MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Romanski v. Stone; Black v. Stone* [2024] QMC 2
PARTIES:	**MAREK ROMANSKI** (Applicant) **V** **MARK DOUGLAS STONE (Resources Safety and Health Queensland)** (Respondent)
PARTIES:	**DENNIS BLACK** (Applicant) **V** **MARK DOUGLAS STONE (Resources Safety and Health Queensland)** (Respondent)
FILE NO/S:	MAG – 001887705/21(9) MAG – 00188647/21(9)
DIVISION:	Industrial Magistrates Court
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	25/01/2024
DELIVERED AT:	Brisbane
HEARING DATE:	14/12/2023
MAGISTRATE:	Pinder
ORDER:	1. The application in respect of the respondent's statement of contentions to strike out paragraphs 15(d), 86(b)(c), 88(a)(b), 89, 90, 93 – 95, 97, 100 – 103 is refused. 2. That paragraphs 18 and paragraphs 115, 116, and 117 of the respondent's Statement of Contentions be struck out. 3. I will hear the parties further in respect of any consequential directions orders and costs.
CATCHWORDS:	*Coal Mine Safety and Health Act 1999* (Qld).

Industrial Relations Tribunal Rules 2011 (Qld).

Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (2011) 245 CLR 446.

Minister for Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41.

Taxation Administration Act 1996 (NSW).

Administrative Appeals Tribunal Act 1975 (Cth)

Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing, and Community Services (1992) 39 FCR 225.

Comcare v Burton (1998) 157 ALR 522.

Dawson v Greyhound Racing Victoria (2017) VSC 123.

Victorian Civil and Administrative Tribunal Act 1988 (Vic).

Racing Act 1958 (Vic).

Shi v Migration Agents Registration Authority (2008) 235 CLR 286.

Dalliston v Taylor & Anor (2015) ICQ 017.

COUNSEL:	N. Boyd for Applicant Romanski
	C.A. Massy for Applicant Black
	M.T. Hickey OAM with Ms S M Derrington & Mr L C Brabazon for Respondent
SOLICITORS:	McGinnes & Associates Lawyers for first and second Applicant
	Resources Safety & Health Queensland for Respondent

Applications in an existing proceeding

[1] The appellants Romanski and Black have both filed applications in an existing proceeding seeking that identified paragraphs in the respondent's Statement of Contentions be struck out.

[2] In the alternative, further directions are sought including further disclosure by the respondent.

[3] The applicant Romanski seeks orders:

(1) That paragraphs 15(d), 86(b)(c), 89, 90, 93 – 95, 97, 100, 101-103 of the respondent's Statement of Contentions be struck out.

(2) Alternatively, that:

(a) The applicant file and serve an answer to the respondent's Statement of Contentions by 4pm on 23 November 2023;
(b) The respondent make disclosure of any and all documents directly relevant to the allegations at paragraphs 15(d), 86(b)(c), 89, 90, 93 – 95, 97, 100, 101-103 of the respondent's Statement of Contentions by 30 November 2023;
(c) The applicant file and serve any further affidavits by 4:00pm on 14 December 2023;
(d) Paragraphs 9-22 of the Order of 24 August 2023 be varied with dates to be fixed after consultation between the parties and the Court.

(3) The Respondent pay the Appellant's costs of and incidental to this application, including costs thrown away.

[4] The applicant Black seeks orders:

(1) That paragraphs 18 and 115 – 117 of the respondent's Statement of Contentions be struck out.
(2) Alternatively, that:

(a) The applicant file and serve an answer to the respondent's Statement of Contentions by 4pm on 23 November 2023;
(b) The respondent make disclosure of any and all documents directly relevant to the allegations at paragraph 18 and 115 to 117 of the respondent's Statement of Contentions by 30 November 2023;
(c) The applicant file and serve any further affidavits by 4:00pm on 14 December 2023;
(d) Paragraphs 9-22 of the Order of 24 August 2023 be varied with dates to be fixed after consultation between the parties and the Court.

(3) The Respondent pay the Appellant's cost of and incidental to this application, including costs thrown away.

