day. Mr Corey stated that he was aware that he was being photographed. He stated that he went to the staffroom. He stated that he angrily said to the teachers "Are you blokes going to find your backbones". He said that he told

> them: “You can’t push and shove them. You can’t yell at them. You can’t treat indigenous kids that way”. He stated that his distress and comments were recorded on video. Mr Corey stated that later that day he was told to go home by the senior teacher.
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> Mr Corey acknowledged that he shouted and yelled at teachers. He stated that he “had had enough.” He said that “When you’ve had enough, you have to do something”.
>
> Mr Corey stated that one out of 11 teachers at the school is supporting him and that the others are all scared as only three are permanent staff. He stated that there is “a negative narrative” about him that he is a “lunatic, a radical and a poor teacher.”

[30] During the hearing the Court was played a recording of the incident. Shouting can be heard. It was not of a quality that reasonable or safe inferences can be drawn.

The decision under section 35 of PSEMA

[31] On 19 July 2016 the decision-maker wrote to the plaintiff advising him that she had been delegated the responsibility of deciding whether he should be transferred to perform his duties in an urban school in the Darwin region. The decision-maker listed the materials she had been asked to consider and that if the plaintiff had any questions, they should be directed to her.[15] A number of those materials have been referred to above. The materials included correspondence with the plaintiff’s solicitor and the report from Dr Majoor, as well as the report of the psychologist Hope Rigby, arranged by the plaintiff or his solicitor and included in the decision book. The list of

[15] Decision Book at 6-7.

materials also includes a letter in the nature of a submission from the plaintiff's solicitor to the effect that the opinion of the psychologist Hope Rigby should be preferred and that for various reasons the plaintiff should not be transferred.[16]

[32] It is not necessary for current purposes to set out the totality of both reports. Dr Majoor concluded the plaintiff did not appear to be suffering from any psychiatric condition and from a psychiatric view point was fit for work. Dr Majoor dealt in some detail with the plaintiff's beliefs about teaching practice and his perceived perceptions of injustice and wrongdoing in the Indigenous community. Dr Majoor stated:[17]

> He holds strong, firm views with regard to these issues, which appeared difficult to challenge and Mr Corey appeared intolerant of other approaches. Mr Corey therefore might be resistive to robust and open discussion and feedback. Mr Corey would appear to have a somewhat confrontational manner when dealing with perceived injustice. As a result of these characteristics, it is likely that he will experience further distress in future. Therefore, supervision within a remote location may be difficult under these circumstances, as there might be limited support from additional third parties.
>
> Mr Corey stated that he is currently on the antidepressant Lovan 20mg per day, which he commenced in late 2015. I note he is not receiving any psychological follow up. As stated above, I did not find any evidence of a depressive disorder or indication for this medication. However, Mr Corey may benefit from a brief course of psychological therapy with anger management/relaxation techniques and problem solving elements. He might also benefit from mentoring from a senior colleague.

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16 Decision Book at 28-29.
17 Decision Book at 25.

[33] Ms Rigby's psychological report concluded as follows:[18]

> Mr Corey has been employed in remote locations teaching Indigenous children for the past nine years. His enthusiasm for his work appears to be very high. He has an absence of diagnosable mental health disorders and falls well within the 'normal' or average range. The assessments conducted and the conclusions drawn in this report support those of Dr Majoor in the IME report dated 8 April 2016, namely that Mr Corey is not suffering from any diagnosable psychiatric condition which may affect his efficiency or performance in his duties as a classroom teacher, and that furthermore Mr Corey does not require any restrictions in his teaching duties.
>
> Mr Corey has been recommended some anger management and reflective counselling sessions, all of which are provided by the NT Government through contracts with EASA and are attainable via the mediums of telephone in Mr Corey's remote area. Further private services are also available to Mr Corey in the form of telephone, skype and face to face counselling, of which Mr Corey has already proactively availed himself of these services, and is continuing to do so.
>
> The NT Government provides a very good range of recommended and relevant services through EASA to the population of the remote areas, with the aim that no person who is currently living in a remote area need be deprived of services or discriminated against because of their choice of residential and work location whilst they are employed in providing essential teaching and allied services to the children of the Northern Territory.

