

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *TW v Director-General, Department of Justice and Attorney-General* [2020] QCATA 120

PARTIES: **TW**  
(appellant)

**v**

**DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL**  
(respondent)

APPLICATION NO/S: APL258-19

ORIGINATING APPLICATION NO/S: CML286-18

MATTER TYPE: Appeals

DELIVERED ON: 7 August 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Aughterson (Presiding)  
Member Kanowski

ORDERS:

- 1. The decision of the Tribunal made on 9 August 2019 is set aside.**
- 2. The review proceeding is returned to the Tribunal, differently-constituted, for reconsideration, with the parties being allowed the opportunity to examine the psychologist SW and to produce such further evidence as determined by the Tribunal at the rehearing.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – DENIAL OF NATURAL JUSTICE – where tribunal placed no weight on a psychologist’s report because psychologist not produced for cross-examination – whether denial of procedural fairness

*Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28

*Kioa v West* (1985) 159 CLR 550

## REPRESENTATION:

Appellant: T C Schmitt instructed by Navarro Lawyers  
 Respondent: C Borger, Principal Legal Officer, Blue Card Services

APPEARANCES: This matter was heard and determined on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (*‘QCAT Act’*)

## REASONS FOR DECISION

## Introduction

- [1] This is an appeal by TW against a decision made by the Tribunal at first instance on 9 August 2019.<sup>1</sup> In that decision, the decision of the Director-General, Department of Justice and Attorney-General (*‘Blue Card Services’*) that TW’s case is exceptional within the meaning of the *Working with Children (Risk Management and Screening) Act 2000* (Qld) (*‘Working with Children Act’*) was confirmed. The effect of classifying TW’s case as *‘exceptional’* is that he cannot obtain a blue card for working with children.
- [2] In the appeal form, several grounds were advanced. However, the only ground ultimately pressed is:
- The member erred in failing to place any weight on the letter authored by the Applicant’s treating psychologist in circumstances where the member made findings adverse to the Applicant in respect of certain psychological assessments and, consequently, his present risk to children.
- [3] In the reasons at first instance it is stated:<sup>2</sup>
- SW is a treating psychologist who met with the Applicant. She provided a letter in support of the Applicant. The Applicant did not call SW for cross-examination due to her being on leave. Accordingly, the Tribunal does not place any weight on her evidence.
- [4] As argued, the appeal focussed primarily on whether the approach of placing no weight on the psychologist’s letter denied TW procedural fairness.
- [5] Both parties were legally represented at the hearing at first instance. Early in that hearing, the parties were asked to identify the material they would be *‘relying on’*.<sup>3</sup> Among other material, the legal representative for the respondent referred to the report of the psychologist.<sup>4</sup> Almost immediately following that, TW’s legal representative, Ms Navarro, stated that the psychologist would not be called as she

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<sup>1</sup> *TW v Director-General, Department of Justice and Attorney-General* [2019] QCAT 209.

<sup>2</sup> *Ibid.*, [86]. Later in the reasons, at [105] it is stated: *‘The Tribunal accepts that the Applicant has consulted with a psychologist however it was limited to two occasions within the last six months. The Applicant said that he found it helpful and he would see her again, however there is no evidence of a plan for ongoing psychological counselling.’*

<sup>3</sup> Transcript of hearing, 1-16.

<sup>4</sup> *Ibid.*

was on leave.<sup>5</sup> At that point, the following exchange occurred between Ms Navarro and the learned Member:<sup>6</sup>

MS NAVARRO: Yes. I think that everything has been canvassed in the written submissions, and I've indicated which witnesses we would be seeking to call. Can I just raise one issue in terms of the psychologist. She is not being called today, because she is currently on leave. So there was just that issue as to why I'm unable to call her ... but I would be seeking that the tribunal rely upon that material that's been filed by the psychologist.

MEMBER: Sure.

- [6] At that time, nothing was said by the respondent's legal representative in relation to that issue and no qualification was made in relation to her earlier indication as to the material to be relied upon. It was not until closing submissions that the respondent's legal representative stated:<sup>7</sup>

That was something that I failed to raise, is the fact that the Tribunal should consider what weight is to be given to the psychiatrist's (sic) report on the basis that she wasn't available for cross-examination, so that – that was something I should have raised earlier.

