From: Chambers - Ross J
Sent: Thursday, 6 April 2017 9:54 AM
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Subject: AM2015/1 - Family and Domestic Violence Leave Case

Dear Parties

I refer to the above matter and attach the decision as referred to by Justice Ross during the hearing of 4 April 2017.

Kind regards

JO RICHARDSON
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President

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NEW SOUTH WALES SUPREME COURT

CITATION: Morton v The Transport Appeal Board & Anor (No1) [2007] NSWSC 1454

JURISDICTION:

FILE NUMBER(S): 30145/2006

HEARING DATE{S): 3 December 2007 - 10 December 2007

JUDGMENT DATE: 12 December 2007

PARTIES:
P:-Stephen James Morton
D1:-The Transport Appeal Board
D2:- Sydney Ferries Corporation

JUDGMENT OF: Berman AJ

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
P: D. Cowan SC; D. Knoll
D1:-
D2:- P.J. Newall

SOLICITORS:
P:- Diamond Conway Lawyers
D1:-
D2:-Sparke Helmore Solicitors

CATCHWORDS:
Ferry Master
Allegation of Misconduct
Termination of Employment
Appeal to Transport Appeals Board
Judicial Review
Unreasonable Decision
Apprehended Bias
Composition of Tribunal
Conduct of Tribunal
Failure of all Three Tribunal Members to Participate in Decision

Breach of Contract
Implied Term of Mutual Trust and Confidence

LEGISLATION CITED:
Transport Appeals Board Act 1980
Supreme Court Act 1970
State Owned Corporations Act 1989
Transport Administration Amendment (Sydney Ferries) Act 2003
Broadcasting and Television Act 1974

CASES CITED:
Zattin v Rail Corporation NSW and Anor [2005] NSWSC 1265
McWilliam v Civil Aviation Safety Authority [2006] FCA 1585
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223
Hamblun v Duffy (No2) (1981) 37 ALR 297
GJ Coles & Co Ltd v Retail Trade Industrial Tribunal (1986) 7 NSWLR 503
Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal [2004] NSWCA 291
Re Polites; ex parte Hoyts Corporation Pty Ltd (1991) 173 CLR 78 at 86
Fingleton v Christian Ivanoff Prorietary Limited (1976) 14 SASR 530 at 533
Webb v The Queen (1994) 181 CLR 41
R v PJE CCA (NSW) 9 October 1993 (1995) 2 Crim LN 73
PJE v THe Queen (High Court of Australia, 9 September 1996, S154/1995)
DPP v Attallah]2001] NSWCA 171
Oze Airlines Proprietary Limited v Australian Airlines Proprietary Limited (1996) 65 FCR 215 at 224 –226)
Velasco v Carpenter (1997) 75 IR 268
Minister for Immigration and Ethnic Affairs v Wu Shiang Liang (1996) 185 CLR 259 at 271-2
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24.
NAQG v Minister for Immigration and Multiculutiral and Indigenous Affairs [2004] FCA 1631, at [17]
Wyong Shire Council v MCC Energy Proprietary Ltd [2005] NSWCA 86 at [79]
Briginshaw v Briginshaw (1938) 60 CLR 336
Russel v The Trustees of the Roman Catholic Church for the Arch-Diocese of Sydney [2007] NSWSC 104
King v University of St Andrews (2002) SLT 439
Weissensteiner v The Queen (1993) 178 CLR 217
Shevill v The Builders Licensing Board (1982) 149 CLR 620
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623.

DECISION:
1. The decision of the Transport Appeals Board of 11 September 2005 dismissing the Plaintiff's appeal is removed into this Court and quashed. The matter is remitted to a differently constituted Transport Appeals Board for determination according to law. 2. Verdict for the second Defendant in relation to the Plaintiff's claim that the second Defendant breached the contract of employment between him and the second Defendant.

JUDGMENT:

JUDGMENT

Introduction

1 On 22 April 2004, there was a violent incident aboard the Lady Northcott, a ferry operated by the second defendant. The two men involved were the Plaintiff, who was the master of the ferry, and Mr Tyrone Best who was the engineer. The Plaintiff claims he was acting in self defence when, in the Engineer's Mess, he pushed Mr Best backwards after Mr Best lunged at him. On the other hand Mr Best claimed that the Plaintiff beat him with his fists over a considerable period of time.

2 The incident in the Engineer's Mess had its genesis in an incident in the wheelhouse a few moments before when the two men had words after Mr Best repaired and loudly tested a marine radio whilst the ferry was approaching Taronga Zoo wharf. After the vessel was tied up at the wharf the Plaintiff went to the Engineer's Mess where he knew Mr Best would be stationed. No third party saw the altercation which happened there, but afterwards Mr Best leapt onto the wharf and made his way from Taronga Zoo wharf to his general practitioner, who saw signs of injury.

3 The Plaintiff was unaware that Mr Best had left the ferry and so began the return journey to Circular Quay. However he had not gone far when he realised that Mr Best had manipulated the engine room controls so that the ferry could only move at slow speed. He left the wheelhouse, leaving a competent person in charge of steering the ferry, and made his way to the engine room to restore proper control. Upon realising that Mr Best was no longer on board he returned the ferry to Taronga Zoo Wharf, contacted his superiors, and awaited a relief crew.

4 Both the Plaintiff and Mr Best were employed by the second Defendant, which carried out an investigation. Mr David Thus, the second Defendant's Operations Manager, was responsible for that investigation. He prepared a written report which was sent to Ms Sinclair, the second Defendant's Chief Executive Officer. The report recommended that the Plaintiff be dismissed from his position. Ms Sinclair accepted that recommendation and so the Plaintiff's position with the second Defendant was terminated.

5 He then appealed to the Transport Appeal Board ("the TAB"), a tribunal set up under the Transport Appeal Boards Act 1980 ("the TAB Act"). A hearing was held over a number of days with evidence being called and witnesses cross-examined. Ultimately, on 11 November 2005 the Plaintiff's appeal was dismissed. He has worked only sporadically since then.

6 He now brings action in this Court on two bases. The first is brought as part of this Court's supervisory jurisdiction and concerns the conduct of the appeal to the TAB. For a number of reasons the Plaintiff seeks that the decision dismissing his appeal be quashed and

that the matter be remitted back to the TAB for further hearing by a differently constituted tribunal. Secondly, the Plaintiff also sues, in this Court's original jurisdiction, for what he says is a breach of a term implied in, and repudiation of, his contract of employment with the second Defendant. He claims damages as a result (although if I quash the TAB decision and remit the matter, he asks that I do not determine damages myself, but order an inquiry into damages to be held after the new TAB hearing).

7 The Plaintiff also brought proceedings against the first Defendant, the TAB. At one stage there was an appearance by the first Defendant, which indicated that a submitting appearance would be filed, but that appears not to have been done. In any case the first Defendant played no active part in proceedings in this Court, and the Plaintiff seeks no damages from them.

8 The two avenues taken by the Plaintiff in this court are quite different, involving different submissions and even different evidence. I heard them concurrently, but will deal with them separately in this judgment.

The Court's Supervisory Jurisdiction

9 I will first deal with the various challenges to the proceedings before the TAB. Although I have found that the Plaintiff has made good a number of his complaints, and it is thus strictly not necessary for me to decide all of them, I will deal with all aspects of the Plaintiff's claim, albeit only briefly where his complaints are rejected.

Nature of Present Proceedings

10 Section 23 of the TAB Act provides:

23 Decisions on appeals

> *"(1) A Board may, in relation to an appeal, decide to allow or disallow the appeal or make such other decision with respect to the appeal as it thinks fit.*
>
> *(2) The decision of a Board in respect to the appeal is final and is to be given effect to by the Authority against whose decision the appeal was made."*

11 However despite the *"final"* nature of a TAB decision this Court is still able to exercise its supervisory jurisdiction to grant prerogative relief in an appropriate case.

12 The relevant principles were summarised by Johnson J in ***Zattin v Rail Corporation NSW and Anor*** [2005] NSWSC 1265 as follows:

> *"9 There is no statutory avenue of appeal to this Court from a decision of the Board under the TAB Act. Indeed, s.23(2) states that the decision of a Board in respect of an appeal is "final". It was not submitted for Rail Corp that this provision prevented this Court from exercising supervisory jurisdiction with*

respect to the decision of the Board. Privative clauses are to be construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied: Public Service Association of South Australia v Federated Clerks Union of Australia, South Australian Branch (1991) 173 CLR 132 at 160; Darling Casino Limited v NSW Casino Control Authority (1996-1997) 191 CLR at 629 and following.

10 Ms Ronalds SC referred me to the statement of Rogers J in Ford v Transport Appeal Board (1987) IR 163 at 164, where his Honour said:

> *'It is of course clear that there is no appeal to this Court from the decision of either the Transport Appeal Board or the State Rail Authority of NSW. It is equally clear that the Supreme Court has a longstanding jurisdiction and indeed obligation to exercise supervisory jurisdiction over the acts of administrative and specialist inferior tribunals. In exercising this power the Court will be anxious to ensure that it does not trespass into areas of jurisdiction committed to specialist inferior tribunals; at the same time the Court must be anxious to safeguard the rights of the subject and to ensure that inferior tribunals are kept within the bounds of their jurisdiction and do provide procedural fairness in the exercise of their jurisdiction.'*

11 This Court may exercise its supervisory jurisdiction and grant prerogative relief under ss.65 and 69 Supreme Court Act 1970 in an appropriate case arising from a decision of the Board: State Rail Authority of NSW v Transport Appeal Board [2004] NSWSC 962; Duhbihur v Transport Appeal Board [2005] NSWSC811"'.

Delay

13 The second Defendant raised, albeit rather faintly, the issue of delay. It was said that there had been an unconscionable delay in the Plaintiff bringing his application for review of the TAB decision, that delay being about 11½ months.

14 In ***McWilliam v Civil Aviation Safety Authority***, [2006] FCA 1585 at [2], a case involving 18 months delay in commencing judicial review proceedings, Ryan J held that delay was not a bar to relief and in so doing said:

> *"A distinction is to be made between the case of a person who, by non-curial means, has continued to make the decision maker aware that he contests the finality of the decision (who has not "rested on his rights": per Fisher J in Doyle v Chief of Staff (1982) 42 ALR 283 at 287) and a case where the decision maker was allowed to believe that the matter was finally concluded."*

15 In this matter the delay was satisfactorily explained, evidence demonstrating the Plaintiff's efforts to have these proceedings brought to fruition was tendered, and this was not a case where the second Defendant was led to believe that the Plaintiff had accepted the TAB

decision. The Plaintiff made his intention to appeal against the TAB decision clear when he wrote to the then Acting Chief Executive Officer, Rear Admiral Chris Oxenbould, on 2 March 2006.

16 Further, the Plaintiff has a reasonable prospect of obtaining the relief he seeks: ***McWilliam v Civil Aviation Safety Authority***, [2006] FCA 1585 at [35].

17 The second Defendant said that the delay is highly prejudicial, and points out that if the matter is remitted to the TAB then there will be those problems which a litigant always faces when a hearing is held some considerable time after the events to which the hearing relates.

18 However much of the material which would be put before any further hearing of the TAB is in written form and of course the tribunal is able to take into account any difficulties occasioned by delay in assessing the reliability of evidence put before it.