[34] In the letter of 27 July 2016 setting out the decision to the plaintiff, the decision-maker referred to the information she considered. In relation to the reports provided by Dr Majoor and Ms Rigby she wrote:[19]

> I note that Ms Rigby concurs with Dr Majoor in that you have an absence of diagnosable mental health disorders and you fall well within the "normal" or average range.

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18 Decision Book at 35.
19 Decision Book at 1.

[35] And further:

> Both Dr Majoor and Hope Rigby have stated that you may benefit from a course or counselling in anger management strategies and tools, and mentoring from a senior colleague. I acknowledge Ms Rigby's opinion that those supports can be provided to you in a remote location.
>
> I note Dr Majoor's advice in the IME report that you have outlined that your teaching practices are at odds with current teaching practices and you have stated that you are convinced that your teaching practices address the needs of the indigenous community. Although this does not constitute a psychiatric disorder, it is a personal philosophy to which you are highly committed.
>
> Dr Majoor further advised that your strong, firm views with regard to these matters appear difficult to challenge and you appear intolerant of other approaches. Dr Majoor observed that you appear to have a somewhat confrontational manner when dealing with perceived injustice.
>
> Consequently Dr Majoor is of the view that you might therefore be resistive to robust and open discussion and feedback, and supervision within a remote location may be difficult under these circumstances, and that it is likely you will experience further distress in the future.
>
> Ms Rigby does not in my opinion override Dr Majoor's advice regarding of these issues, nor does anything in your own submissions dissuade me from accepting the opinion expressed by Dr Majoor.
>
> I have many years of experience working in schools in both remote and urban contexts. Your admission that your teaching practices are at odds with mainstream teaching practices; your apparent intolerance of other approaches and the possibility of you being resistant to feedback and supervision in a remote environment where mutual cooperation and collegiality are paramount to improving student outcomes are of concern to me. Based on those concerns, I am of the opinion that you are better suited to perform your duties in an urban location.

Do the rules of natural justice apply to a decision made under section 35 of PSEMA?

[36] It is not necessary to deal in detail with all aspects of the rules of natural justice such as the hearing rule and the question of their applicability or not to a decision under s 35 of PSEMA. The single breach of the rules of natural justice alleged is the rule against bias. In this instance, not actual bias, but ostensible or perceived bias is alleged. In my view, the bias rule does apply to decisions made under s 35 but, like the hearing rule, the content of the bias rule is flexible depending on the circumstances. The content of the bias rule is determined by the fair minded observer in the circumstances. The standards are not as demanding when applied to the bureaucracy as to the judiciary.

[37] The power of a Chief Executive Officer of an Agency of the Northern Territory or of the Commissioner for Public Employment to require an employee to perform their duties in a different locality is grounded in s 35 PSEMA. There is little on the face of s 35 to guide the Chief Executive Officer in respect of any assessment of the relevant considerations or any balancing of competing factors. That is unsurprising given s 35 effectively regulates a common incident of employment. Section 35 is a broad power, envisaged to be exercised in a range of circumstances and by its nature, dealing with public employment in the Territory, a high degree of flexibility would be expected in its application.

[38] A transfer may be for an ongoing or for a fixed period.[20] An employee transferred under the section must not refuse to commence the duties the subject of the transfer in accordance with the directions of the Chief Executive Officer or the Commissioner.[21] The merit principle does not apply in relation to the exercise of the transfer power under s 35, although the principle is not excluded if the transfer is directed through other processes within PSEMA.[22] Section 35 must be seen as a broad and general power relevant to the usual incidents of employment in the public sector in the Northern Territory.

[39] The power under s 35 PSEMA is separate and distinct from Part 8 of the Act dealing with discipline, save that after disciplinary action is permitted to be taken against an employee, and if a breach of discipline is found, a Chief Executive Officer may exercise the transfer power under s 35, within the context of the options available pursuant to s 49C PSEMA, in particular s 49C(1)(vi). The procedures to be invoked in relation to alleged breaches of discipline, as would he expected, are far more elaborate than those required in respect of an exercise of the power undertaken solely within the ambit of s 35. Further, a finding of a breach of discipline is subject to appeal within PSEMA. There is no review mechanism within s 35.

