

**Paper presented to the Appeals Delegates**

**Office of Public Service Merit and Equity**

**on Tuesday 1 March 2005 by**

**Mr Gary Crooke QC, Queensland Integrity Commissioner**

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Firstly I congratulate you on your selection to fulfil this important responsibility. You bring with you a wealth of experience and an inherent sense of fairness and integrity which will stand you in good stead for the challenges that lie ahead.

In fulfilling your role you should never become side-tracked by legalistic terms or allowing subsidiary issues to distract your attention from the main purpose of your role.

Fundamentally an appeal is a creature of statute. No appeal will lie from a decision unless there is some legal basis for it to occur. This legal basis, and your case is no exception, sets out the procedures and the nature of the appeal.

It is fundamental for you to understand that appeals which you conduct are not ones which second-guess the original decision-maker. They are appeals under administrative law which recognises the primary role of the manager as the person on the spot, best equipped to make a decision. So much is this so that you can interfere or change the decision only if you conclude that no reasonable decision-maker could have arrived at the result appealed against.

There is a temptation to put yourself in the shoes of the original decision-maker but the system does not permit this to happen. You have to look at all the material before the original decision-maker and any reasons of the decision-maker and come to your conclusion with the above very significant limitation.

Administrative law has developed and part of its development has been to recognise practicalities. One of these practicalities is that there should be an end to

administrative processes and they should not be needlessly drawn out by excessive technicality and formality. For this reason the rules of procedure, while permitting the introduction of fresh evidence, should take account of experience, which has decreed that in circumstances where fresh evidence is adduced there should be cogent reasons for allowing it. To be too lenient in this regard would be to allow the disappointed applicant to present a different case if the original attempt was not successful. Very cogent reasons should be demonstrated before new material or different material is allowed to be introduced.

Another consideration that is always lurking is the question of bias or perceived bias. The ingenuity of a disappointed litigant covers vast compass. Matters that might be regarded as insignificant or common place can often be magnified to mount an argument to set aside an unfavourable decision. For example there was a recent case in the Federal Court where a bank was instrumental in bringing about the bankruptcy of a debtor. The matter was vigorously contested in court and ultimately the Judge decided in favour of the bank against the debtor. During the period which the Judge reserved his decision the Judge's mother died and left him a small parcel of shares in the bank. After the unfavourable decision was handed down, the debtor mounted an appeal to contend that the Judge was biased and his decision ought to be set aside because he was a shareholder in the bank.

The debtor's claim was unsuccessful in the Appeal Court because it was held that a reasonable person with full knowledge of the facts would not maintain a perception of unacceptable bias. I mention this, however, to reinforce my point that one cannot be too careful in situations where disappointed persons will look to every possible avenue to set aside a decision which is unpalatable to them.

Translating this to your environment when hearing an appeal, you must be particularly careful not to have any contact or discussion with either party to the appeal in the absence of the other. You must disclose any relationship or other factors that might give rise to some perception that you might be favourably, or even unfavourably, disposed to one of the parties. I understand the system to be that you are unlikely to be asked to sit on any appeal that involves the agency or department which is your home base. This is for good reason.

Should there be any situation which you think might raise questions of your ability to be impartial (here perceived bias is the usual factor which is raised in these types of matters, rather than actual bias) you should be very careful to raise the issue before those involved in the appeal, and then to consider your position if any party maintains an objection. If there is any possible substance in the objection it is better to err on the side of caution and arrange for somebody to replace you than to take a risk that could lead to any decision being set aside with resultant inefficiencies and trauma to all those involved.

It is important to recognise that bias or the perception of bias can arise not only in the context of a favourable relationship but also in the case of a perceived unfavourable relationship. In another way, you must be careful that there be no perception available that you dislike a particular party just as much as you must be careful to avoid any perception arising that you are favourably disposed to a party, or have connections with that party that might give rise to this perception.

Another aspect which you must always bear in mind is that there is no unimportant or “run of the mill” case. In the matters that will come before you for your determination, undoubtedly the issues are of major importance to those involved. A person’s career may well be at stake. In order to implement this concept you should be alert to, and have sympathy for, parties with language difficulties, timid parties, parties with physical or mental disabilities, those who are unfamiliar with the tribunal’s procedures and conversely those who are over-familiar and perhaps feel they can take advantage of technicalities. On another plane, you must not allow yourself to be drawn into internecine squabbles within a department which all too frequently attend disciplinary or selection procedures.

Consistent with your own integrity, and maintaining respect for the system, any decision you make must be underpinned by intellectual honesty. Obviously you should not adopt any part of reasoning which is illogical or is not consistent with what your conscience tells you is fair and just.

At all times you must bear in mind the admonition in the *Public Service Act 1996* which requires that you “*must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues*”.

This means that you are required to cut away excessive formality and not to put on a lawyer’s hat meticulously to dissect technical arguments. You preside over a practical procedure which, in the ultimate interests of all concerned, is one of expedition and finality with as little formality as possible. Too much can be written into the concept of fairness and you should beware of flowery definitions seeking to circumscribe it. You are required to see that natural justice is done, but natural justice is described as no more and no less than fairness writ large. There is no exclusive code to say what is or is not fair as a generality. You must look at the particular circumstances and determine whether in accordance with your values and experience your decision is a fair one.

You bring with you into the hearing room an inherent acceptance and embracing of the ethical principles enunciated in the *Public Sector Ethics Act*. Not so much because they are embodied in an Act but because these selection processes recognise that you intrinsically adopt these principles as part of the way you conduct your day-to-day activities. These are indispensable requirements to a fair and proper conduct of any appeal and they should go with you into the hearing room in the same way as they are with you in conduct of your professional life.