19 I find that there has been no relevant delay in bringing these proceedings.

20 It is appropriate therefore that I consider the merits of the Plaintiff's challenge to the decision of the TAB.

Complaints Concerning the Transport Appeals Board.

21 The Plaintiff has a number of complaints concerning the way in which his appeal to the TAB was conducted. They can broadly be divided into a number of categories as follows:

> The tribunal was not properly constituted at the time the decision was made.
>
> Apprehended bias on the part of one of the members of the tribunal.
>
> Denial of natural justice by reason of the failure of the second Defendant to produce a medical report of Dr White to the TAB despite being obliged to do so.
>
> The TAB failed to take into account relevant evidence.
>
> The TAB decision was so unreasonable that it met the test to be found in ***Associated Provincial Picture Houses v Wednesbury Corporation*** [1948] 1 KB 223.

22 I have found that the Plaintiff has made good three of those complaints, as a consequence of which I will quash the TAB's decision and remit the matter for a new hearing by a differently constituted Tribunal. That finding makes it unnecessary for me to deal with every submission made by the Plaintiff regarding the other two complaints, although I will indicate why those complaints have not been made out.

The Tribunal was not properly constituted at the time the decision was made.

23 The Plaintiff's basic complaint as regards the composition of the tribunal is that what purported to be a decision of the Board was not properly such a decision because of the way in which the TAB members reached that decision.

24 What I propose to do is to refer to the relevant statutory provisions, then outline the circumstances in which the Board purported to reach its decision, before explaining, after reference to authority, why it is that the Board did not properly determine the Plaintiff's appeal.

25 The Board is to be constituted as provided in s 5 TAB Act:

5 Constitution of Boards

> *"(1) The Governor may appoint a Chairperson of Transport Appeal Boards.*
> *(2) A transport Appeal Board shall, in relation to a particular appeal, consist of:*
> *(a) the Chairperson*
> *(b)1 member who shall be an officer authorised in accordance with Part 1 of Schedule 1, and*
> *(c)1 member who shall be a nominated member within the meaning of clause 5 or 8 of Part 2 Schedule 1".*

26 The Act provides for a Vice-Chairperson to act in the place of the Chairperson see s 6:

6 Vice-Chairperson

> *"(1) The Governor may appoint not more than 2 Vice-Chairpersons of Transport Appeals Boards.*
> *(1A) The office of Vice-Chairperson is a part-time office.*
> *(2) Where the Chairperson is absent from any meeting of a Board, a Vice-Chairperson nominated by the Chairperson in advance (or, if the Chairperson has not done so, by the secretary) may exercise the functions of the Chairperson and shall be deemed to be the Chairperson at that meeting".*

27 The term *"meeting"* is clearly intended to encompass the situation where the three members of a TAB come together to determine an appeal. This is made clear by s 15 which provides:

15 Convening of a meeting of a Board

> *"Upon the lodgment of an appeal, the secretary shall convene a meeting of a Board and shall cause to be given to the appellant at least 7 days notice of the hearing of his or her appeal."*

28 Parliament of course recognised that it would not always be the case that the three members agree with each other, thus s 9 TAB Act provides:

9 Voting at meetings of Boards

> *"At any meeting of a Board each member present shall have 1 vote and the decision of the majority of the members shall be the decision of the Board."*

29 Finally, for present purposes, s 23, which I quoted above, sets out the possible decisions which a Board can arrive at and the consequences of those decisions.

30 With those provisions in mind, let me turn to the evidence as to what occurred in the present case after the evidence and submissions before the TAB were completed. The source of this evidence is an affidavit of Ms Vanessa Ambler, one of the TAB members, which, although being filed on behalf of the second Defendant, was tendered by the Plaintiff. That affidavit records that the Plaintiff's appeal was heard over a number of days and that for the purposes of the Plaintiff's appeal the TAB was comprised of Vice-Chairman George Thompson, Mr Peter Ferrarelli and herself.

31 On 11 October 2005, a few days after the final day of hearing, the three members of the TAB met to discuss the appeal. Ms Ambler's evidence was that:

> *"7. Each of the members of the Board expressed the view in relation to the appeal and we had a conversation to the following effect:*
>
> *Peter Ferrarelli expressed the view that Mr Morton should be reinstated and gave reasons for this view, of which I cannot now specifically recall.*
>
> *Vice-Chairman Thompson expressed the view that Mr Morton should not be reinstated. The reasons expressed by Vice- Chairman Thompson, to the best of my recollection, are as set out in the Transport Appeals Boards decision dated 11 November 2005.*
>
> *I expressed the view that I concurred with the view and rationale of Vice-Chairman Thompson".*

32 Ms Ambler's affidavit continued:

> *"8. It was apparent to me from the conversation described in the previous paragraph that Vice-Chairman Thompson and I agreed that Mr Mortons's appeal should be disallowed. It was apparent that Mr Ferrarelli did not share this view."*

33 At no stage after that did the TAB members meet as a group of three and there was no further communication between Ms Ambler and Mr Ferrarelli. Ms Ambler's affidavit records:

> *"9. On or about 7 November 2005, Vice-Chairman Thompson forwarded me a draft decision in respect of the appeal. I reviewed this draft and met with Vice-Chairman Thompson on or about 8 November 2005 to discuss the draft decision. My best recollection is that I only made a couple of comments on the factual information in the draft decision."*

34 Whether Mr Thompson also forwarded a copy of the draft decision to Mr Fararelli is unclear, although I am inclined to think that he did not. If he had sent the draft decision to Mr Fararelli for his comment and received none I would have expected him to have told Ms Ambler that, and I would have expected Ms Ambler to have recorded that fact in her affidavit. If he had sent the draft decision to Mr Fararelli for his comment and received a response then it is inconceivable that he would not have told Ms Ambler what he said, and inconceivable also that that fact would not have been included in Ms Ambler's affidavit.

35 No evidence was tendered from either Mr Fararelli or Mr Thompson to fill what is an obvious gap in the evidence. Nor was any explanation offered by either party to explain why they were not called. In these circumstances the inferences which I draw from the evidence, and on which I will proceed, are limited. Although I am inclined to the view that Mr Thompson did not send a copy of his draft decision to Mr Fararelli, I am prepared to decide this issue on an inference less favourable to the Plaintiff.

36 The inference which I can draw from paragraph 9 of Ms Ambler's affidavit, and on which I will proceed, is that the Vice-Chairman conveyed nothing to Ms Ambler concerning Mr Ferrarelli's attitude towards the draft written decision which the Vice-Chairman had prepared. This may be because Mr Ferrarelli was not given the opportunity to comment on the draft by Mr Thompson (given his previously expressed views) or because Mr Thompson did not convey to Ms Ambler the results of any attempt to seek Mr Ferrarelli's comments.

37 This circumstance should be considered in the light of the unchallenged evidence that there was no communication between Mr Ferrarelli and Ms Ambler after their meeting of 11 October, before the draft decision was prepared. This means that two of the three members of the tribunal (Ms Ambler and Mr Ferrarelli) did not discuss what occurred after 11 October and that the views (if any) that Mr Ferrarelli had on the draft decision, if indeed he was given the chance to look at it by the Vice-Chairman, were not conveyed to Ms Ambler.

38 Was it essential for the TAB to properly carry out its function in accordance with the Act that Ms Ambler be told, either by Mr Ferrarelli himself, or through the Vice-Chairman, of Mr Ferrarelli's comments on the draft decision or that he had no comment to make about it? (I repeat that I am proceeding on the assumption most favourable to the second Defendant - that there was some communication between the Vice-Chairman and Mr Ferrarelli concerning the draft decision. If that assumption is incorrect, and there was no communication between the Vice-Chairman and Mr Ferrarelli concerning the written decision prepared by the Vice-Chairman then the position of the Plaintiff is even stronger.)

39 There is authority which assists, although it is not directly on point. In ***Hamblin v Duffy (No2)*** (1981) 37 ALR 297, the Federal Court dealt with an application for judicial review following a decision of a Promotions Appeal Board set up under the Broadcasting and Television Act 1974. In that case, as this, the Board comprised a Chairman and two other members. At one stage during the appeal process the Chairman said to the other members *"I will now bring the proceedings of this appeal to an end"*. After that statement one of the members of the Board, a Mr White, said that he saw no purpose in interviewing any further witnesses as *"he had already made up his mind"*. Following those two statements the remaining member of the Board, a Mr Aarons, told his fellow Board members that he would take no further part in the proceedings of the Board and that he would *"not sign the papers concluding the appeal"*. He then left the Boardroom where the Board had been meeting. Lockhart J held that, at 303:

> *"for the Board to determine an outcome of an appeal to it... all three members must be present"*

and that:

> *"the absence of Mr Aarons before any decision was made inevitably leads to the conclusion that there was no such decision"*.

40 Of course this case is not of direct application to the present. The Promotions Appeal Board was set up under different legislation to the TAB and Mr Aarons' participation in the proceedings concluded at an earlier stage than the participation of Ferrarelli. Nevertheless the decision is of considerable assistance.

41 I regard it as an essential matter for the TAB to have properly performed its functions in accordance with the TAB Act that the three tribunal members exchanged their views: not only as to the ultimate outcome; not only as to the reasons for the outcome; but also as to the contents of the written decision which was handed down. In this case Mr Ferrarelli was not present in either a physical or a constructive sense when the decision was made. He was with the other two members on 11 October 2005, but an initial exchange of views, even with reasons being given for those views, does not amount to the decision of the TAB being made. If it were then it would not be permissible for a member to change his or her mind (something which happens often enough when the discipline of writing a decision forces closer analysis to be made) which is clearly not the case.

42 It is inaccurate to describe what occurred on 11 October 2005 as the members of the TAB reaching a decision, because any views expressed by a TAB member at such a meeting would necessarily be preliminary views which may well change once a draft judgment is prepared, and sent to the other members for their comments. It is not beyond the realms of possibility that, in preparing the draft judgment, the Vice-Chairperson of the TAB himself might have come to a different view. It would not be the first time that the process of a preparing a written judgment has led a judicial officer, or quasi-judicial officer, to come to the conclusion that his or her initially expressed view is incorrect.

43 To categorise what happened on 11 October 2005 as the Board reaching a decision is to suggest that no member of the Board could change his or her mind, but as I have already

noted that is clearly not the case. The decision of the TAB was made without Mr Ferrarelli participating as a member of the TAB in an important aspect of that decision, namely by his comments, if any, on the draft decision prepared by Mr Thompson being communicated to Ms Ambler.

44 It is no answer to say that since s 9 TAB Act provides that the decision of the majority of the members shall be the decision of the Board, it does it matter that Mr Ferrarelli (as far as Ms Ambler is concerned) played no part in the formulation of the written decisions.

45 Mr Ferrarelli's functions as a member of the TAB did not cease upon him expressing his view, with reasons, as to the ultimate outcome. He still had a function to play in the preparation of the decision and that included him communicating, even perhaps indirectly, with the other members of the TAB, including of course Ms Ambler.

46 It is not fanciful to suggest that had his views on that draft decision been communicated to Ms Ambler she may have decided that her initial view was incorrect. As the Plaintiff demonstrated when dealing with other complaints made by the Plaintiff concerning the way the TAB went about its function there was fertile ground for pointing out deficiencies in the decision.