[40] Similarly, pursuant to Part 7 of PSEMA, if action is permitted against an employee for reasons of capacity or performance, one of the options a Chief

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20 PSEMA s 35(4).
21 PSEMA s 35(6).
22 PSEMA s 35(7).

Executive Officer may choose is a transfer under s 35. In that instance, s 35 operates through s 46, headed "Remedial Action". As might be expected, under s 46, there are a number of statutory requirements to be met relevant to the operation of s 35 when utilised in the context of Part 7 of PSEMA.

[41] Although when utilised independently of the other parts of PSEMA s 35 does not evince criteria or conditions relevant to the exercise of the power, the Commissioner for Public Employment, pursuant to s 16 of PSEMA, has from time to time issued guidelines[23] to ensure that persons exercising powers and functions under PSEMA understand the principles of natural justice and apply them properly. "Employment Instruction Number 3", *inter alia*, provides:

> 2.1 A person who may be adversely affected by an impending decision must be afforded natural justice before a final decision is made. This means that:
>
> a) the person must be informed of any adverse information and other relevant information that may be taken into account by the decision-maker;
>
> b) the person must be given a reasonable opportunity to respond to the information including providing any evidence he or she wishes to include in the response;
>
> c) the decision-maker must impartially consider the employee's submissions, prior to making a decision; and
>
> d) a decision-maker must not have a personal interest in the outcome of a decision, and he or she must make the decision in

[23] Eg. "Natural Justice", Employment Instruction Number 3, 14 December 2011.

> a fair and considered manner, based on a consideration of all of relevant information.

[42] Whether a person to be transferred elsewhere to perform their duties is "adversely affected" may depend on their circumstances. For example, if the transferee is well supported in a location, with community and family ties, including the employment of family members, a decision to transfer may well affect them adversely. If, for example, a spouse of an employee who is to be transferred has employment in a particular region, the financial position of the employee may be adversely affected. Other employees may welcome the decision to transfer. From what is known of the plaintiff's circumstances, the transfer should be regarded as a decision that may adversely affect him.

[43] Although it did not impact on his right to employment, some consideration of his circumstances was to be expected. To what degree any adverse consequences influence the ultimate decision is another question. By Employment Instruction Number 3, it is expected adverse consequences would be a consideration in the decision making.

[44] It may be noted the plaintiff was advised that a s 35 transfer was being considered and there was correspondence not only between the plaintiff and the defendant, but also from the plaintiff's solicitor, Mr Ron Hope, who has sworn affidavits setting out the relevant correspondence; this is also evident

from the material in the Decision Book.[24] As noted above, the report of the psychologist Hope Rigby was provided by the plaintiff's solicitor. In his own response to the possibility of a transfer, the plaintiff refers to his support network in the community, the disadvantage to his wife, the financial disadvantage through his wife being hindered in her training, their pet dog (it is not clear how this was an adverse consequence and I do not regard it as such), and local services he relied on, including counselling services.

[45] In my opinion, the plaintiff's interests were affected to the degree necessary to require procedural fairness to be presumed to apply, however the practical content of procedural fairness in each circumstance requiring procedural fairness must be governed by the nature of the power and how it is reasonably anticipated to be exercised. If it was not strictly his "interests" being adversely affected, then more broadly, he may be seen as being "adversely affected".

[46] In *Haoucher v Minister for Immigration and Ethnic Affairs,*[25] Deane J stated:

> [T]he law seems to me to be moving toward a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making … and where the question whether the particular decision affects the rights, interests, status or legitimate expectations of a

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[24] Letter from the plaintiff to the Executive Director, Schools North, Decision Book at 10 and 11.
[25] [1990] HCA 22; 169 CLR 648 at 653; noted by the majority in *Annetts v McCann* [1990] HCA 57; 170 CLR 596 at 598.

> person in his or her individual capacity is relevant to the ascertainment of the practical content, if any, of those requirements in the circumstances of a particular case and of the standing of a particular individual to attack the validity of the particular decision in those circumstances.