- [7] In response, the applicant submitted that it should be given 'full weight', adding:<sup>8</sup>

It's a detailed letter. There's been lengthy sessions that the applicant has attended upon with that particular counsellor. There's sufficient detail in here that I don't know for what purpose she would have been required for cross-examination in any event, and given the detail she provides in that letter, it would be my submission that the tribunal give it its full weight,

- [8] The report itself refers to the therapeutic processes undertaken by the applicant, his recognition of prior negative behaviour, his adoption of 'positive life strategies in terms of emotional and behavioural responses', his insight and the development of interpersonal skills over recent years. It is added that in the psychologist's opinion the applicant 'has addressed the underlying causes of his offending behaviour and has developed a relevant skill set that would preclude such behaviour from occurring in the future'.<sup>9</sup>

#### **Applicant's submissions on appeal**

- [9] The applicant's submissions may be summarised as follows. The approach taken by the member denied him procedural fairness. There is no rule which required SW to be called for cross-examination before her written evidence could be relied upon. If the sole basis for rejecting SW's evidence was that she was not called for cross-examination, the member should have told Ms Navarro that she was concerned about placing weight on the report in the absence of cross-examination. This is particularly so when Ms Navarro had stressed the reliance being placed by TW upon SW's opinion.
- [10] It was further submitted that if there were any objection to the psychologist's report in the absence of her being called to give oral evidence, then, in terms of s 95(1) of

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<sup>5</sup> Ibid, 1-18.

<sup>6</sup> Transcript of hearing, 1-18.

<sup>7</sup> Ibid, 1-50.

<sup>8</sup> Ibid.

<sup>9</sup> Report of SW, Registered Psychologist, 29 January 2019.

the *Queensland Civil and Administrative Appeals Tribunal Act 2009* Qld ('QCAT Act'), the applicant should have been given a reasonable opportunity to endeavour to have her made available by telephone, or, alternatively, to seek an adjournment.

[11] Further, the applicant submitted:<sup>10</sup>

Not only is the evidence of the psychologist not contested, it is uncontradicted by other evidence. To the extent it might be suggested that evidence given by the Applicant as to his own insights might be at odds with the opinions expressed by the psychologist, that suggestion may be rejected. The Applicant – an electrician of far-regional upbringing giving oral evidence under cross-examination in an adversarial setting – is less likely to eloquently describe his personal thoughts and feelings than a professional trained in the recognition and categorisation of those matters. Rather, that there might be some difference in the two highlights the importance of having professional psychological evidence before the Tribunal.

### **Respondent's submissions on appeal**

[12] The respondent's submissions may be summarised as follows. It is open to a member to place varying weight on different pieces of evidence. Clearly, the member had regard to SW's report, but decided to place no weight on it.

[13] Tribunal directions to the parties in December 2018 included a direction that all witnesses who had given witness statements or references must attend the hearing in person for cross-examination, unless the Tribunal gave leave for witnesses to attend by telephone. Further, any request for a witness to give evidence by telephone was to be made by a particular date (prior to the hearing). Similar directions were made again in March 2019. The notice of hearing included a note that witnesses must attend the hearing unless the other party advised they were not required for cross-examination. Accordingly, TW had been put on notice by the Tribunal of the requirement to have his witnesses available for cross-examination at the hearing.<sup>11</sup>

[14] In circumstances where the applicant was legally represented, he took no steps to have the matter stood down so that SW might appear by telephone, nor did he make application for the hearing to be adjourned.<sup>12</sup>

[15] It was further submitted that early in the hearing the Tribunal, at the request of the respondent, accepted into evidence material arising from notices to produce issued to the Queensland Police Service and the Magistrates Court, but added that it would be decided at a later time what weight if any would be placed on this material.<sup>13</sup> It was said that this indicated the Tribunal's approach to its deliberations.<sup>14</sup> However, it is noted that in relation to that material it was submitted by the applicant that it would be prejudicial particularly given that it contained four witness statements that were not put before the magistrate and had not been tested and proved in court.<sup>15</sup>

[16] It was also submitted that SW's report lacked 'value' as evidence, as it did not outline in detail the four considerations that the Tribunal's directions of December 2018 had said should be considered in any health report. Further, it did not comply

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<sup>10</sup> Applicant's written submissions filed 7 February 2020, [19].

<sup>11</sup> Respondent's written submissions filed 5 March 2020, [33].

<sup>12</sup> Ibid, [34].

<sup>13</sup> See Transcript of hearing, 1-10 to 1-11.

<sup>14</sup> Respondent's written submissions filed 5 March 2020, [38].

