SUPREME COURT OF QUEENSLAND

CITATION:	*Lightning Bolt Co P/L v Skinner & Anor* [2002] QCA 518
PARTIES:	**LIGHTNING BOLT CO PTY LTD** ACN 050 410 252 (applicant/appellant) **v** **MICHAEL THOMAS BYATT SKINNER** (first respondent) **DAVID CLARENCE SMITH** (second respondent)
FILE NO/S:	Appeal No 3428 of 2002 SC No 6857 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2002
JUDGES:	Davies and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	DISCRIMINATION LAW – STATE PROVISIONS – QUEENSLAND – where appellant dismissed respondents from employment – whether discrimination on the basis of age – where Anti-Discrimination Tribunal found discrimination on the basis of age – whether error of law – whether Tribunal failed to give reasons – whether Tribunal's findings supported by the evidence – whether more probable and innocent inference available on the evidence *Anti-Discrimination Act* 1991 (Qld), s 7(1)(f), s 9, s 10(1), s 10(4), s 15(1), s 15(1)(c), s 136, s 217(1) *Steinberg v Federal Commissioner of Taxation* (1972-1975) 134 CLR 640, cited
COUNSEL:	J E Murdoch SC, with C J Arnold, for the appellant A A J Horneman-Wren for the respondents
SOLICITORS:	Dibbs Barker Gosling for the appellant Roberts & Kane for the respondents

[1] **DAVIES JA:** I agree with the reasons for judgment of Philippides J.

[2] **JERRARD JA:** I have read the reasons in draft of Philippides J, and agree with her Honour's reasons and proposed order. I add only that the Tribunal made the finding which was necessary and sufficient, namely that the age of the respondents was a substantial reason for their dismissal. Portion of the appellant's written argument was that that finding necessarily implied there must be at least one other reason, which it was asserted was not identified in the judgment of the Tribunal. Accordingly, it was submitted the Tribunal did not disclose (all) the reasons for its ultimate finding.

[3] I agree with Philippides J that the judgment of the Tribunal does describe the facts from which the available inference was drawn that the discrimination complained of had occurred. The appellant's complaint that there were other and unidentified inferences available does not demonstrate an error or question of law. Section 10 of the *Anti Discrimination Act* 1991 does not require that the reasons for judgment of the Tribunal identify all the other reasons for dismissal made irrelevant by its findings.

[4] **PHILIPPIDES J:** The appellant employer, Lightning Bolt Co Pty Ltd, was the unsuccessful respondent in the Anti-Discrimination Tribunal to a complaint lodged under s 136 of the *Anti-Discrimination Act* 1991 ("the Act") by the present respondents, dismissed employees of the appellant. On 4 July 2000, the Tribunal found that the appellant had contravened the Act and made orders for compensation and costs against it. The Tribunal found that a substantial reason for the respondents' dismissal was their age. The appellant appealed unsuccessfully from the Tribunal's decision to the Supreme Court of Queensland, pursuant to s 217 of the Act. The appellant now appeals against the decision of the Supreme Court.

Relevant provisions of the Act

[5] The Act prohibits discrimination, whether direct or indirect,[1] on the basis of *inter alia* age[2] (as was the issue in the present case) in work and work related areas[3]. A person must not discriminate in *inter alia* dismissing a worker.[4]

[6] The present case was conducted before the Tribunal as one of "direct discrimination". The Act provides that direct discrimination occurs "if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different."[5] The Act also provides that "if there are 2 or more reasons why a person treats … another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment."[6]

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1 s 9 *Anti-Discrimination Act* 1991
2 s 7(1)(f) *Anti-Discrimination Act* 1991
3 s 15(1) *Anti-Discrimination Act* 1991
4 s 15(1)(c) *Anti-Discrimination Act* 1991; see generally, Part 4 Division 2 of the Act.
5 s 10(1) *Anti-Discrimination Act* 1991
6 s 10(4) *Anti-Discrimination Act* 1991

The hearing before the Tribunal

[7] The appellant carried on business manufacturing and selling a variety of fasteners such as nuts, bolts and screws. It employed the respondents (both of whom were skilled and experienced in fastenings stores) as storemen. On 31 March 2000, after a period of employment of approximately three months, both men were dismissed. The reason for their dismissal, according to the Employment Separation Certificates signed by the appellant and provided to them, was "insufficient work owing to a down turn in trade". However, on 10 April 2000, the appellant employed two younger and inexperienced men, Mr Anderson and Mr La Macchia, to do the work previously done by the respondents.

[8] Before the Tribunal, the respondents contended that they were dismissed because of the appellant's desire to replace them with younger men. The appellant denied this and contended that the respondents' employment was terminated due to lack of work caused by a number of factors, including the fact that a large customer of theirs, Websters Products Pty Ltd, had been placed in administration and ultimately into liquidation. The appellant contended that as a result, it was unable to recover money owed to it, had lost potential future trade and had therefore embarked in or about March on a cost reduction exercise. It contended that the terminations were decided on a "last employed, first out basis".

[9] The Tribunal member considered the evidence of the respondents, which he accepted as honest witnesses and whose evidence closely accorded to that given by Mr Anderson and Mr La Macchia, the two employees who replaced the respondents. The Tribunal member also referred to the evidence of Mr O'Neil, the Managing Director of the appellant and Mr Greenfield, General Manager of the appellant. The Tribunal member considered their evidence required "close scrutiny" and was sometimes "quite misleading", preferring the evidence of the respondents where it conflicted with that of Mr O'Neil and Mr Greenfield.