[47] Further, in *Kioa v West*,[26] Brennan J gave a broad meaning to "interest" when commenting on the concept of interests protected by procedural fairness, referring to the "almost infinite variety of interests which are protected by the principles of natural justice". In any event, if I am wrong to presume procedural fairness applies, with its features adapted appropriately to the context of s 35 decisions, Employment Instruction No 3 requires decisions that have adverse consequences for a person are to be made in accordance with natural justice. On behalf of the defendants, it is argued this reflects the common law in any event; however, in my view the wording of Employment Instruction No 3 is broader than the common law and was intended to apply to decisions such as transfer decisions under PSEMA. If that conclusion is in error, in my opinion the plaintiff was, in any event, accorded natural justice throughout the process.

[48] Throughout the process leading up to the s 35 decision being made, procedural fairness at a level and content that might be expected was offered and complied with. Concomitant with that process are the requirements of impartiality, fairness and for the decision-maker to consider all of the relevant material.

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26 [1985] HCA 81; 159 CLR 550 at 617.

[49] In my view, the bias rule applies in the context of a decision under s 35 PSEMA, however it must be understood in the light of bureaucratic decision-making that does not require or enjoy the institutional independence of the judiciary or the independence of many tribunals depending on their constitution. The process engaged in by departmental officers leading to the decision to transfer illustrates they accepted a level of procedural fairness applied. A decision made pursuant to s 35 does not in any way require an adversarial or adjudicative process to be undertaken to comply with natural justice. The decision-maker must not be biased, nor be perceived to be biased by a reasonable, fair-minded and informed member of the public; however, as a departmental officer, unlike a judicial officer, it is expected they would be familiar with a range of relevant materials and processes,[27] with an ability to rely additionally on their experiences.

[50] The requirements of natural justice arise from an implied condition governing the exercise of a statutory power. In *Kioa v West*,[28] Brennan J said:

> What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly.

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27 *Webb v The Queen* [1994] HCA 30; 181 CLR 41.
28 [1985] HCA 81; 159 CLR 550 at 627.

Does the decision give rise to a reasonable apprehension of bias?

[51] The only question to be determined is whether any of the relevant circumstances would give rise, in the mind of a fair minded and informed member of the public, to a reasonable apprehension of lack of impartiality on the part of the decision-maker.[29] This matter is not concerned with the correctness of the decision, it is not a merits review, nor is any other element of compliance with procedural fairness to be assessed, although some of the particulars at first blush appear to raise other alleged breaches. The plaintiff seeks that all the particularised circumstances be considered to determine whether there existed a reasonable apprehension of bias. As pointed out on behalf of the plaintiff, and acknowledged here, the test is not whether there is a "real danger of bias" or an objective test of "reasonable likelihood of bias" — those tests were rejected by the High Court in *Webb* — but rather whether there was a reasonable apprehension of bias. This is to be determined through the perspective of the "fair minded and well informed observer." The question is "one of possibility (real and not remote), not probability."[30] Bias need not be established in fact.

[52] Counsel for the plaintiff set out different ways the modern test has been expressed:[31] "[a]n observer aware of the facts … a reasonable man could very properly suspect" a lack of impartiality,[32] or feel a "reasonable

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29 *Webb v The Queen* (1994) 181 CLR 41.
30 *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at 345.
31 Plaintiff's Written Submission at [13].
32 *Stollery v Greyhound Racing Control Board* [1972] HCA 53; 128 CLR 509 at 519 per Barwick CJ.

apprehension that [the tribunal] might not bring fair and unprejudiced minds to the resolution of the question arising before them",[33] or that "the conclusion will not be altered irrespective of the evidence or arguments put forward".[34] All expressions of the rule are sourced in the principle of impartiality and that justice must not only be done but must be seen to be done.

[53] Both parties referred the Court to *Ebner v Official Trustee in Bankruptcy* on the steps to be undertaken to establish whether an interest may give rise to a reasonable application of bias. Gleeson CJ, McHugh, Gummow and Hayne JJ summarised the test as follows:[35]

> First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

[54] Counsel for the respondent pointed out a recent helpful re-formulation of the test in *Isbester v Knox City Council*[36] by Gageler J:

> Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as a result of a neutral

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33 *R v Watson*; *Ex Parte Armstrong* [1976] HCA 39; 136 CLR 248 at 262 per Barwick CJ, Gibbs, Stephen and Mason JJ.
34 *Keating v Morris* [2005] QSC 243 at [43] per Moynihan J.
35 (2000) 205 CLR 337 at 345.
36 [2015] HCA 20; 255 CLR 135 at 155-156 at [59].