<sup>15</sup> Transcript of hearing, 1-10.

with requirements of the Tribunal's Practice Direction for expert evidence in that it did not detail SW's qualifications, refer to material relied on, or 'make a number of confirmations at the end of the report as required by the Practice Direction'.<sup>16</sup> It was submitted that although the member did not refer to these matters, they, together with the limited nature of SW's written evidence, support 'the Presiding Member's position as to the discretionary weight she placed on that evidence'.<sup>17</sup> Answers given by TW in his oral evidence indicated that his appointments with SW related mainly to his current circumstances, such as work stresses, and that he did not see any link between his past offending behaviour and a risk to children. Accordingly, the member was correct in placing no weight on SW's report 'in light of the paucity of the report itself' and the other evidence.<sup>18</sup>

### **Was TW denied procedural fairness?**

- [17] Procedure in the Tribunal is at the discretion of the Tribunal, 'subject to [the *QCAT Act*], an enabling Act and the rules'.<sup>19</sup> The Tribunal must act fairly and according to the substantial merits of the case.<sup>20</sup> The Tribunal may inform itself in any way it considers appropriate.<sup>21</sup> The Tribunal must observe the rules of natural justice.<sup>22</sup> Procedural fairness is a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.<sup>23</sup>
- [18] The purpose of review proceeding is to produce the correct and preferable decision.<sup>24</sup> The respondent is required to use its best endeavours to assist the Tribunal in making its decision on the review.<sup>25</sup> Its role is not to be adversarial, but rather to properly test the evidence relied on by an applicant.<sup>26</sup>
- [19] In our view, there has been a denial of procedural fairness. In circumstances where it is clear that the applicant was placing considerable reliance on the report of the psychologist and where there was no indication by the Tribunal that the evidence would be accorded no weight and where no issue was raised by the respondent in relation to that evidence until final submissions, the applicant was denied an opportunity to either endeavour to call the psychologist to give evidence or to seek an adjournment. The reason given for placing no weight on the psychologist's report was not that other evidence was preferred, but rather that the applicant had not produced the psychologist for cross-examination. Relatively early in the hearing, the applicant's legal representative stated that though the psychologist was not being called, reliance was being placed on her evidence. While the response of 'sure' might not be conclusive of the view of the Tribunal at that stage,<sup>27</sup> it was such that the applicant was entitled to assume that the psychologist was not required for

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<sup>16</sup> Respondent's written submissions filed 5 March 2020, [40].

<sup>17</sup> *Ibid*, [41].

<sup>18</sup> *Ibid*, [46].

<sup>19</sup> *QCAT Act*, s 28(1). 'The rules' means the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld).

<sup>20</sup> *Ibid*, s 28(2).

<sup>21</sup> *Ibid*, s 28(3)(c).

<sup>22</sup> *Ibid*, s 28(3)(a).

<sup>23</sup> *Kioa v West* (1985) 159 CLR 550, 585.

<sup>24</sup> *QCAT Act*, s 20(1).

<sup>25</sup> *Ibid*, s 21(1).

<sup>26</sup> QCAT Practice Direction No 3 of 2013, *Hearings in Administrative Review Proceedings* (updated 18 February 2019), [3].

<sup>27</sup> See paragraph 5, above.

questioning, particularly given the lack of any contrary indication on the part of the respondent prior to closing submissions.

- [20] The evidence of the psychologist was clearly relevant to the present circumstances of the applicant, relative to the question of whether this was an exceptional case, and it is impossible to ascertain what the outcome might have been had the psychologist been called to give evidence and had due consideration been given to the report in the context of that evidence.

**What is the appropriate outcome of the appeal?**

- [21] A denial of procedural fairness is an error of law. In deciding an appeal on a question of law, the Tribunal may, among other things, set aside the decision and substitute its own decision, or set aside the decision and return the matter to the Tribunal for reconsideration, with or without the hearing of additional evidence.<sup>28</sup>
- [22] We consider that the preferable approach is the latter of those two options. In our view, the respondent should be given the opportunity to cross-examine the psychologist. The hearing should be before a differently-constituted Tribunal, to avoid any apprehension of pre-judgment. Ultimately, it is for the member who hears the matter to determine what further evidence, if any, should be allowed.

**Conclusion**

- [23] The decision of the Tribunal made on 9 August 2019 should be set aside. The review proceeding should be returned to a differently-constituted Tribunal for reconsideration, with the parties being allowed the opportunity to examine the psychologist SW and to produce such further evidence as determined by the Tribunal at the rehearing.

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<sup>28</sup> *QCAT Act*, s 146.