The parties' material

[5] The parties have filed and rely on the following material:

Applicants Romanski and Black:

- Affidavit M.E. Wood filed 15 November 2023.
- Affidavit M.E. Wood filed 11 December 2023.

Respondent Stone

- Affidavit B.J. Szima filed by leave 14 December 2023.

[6] Counsel for both applicants and the respondent have conveniently provided comprehensive written outlines of argument.

The court's power to strike out

[7] Counsel for both applicants submit that the court has power to strike out the impugned of paragraphs in the respondent's Statement of Contentions relying on:

- Section 240 of the *Coal Mine Safety and Health Act* (**CMSH**).
- Rule 113 of the *Industrial Relations Tribunal Rules 2011* (Qld) (**Rules**).
- The inherent or implied powers of the court to control its own proceedings.

[8] Conveniently and very properly, counsel for the respondent does not take issue with that and concedes:

> *"Your Honour can proceed on the basis that a court of course, does have some power irrespective of where it finds it's basis.*[1]*"*

The jurisdictional issue – court restricted to the grounds contained in the respondent's show cause notice and decision

[9] Both applicants Romanski and Black contend that the court lacks jurisdiction to entertain what each assert are *"new claims"* articulated in the respondent's Statement of Contentions.

[10] The applicants submit that the court, on the hearing of this appeal, is expressly limited to considering the grounds for cancellation detailed in the respondent's show cause notice and subsequent decision.

[11] Upon that basis the applicants seek orders to strike out paragraphs in the respondent's Statement of Contentions respectively as follows;

(a) Romanski

Paragraphs 15(d), 86(b)(c), 88(a)(b), 89, 90, 93-95, 97, 100, 101-103.

(b) Black

Paragraphs 18, 115-117.

[12] Whilst each of the counsel for the applicants Romanski and Black frame the proposition using different language, the respective contentions are effectively the same.

[13] The applicants cite and rely on a number of authorities that they respectively submit support the proposition contended for that the court *"lacks jurisdiction"* where the alleged ground (here contained in the respondent's Statement of Contentions) is expressed differently from that of the original decision maker (here, the respondent in the show cause notice and decision).

[14] The applicant Black relies on *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* (2011) 245 CLR 446 and *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41.

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[1] Transcript page 6 [20]

[15] In *Tasty Chicks Pty Ltd* (supra), the review was concerned with a provision of a New South Wales *Taxation Administration Act 1996*, whilst in *Pochi* (supra) the appeal was from a review decision of the Administrative Appeals Tribunal who's review power was found in the *Administrative Appeals Tribunal Act 1975* (Cth) at s 43.

[16] The statutory provision in the present appeal is of course contained within the *Coal Mining Safety and Health Act 1999* (Qld) (**CMSH**) at s 240 and s 241.

[17] The applicant Romanski similarly cites and relies on decisions, concerned with the Administrative Appeals Tribunal and its conferred review power. Those decisions, *the Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing, and Community Services* (1992) 39 FCR 225, *Comcare v Burton* (1998) 157 ALR 522, and *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 are all appeals from the Administrative Appeals Tribunal and its review decisions and are concerned with the review power of the tribunal conferred by s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth). The applicant refers to various statements in each of those decisions to support his proposition, that on the hearing of this appeal, the courts jurisdiction is confined to reconsideration of the questions that were before the decision-maker.

[18] The Administrative Appeals Tribunal's review powers are conferred by s 43 of the *Administrative Appeals Tribunal Act*.

[19] Section 43 relevantly provides:

> *"Tribunal's decision on review*
>
> *(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:*
>
> *(a) affirming the decision under view;*
> *(b) varying the decision under review; or*
> *(c) setting aside the decision under review and:*
>
> *(i) making a decision in substitution for the decision so set aside; or*
> *(ii) remitting the matter back for reconsideration in accordance with any directions or recommendations of the Tribunal."*

[20] The authorities relied upon by the applicants, considering the AAT's statutorily conferred review powers, do support the applicant's contended position that in those matters the Tribunal was confined to a reconsideration of the questions that were before the original decision-maker.