> evaluation of the merits. Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation by that factor in that way.

[55] The standards applicable to apprehension of bias in the case of pre-judgement are necessarily different in the case of administrators and some, less formal tribunals. For example, the majority in *Minister for Immigration and Multicultural Affairs v Jia*[37] referred to the House of Lords decision in *Franklin v Minister of Town and Country Planning*[38] as a "useful reminder" of how the requirements of bias are modified when applied to Ministers. In *Jia*, notwithstanding apparently uncompromising public statements concerning character assessment in visa applications, the Court refused to accept that the Minister had impermissibly pre-judged the matter. As submitted by counsel for the defendants, statements in *Jia* tend to the conclusion that apprehended bias is not disclosed where there is mere inclination, pre-disposition or tendency, but rather as Hayne J said:[39] "some preponderating disposition or tendency, a propensity; predisposition *towards*; predilection; prejudice".

[56] In *Golden v V'landys*[40] the New South Wales Court of Appeal said:

> Thus, the test for a reasonable apprehension of bias requires an analysis of three interrelated questions:

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37 [2001] HCA 17; 205 CLR 507 at 539 per Gleeson CJ and Gummow J, Hayne agreeing.
38 [1948] AC 87.
39 *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 563 [183].
40 [2016] NSWCA 300 at [88] per Payne JA, with whom McColl and Leeming JJA agreed.

(a) what the fair-minded observer *might* apprehend [would lead the decision-maker to decide a case other than on its merits];

(b) whether the decision-maker *might* not be impartial and;

(c) the reasonableness of the asserted apprehension.

[57] In *Ebner v Official Trustee in Bankruptacy*[41] the test was expressed as follows: "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide." The test is not, as suggested at one point during submissions on behalf of the plaintiff, a "double maybe" test.

[58] Returning to the particular circumstances raised here. The particulars said to give rise to the reasonable apprehension was that no consideration was given by the decision-maker, before making the decision, of the plaintiff's explanation of his behaviour during the 3 March 2016 incident. This was in circumstances where: improper behaviour by the plaintiff was alleged to have occurred by others; that prior to the date of the decision, no finding adverse to the plaintiff had been made concerning disciplinary proceedings against him for his behaviour during the incident; and that the alleged improper behaviour by the plaintiff during the incident was the primary reason for the decision-maker's consideration whether she thought it appropriate to make the decision to transfer. A further particular alleged was that the plaintiff's alleged behaviour during the incident was the precursor

[41] (2000) 205 CLR 337 at [6]; quoted with approval in *Smits v Roach* [2004] NSWCA 233; 60 NSWLR 711 at [28].

to the plaintiff being required to be examined by a psychiatrist to determine if he suffered from a mental disability and if so, whether he was capable of performing normal classroom duties; and “there being any perceived need by the First Defendant to consider making the decision”.

[59] Importantly, although the particulars have the character of failing to take into account certain relevant considerations, the case is not put on the basis of an asserted failure to consider the explanation given by the plaintiff, but rather it is put that those matters having been raised by the plaintiff and not discussed by the decision-maker, raises the relevant apprehension. In my view, this is not sufficient to form the basis of a claim for apprehended bias in these circumstances. Whether or not the decision is correct is not relevant to the determination of whether there can be said to be apprehended bias. There was a suggestion made on behalf of the plaintiff that the court should “make new law” with respect to circumstances or categories that may give rise to an apprehension of bias. It is not clear to me that this would be a correct approach. The plaintiff was engaged with the process leading up to the decision. A deal of the material he wanted to raise was before the decision-maker. The fact the decision-maker knew of some of the historical matters and the lead up to the examination could not in these circumstances be said to “poison the well”. The decision-maker was not adjudicating between parties. The fair minded and informed member of the public would comprehend the decision-maker was required to make a decision on the basis of the material before her, including the medical material. The fact that the

decision-maker did not evaluate who may be “right” or “wrong” in the lead up to the examination and the decision and did not comment on the versions given by the plaintiff, in these circumstances would not raise a suspicion of bias. A decision was required to be made to manage the plaintiff in the circumstances, bearing in mind the requirements of the school and the department.