[10] The Tribunal rejected the evidence of the appellant's witnesses that the respondents were dismissed due to a lack of work and a need to reduce the number of storemen. The Tribunal found that there was no lack of work for the respondents at the time of their dismissal and that the loss of business from Websters Products Pty Ltd did not give rise to a need to reduce the number of storemen employed, nor any need for cost-cutting. The Tribunal concluded that the substantial reason for the respondents' dismissal was their age and that, in dismissing the respondents, the appellant had therefore contravened the Act.

The grounds of appeal

[11] Pursuant to s 217(1) of the Act, an appeal from the decision of the Tribunal lies only on a question of law. The errors of law contended for by the appellant are that:

(a) the Tribunal failed to give reasons or adequate reasons for its conclusion;
(b) the findings of the Tribunal were inadequate to ground its conclusion that the appellant had directly discriminated against the respondents on the basis of age;

(c) there was insufficient evidence to justify the Tribunal's conclusion that the appellant had discriminated against the respondents on the basis of age.

(a) Alleged failure to give reasons

[12] The appellant alleges that the Tribunal failed to give adequate reasons, because it failed to set out the findings of fact and the reasoning process for the conclusion that a substantial reason for the dismissal of both respondents was their age.

[13] I do not consider that the Tribunal member failed in this case to give adequate reasons, such as to give rise to an error of law. Although the reasoning of the Tribunal is not as explicit as it might have been, it is clear that the Tribunal reached the conclusion, that a substantial reason for the dismissal of both respondents was their age, by making the inference contended for by the respondents. The respondents had sought to discharge the burden on them of showing that a substantial reason for their dismissal was their age by asking the Tribunal to make that inference from the following facts:

(a) There was no apparent downturn in the respondent's business through the Rocklea store which was the appellant's only outlet;
(b) One week after their dismissal the appellant employed two younger and inexperienced men to do the work previously done by the respondents;
(c) The respondents' work performance had been good, as indicated in references given by Mr Greenfield;
(d) Shortly before the dismissals, an employee of the appellant was overheard saying to Mr O'Neil that he should employ younger storemen as they "would be … ambitious …easier to train, and they would be hired on the basis that they work in the store … then go out on the road as sales representatives". While there was no evidence of a response by Mr O'Neil, he acknowledged that that statement accorded with the philosophy applied by the appellant in the appointment of Mr Anderson and Mr La Macchia;
(e) When Mr Leclos, the head storeman, moved from his position the respondent Smith would have been next in line after the respondent Skinner to fill the vacancy, but was not approached by the appellant.

[14] It is clear from the Tribunal's reasons that the above matters were determined in the respondents' favour and that the inference drawn by the Tribunal was based on some or all of those matters.

(b) Alleged inadequacy of findings of fact and alleged insufficiency of evidence to ground a discrimination finding

[15] The appellant contends that the Tribunal's findings did not support the conclusion that the appellant discriminated against the respondents on the basis of age. In particular, it was said to be important that the Tribunal did not make any express finding that the appellant had treated the respondents less favourably than younger men, or that the appellant would not have dismissed younger employees in similar circumstances.

[16] As was stated by the learned judge at first instance, it was necessary for the Tribunal to find that young men would not have been dismissed in similar circumstances, but that was implicit in the Tribunal's finding that a substantial reason for the dismissal was the respondents' age.

[17] There is no question that the Tribunal could draw the inference which it did. The only question can be whether it should have drawn the inference. That was clearly a question of fact and one which it was open to the Tribunal to draw on the basis of the matters referred to above. Additionally, the Tribunal having rejected the appellant's evidence as to the reasons for the respondents' dismissal and having further found that it had lied about the reasons, it may be that in the circumstances those lies also supported the drawing of the inference.[7]

[18] In any event, it is clear that the appeal being limited to questions of law, these grounds of appeal concerning the alleged inadequacy of the findings of fact and insufficiency of the evidence are not properly raised. What the appellant seeks to do by raising these grounds of appeal is to obtain a review of the matter on its merits. That is clearly impermissible.

[19] The appellant raised an additional argument concerning the insufficiency of the evidence to ground the inference made by the Tribunal as to the basis for the dismissals. It was contended that the Tribunal, having rejected the argument that the reason for the dismissals was a down turn in business, should have gone on to consider whether the respondents were discriminated against on the basis of age, in circumstances where there was a company policy not to engage persons who were unable to be trained or follow a career with the appellant.

[20] Counsel for the appellant contended that there was evidence (albeit contrary to the evidence put forward by the appellant before the Tribunal) that at the time of the dismissals in March 2000 the appellant would have dismissed any employee, regardless of age, who was unable to undergo training and follow a career path with the appellant. It was said that the Tribunal erred in failing to consider that evidence in determining whether there was direct discrimination against the respondents. That proposition, however, was not one advanced before the Tribunal on behalf of the appellant. Further, it was conceded by counsel for the appellant that, had the proposition been raised before the Tribunal as the basis for the dismissals, it would have been disavowed by the appellant. In those circumstances, it is hardly surprising, nor can it amount to an error of law, that the Tribunal did not consider the proposition.

[21] In any event, the proposition lacked credibility. The evidence which was accepted by the Tribunal was that, while the appellant had a policy of recruiting those who could undergo training and transfer to other positions with the appellant, the respondents were engaged "in the face of that policy" and in circumstances where the appellant had no intention that they pursue a career path with the appellant, by for example, replacing Mr Leclos, and where there was no genuine attempt to train either of them. Given these additional matters and the fact that the Tribunal noted that the appellant had failed to explain how the respondents came to be employed in view of the appellant's policy of recruitment, there can be no error of law in the

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7 *Steinberg v Federal Commissioner of Taxation* (1972 1975) 134 CLR 640 at 694 per Gibbs J; see also Barwick CJ at 684.

Tribunal failing to consider the proposition now advanced by the appellant before this Court.

Order

[22] The appellant's grounds of appeal do not reveal any error of law. I would dismiss the appeal with costs.