[21] The applicant Romanski also relies on the Victorian Decision of *Dawson v Greyhound Racing Victoria* (2017) VSC 123. That decision was an appeal from a decision of the Victorian Civil and Administrative Tribunal (**VCAT**) and dealt with a review of a disciplinary decision of the Greyhound Racing Victoria Appeals and Disciplinary Board.

[22] It is contended by the applicant Romanski that the decision of the Supreme Court of Victoria supports the proposition contended for that it was jurisdictional error to consider an issue substantially different from the question considered by the primary decision-maker.

[23] The review jurisdiction of **VCAT** is created by s 42 of the *Victorian Civil and Administrative Tribunals Act 1998* (**VCAT Act**) and s 51 of that Act.

[24] In considering the application of that decision to the present circumstances, it is necessary to consider those statutory provisions conferring jurisdiction on the review tribunal. Section 42 provides as follows:

What is a review jurisdiction?

(1) Review jurisdiction is jurisdiction conferred on the Tribunal by or under an enabling enactment to review a decision made by a decision-maker.
(2) For the avoidance of doubt, the Tribunal's jurisdiction under Part 7 of the **Guardianship and Administration Act 2019** is original jurisdiction, not review jurisdiction.

[25] The effect of that provision is that the review jurisdiction is confirmed by the enabling act – in that case the *Racing Act 1958* (Vic).

[26] Section 51 provides for the functions of the Tribunal on review and is in these terms:

(1) In exercising its review jurisdiction in respect of a decision, the Tribunal –

(a) has all the functions of the decision-maker; and
(b) has any other functions conferred on the Tribunal by or under the enabling enactment; and
(c) has any functions conferred on the Tribunal by or under this Act, the regulations and the rules.

(2) In determining a proceeding for review of a decision the Tribunal may, by order-

(a) affirm the decision under review; or
(b) vary the decision under review; or
(c) set aside the decision under review and make another decision in substitution for it; or
(d) set aside the decision under review and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of the Tribunal.

(3) Subject to subsection (4), a decision of a decision-maker as affirmed or varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a decision-maker –

(a) is deemed to be a decision of that decision-maker; and
(b) subject to any contrary order by the Tribunal, has, or is deemed to have had, effect from the time at which the decision under review has or had effect.

(4) Subsection (3)(a) does not apply for the purposes of –

(a) an application to the Tribunal for review of the decision; or
(b) an appeal under Part 5.

(5) If an applicant does not appear (personally or by representative) at the hearing of a proceeding for review of a decision, the Tribunal must confirm the decision.

[27] The provision is markedly different from the appeal provisions under the **CMSH**. Notably because in exercising its review decision, the Tribunal:

- Has all the functions of the decision maker.

- Has other functions conferred by the enabling Act.
- Has functions conferred by the Tribunal rules.

[28] The statutory provision empowering the Review Tribunal in *Dawson v Greyhound Racing Victoria* (supra) is in markedly different terms from the appeal provisions of the **CMSH**.

[29] The decision is of little assistance in determining the appropriate approach to the present interlocutory application.

[30] The issues raised on the current interlocutory applications require consideration of the statutorily conferred appeal powers pursuant to the **CMSH**.

[31] Section 240 of the **CMSH** relevantly provides:

- The practice and procedure for the appeal are to be in accordance with the rules of court or, if the rules make no provision or insufficient provision, in accordance with the directions of the court.
- The appeal must be by way of rehearing, unaffected by the original decision-makers decision.
- In deciding an appeal, the court;

(a) Is not bound by the rules of evidence and
(b) Must observe natural justice.

[32] The respondent correctly submits that it is the express powers conferred upon this court for the hearing of the appeal that require consideration to resolve the issue. The parties agree that there are no direct authorities in respect of the conduct of appeals under s 240 of the **CMSH**.