[60] The third particular is that the decision-maker and the second defendant had an unstated primary reason for making the decision, that is wanting to remove the plaintiff from his teaching position at Kalkarindji School because he had made complaints about the principal and another teacher in relation to their alleged inappropriate conduct when interacting with students, and against another teacher concerning his alleged bullying and intimidating behaviour towards the plaintiff, without those complaints being investigated to the stage of the Department of Education deciding whether the complaints had properly been made by the plaintiff. There was no requirement to assess or adjudicate those matters. The plaintiff was required to be examined independently of those concerns. The decision-maker assessed and acted on Dr Majoor’s opinion. Once again, the fair minded and informed member of the public would understand the need for a decision to be made that appropriately managed the plaintiff in the context of the particular school environment and the broader department.

[61] One way the plaintiff puts his case is to suggest that because the decision-maker did not make any reference whatsoever to the history of the plaintiff

at the school, it raises the prospect that she may not have brought an impartial mind to bear and that her conclusion would not be altered irrespective of the arguments put forward. The submissions were said to be variations on the theme of justice being seen to be done.

[62] It was argued that the matters in the particulars raise the suspicion, in the sense that it identifies what might lead the decision-maker to decide the case on other than its legal and factual merits. This is primarily said to be because the plaintiff's version of events does not appear in the decision-maker's decision. It was submitted the plaintiff's submissions were either not considered, or if considered they were ignored because there was a primary purpose in the Department to have him moved because of complaints he had made. It was argued the second step, the logical connection between the matter raised and the feared deviation from the course of deciding the case on its merits, was satisfied because the decision-maker did not say anything about the plaintiff's complaints or version. It was submitted that when all of the material is considered, including the decision-maker's reasons for preferring the psychiatrist's opinion to have the plaintiff returned to an urban setting, and her own preference for the plaintiff to be mentored, while there was no error in the decision, that given the history, there would be a reasonable apprehension that the decision-maker was not impartial. While the plaintiff submitted there was the possibility of an unstated primary purpose in the decision to transfer, it was also acknowledged there was no evidence of that unstated purpose.

However, it was submitted the material raised the suspicion of an unstated purpose.

[63] The remarks of Gaudron, Gummow and Hayne JJ in *Hot Holdings Pty Ltd v Creasy*[42] are apt to the circumstances:

> Those who place information before decision-makers will often have an interest in the outcome and it will not always be the case that the nature or extent of that interest will be fully revealed to the decision-maker. It would be wrong to say, as a general rule, that in *every* such case the decision must be considered to be legally infirm.

[64] In my opinion, there is an unacceptably high level of speculation required to come to the conclusions the plaintiff asserts. If others who were not the decision-maker had an un-stated primary reason in respect of the plaintiff, it does not follow that the decision-maker deviated from the requirement of impartiality. There is no evidence the decision-maker was influenced by others with an unstated purpose. As a decision-maker within the department, it would be expected the decision-maker had some knowledge of the lead up to the examination and subsequent processes leading to her decision. A fair minded reasonable person reflecting on this form of decision making would not, as a result, suspect bias as a result of influence.

[65] On behalf of the plaintiff it is acknowledged that none of the matters raised in the particulars fall within the categories of apprehended bias identified by Deane J in *Webb v The Queen:*[43] interest, conduct, association and extraneous information. It was pointed out that the High Court has accepted

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42 [2002] HCA 51; 210 CLR 438 at [50].
43 (1994) 181 CLR 41 at 74.

that these categories provide a "convenient frame of reference."[44] I have already indicated that the decision-maker was aware of some of the history between the plaintiff and other persons at the school, without being aware of every single document or email.

[66] In respect of a decision-maker in this context, it would not reasonably be expected that the decision-maker trawl through and list every consideration that contributes to the decision. A failure to do so, given the context of both the decision-maker and the decision to be made, could not, in my view, raise a reasonable apprehension in the mind of a fair-minded lay observer that the decision-maker lacked impartiality. The incident of 3 March 2016, given what the plaintiff has said in various accounts, appeared to be a significant incident. It came after a number of issues that the plaintiff had with colleagues that the decision-maker had some general knowledge of, as appears in the decision book. It was not the role of the decision-maker to adjudicate between supposed competing parties, but to make a reasonable decision based on the material. As has already been indicated, institutional independence is not a feature of decision-making in the circumstances of a public sector administrator making a decision of this nature.