47 A member of a tribunal who, upon an initial exchange of views, finds himself or herself in a minority is entitled, and probably even obliged, to point out such things as errors of logic, errors or law, a failure to take into account relevant material, and other errors in a draft decision which may result in his or her view ultimately prevailing. That is not affected by the circumstance that in TAB proceedings, unlike appellate courts, no dissenting judgment is delivered. Indeed the consideration that I have been referring to is of heightened application where, as in TAB decisions, the dissentient does not publish a dissenting judgment.

48 The corollary of what I have just written is that those who find themselves, on an initial exchange of views, to be in the majority are obliged to expose themselves to the views of the minority, something which Ms Ambler did not do, apparently treating Mr Ferrarelli's views as irrelevant once it became clear that he had been outvoted.

49 The role of a tribunal member who is, at least initially, in the minority is not limited to pointing out errors with a view to having his or her decision prevail. A decision unaffected by errors of the kind the Plaintiff relies on, and which are referred to elsewhere in this judgment, is a desirable end in itself and it is often the dissenting member who is best placed to point out such errors, leading not to the majority changing their ultimate views, but to the majority expressing those views in an error free form.

50 Thus far I have been discussing the issue on which there was most focus during the hearing of this matter, the non-participation of Mr Ferrarelli after the meeting of 11 October 2005, but there is one other matter to which reference should also be made. It is apparent from Ms Ambler's affidavit that whilst Ms Ambler saw the draft decision and made some comments on it, she did not see the final decision, as handed down by the Vice-Chairman, before it was delivered on 11 November 2005. The second Defendant might suggest that this is immaterial but there is no evidence as to the extent of any amendments to the draft

decision and there was no opportunity given to Ms Ambler to agree to, or otherwise comment on, the amendments made by Mr Thompson. It is essential for a valid decision of the TAB, that that decision be the decision of the majority of the members. But the decision actually handed down by Mr Thompson, shown to neither Mr Ambler or Mr Ferrarelli, was the decision of only one out of three. It is no answer to say that two out of the three members had the same view as to the ultimate result, namely that the Plaintiff's appeal should be dismissed, because it was a necessary part of the tribunal's function that it give reasons for dismissing the Plaintiff's appeal. Those reasons were as delivered on 11 November 2005, but they were not reasons which had been agreed by either Mr Ferrarelli or Ms Ambler. This represents a further defect in the way the decision of 11 November 2005 was reached.

51 The second Defendant suggested that an available inference on the evidence, namely Ms Ambler's affidavit, is that Mr Ferrarelli was able to speak to Ms Ambler but may have chosen not to. Counsel for the second Defendant submitted:

> *"but it ought not to be thought that there was a bar on that occurring (Ms Ambler and Mr Farrerelli commenting) and it may be that Mr Ferrarelli chose not to".*

52 Given that that is an inference that the second Defendant says is open on the evidence, it is important that I consider whether that itself raises a problem with the manner in which the tribunal ultimately reached its decision. Let me assume what the second Defendant asks me to infer. Let me assume that Mr Ferrarelli chose not to have any involvement after 11 October. It is not up to him to say, as counsel for the second Defendant suggested he might have, "obviously I am in the minority and I know that the Board operates on a majority view and I have other work to do and I will not ring you".

53 If in fact Mr Ferrarelli did take that view then he has done what Mr Aarons did in ***Hamblin v Duffy (No2),*** supra. The process of the tribunal reaching its decision extended from the date of the meeting of 11 October 2005 to the date the decision was delivered on 11 November 2005, which included the further meeting between two of the members of the tribunal on 7 November 2005. It was not open to Mr Ferrarelli to decide, on 11 October 2005, that he would have nothing more to do with the tribunal's deliberations and decision. If that is what he did, and that is an inference which was suggested to me was open by the second Defendant, then as was made clear in ***Hamblin v Duffy (No2)*** supra the TAB decision was a nullity.

54 In ***GJ Coles & Co Ltd v Retail Trade Industrial Tribunal*** (1986) 7 NSWLR 503 at 511, Kirby P and Hope JA said:

> *"Where Parliament has created a body constituted in a particular way, that body can only function in that way."*

In this case the TAB did not function in the manner required by the Act creating it, and the decision cannot stand.

55 The second defendant suggested that, if I found in favour of the Plaintiff on this point I should, in effect, overlook the defect in the way the TAB reached its decision, because if I remitted the matter back for further hearing then all that need happen is that the three members meet and have further discussions, but this would not result in a change in the outcome of the hearing, that is, the Plaintiff would still lose his appeal.

56 This submission illustrates why the TAB should be differently constituted when the matter is remitted. The submission that the members of the tribunal, having reached their own views, would be unlikely to change their minds is a submission reflecting an apprehension of bias. In any case the tribunal will have to be reconstituted for another reason involving an apprehension of bias to which I will now turn.

Apprehended Bias

57 In ***Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal*** [2004] NSWCA 291 the Court of Appeal recognised that the principles regarding apprehended bias apply to a tribunal such as the TAB. Giles JA summarised the test for apprehended bias as follows:

> *"22 In determining whether a decision-maker is disqualified by reason of an appearance of bias the question is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question he or she is required to decide: Livesey v New South Wales Bar Association (1983) 151 CLR 288 at 293-4; Ebner v Official Trustee (2000) 205 CLR 337 at [6]; Re Refugee Review Tribunal; ex parte H (2001) 75 ALJR 982 at [27]."*

58 However, as Giles JA noted, the nature of the tribunal and hearing must be taken into account. His Honour quoted from ***Re Polites; ex parte Hoyts Corporation Pty Ltd*** (1991) 173 CLR 78 at 86:

> *" ... the test in Livesey cannot be pressed too far when the qualifications for membership of the tribunal are such that the members are likely to have some prior knowledge of the circumstances which give rise to the issues for determination or to have formed an attitude about the way in which such issues should be determined or the tribunal's power's exercised. Qualification for membership cannot disqualify a member from sitting."*

59 Of course the fair minded lay observer does not know anything about the personalities of the person concerned (see ***Fingleton v Christian Ivanoff Proprietary Limited*** (1976) 14 SASR 530 at 533 because this is not a matter to be determined according to the particular attributes of the person involved.

60 With these principles in mind I will turn to the present matter.

61 The Plaintiff complains about the participation of Ms Ambler as a member of the TAB. No question of waiver arises because there is uncontradicted evidence before me that

the Plaintiff did not know of the matters about which he now complains until after the TAB handed down its decision.

62 The Plaintiff suggest that the close working relationship between Ms Ambler and Ms Sinclair, the Chief Executive Officer of the second Defendant and the person whose decision was under appeal, is such that a fair minded lay observer might reasonably apprehend that Ms Ambler might not bring an impartial mind to the question of whether the Plaintiff's appeal should be allowed, that decision necessarily involving the overturning of Ms Sinclair's decision.

63 Ms Ambler had a position within the second Defendant, indeed it was a requirement of the TAB Act that one of the members of the TAB come from the employer, see s 5 TAB Act quoted earlier.

64 So the Plaintiff's challenge is not to the mere presence on the TAB of an employee of the second Defendant, his challenge is more concerned with the nature of the position held by Ms Ambler and the closeness of her working relationship with Ms Sinclair.

65 Of course I emphasise that there is no suggestion at all that Ms Ambler was in fact biased. What the Plaintiff complains of however is apprehended bias, the test as to which I have set out above.

66 A document headed "Sydney Ferries - Organisational Chart" and accompanying documents were tendered by the Plaintiff. He also relied on answers given to various Notices To Admit Facts served on the second Defendant. The evidence reveals that at the time of the TAB hearing, Ms Ambler held the position of Corporate Counsel and Company Secretary within the second Defendant. The organisational chart and a document headed Revised Organisational Structure for the New Corporation, apparently prepared by Ms Sinclair, revealed that "the Corporate Counsel and Company Secretary… report(s) directly to the Chief Executive". In a document "What does the revised structure mean?" the position of Corporate Counsel Company Secretary is described as "a stand alone position reporting to the Chief Executive Officer".

67 Ms Ambler was thus Ms Sinclair's subordinate, reporting and giving legal advice directly to Ms Sinclair whilst the TAB hearing was taking place. She occupied a *"stand alone position"* which I take to mean that she did not herself have subordinates under her.

68 The Plaintiff emphasises that he accepts that he would not have a valid cause for complaint merely because an employee of the second Defendant was a member of the TAB hearing an appeal against a decision of the Chief Executive Officer of the second Defendant. Indeed as I have mentioned s 5 of the TAB Act requires that this occurs. It is the particular position that Ms Ambler occupied as at the time the hearing was ongoing which, says the Plaintiff, establishes her apprehended bias.

69 In deciding this issue it is important to identify what the lay observer can be assumed to know about the matter. Firstly, the lay observer would know the requirements of s 5 of the TAB Act and that this explained why there was an employee of the second Defendant sitting as a member of the TAB. The lay observer would also know the matters that I have referred

to above concerning Ms Ambler's position with the second Defendant and the nature of her working relationship with the Chief Executive Officer, Ms Sinclair, as revealed in the evidence. The lay observer would know that it was Ms Sinclair's decision to terminate the Plaintiff's employment which was under appeal to the TAB. The lay observer would also presume that Ms Ambler would be likely to have legal qualifications, given the nature of her position within the second Defendant, and that those legal qualifications might be of assistance to the tribunal in the performance of its functions. The lay observer would however know that there is no requirement that any member of the tribunal have legal qualifications and that it was assumed therefore by Parliament that the TAB is perfectly able to carry out its function without any member being a lawyer. Indeed the lay observer might think that the composition of the TAB was as Parliament required because of the special knowledge that the members might have concerning the day to day activities of a person employed in public transport work. The lay observer would know that the second Defendant was a reasonably large organisation and there would be many suitable people, who did not report directly to the person whose decision was under appeal, from whom it could choose to nominate as a member of the TAB.

70 A fair minded lay observer might reasonably apprehend that in the event that Ms Ambler took the view, after the TAB hearing was concluded, that Ms Sinclair's decision was wrong and the Plaintiff should be reinstated then the next time Ms Ambler and Ms Sinclair met in the course of their work, the topic would come up, especially if the outcome was the Plaintiff's reinstatement to the position from which Ms Sinclair had dismissed him. A fair minded lay observer might also reasonably apprehend that the prospect of discussing such matters with Ms Sinclair later might influence Ms Ambler in her decision. A fair minded lay observer would probably recognise that human beings are involved and that Ms Ambler might well be concerned that there may be friction between her and Ms Sinclair in the event that Ms Ambler, who was Ms Sinclair's subordinate and reported directly to her, effectively overturned her decision. The fair minded lay observer would probably conclude that it would be easy too for Ms Ambler to feel under pressure at the prospect of taking a decision that would effectively amount to criticism of her immediate superior who is the Chief Executive Officer of the organisation for whom she worked.

71 It is no answer to say that Judges, used to being overturned and even criticised on appeal, should have a more robust attitude than that. As Mason CJ and McHugh J pointed out in ***Webb v The Queen*** (1994) 181 CLR 41, at 52, '... it is the court's view of the public's view, not the court's own view, which is determinative'.