[33] The respondent refers to and relies on the decision of *Dalliston v Taylor & Anor* (2015) ICQ 017. The then President of the Industrial Court Martin J in considering s 246 of the **CMSH** found:

> *"[12] In other words, section 246 uses a form of words which is more clearly understood as an appeal de novo. An appeal de novo involves a rehearing of the evidence by the appellant court. It is analogous to a new trial.*

> *[13] The parties were agreed that I should proceed as if this matter was, in effect, a trial by which the directive would be reviewed and that I would need not have regard to the decision of the first respondent."*

[34] Martin J continued:

> *"[14] … But, the exercise I must embark on requires that I stand in the shoes of the Chief Executive and exercise the power afresh. In doing that, the question for this court is determined by the provision of the Act relating to acceptable levels of risk. Thus, it is not a question of comparing what was in place but, rather, whether the replacement vehicles satisfy the Act so far as risk is concerned."*

[35] Martin J in *Dalliston* (supra) was concerned with s 246 of the **CMSH** which provision did not contain the additional and relevant provisions of s 240, namely:

- For deciding an appeal against decision to impose a civil penalty, information that was not available to the CEO making the decision must not be taken into account.
- In deciding an appeal, the court;

  (a) Is not bound by the rules of evidence and
  (b) Must observe natural justice.

[36] As the applicant Romanski in his submissions correctly directs the court, Kiefel J in *Shi* (supra) observed:

> *"That the nature of the review conducted depends on the terms of the statute conferring the right of review, rather than upon identification of it as an administrative authority trusted with a particular type of function."*

[37] The enquiry required in the present applications is therefore directed to *"s 240 Hearing Procedures of the **CMSH**."*

[38] The respondent correctly contends that it is not the powers under the *Administrative Appeals Tribunal Act 1975* or the *Victorian Civil and Administrative Tribunal Act 1988* that are relevant but rather, an enquiry to the express powers conferred upon the court for the hearing of this appeal namely, s 240 of the **CMSH**.

[39] Upon consideration of s 240 – Hearing Procedures, and the far broader powers that it confers upon the court and consistent with the approach of Martin J in *Dalliston* (supra) the court is not restricted to consideration, upon the hearing and determination of this appeal, strictly to the expressly articulated grounds of the respondent (as original decision maker) in the show cause notice and decision.

The prejudice argument – The respondent should not be permitted to advance a new case

[40] The applicant Romanski contends that the respondent in the impugned paragraphs in the Statement of Contentions seeks at a late stage to advance a new case.

[41] The first three grounds in the Statement of Contentions are uncontroversial, however, the applicant Romanski contends that ground four, as it is expressed and particularised in the Statement of Contentions, seeks to advance a wholly new case. The respondent submits in relation to the impugned allegations that they are simply a reframing of existing issues.

[42] Ground 4 in the notice of contentions is contained in paragraphs 84 – 103.

[43] The ground is alleged to be:

> *"**Failing to withdraw workers to the surface on 28 August 2018.**"*

[44] Paragraphs 84 – 103 of the Statement of Contentions then proceed to particularise what are alleged to be Romanski's obligations pursuant to s 39(1)(c) of the **CMSH** and the factual basis upon which he is alleged to have contravened health and safety obligations enlivening a ground for cancellation pursuant to s 197A(1)(a) of the **CMSH**.

[45] In both the notice of proposed action (see annexure to affidavit M.E. Wood MEW1) and the notice of cancelation – the decision (see affidavit Wood MEW2), ground 4 is expressed by the respondent in these terms.

> *"Not withdrawing workers to the surface on 28 August 2018 upon detection of ethaline and conducting an IMT being a reasonable and necessary course of action, in contravention of s 39(1)(c) of the Act."*

[46] Both the notice of proposed action and the notice of cancellation (the Decision) are lengthy documents in which the respondent articulates firstly in the notice of proposed action the concerns, and secondly in the decision the findings, in respect of this ground.

[47] Whilst in the Statement of Contentions – contravention 4 expresses the ground and factual basis, in different terms to the show cause notice and decision, upon a careful consideration I am satisfied that this does not take the applicant Romanski by surprise, and there is no resulting prejudice.

[48] The applicant Romanski in the interlocutory application in the alternative seeks further particularisation and disclosure, in the event that the impugned paragraphs in the Statement of Contentions are not struck out. Upon consideration of the respondent's observations in relation to the expert report commissioned by the applicant from Professor Cliff, the matters of which the applicant complains now, appear to have been within his contemplation for the purpose of responding in this appeal. The reframing of ground 4 in the Statement of Contentions does not give rise to such prejudice as to warrant the impugned paragraphs being struck out.