[67] In my view, the plaintiff has not established that, having given his version of events of the 3 March 2016 incident, there is therefore established a connection to the possibility that the decision-maker might not have made an

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[44] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [24], per Gleeson CJ, McHugh, Gummow and Hayne JJ.

impartial decision. Nor that a fair minded informed member of the public might think the same. Once again the context is significant. A decision-maker in these circumstances might be expected to have particular experience or expertise. Clearly the decision-maker drew upon her own experience. The features of the decision-making in this case are well summarised in the defendants' written submissions and are in accordance with what might be expected in relation to administrative decisions concerning public employment short of disciplinary or capacity matters.[45] Those features are: the exercise of a broad and general power in relation to the usual incidents of employment; not acting as an adjudicator; not weighing up competing rights or the public interest; not making a decision concerning a member of the public or a private entity; making a decision concerning a common incident of a public sector employee's employment; not exercising disciplinary or termination powers; would not be expected to come to the decision free of any knowledge of the plaintiff or of the history of his employment; would not be expected to quarantine themselves from "so called" extraneous information; and would be expected to apply their own experience in reaching a decision.

[68] Having reviewed the relevant material, it appears the plaintiff in reality seeks to have the court decide certain matters raised by the plaintiff on the merits, without making the appropriate logical connection between the factor or factors that might call into question the neutrality of the decision-

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45 Defendant's Outline of Submissions - Resumed Trial 18 November 2016.

maker and how that factor might cause deviation from a neutral evaluation of the merits. As was emphasised in *Michael Wilson & Partners Ltd v Nicholls*:[46]

> Because the test is objective it is important to keep an inquiry about apprehension of bias distinct from any inquiry about actual bias … But to allow an inquiry about whether the judge had *in fact* prejudged some issue to enter into a debate about what a fair-minded lay observer might *apprehend* is to introduce considerations that are irrelevant to the issue that is to be decided when a party submits that there is or was a reasonable apprehension of bias.

Waiver

[69] It was submitted on behalf of the defendants that the plaintiff should be taken to have waived the right to invoke any applicable claim of apprehended bias. It was submitted the plaintiff was aware, before the decision, of the issues raised in these proceedings and was legally represented throughout the process leading to the decision but failed to draw the decision-maker's attention to the issues.

[70] It is accepted that waiver is an exception to the bias rule.[47] Although some of the particulars put forward by the plaintiff must have been known by himself or his lawyer before the decision, such as those particulars that alleged an unstated purpose, the plaintiff did raise an issue with the Acting Executive Director of Schools North prior to the examination. The plaintiff

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46 [2011] HCA 48; 244 CLR 427 at [33].

47 *Smits v Roach* [2006] HCA 36; 227 CLR 423 at 439-440 per Gleeson CJ, Heydon and Crennan JJ.

suggested any decision to remove him would be premature if his own complaints were not dealt with.[48]

[71] In my view, the plaintiff did not waive his right to invoke a claim of apprehended bias on the basis of the "Second Ground Particular". Had the proceedings solely concerned the matters raised in the "Third Ground Particular", the conclusion may be different. Obviously a known claim of bias will need to be brought to a decision-maker's attention so that corrective steps, if possible, may be taken. I would not, however, conclude the plaintiff had waived his right to claim apprehended bias, as some of the particulars in the "Second Ground Particular" had been raised during the process leading to the examination. Implicit in the correspondence from the plaintiff are suggestions he is not being fairly dealt with, although not expressly alleging bias.

Parties to the action

[72] The action is brought against both defendants as it was submitted that while the decision is that of the Chief Executive Officer, in charge of the Department of Education, the department is effectively the Northern Territory and the plaintiff claimed a remedy against both defendants. It may be noted that the first defendant before the Master agreed not to take any action to remove the plaintiff from his residence, provided by the second defendant, pending the termination of these proceedings. I do not think this

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48 Decision Book at 10-12.

a significant matter. There is no need to remove the second defendant. As the plaintiff's action is to be dismissed, there is no need to make orders with respect to the strike out application.

Orders

1. The proceeding brought by the plaintiff set out in the Amended Originating Motion is dismissed.

2. I will hear the parties as to costs.