72 The fair minded lay observer in considering whether Ms Ambler might not bring an impartial and unprejudiced mind to the resolution of the question she was required to decide would also take into account, as I have noted above, that the second defendant could have nominated as a member of the TAB a person who did not report directly to the person whose decision was under appeal.

73 Such considerations would not apply if the member of the TAB nominated by the second Defendant under s 5 of the TAB Act were a person who did not directly report to Ms Sinclair. A fair minded lay observer might reasonably apprehend that, even in that case, there might be subtle pressures on a person nominated by the second Defendant to agree with the decision taken by the Chief Executive Officer, but the fair minded lay observer would

recognise that this would be inherent whenever a person was appointed under s 5 TAB Act 1980.

74 The nomination of a member of a TAB by an employer will always have potential problems which necessarily flow from s 5 TAB Act. Nevertheless it is important to recognise that there is already the possible perception of bias when the employer (who has terminated the employment of a person) chooses one member of the TAB. Thus the choice of TAB member by the employer must be made with particular care. What I mean to say here, is that the fair minded lay observer might already reasonably harbour some suspicions about the ability of the person nominated by the employer, and also employed by it, to bring an impartial mind to the issue which the nominee has to decide. But where, on top of that, the person actually chosen has a stand alone position which reports directly to the person whose decision is under review, that person being the Chief Executive Officer of the organisation, then I am satisfied that the fair minded lay observer's suspicions would increase to a level where that person might reasonably apprehend that the nominated member of the TAB might not bring an impartial mind to the question of whether the decision of the Chief Executive Officer should be overturned.

75 What I have been attempting to say in the immediately preceding paragraphs was said, in a better way, by Ipp JA in ***Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal***, supra, at [37]-[38]:

> *"37 The present tribunal system involves the appointment of tribunal members by contract, for a fixed period, and allows for their possible re-appointment for a further period, thereafter. Inherent in this system is a reasonable apprehension that a tribunal member may wish to please the government by making decisions of which it may approve (so as to secure re-appointment). The system also gives rise to the reasonable apprehension that a tribunal member might be grateful for being re-appointed, or disappointed or angry for not, and that these feelings might influence the member's decision. To this extent there is an appearance of lack of impartiality that is "built in" to the system.*
>
> *38 These problems with the very nature of the system underline the care which tribunal members should take to do nothing that gives further cause for apprehension of bias."*

76 The second Defendant points out that the cases referred to by the Plaintiff in support of its claim of apprehended bias do not deal with the circumstance of an administrative tribunal assembled, by statutory provision, to include members of the employer and employee ranks in matters involving employment. But the implications for this case of that circumstance are limited. Of course given that Parliament has decided how the TAB will be composed, an appellant to the TAB will not be able to succeed in a claim for apprehended bias merely because the requirements of the TAB Act have been followed. But the reason for the Plaintiff's inability to complain is not because there would be no apprehension of bias, it is because a claim of apprehended bias is denied him by the Act of Parliament. Parliament has decided how the TAB will be composed. It has not decided that that does not give rise to the situation where a fair minded lay observer might reasonably apprehend that one of the

decision makers on the tribunal might not bring an impartial mind to the question of whether the appeal should be allowed or not.

77 It is within the Power of Parliament to decide how Courts and tribunals will determine matters even if that might be perceived to lead to unfairness see ***R v PJE*** CCA (NSW) 9 October 1993 (1995) 2 Crim LN 73, ***PJE v The Queen*** (High Court of Australia, 9 September 1996, S154/1995) at 11 and ***DPP v Attallah*** [2001] NSWCA 171.

78 This distinction is very important and I will repeat it for emphasis. An appellant to a TAB which has an employer representative on it pursuant to s 5 of the TAB Act is unable to challenge the composition of the tribunal on the basis of apprehended bias because Parliament had provided for the tribunal to include an employer representative even if the mere fact that the relationship between the decision maker and the employer representative on the tribunal would be such that apprehended bias exists. But the Plaintiff is not without a remedy where the particular person chosen by the employer under s 5 TAB Act holds a position of such close association with the person whose decision is being appealed that a fair minded lay observer might reasonably apprehend that the nominated member of the tribunal might not bring an impartial mind to the question of whether the decision should be overturned.

79 Whilst each case has to be decided on its facts, and the authorities are primarily useful for the principles they state rather than as a comparison between circumstances of apprehended bias, it is helpful to note that the issue of a decision maker's employment was referred to in ***Fingleton v Christian Ivanoff Proprietary Limited*** (1976) 14 SASR 530 at 534 – 535. There Bray CJ postulates a case where the relationship of employment exists between decision maker and the legal representative of one of the parties. Bray CJ said, at 535:

> *"but I think that the fair minded person looking on would say: ' he ought not to sit, he would be biased because he would not want to effect his employment'".*

80 The Plaintiff accepts that he has to demonstrate:

> *"a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case".*

But he emphasises that it is

> *"the capacity of the association to influence the decision rather than the association as such that is disqualifying"*

(both these passages coming from ***Oze Airlines Proprietary Limited v Australian Airlines Proprietary Limited*** (1996) 65 FCR 215 at 224 –226).

81 In ***Velasco v Carpenter*** (1997) 75 IR 268, Myrtle J, whose judgment in ***Oze Airlines*** I have just quoted from, held that the link between the person bringing charges before an enquiry officer and the enquiry officer himself was tenuous and remote but I am satisfied that this is not the case here.

82 I conclude that a fair minded lay observer might reasonably apprehend that because of the following factors:

> Ms Ambler was employed by the second Defendant.
> She held a stand alone position which reported directly to Ms Sinclair.
> Ms Sinclair was the Chief Executive Officer of the second Defendant.
> The second Defendant had many people, who did not report to the Chief Executive Officer whom it could nominate as a member of the TAB.
> Ms Sinclair's decision was the subject of appeal to the TAB which could overturn it and order reinstatement,

Ms Ambler either consciously or unconsciously might be predisposed to upholding Ms Sinclair's decision. As a result the fair minded observer might reasonably apprehend that she might not bring an impartial and unprejudiced mind to the question she had to decide.

Failure to Produce Dr White's Report

83 The Plaintiff now has, but did not have at the time of the TAB hearing, a report from a Dr White, a psychiatrist, prepared in relation to a Workers Compensation Claim lodged by Mr Best. That report was produced by the second Defendant during the course of the proceedings in this Court. It refers, amongst other matters, to Mr Best suffering from schizophrenia and delusions.

84 It was submitted by the Plaintiff that that report is of great significance in deciding which of Mr Best's and the Plaintiff's versions should be accepted. The only two people in the Engineer's Mess at the time of the altercation were Mr Best and the Plaintiff. In "*word against word*", cases matters tending to suggest either the reliability of a version or the reliability of the person giving the version on the one hand and the unreliability of the version and the unreliability of the person giving the version on the other hand, are of great importance.

85 The Plaintiff says that the contents of the report would have been of considerable assistance to him in establishing a number of matters adverse to Mr Best which would then have supported his claim, put forward to the TAB, to have acted in self defence when he pushed Mr Best in the Engineer's Mess of the Lady Northcott.

86 The Plaintiff's case is that the second defendant was obliged to produce Dr White's report at the TAB hearing and that its failure to do so requires that the TAB determination be quashed.

87 During the course of the TAB hearing the Plaintiff called for the production of certain documents. It is not necessary to better describe the documents called for, because the second Defendant accepts that the report of Dr White should have been produced if it was in its possession. The second Defendant also accepts that its obligation to produce the report of Dr White was a continuing one and that if it received the report at any time before the tribunal handed down its decision on 11 November 2005 then it was obliged to produce it to the Plaintiff.

88 However the second Defendant submits that it did not receive Dr White's report before the TAB decision was handed down.

89 The report, prepared in relation to a workers compensation claim lodged by Mr Best, has a cover sheet and summary, in very small type-face, dated 3 August 2005 (although the body of the report is, curiously, dated 9 August 2005). There is a date stamp on the cover sheet. The date on the exhibit tendered is difficult to read but counsel, who have seen a better version of the report, agree that what is on the date stamp is as follows:

> *Received*
> *23 August 2005*
> *STA – Workers Comp.*

90 The abbreviation STA clearly stands for "*State Transit Authority*" because the covering sheet is addressed to "*Ms Natasha Cook, State Transit Authority, PO 2557 Strawberry Hills 2012*". The second Defendant makes the point that it is not the State Transit Authority and there is nothing to suggest that the report came in to the possession of the second Defendant before the tribunal handed down its decision on 11 November 2005.

91 The second Defendant does not suggest it never had possession of the report because a copy of it was produced to the Plaintiff pursuant to a Notice to Produce issued in these proceedings. The Notice to Produce was dated 2 April 2007 and the letter forwarding the copy of the report to counsel for the Plaintiff was dated 27 July 2007. But proof that the document was in the possession of the second Defendant in July 2007 is a long way short of proving that it was in the second Defendant's possession by 11 November 2005.

92 In order to examine the evidence regarding when it was that the second Defendant came into possession of Dr White's report it is necessary to make reference to the history of the creation of the second defendant as a corporation and when it was that the operation of Sydney Ferry Services ceased being a function of the State Transit Authority (the STA).

93 The second Defendant is a state owned corporation under the State Owned Corporations Act 1989. It is common ground that the second defendant is the successor to the Sydney Ferries Business Unit within the STA.

94 The legislation establishes that the STA, to whom Dr White's report was sent, and the second Defendant, were separate entities from 1 July 2004, the second Defendant being created by an Act of Parliament, the Transport Administration Amendment (Sydney Ferries)

Act 2003. However, the STA remained responsible for the conduct of Mr Best's workers compensation claim (see Order No 2 made by Minister for Transport Services pursuant to Schedule 1 Section 20 of the Transport Administration Amendment (Sydney Ferries) Act 2003).

95 So the position as at the time the second Defendant had an obligation to produce Dr White's report, if it had it, was that it had been sent to the STA, which was then handling Mr Best's workers compensation claim even though Mr Best worked for the second Defendant.

96 It is for the Plaintiff to prove that Dr White's report was in possession of the second Defendant by 11 November 2005. There is no evidence to establish when it was that it was sent from the STA to the second Defendant or the circumstances in which it was sent and so the Plaintiff is forced to rely on the drawing of an inference. He asks me to conclude, on the balance of probabilities, that the STA who received the document on 23 August 2005, would have sent it to the second Defendant such that it was received by the second Defendant before 11 November 2005. He relies on other reports, with other STA date stamps, as supporting that inference.

97 The difficult with drawing that inference is that there are many things about which there is simply no evidence. There is no evidence as to why the document would have been sent to the second Defendant, whether promptly, slowly, or at all.

98 The Plaintiff accepts this but points to other documents which suggest that things sent to the STA came into the possession of the second defendant, and that indeed the same fax number appears to have been used by both STA and the second defendant.

99 The Plaintiff referred me to other medical reports in the evidence with a "STA - Workers Comp" date stamp on them. My attention was also drawn to the fax numbers to which two of those reports were sent.

