

CASENOTE: *Schneider v Warrnambool City Council [2021] VSC 337 (11 June 2021)*

Mr Schneider ('Employee') was appointed as CEO of Warrnambool City Council ('Council'). The Employee's employment was subject to the local government legislation, including the *Local Government Act 1989 ('LG Act 1989')* and the *Local Government Act 2020 (Vic) ('LG Act 2020')*.¹ On 13 July 2020 the Council terminated Mr Schneider's appointment and employment as CEO in reliance on cl 14.1 of his contract of employment. That clause conferred on the Council a right of termination for no reason, if a payment equivalent to 12 months of Mr Schneider's remuneration package were made in lieu of notice.

Mr Schneider sued, seeking to set aside the termination.

-Dispute and trial-

It is necessary to set out some preliminary facts. In around mid-June 2020, Councillor Neoh (on behalf of himself and three other councillors, one of whom was Councillor Gaston) obtained advice about termination of the Employee's employment. This advice was not shared with other councillors – including Councillor Herbert, who was at that time the mayor of the Council.

On 28 June 2020, Councillor Gaston called a special meeting, including a resolution considering termination of the Employee's employment. There was no discussion of reasons. The motion to terminate 'the employment of the Chief Executive Officer' was passed, based upon the votes of Councillors Gaston, Neoh, and the two other councillors.

Hearing

McDonald J of the Supreme Court of Victoria heard the Employee's application for relief. In particular, section 94 of the LG Act 1989 was in issue. That section (headed 'The Chief Executive Officer') made provisions for the engagement of a CEO, on a permanent basis, tougher with provisions for remuneration and advertising of the role if vacant. Section 94 required that a CEO be engaged under a contract, without providing for terms of that contract.

At the hearing, the Employee claimed:

- a. that section 94 of the LG Act 1989 includes the power to terminate the appointment of Mr Schneider as CEO;
- b. that when the Council terminated the Employee's appointment and employment on 13 July 2020, it exercised this statutory power which was subject to a requirement that Mr Schneider be afforded natural justice; and
- c. because no natural justice was afforded to the Employee, the termination should be quashed, in the nature of *certiorari*, pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015*. This was in effect:
 - i. quashing the decision to terminate the Employee's appointment and employment; and
 - ii. seeking declaratory relief, including a declaration that the Council breached the rules of natural justice when it terminated his appointment and employment as CEO.

¹ These were the *Local Government Act 1989 (Vic)* (Act No 11 of 1989); and the *Local Government Act 2020 (Vic)* (Act No 9 of 2020). The second of these Acts substantially modified and repealed the first.

The Council submitted that no requirement of natural justice existed and that the ultimate source of termination between the parties was the employment contract. The Council submitted that there was no provision in the LG Act 1989 to infer or imply natural justice – and no natural justice provisions were present in that legislation. The judge rejected the contention that Schneider's employment as CEO was governed solely by his employment contract with the Council.

-The Judge's reasoning-

McDonald J found that:

- on the basis of the provision of the *Interpretation of Legislation Act 1984* (Vic), the power to employ Mr Schneider included the power to 'remove a person appointed to the office': section 41(1)(b) of the IL Act. Section 41(2) of the IL Act provides that an appointment 'may [be] terminate[d] at any time'; and
- his Honour also found that the exercise of the statutory power of termination was invalid and of no legal effect because the termination decision was affected by a denial of natural justice.

His Honour ordered that the Council's decision to terminate of the Employee be quashed, effectively reinstating the Employee. His Honour also found that the exercise of the statutory power left little room for discretionary considerations to justify withholding the relief sought, and that the relief should be ordered. His Honour found that the decision of the Council purporting to terminate Mr Schneider was invalid.

-Rationale of the decision-

This case is unusual, taking an administrative law approach to both quash an employer decision (and to effectively undo a contractual provision) by reason of the legislative requirements underpinning the engagement. By contrast, the judge was undoubtedly right to reject the contention that Mr Schneider's employment as CEO was governed solely by his contract with the Council – self-evidently the LG Act 1989 and the LG Act 2020 have roles to play; though the latter to a limited extent.

However, this case is also legally strained: it relies upon the terms of the LG Act 1989, to imply 'natural justice' obligations as a legislative requirement where no clear intention exists. Rather, there is a clear parliamentary intention not to stipulate a CEO's contract in the legislation. In a similar case regarding public service legislation, Tucker v State of Victoria,² the Victorian Court of Appeal reached the opposite conclusion, based upon provisions with similar terms to the LG Act 1989.³ It is submitted that the appeal Court was correct, which casts doubt upon Schneider.

Utility is an issue in this decision. That is, where the Council were not satisfied with the CEO, even after reinstatement by the Court, then it would be open to the councillors to re-start termination procedures, using this decision as a guide. Given section 94 (and all of Division 3 of Part 4 of the LG Act 1989) ceased operation on 1 July 2021 (and section 44 of the LG Act 2020 is of slightly different effect) it is not clear whether this decision may be repeated.

**TIM DONAGHEY
AICKIN CHAMBERS**
17 September 2021

² Tucker v State of Victoria [2021] VSCA 120, per Kyrou, McLeish and Sifris JJA.

³ See Tucker, above n2 at [242]-[248]; see also [252]-[257].