

LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

LOCAL GOVERNMENT ACT 1993

PIT NO. 2/2000

**DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT
RE COUNCILLOR DOMINIC WY KANAK, WAVERLEY COUNCIL (2)**

**STATEMENT OF DECISION CONCERNING
THE DECISION TO CONDUCT
A HEARING**

1. This Statement ought to be read in conjunction with the facts set out in a Statement of Decision (3), of even date in the substantive proceedings.
2. After Councillor Kanak had made the admissions which he did at the hearing on 17 December, after the Tribunal had received submissions as to what consequences, if any, ought to flow by way of penalty, and after the Tribunal had reserved its decision, Councillor Kanak filed a Notice of Motion which sought a review of the Tribunal's decision made and communicated to the parties in June 2001 to conduct a hearing into the complaint.
3. While the basis of the suggested review was not clear from the motion, at a hearing held on 4 February 2002 it became clear that the basis of the application, in substance, was that Councillor Kanak had not been given an opportunity to be heard by the Tribunal prior to the Tribunal's decision to conduct a hearing into the substance of the complaint. As Councillor Kanak said "The Tribunal shouldn't have decided to conduct a hearing for a trial without hearing from the accused at the indictment".

The application was, on 4 February 2002 refused for reasons to be given.

The reasons are set out below.

4. Even if one were to leave aside the question of the admissions made by Councillor Kanak at the hearing on 17 December and whether he should be permitted to re-open the substance of the case or re-agitate any point inconsistent with such admissions (which in the Tribunal's decision he ought not and for reasons given contemporaneously with this decision) the application assumes that in the circumstances, there was some obligation to give Councillor Kanak an obligation to be heard before the decision to conduct a hearing took place. In the Tribunal's opinion, no such obligation existed.
5. The authorities make it clear that whether or not, in any decision making process, there is an obligation to permit someone to be heard, and if so to what extent, depends on all the circumstances.
6. The decision to conduct a hearing, of itself, does not relevantly impinge upon any proprietary or other rights or interests of a councillor. There is nothing, in the Tribunal's opinion, intrinsic in the process which would indicate a need to afford such an opportunity. It could not be said, in the Tribunal's opinion, that there was any legitimate expectation of a right to be heard at that stage of the process.
6. The statutory framework does not require or envisage that Councillor Kanak be given such an opportunity. The legislation expressly envisages he would

be given notice and particulars of the decision, once made. The legislation expressly permits him to be heard if a decision is made to conduct a hearing into the complaint. (cf. ***Twist v. Council of the Municipality of Randwick*** (1976) 136 CLR 106, ***Bread Manufacturers of New South Wales v. Evans*** (1980) 180 CLR 404). The exercise of statutory powers such as here involved in coming to a decision to conduct a hearing traditionally are not the subject of an obligation to accord natural justice or an opportunity to be heard before such a decision is made (see ***Oates v. Reid*** (1998) 81 FCR 296 at 313, ***Commissioner of Police v. Reid*** (1989) 16 NSWLR 453 particularly at 461 where it is said “*It has been well recognised that a decision to commence criminal proceedings does not require the observance of the principles of natural justice*”).

The person involved has full opportunity to be heard and to participate in the hearing concerning the substance of the matter. There is no requirement of procedural fairness that he have an opportunity to be heard at the earlier stage of the process.

7. Councillor Kanak’s contention that he ought to have been afforded natural justice before the decision was taken to conduct a hearing in the present matter is rejected.

DATED: 1 March 2002

D.P.F. OFFICER QC
Pecuniary Interest Tribunal