100 Although the evidence demonstrates that medical reports date stamped in the same manner as the report of Dr White did come into possession of the second Defendant before the TAB hearing, I still know nothing about the circumstances in which that occurred. I do not know, because the evidence is silent on this issue, why those reports were sent from an entity which was handling the workers compensation claim to the entity which employed the worker. I can speculate on a number of reasons, but that falls far short of me being able to infer why it was that they were sent. And if I can't draw any conclusion as to why they were sent then I am unable to decide when it was likely that Dr White's report was sent.

101 If I am wrong about the inferences which can be satisfactorily drawn, and if it is therefore likely that the second defendant had Dr White's report in its possession before the TAB decision on 11 November 2005, then I would have found that the Plaintiff's complaint was made out. Although there was some evidence concerning Mr Best's mental condition before the TAB, primarily in the form of evidence and reports from Dr Snowdon, the report of Dr White painted a very different picture of Mr Best. The TAB's assessment of Mr Best's ability to perceive what was happening and his reliability as an accurate witness would have been significantly effected had it been made aware of Dr White's findings.

102 These included:

> *"In my view, it is more probable than not that Mr Best suffers from chronic schizophrenia which is severe and which is progressing because he is not having appropriate treatment."*
>
> Mr Best *"was unable to provide me with an organised or coherent history. He exhibited loose associations, an inability to stay on the point, an inability to filter important information from trivial, and an apparent high degree of disorganised thinking."*
>
> Mr Best "*suffers quite a serious and genuine constitutional psychiatric disorder."*
>
> *"He is a man with very obvious and quite profound psychiatric disability who is unable to function normally in the workplace at this time."*
>
> *"Having reviewed Mr Best twice, it is my opinion that he suffers from a serious and disabling constitutional psychiatric disorder which is affecting his capacity for logical thought and which is interfering with his ability to function both at work and at home. This appears to be a longstanding problem unrelated to his employment with the State Transit Authority but which is complicating his ability to perform his work in a normal fashion."*

103 Notwithstanding the obvious importance of these findings to the reliability of Mr Best, in particular the findings of severe chronic schizophrenia which effected his capacity for logical thought, the Plaintiff fails in his claim that natural justice was denied him by reason of the failure of the second Defendant to produce Dr White's report because he has not satisfied me on the balance of probabilities that the second Defendant came into possession of the report before the TAB hearing was concluded and was thus ever under an obligation to produce it, or even capable of producing it, at the TAB hearing.

Matters said to have been ignored by TAB

104 The Plaintiff's next complaint is the TAB ignored evidence it was bound to consider. Although these matters are relied upon by the Plaintiff as an independent ground of complaint, there is considerable, and understandable, overlap between the submissions on this ground and the complaint that the TAB decision was unreasonable. As part of the submissions that some evidence was overlooked the Plaintiff suggested that the evidence was of importance and these submissions were reprised when I was asked to find that no reasonable tribunal could have reached the conclusion the TAB reached in this case.

105 Before dealing with evidence which the Plaintiff says was not taken into account by the tribunal I should makes some preliminary comments about the matter.

106 There is a difference between a tribunal failing to take evidence into account and failing to refer to that evidence in its written decision. Of course a perfect written decision would make reference to every aspect of the evidence which the TAB took into account but

such perfection is neither required nor possible. That is particularly the case where what is being examined is a decision of a lay tribunal.

107 In **Minister for Immigration and Ethnic Affairs v Wu Shiang Liang** (1996) 185 CLR 259 at 271-2, Brennan CJ, Toohey McHugh and Gummow JJ said:

> *"When the Full Court referred to "beneficial construction", it sought to adopt an approach mandated by a long series of cases, the best exemplar of which is Collector of Customs v Pozzolanic (1993) 43 FCR 280. In that case, a Full Court of the Federal Court (Neaves, French and Cooper JJ) collected authorities for various propositions as to the practical restraints on judicial review. It was said (at 287) that a court should not be "concerned with looseness in the language ... nor with unhappy phrasing" of the reasons of an administrative decision-maker. The Court continued (at 287):*
>
> > *'The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error'.*
>
> *These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."'*

108 Further, the consequences, if any, of a failure to take matters into account will depend on whether the TAB was bound to take those matters into account, see ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (1986) 162 CLR 24. But as Allsop J said in ***NAQG v Minister for Immigration and Multiculutiral and Indigenous Affairs*** [2004] FCA 1631, at [17]:

> *"...the issue as to whether the Tribunal completed its jurisdictional task arises if it can be seen to have decided a fact without addressing material before it which, on its face, contradicted the conclusion that it was otherwise minded to draw and which it expressed."*

109 With these principles in mind I will turn to the evidence which the Plaintiff said the TAB failed to take into account. The evidence the subject of these submissions can be conveniently grouped as follows:

> Evidence suggesting that the Plaintiff had given an exculpatory version soon after the altercation occurred.
>
> Evidence suggesting that Mr Best was uninjured when he left the Lady Northcott, that evidence coming from other employees of the second Defendant and CCTV footage.
>
> Evidence of the Plaintiff's character and good work record.

Evidence of previous problems which Mr Best had with Ferry Masters and workmastes.

Evidence of Dr Snowden which qualified his written reports.

The Plaintiff's Exculpatory Version

110 The first alleged omission concerns whether the Plaintiff had given an exculpatory version of events soon after the altercation occurred (many of the matters discussed here also arise in the breach of contract case). Before the tribunal was a hand written note of Mr David Thus, the Operations Manager of the second Defendant who carried out the initial investigation into what occurred and who recommended to Ms Sinclair, the second Defendant's Chief executive officer, that the Plaintiff's position be terminated.

111 The Plaintiff submits that the note suggests that at a meeting between himself, the Plaintiff and others, the Plaintiff says that he *"defended (him)self"* after Mr Best *"took a lunge at Morton"*. That is inconsistent the way the tribunal treated this issue (see TAB decision page 3). However for reasons which I will explain in more detail later when dealing with the breach of contract case, the note does not carry the meaning that the Plaintiff presses. Read in context, the words *"defended self"* clearly mean that the Plaintiff told Mr Thus that before Mr Best lunged at him, he defended his earlier actions in the wheelhouse.

112 There is a significant difference between the Plaintiff's claim that he put forward an exculpatory version raising the issue of self-defence, and what I find really happened. The complaint that the TAB failed to take into account the Plaintiff's exculpatory version as noted by Mr Thus can not succeed if no exculpatory version was put forward.

Evidence suggesting that Mr Best was uninjured when he left the Lady Northcott.

113 The Plaintiff suggests that it was a significant matter that no employee of Sydney Ferries who saw Mr Best immediately after he was allegedly attacked by the Plaintiff observed any injuries to him. Further the Plaintiff relies on CCTV footage, shown in Court, which showed no sign of Mr Best being in pain or his movements being restricted.

114 I do not regard this as significant at all. The evidence which the Plaintiff says the TAB should have referred to was of little, if any, weight.

115 The suggestion lying behind the Plaintiff's claim that Mr Best appeared to be uninjured when he left the Lady Northcott is that in the period between doing so and attending his General Practioner, Mr Best was injured in some other way.

116 The injuries which Mr Best were later found to have suffered were not such that they would be observed by someone who did not carry out a fairly close examination of Mr Best, nor were they of a nature which would have necessarily led to Mr Best moving in a different way to that which could be seen on the CCTV footage.

The Plaintiff's character and good work record.

117 The Plaintiff complains that in deciding whether Mr Best's evidence that he was assaulted by the Plaintiff should be accepted, the TAB made no reference to evidence regarding the Plaintiff's character and good work record with the second Defendant.

118 It can not be denied that those matters should have been taken into account by the TAB in determining not only whether the Plaintiff should be dismissed from his position, but also the preceding question of whose version of the altercation to believe. And the tribunal's decision would clearly have been improved by a reference to the Plaintiff's good character as being a matter it had considered in deciding whether Mr Best was telling the truth.

119 However the tribunal clearly had before it Mr Thus' report in which the Plaintiff's good character and good work record is referred to and the TAB obviously had regard to that report in reaching the decision to dismiss the Plaintiff's appeal.

120 Further the TAB implicitly made reference to a matter which may have tended to have caused the Plaintiff to act out of character when it referred to the Plaintiff's evidence:

> *"that he had been emotionally drained on the day the incident occurred, having attended the funeral of a fellow work colleague that morning".*

121 In those circumstances I do not regard the failure of the TAB to make specific reference to the Plaintiff's character and good work record as significant.

Evidence of previous problems which Mr Best had with Ferry Masters and workmates.

122 The Plaintiff complains that the tribunal did not refer to all of the evidence before it concerning problems which Mr Best had with workmates and Ferry Masters in its written decision. The TAB did refer to such matters but the Plaintiff's complaint seems to be that it did not refer to all of them.

123 There is no doubt that Mr Best had problems at work and that these appear to have been caused by his personality and psychiatric condition. But it is not the case that the evidence demonstrated a propensity for violence on the part of Mr Best. Indeed, if anything, it tended to suggest that Mr Best was a person with whom others could easily get annoyed. In oral submissions the Plaintiff made much of an incident involving a Mr Wigney, but when the evidence on that issue was examined it was clear that Mr Best was the victim of violence rather than the instigator of it.

124 The Plaintiff's submission seems to have been this: Mr Best was an unusual man who had trouble fitting in, therefore he was more likely to have attacked the Plaintiff than the Plaintiff was to have attacked him. The latter proposition simply does not flow from the former.

Evidence of Dr Snowden which qualified his written reports

125 The tribunal relied heavily on the evidence of Dr Snowden, a psychiatrist who examined Mr Best and provided reports which, inter alia, suggested Mr Best's honesty. The Plaintiff complains that the TAB did not refer to oral evidence of Dr Snowden which the Plaintiff said contradicted or at least qualified his written reports.

126 It is impossible for any decision to refer to every part of the evidence which was heard in a particular case. Where reference is made to evidence, a tribunal should ensure that the reference or extracts quoted fairly reflect the whole of the evidence of a particular witness. I am not satisfied that those parts of Dr Snowden's evidence to which the tribunal did not refer in its decision significantly qualified those parts of the evidence to which the TAB did refer. It does seem that the TAB missed the suggestion in Dr Snowden's oral evidence that whilst honest, Mr Best's recollection may be inaccurate because of some misperception or misremembering of the events, but I do not regard that as of such significance as to justify a finding that the tribunal failed to take into account material which it was bound to take into account.

127 Thus having considered those matters which the Plaintiff relies on as suggesting that the TAB decision should be quashed because it failed to take into account evidence which it was bound to take into account, the Plaintiff fails on this ground.

Was the TAB Decision Unreasonable?

128 The decision of the TAB turned, almost completely, on whether it accepted Mr Best's version of events. It was a *"word against word"* case. This meant that a close analysis of independent evidence tending to support one version or another was required, and also that what may in other cases be quite minor matters of corroboration, have the potential to be very significant.

129 The tribunal decision is, it must be said, a surprising one given the evidence before it, in particular the evidence of the Plaintiff's good character, the equivocal nature of the injuries suffered by Mr Best, Mr Best's psychiatric condition and the circumstance that the Plaintiff caused the Lady Northcott to leave Taronga Zoo on its return journey to Circular Quay. I will refer these matters, and explain their significance, later in this judgment but before I do so I should emphasise that the test as to whether the tribunal's decision demonstrates jurisdictional error is not whether it is surprising. The Plaintiff is required to demonstrate much more than that.