[49] The applicant Romanski can be further heard in relation to directions orders for supplementary disclosure or particularisation.

Applicant Black's additional contentions

[50] The applicant Black in addition to joining with the applicant Romanski in relation to the *"lack of jurisdiction"* contentions, submits there are two additional bases on

which the impugned paragraphs (relating to his appeal) should be struck out, namely:

- The new claims are bound to fail because they do not plead sufficient material facts.
- The respondent should not be permitted to advance that ground where the respondent expressly abandoned that ground.

[51] The applicant Black seeks to strike out paragraphs 18, 115, and 117 of the respondent's Statement of Contentions.

[52] It is convenient to consider the second limb of the applicant Black's basis for strikeout of the impugned paragraphs which relates to the respondent's earlier expressed abandonment of that ground.

[53] Paragraph 18 and paragraphs 115 – 117 of the respondent's Statement of Contentions relate to allegations concerning the applicant Black failing to ensure that no person was exposed to an unacceptable level of risk in contravention of s 39(1)(c) of the **CMSH** (contained in paragraph 18) and the particularisation of that ground contained in paragraphs 115 – 117.

[54] The applicant Black and the respondent's outlines, and the affidavit material, all uncontroversially confirm the following:

- The respondent initially issued a show cause notice expressly identifying an alleged contravention of s 39(1)(c) of the **CMSH** - on 8 October 2020.
- Subsequently the respondent withdrew that show cause notice and issued a new show cause notice that did not contain any allegation that an obligation pursuant to s 39(1)(c) had been contravened - on 28 June 2021.
- Subsequent to the commencement of this appeal, in the course of the exchange of correspondence advancing the appeal to a hearing, the respondent expressly abandoned that ground in correspondence dated 10 June 2022.
- The applicant Black became aware of an attempt to *"resurrect"* ground 2 only upon the delivery by the respondent of the Statement of Contentions on 4 October 2023.

[55] The respondent's counsel's outline, whilst asserting that there are no new facts raised in the allegations in the Statement of Contentions, is silent and does not address the issue of the respondent's previous express abandonment of ground 2.

[56] The respondent's counsel's oral submissions on that issue were similarly limited to submissions in effect that:

- The appeal was not a case subject to ordinary pleading rules and the Uniform Civil Proceeding Rules that oblige the respondent to comply with particular prescriptive rules which require a case to be pleaded in a particular way.
- That particulars can be provided in due course.
- That what was ultimately required is that they (the applicants) be given procedural fairness and natural justice.

[57] Indeed, it is the last of those points in oral submission by the respondent's counsel that has the most force.

[58] Section 240(4) of the **CMSH** requires:

> *"In deciding an appeal, an Industrial Magistrates Court…b) must observe natural justice."*

[59] The respondent has not once but twice expressly abandoned ground 2 by:

- Withdrawing the initial show cause notice giving a second notice that did not include that ground.
- In correspondence directly responding to this issue raised by the applicant's solicitor's expressly abandoning that ground.

[60] In complying with the obligation to afford the applicant Black natural justice, the respondent having twice abandoned the impugned ground – ground 2, I conclude that the respondent ought not be permitted now on the hearing of the appeal to resurrect that ground and consequently, the applicant Black is entitled to have paragraphs 18 and paragraphs 115 – 117 of the respondent's Statement of Contentions struck out.

Disposition

[61] In respect of the applicant Romanski, I make the following orders:

- The application in respect to the respondent's statement of contentions to strike out paragraphs 15(d), 86(b)(c), 88(a)(b), 89, 90, 93 – 95, 97, 100 – 103 is refused.

[62] In respect of the applicant Black, I make the following orders:

- That paragraphs 18 and paragraphs 115, 116, and 117 of the respondent's Statement of Contentions be struck out.

[63] I will hear the parties further in respect of any consequential directions orders and costs.

Magistrate J N L Pinder

25/01/24