130 The Plaintiff advanced an argument that the decision of the TAB was so unreasonable that it met the test to be found in ***Associated Provincial Picture Houses v Wednesbury Corporation*** [1948] 1 KB 223. The test for Wednesbury unreasonableness is stringent, and before the decision of the TAB in this case can be said to be unreasonable in that sense, the decision must amount to an abuse of power or be so devoid of plausible justification that no reasonable person could have taken that course (see ***Wyong Shire Council v MCC Energy Proprietary Ltd*** [2005] NSWCA 86 at [79]). It is not simply a case of me deciding whether I

would have come to a different view or that the TAB's decision was against the evidence. The test is much more stringent than that.

131 The TAB was heavily influenced by the opinions of Dr Snowden. His reports were before the TAB and he gave oral evidence. Even in a lay tribunal hearing, where the rules of evidence do not apply, some aspects of Dr Snowden's reports require comment. It is of course a necessary part of a psychiatrist's work that the psychiatrist evaluate the accuracy of the history given by a patient. But Dr Snowden's expression of opinion as to the veracity of Mr Best went far beyond that.

132 Lawyers acting for the second Defendant wrote to Dr Snowden on 22 July 2005 advising him that the Plaintiff's criminal matter had been dismissed. They also told Dr Snowden that at the criminal hearing the Plaintiff's lawyers had submitted that Mr Best was the aggressor and the Plaintiff was the victim. They advised Dr Snowden that they anticipated that the Plaintiff's lawyers would run a similar case in the Transport Appeal Board proceedings. Accordingly they sought his opinion as to Mr Best's propensity to be an aggressor in such an altercation and assault the Plaintiff. Dr Snowden's reply, of 4 August 2005 expressed his opinion as to the veracity of Mr Best, based on his examinations of Mr Best and a "background of practising in psychiatry now for 23 years".

133 However Dr Snowden seems to have been influenced, and certainly pointed out, matters which required no background of practice in psychiatry and which revealed something of a mindset:

> *"I would also comment, but perhaps more in the area of fact, that, as is pointed out in your enclosed documentation, it was Mr Morton who approached Mr Wiseman-Best's area, for what seems to have been no apparent reason other than anger at him.*
>
> *I think, too, as a matter of fact, which also, however, I think needs to be taken into account in psychiatric evaluation, and in the context of the question that you have asked, it was Mr Wiseman-Best who was physically injured, and significantly so, and not Mr Morton."*

134 What Dr Snowden does not take into account is the possibility that the Plaintiff, now that he was no longer constrained by the criminal proceedings might reveal innocent explanations for the matters he seems to have regarded as quite important in demonstrating Mr Best's veracity. In particular Dr Snowden does not appear to have given any thought to the possibility that the injuries suffered by Mr Best occurred in the course of an altercation in which the Plaintiff was defending himself. In those circumstances the TAB should not have given the weight to Dr Snowden's evidence which it appears to have given.

135 The TAB found "implausible" the evidence of the Plaintiff that having pushed Mr Best in self-defence he would turn and leave the Engineer's Mess without seeing or hearing what had happened to Mr Best. I recognise that minds may differ as to whether that is implausible or not and that at least one member of the tribunal, namely the Vice-Chairperson who prepared the written decision, did find that such conduct was implausible (I say "at least one member" because there is no evidence to suggest that Ms Ambler or Mr Ferrarelli saw

the final decision before it was published and we do not know whether the draft shown to Ms Ambler included that finding). However even with those constraints I have to say that I do not find the Plaintiff's description of his conduct as implausible at all. If Mr Best lunged at him and he pushed Mr Best backwards in self-defence, it is not at all surprising that the Plaintiff would be anxious to leave the Engineer's Mess in a hurry in order to avoid the risk of further violence from Mr Best. The Engineer's Mess is quite small and, even if the door to it was shut it would take only a matter of moments for the Plaintiff to leave.

136 The Plaintiff also suggests that the dimensions of the Engineer's Mess are such that the events could not have occurred as Mr Best described. I have two things to say about that submission. The first is, that if Mr Best was telling the truth and he was being beaten by the Plaintiff, he could hardly be expected to give an accurate account as to precisely what occurred. The second is that, even if what could have happened is tested against what Mr Best said happened without an allowance being made for mistakes, then I fail to see how it would be impossible for Mr Best's version of events to have occurred. To take but one example, the Plaintiff suggests that it would not have been possible for Mr Best to have run past him and left the Engineers Mess. When asked about this Mr Best at the TAB came up with an explanation. He said that it was a possibility that the Plaintiff had taken pity on him. That is an entirely possible explanation. Even if that explanation was not accepted, the dimensions of the Engineer's Mess are not such that it would be impossible for a man who feared further violence to have forced his way past the Plaintiff.

137 The nature of the Engineer's Mess is, however, quite important in considering whether the injuries which Mr Best undoubtedly suffered could have occurred in a way other than that he suggested. I consider it entirely possible that Mr Best's injuries could have been caused when he fell backwards after being pushed forcefully by the Plaintiff. There were a number of hard objects in the room, in particular the desk and a microwave and if the Plaintiff is to be believed he pushed Mr Best forcefully in their direction. Indeed after Mr Best left the vessel, and replacement crew arrived, it was discovered that the glass turntable for the microwave had shattered (it was on Mr Best's left and the fracture to Mr Best's zygomatic arch was also on the left side of his face). The injuries seen by Mr Best's General Practitioner were consistent with him having struck a hard object or objects after being pushed backwards by the Plaintiff.

138 Of course the medical evidence is also consistent with Mr Best's version. In those circumstances the medical evidence does not support Mr Best's version nor does it support the Plaintiff's version. It is neutral, but it was not treated that way by the TAB.

139 The Plaintiff suggests that the gap of four hours between leaving the vessel and seeing a medical practitioner would be enough time for Mr Best to have suffered the injuries seen by his doctor in a manner unconnected with the altercation which had taken place between him and the Plaintiff on the Lady Northcott. In circumstances where the Plaintiff himself admits pushing Mr Best in a confined space with many hard objects around, the suggestion that the injuries which Mr Best was later found to have suffered, including the fractured zygomatic arch discovered some time later, were unconnected with that altercation is, with respect, fanciful.

140 I have already mentioned the complaint of the Plaintiff regarding the failure of the TAB to refer to the character and work record of the Plaintiff. That was clearly relevant to

his credibility. That is not to say that people can't act out of character at times, particularly after being at a funeral and in response to a difficult person, (both circumstances faced by the Plaintiff in this case) but it is a consideration which I have taken into account.

141 There is one particular factual circumstance which points strongly to the inaccuracy of Mr Best's evidence concerning the beating he alleged he suffered at the Plaintiff's hands.

142 That circumstance is that the Plaintiff commenced the journey from Taronga Zoo wharf to Circular Quay but, upon learning Mr Best was not on the vessel, he immediately returned the Lady Northcott to Taronga Zoo wharf. I will explain why I regard those events as highly significant.

143 It is an operational requirement that when a ferry is approaching a dead end wharf such as Circular Quay, the Engineer is present in the Engine Room, ready to take control of the ferry if the bridge controls, operated by the Master, fail. Clearly the idea is that if when the vessel is approaching Circular Quay and the Master discovers that he or she is unable to stop the vessel, the Master can signal to the Engineer in the Engine Room who is able to put the engines astern.

144 Thus, after Mr Best left the vessel at Taronga Zoo wharf, the Plaintiff could not have properly returned the ferry to Circular Quay if he knew Mr Best was not on board. He did commence that return journey, but the uncontradicted evidence is that, as soon as he discovered that Mr Best was not on the vessel, he returned to Taronga Zoo wharf, had the vessel tied up, and remained there until a relief crew arrived and stop the vessel before it collides with anything.

145 This uncontradicted evidence strongly suggests that the Plaintiff would not have caused the vessel to leave Taronga Zoo wharf on its way back to Circular Quay if he knew that Mr Best was unable or unwilling to carry out his duties as an Engineer, those duties being essential for the safety of the ferry when approaching a dead end wharf such as Circular Quay. (The plaintiff's commendable work record is also relevant here). But had the Plaintiff beaten Mr Best, as Mr Best alleged, then the Plaintiff would have known that there was a real risk that Mr Best was injured to the extent that he would not be able to carry out his duties, or that he was at least, having been beaten by the Plaintiff, likely to be unwilling to carry out his essential functions on the vessel.

146 So the evidence demonstrates that the Plaintiff would not have approached Circular Quay without an Engineer willing and able to carry out his duties. It also demonstrates that he returned the Lady Northcott to Taronga Zoo wharf as soon as he discovered that there was no Engineer on board. These two matters strongly suggest that he did nothing which would have led him to believe that the Engineer was either injured or reluctant to perform his functions on board the ferry.

147 Of course there are other explanations for the Plaintiff's conduct and I have considered alternatives raised by the second Defendant in the course of its submissions, but I remain of the view that the circumstances I have described above strongly support a conclusion that Mr Best was not accurate when he gave evidence describing the attack upon him by the Plaintiff.

148 Of course the TAB had the undeniable advantage of seeing the witnesses and being able to assess their demeanour, a matter which the TAB specifically referred to in relation to Mr Best, but there is a growing realisation that human beings, even judges, are very poor at telling whether a person is lying on the basis of their demeanour. This is especially the case where the witness genuinely believes their version to be true, even if objectively it is not (a possibility raised by Dr Snowdon).

149 When I take into account also the following matters:

> The evidence of the Plaintiff's good character and good work record;
> Evidence regarding the psychiatric condition of Mr Best insofar as it effected his thinking and reliability as a witness;
> My finding that the Plaintiff's evidence as to what he did after pushing Mr Best was not implausible;
> The neutrality of the medical evidence;
> The damaged microwave;
> The standard of proof required, see ***Briginshaw v Briginshaw*** (1938) 60 CLR 336;
> And even paying due allowance to the advantages the tribunal had of seeing the witnesses give their evidence;

I am satisfied that the TAB decision was one which is so devoid of plausible justification that no reasonable tribunal could have reached it.

Conclusion concerning the supervisory Jurisdiction Case

150 The Plaintiff has made good a number of his complaints regarding the conduct of the hearing before the TAB. The result is that the decision of the TAB must be quashed and the matter remitted to the TAB for determination in accordance with this judgment. It is appropriate, given the nature of the matters on which the Plaintiff has succeeded, that I order that the TAB be differently constituted.

The Contract Case

151 The second part of the case before me concerned the Plaintiff's claim for damages suffered as a consequence of what it said was the second defendant's repudiatory breach of an implied term in the Plaintiff's contract of employment with the second defendant.

152 The second Defendant's response to the contract case is as follows:

There was an implied term in the contract of employment between it and the Plaintiff that it would not conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between it and the second Defendant.

Nothing it did breached that implied term.

Even if its conduct did amount to a breach of that implied term, the conduct did not amount to a repudiation of the contract of employment.

Even if it did act in such a way as to repudiate the contract, then that caused no loss.

And finally, even if there was a loss, it was limited to one week's wages.

153 I find that the plaintiff fails to establish that the second defendant breached the contract of employment. Even if I am wrong, and the second defendant did breach the implied term, then that breach did not amount to a repudiation of the contract.

There is an Implied Term of Mutual Trust and Confidence

154 In submitting that there was an implied term of mutual trust and confidence, the Plaintiff relied on the recent decision of Rothman J in ***Russell v Trustees of the Roman Catholic Church for the Arch-Diocese of Sydney*** [2007] NSWSC 104 (hereinafter referred to as ***Russell)***. The second Defendant, although pointing out that Rothman J himself noted that the implication of a term of mutual trust and confidence in an Australian employment contract awaited definitive clarification by an appellate court, accepted that principles of judicial comity applied such that I would only take a different view from that of Rothman J if I though his Honour was clearly wrong.

155 The second defendant did not submit that I would conclude that Rothman J was wrong. Indeed I found his Honour's reasoning, particularly at [124] – [133], compelling, and so will follow the decision in ***Russell***. The second Defendant, did however, urge caution and suggested that I should not expand or enlarge upon it. I will therefore find that there was an implied term in the contract of employment between the Plaintiff and the second Defendant that the second defendant would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or damage the mutual trust and confidence between employer and employee.

The implied term was not breached by the second Defendant

156 The next step is to consider whether the implied term was breached by the employer.

157 The Plaintiff does not suggest the contract was breached by his termination. The Plaintiff relies on a preceding step, namely the investigation by Mr Thus into the allegation made against the Plaintiff, and the contents of the report which he prepared.

158 Before I look at Mr Thus' report in more detail I should note a factual matter regarding the content of Mr Thus' report.

159 Although Mr Thus' report is in evidence before me, and although it refers to some documents being attached to that report, I do not know whether any other documents were also attached to the report such that they became part of it. It was not possible, given what has occurred in these proceedings since the report was prepared, to identify with precision what was attached to the report. In these circumstances I will proceed on the basis that the only documents attached to the report were those which are referred to in the body of the report itself.

160 I should also make some general comments about the obligations, which arise from the implied term, of an employer which is investigating allegations of misconduct made against one of its employees.

161 Firstly, there is no doubt that the duty of an employer arising from the implied term applies to the conduct of disciplinary investigations such as those carried out by Mr Thus, see for example ***King v University of St Andrews*** (2002) SLT 439.

162 Secondly the employer could not be expected to carry out an investigation of a standard which might be carried out by the police. The relationship of mutual trust and confidence is not damaged or destroyed simply because the second defendant's investigation and report into the allegation were imperfect. The second Defendant's business was in the area of ferry services (see s 22 Transport Administration Act 1988) not in the area of investigation of serious criminal assaults.

163 Thirdly the extent of an employer's obligation under the implied terms must be informed by the circumstance that, generally, an employer is under no obligation to afford natural justice to its employees. As Rothman J said in ***Russell***:

> *"Generally, and disregarding for present purposes the implied duties already discussed, there is no duty, under the common law, to afford natural justice in employment. See, by way of analogy,* ***Public Service Board of New South Wales v Osmond*** *(1986) 159 CLR 656. The law is summarised in* ***Johnson,*** *supra (at 540), by reference to* ***Malloch v Aberdeen Corporation*** *[1971] 1 WLR at 1578, where, at 1581, Lord Reid said:*
>
> > *"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."'*

164 Thus, in deciding what conduct of an employer will damage or destroy mutual trust and confidence, the employee cannot complain that he or she was denied natural justice. To hold otherwise would be to create a duty to afford natural justice in all contracts of

employment, thus creating by the back door a duty which the common law has consistently held to be absent from the relationship between employer and employee.

165 The Plaintiff says that the investigation and report of Mr Thus were so deficient that they amounted to repudiatory breaches of the contract of employment between the Plaintiff and the second defendant. The Plaintiff relies on three areas of allegation:

> Failing to record the Plaintiff's representations.
>
> Drawing an adverse inference from the Plaintiff's exercise of his right to silence.
>
> Failing to take exculpatory material into account..

No Failure to record the Plaintiff's representations.

166 It is a very important part of the Plaintiff's case that Mr Thus knew from a very early stage that the Plaintiff was suggesting that he had acted in self-defence, but failed to include that information in his report to Ms Sinclair. The factual basis for that submission arises primarily from a document headed *"Incident Lady Northcott"* which Mr Thus prepared on 27 April 2004.

167 Included within this document appears to be Mr Thus' handwritten summary of what the Plaintiff told him. I will quote the relevant parts:

> *"Eng. Mess Room – conversation asked for apology.*
> *became abusive and defended self.*
> *took lunge at Master.*
> *Incred. Arrogant.*
> *Did not want to expand on altercation as it could may incriminate yourself.*

168 It is a crucial, indeed almost fundamental, part of the Plaintiff's submissions that the words *"and defended self"* represent a claim of self-defence being raised by the Plaintiff. But that is clearly not the case. Read in their context, as they must be, they can only suggest that the Plaintiff was telling Mr Thus that after he asked Mr Best for an apology, Mr Best became abusive and defended his actions before he took a lunge at the Plaintiff.

169 The words *"and defended self"* come before the words *"took lunge at Master"*. There would be no need for the Plaintiff to act in self defence before Mr Best lunged at him. Further, the words *"became abusive and defended self"* only really make sense if it is the same person who has become abusive and defended (him)self in the context of an event which began when the Plaintiff asked Mr Best for an apology.

170 The words *"and defended self"*, coming after the words *"became abusive"*, have but one rational meaning, namely that the plaintiff was telling Mr Thus that Mr Best attempted to justify his earlier conduct before the Plaintiff described what occurred in the Engineers Mess.

171 As the report makes clear, the Plaintiff told Mr Thus that he did not want to expand on the altercation as it could, or perhaps may, incriminate him. So all Mr Thus was told by the

Plaintiff about any violence, was that Mr Best had taken a lunge at him. In those circumstances the injuries to Mr Best are unexplained.

172 Much of the Plaintiff's case concerning the breach of the implied term of mutual trust and obligation was based on the assumption that the words "and defended self" should have alerted, or even did alert, Mr Thus to the Plaintiff's version of events being that he was forced to defend himself after Mr Best took a lunge at him. But that assumption is unfounded.

173 The Plaintiff also complains that Mr Thus did not interview Alistair Gault, the Sydney Ferries Duty Manager who brought a relief crew to the Lady Northcott straight after the incident. The evidence of the Plaintiff was that he said to Mr Gault, inter alia:

> *"When I went in to the engine room Tyson started screaming at me and rushed at me like the incredible hulk. I was pretty shocked, and put my hands up and pushed him back real hard and turned around and went straight out of the engine room".*

174 The complaint of the Plaintiff is that Mr Thus did not interview Mr Gault, presumably on the basis that if he had, this exculpatory version would have been made known to him.

175 However it is clear from Mr Thus' report itself (see page three) that he had considered a report from Mr Gault dated 27 April 2004. Mr Thus was entitled to assume that Mr Gault would have included all relevant matters in his report. It may have been better if Mr Thus had actually interviewed Mr Gault rather than just relying on his written report, but a failure to do so is not the sort of omission which would lead to a breach of an implied term of mutual trust and obligation.

176 Similar comments can be made regarding Mr Thus' failure to interview Mr Turner who was also present on the Lady Northcott's bridge with the Plaintiff and Mr Gault as the vessel made its way back to Circular Quay. Mr Thus was entitled to assume that relevant matters concerning what was said on the bridge would have been made known to him through Mr Gault's report which, as I have noted above, Mr Thus did take into account.

177 The Plaintiff also complains that Mr Thus did not make reference in his report to an email which he had received from Colin Pursehouse, a union official assisting the Plaintiff. Included in that email is this statement:

> *"Steve has told you that he was shocked by Tyson's demeanour and the aggression which he displayed, he has also characterised his own response as one of defence against that aggression".*

178 This is perhaps the high point of the evidence on which the Plaintiff is entitled to rely as suggesting that a claim of self defence was put to Mr Thus. However all that the relevant part of that email relates to is Mr Pursehouse putting forward his interpretation of what the Plaintiff had already told Mr Thus, about which Mr Thus was well able to draw his own conclusions.

179 Thus as far as the first complaint which the Plaintiff makes about Mr Thus' report is concerned, namely that his representations went unheard, I am not satisfied that he represented to Mr Thus that he was acting in self-defence nor am I satisfied that Mr Thus' failure to interview others to whom the Plaintiff may have said he was acting in self defence was unreasonable.

180 I repeat that it is not to the point that a better investigation could possibly have been done. The implied term of mutual trust and obligation is not breached merely by Mr Thus' investigation and report failing to be perfect.

No adverse inference drawn from privilege against self-incrimination

181 The Plaintiff claims that Mr Thus wrongly drew an inference adverse to the Plaintiff from the fact that he, given that criminal proceedings were against him were on foot, exercised his right to silence. There is a substantial difference between noting that someone has exercised their right to silence as an explanation for the absence of an explanation from that person, and the situation where an inference is drawn that the exercise of the right to silence tends to suggest guilt.

182 The former is legitimate and I am prepared to proceed on the basis, without deciding, that for an employer to do the latter is wrong.

183 At a number of places in Mr Thus' report he refers to the fact that the Plaintiff has exercised his right to silence, but at no stage does he tend to suggest that that is a matter suggestive of the Plaintiff's guilt. Of course the exercise of the right to silence makes it easier to conclude that one person's version of events is true when the exercise of the right to silence leaves that person's version uncontradicted (see ***Weissensteiner v The Queen*** (1993) 178 CLR 217).

184 In the summary of Mr Thus' report, on page seven, this appears:

> *"Mr Morton had not denied the allegation of assault against Mr Best or offered any explanation or defence against the allegation".*

185 In the body of the report, at page four, Mr Thus had earlier written:

> *"To date Mr Morton has not offered an explanation or defence to the allegations set out in the E1 Form. Correspondence from Mr Morton's lawyers advises that Mr Morton denies any guilty conduct and that he disagrees with the version of events asserted by Mr Best and categorically denies that he is guilty in any way of wrong doing or impropriety. However Mr Morton has not specifically denied assaulting Mr Best nor has he responded to the specific allegations in the E1 Form"*

186 Mr Thus also attached to his report, correspondence with the Plaintiff's solicitor's in which they repeated that the Plaintiff intended to exercise his right not to incriminate himself.

187 A careful reading of Mr Thus' report enables me to conclude that in Mr Thus' report he records that the Plaintiff was exercising his privilege against self-incrimination without suggesting that an inference should be drawn from that fact. It is a relevant matter that, as at the date of the preparation of the report, the Plaintiff had not offered an explanation or defence against the allegation, in particular he had not responded to the E1 Form (which appears to be the form used when an employee is given notice of a possible breach of State Transit policies and regulations).

No failure to consider exculpatory evidence

188 The Plaintiff relies on a number of aspects of Mr Thus' investigation and report which he says establish that available evidence was not taken into account.

189 The first category is evidence which suggests that at the time Mr Best left the Lady Northcott he was uninjured. Evidence was put before me in the form of CCTV footage, and statements from employees of the second Defendant, to demonstrate the evidence which Mr Thus could have obtained before completing his report.

190 Given the nature of the injuries observed by doctors when Mr Best later sought medical treatment I do not find it all surprising that Mr Best appeared uninjured, both on the CCTV footage, and to the employees of Sydney Ferries. Nor do I find it surprising that Mr Thus would not have obtained such evidence, again in the light of injuries which he then knew Mr Best to have suffered.

191 The submission from the Plaintiff seems to be that Mr Thus should have investigated the possibility that the injuries observed by Mr Best's general practitioner occurred in between Mr Best leaving the Lady Northcott and him arriving at his doctor's rooms. I regard Mr Thus' apparent view that the injuries seen by Mr Best's doctor were occasioned during the altercation with the Plaintiff as being entirely justified.

192 The next matter which the Plaintiff said was exculpatory of him but ignored by Mr Thus concerned Mr Best's record. In order to establish that Mr Best had a history of misconduct the Plaintiff referred in his written submissions to evidence given by Mr Best at the TAB hearing. It goes without saying that that evidence was not available to the second Defendant at the time Mr Thus prepared his report, but even if it is assumed that the second Defendant's service records of Mr Best showed, or enquiries would have revealed, that Mr Best had a history of being put off other ferries by Masters, and conflict with other employees, that would not take the matter very far at all. Indeed Mr Best had a history of strange and antagonistic behaviour, which might well be the sort of thing which would lead one of his superiors to get angry with him, particularly if the superior had been to a workmate's funeral that day (as had the Plaintiff), and make it more likely that he would assault Mr Best.

193 The Plaintiff relies on an instance where Mr Best bashed his fist, and possibly even his head, against a locker as demonstrating aggressive behaviour. But there is a significant difference between aggressive behaviour towards an inanimate object and aggressive behaviour towards a human being.

194 Also during the course of submissions the Plaintiff relied on an incident involving Mr Wigney but upon further examination of the actual evidence it was revealed that Mr Best was the victim rather than the aggressor.

195 It is significant that although the Plaintiff referred throughout the course of the hearing before me to Mr Best's prior conduct as supporting the suggestion that he was the aggressor and the Plaintiff the victim, there was no evidence before me that Mr Thus would have discovered, from Mr Best's employment file, that Mr Best had ever been violent towards any other employee of Sydney Ferries in the past, despite a history of discord with Ferry Masters and other employees.

196 Next the Plaintiff complains that Mr Thus relied on a report prepared by a loss adjuster, Ian Whitehead despite the fact that there were, what the Plaintiff said, "significant omissions" from his investigations. I have already referred to many of the "significant omissions" alleged. They include a failure to visit the Engineer's Mess on the Lady Northcott in order to see whether Mr Best's version of events was plausible (a matter I have dealt with in the first part of this judgment when discussing whether the TAB decision was unreasonable), a failure to investigate Best's service files (a matter I have dealt with immediately above), and a failure to enquire whether there was a wharf hand at Taronga Zoo (a matter I have dealt with in discussing whether it is surprising that Mr Best failed to show signs of injury).

197 Quite apart from the fact that Mr Thus was entitled, without breaching the implied term of mutual trust and obligation to rely on a report prepared by, on the face of it, a qualified loss adjuster, I do not regard the alleged omissions in Mr Whitehead's report as establishing the second Defendant's breach of the implied term.

198 It was also submitted that Mr Thus failed to refer to the prior good character of the Plaintiff and his commendable service with the second Defendant on the issue as to whether he did what Mr Best alleged. The report does make reference to the Plaintiff's commendable service record, but only on the issue of what should happen to the Plaintiff given Mr Thus' finding that he has misconducted himself.

199 Having examined those matters which the Plaintiff says were conduct of Mr Thus amounting to a breach of the implied term, let me now consider the question of whether such conduct was calculated or likely to destroy or seriously damage the relationship of confidence and trust between the Plaintiff and the second Defendant.

200 Any criticisms I have been able to make of Mr Thus' investigation and report are made with the benefit of hindsight and after hearing a case which ran for six days in the Supreme Court. The Plaintiff failed to make out almost all his criticisms of Mr Thus' conduct and all that is left are some relatively minor matters where Mr Thus could have perhaps done a better job.

201 It must be remembered that the adjective "seriously" appears before the word "damage" in the formulation of the implied term. There is a duty, without reasonable and proper cause, not to conduct oneself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (***Russell*** at [135]). It must also be borne in mind that what is required is a balancing, in good faith, of the interests of the employer against adverse effects it may have on the employee (***Russell*** at [160]). I note that in ***Russell***, Rothman J found that the employer in that case breached the implied term by failing to interview "Mr X", a person making allegations against Mr Russell, the employee, face to face. This tends to suggest that the implied term imposes a fairly onerous duty upon the employer. For an employer to have been held to have breached the implied term by not conducting a face to face interview with Mr X, who was instead over the telephone, might be thought to impose an onerous duty on the employer, especially when it is realised that this would have required travel from Sydney to Perth where Mr X lived.

202 So in deciding whether any of Mr Thus' conduct breached the employer's duty of mutual trust and confidence I have applied a standard which is onerous as well. Even setting the standard at that level I am not satisfied that the second Defendant breached the implied term. To require that the second Defendant, in particular Mr Thus, do more than he did, would be to truly require perfection which, although an employee may hope for, a failure to achieve is neither calculated nor likely to destroy or seriously damage the relationship of mutual trust and confidence which exists in all contracts of employment.

203 Another way of expressing the same implied term is that the employer has a duty to exercise prudence, caution, and diligence, with due care to avoid or minimise adverse consequences to the employee in the conduct of the employment relationship (see ***Russell*** at [134]). Formulating the implied term in that manner emphasises the absence of a requirement that the employer's conduct will be perfect. The reference to "due care" makes that clear.

Even if Breached, the Contract was not Repudiated.

204 My finding that the implied term of mutual trust and confidence was not breached makes it unnecessary for me to decide any other matters relating to the breach of contract case. But for more abundant caution I should say that even if I were wrong, and even if the implied term was breached by Mr Thus in his investigation and report, I would not have found that that amounted to a repudiation of the contract of employment between the second Defendant and the Plaintiff.

205 The Plaintiff submits that all breaches of an implied term of mutual trust and confidence must be repudiatory, but I do not agree.

206 In Professor Carter's *"Breach of Contract"* (second ed) [701] – [705], the various meanings of repudiation are discussed before the author adopts the meaning:

> *"A repudiation of obligations occurs when a party to a conduct clearly indicates an absence of readiness or willingness to perform contractual*

obligations if the absence of readiness or willingness satisfies the requirement of seriousness"

207 Greig and Davis in "The Law of Contract", The Law Book Company Ltd, (1987) at p 1198 describe repudiation in these terms:

> *"Where one party indicates, by his words or conduct, that he is unable, or is no longer willing, to provide the other with the benefits expected under the contract, it is often said that he has 'repudiated' or 'renounced' his obligations thereunder. But there is no magic in such words. They are merely a convenient means of expressing the notion that a refusal to perform, or a breach committed during the course of performance, is sufficiently serious to give rise to the right to terminate. However, because of the use of such expressions in the latter context, any idea that the words necessarily connote the requirement of an intention on the part of the defaulting party not to continue with performance must be rejected."*

208 In **Shevill v Builders Licensing Board** (1982) 149 CLR 620, Gibb CJ said, at 634:

> *"a contract may be repudiated if one party renounces his liabilities under it – if he evinces an intention no longer to be bound by the contract or he shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way".*

This passage was cited with approval in ***Progressive Mailing House Pty Ltd v Tabali Pty Ltd*** (1985) 157 CLR 17 and ***Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*** (1989) 166 CLR 623.

209 The Plaintiff's argument is that any breach by an employer of a term in an employment contract relating to mutual trust and confidence must necessarily evince an intention no longer to be bound by the contract or show an intention to fulfil the contract only in a manner substantially inconsistent with the employer's contractual obligations and not in any other way.

210 The Plaintiff relies on those passages in ***Russell*** where Rothman J speaks of the fundamental nature or a relationship of trust and confidence to a contract of employment, (see in particular [127 – 128]). However the implied term, as described by Rothman J, includes an obligation not to seriously damage the relationship of confidence and trust between the parties and it is entirely conceivable that one party's conduct may seriously damage that relationship without being of such seriousness as to demonstrate an intention to no longer be bound by the contract or demonstrate an intention to fulfil the contract only in a manner substantially inconsistent with contractual obligations.

211 Perhaps the Plaintiff is correct that if the relationship of mutual trust and confidence is destroyed then that does amount to repudiatory conduct, but where the implied term imposes an obligation not to damage the relationship I am satisfied there can be conduct which damages the relationship (thus breaching the term) which does not repudiate the contract.

212 Indeed I am satisfied that if, contrary to what I found above, the second Defendant's conduct did amount to a breach of the implied term of mutual trust and confidence, it was not of such seriousness that it indicated an unwillingness to perform the second Defendant's contractual obligations or to no longer be bound by the contract or to demonstrate an intention only to fulfil the contract in a manner substantially inconsistent with the second Defendant's obligations and not in any other way.

213 In this regard I refer to, without repeating, my analysis of the particular conduct of Mr Thus said by the Plaintiff to have breached the implied term. None of that conduct was of such seriousness, or of such a fundamental nature to the contract of employment between the second Defendant and the Plaintiff, that it amounted to repudiatory conduct.

Conclusion regarding contract case

214 The Plaintiff has failed to demonstrate that the second Defendant breached the contract of employment between it and the Plaintiff. Nor has the Plaintiff been able to demonstrate that the conduct on which it relied, namely that of Mr Thus in investigating and preparing a report on the incident involving the Plaintiff and Mr Best, was repudiatory of the contract of employment. In those circumstances the Plaintiff fails in that part of the case which relates to the alleged breach of contract.

I will not decide damages

215 Although what I have written above is enough to dispose of the Plaintiff's case concerning the alleged breach of contract, I would ordinarily go on to determine damages to avoid unnecessary expense in the event that my decision is overturned. However I will not do that in this case because of the uncertainty as to the extent of damage, uncertainty which will remain until the result of the new TAB hearing is known. It may well be that the Plaintiff is re-instated.

216 In accordance with the submission of the Plaintiff, having decided that the Plaintiff succeeds in his challenge to the TAB hearings, and having decided to quash the TAB determination, I could not have decided the issue of damages even if the Plaintiff had succeeded in his breach of contract claim.

217 In those circumstances I can not determine what damages would have been awarded if the Plaintiff had succeeded in his breach of contract claim, because the extent of damage will depend on what happens when the new TAB hears the Plaintiff's appeal against his dismissal.

Conclusion and Orders

218 The Plaintiff has succeeded on that part of the case which involves the supervisory jurisdiction of this Court but failed in that part of its case which was brought under the original jurisdiction of this Court. In those circumstances the orders I make are these.

1. The decision of the Transport Appeals Board of 11 September 2005 dismissing the Plaintiff's appeal is removed into this Court and quashed. The matter is remitted to a differently constituted Transport Appeals Board for determination according to law.

2. Verdict for the second Defendant in relation to the Plaintiff's claim that the second Defendant breached the contract of employment between him and the second Defendant.

219 I note that the parties will be making submissions about the appropriate order for costs.

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LAST UPDATED: 14 December 2007