# SUPREME COURT OF QUEENSLAND

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| CITATION: | *York v The General Medical Assessment Tribunal & Anor* [2002] QCA 519 |
| PARTIES: | **PHILIP JOHN YORK**<br>(applicant/first respondent)<br>**v**<br>**LIONEL NEVILLE YOUNG**<br>**SHIRLEY COGHLAN**<br>**JOAN LAWRENCE**<br>**constituting**<br>**THE GENERAL MEDICAL ASSESSMENT TRIBUNAL**<br>(first respondent/second respondent)<br>**WORKCOVER QUEENSLAND**<br>(second respondent/appellant) |
| FILE NO/S: | Appeal No 1741 of 2002<br>SC No 6704 of 2000 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 29 November 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 October 2002 |
| JUDGES: | McMurdo P, Davies and Jerrard JJA<br>Separate reasons for judgment of each member of the court, each concurring as to the orders made |
| ORDER: | **1. Appeal dismissed**<br>**2. Appellant to pay respondents' costs of and incidental to this appeal to be assessed on the standard basis** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – GROUNDS FOR REVIEW OF DECISION – BREACH OF NATURAL JUSTICE – WHAT CONSTITUTES – where application for judicial review was allowed based upon the finding that The General Medical Assessment Tribunal denied natural justice to the first respondent – where learned primary judge found that the Tribunal had failed to inform the first respondent that it disagreed with the external medical evidence which was favourable to the first respondent – where appellant submits that the rules of natural justice did not require the Tribunal to identify its preliminary views on the first respondent's claim |

– whether Tribunal should have advised the first respondent in advance of its views

ADMINISTRATIVE LAW – JUDICIAL REVIEW AT COMMON LAW – PROCEDURAL FAIRNESS – EXISTENCE OF OBLIGATION – TYPES OF REASON FOR APPLYING RULES OF NATURAL JUSTICE – where Tribunal did not explain reasoning for its decision – where appellant submits that the Tribunal was under no obligation to give reasons – where principles outlined in *Public Service Board of New South Wales v Osmond* do not require reasons to be given – where judgments in *Osmond* recognised that in exceptional circumstances natural justice may require a decision maker to give reasons – whether circumstances of this case are exceptional so as to require reasons to be given

*Judicial Review Act* 1991 (Qld), s 7, s 20
*WorkCover Queensland Act* 1996 (Qld), s 34, s 197, s 253, s 265, s 437, s 440, s 442, s 447
*WorkCover Queensland Regulation* 1997 (Qld), Sch 2

*Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, followed
*Kioa v West* (1985) 159 CLR 550, considered
*Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal and Torres Straight Islander Affairs* (2000) 103 FCR 539, considered
*Public Service Board (NSW) v Osmond* (1986) 63 ALR 559, distinguished
*Somaghi v Minister for Immigration Local Government & Ethnic Affairs* (1991) 31 FCR 100, followed

COUNSEL: G J Gibson QC, with S A McCloud, for the appellant
J S Douglas QC, with D C Rangiah, for the respondents

SOLICITORS: Bradley & Co for the appellant
MurphySchmidt for the respondents

[1] **McMURDO P**: I agree with the reasons for judgment and order of Jerrard JA and with the additional observations of Davies JA.

[2] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA. I agree with those reasons and with his conclusion. Indeed it may even be that, if the reason for the Tribunal's decision was that it disbelieved the respondent (see [28] and [29] of his Honour's reasons), it was nevertheless obliged to give the respondent an opportunity of adducing evidence to corroborate a relevant aspect of his evidence which the Tribunal was otherwise inclined to disbelieve.

**Order**

Appeal dismissed with costs.

[3] **JERRARD JA**: In this matter WorkCover Queensland ("WorkCover")[1] appeals against a decision of the Supreme Court delivered on 1 February 2002, in which orders were made under the *Judicial Review Act* 1991 (Qld) setting aside a decision of the General Medical Assessment Tribunal made 5 July 2000, and remitting the matter in which that decision had been made to a differently constituted General Medical Assessment Tribunal ("the Tribunal"), to be dealt with according to law. The learned judge who made those orders did so consequent upon a finding that the Tribunal had denied natural justice to the respondent Philip York, (who was the applicant before the Tribunal) in the proceedings before it. The appellant WorkCover contends that the learned judge erred in so holding, and seeks orders setting aside the orders of the learned primary judge, and dismissing the application for orders under the *Judicial Review Act* brought to this court by Mr York in respect of those proceedings before the Tribunal.

[4] The principal parties in this appeal are Mr York and WorkCover. The three medical practitioners who constituted the Tribunal[2] and the Tribunal itself are also made respondents to the appeal. The issue made critical by the parties in the appeal is whether or not the Tribunal was obliged when conducting the hearing before it to advise Mr York's solicitor that its members held a preliminary opinion contradictory to that of the opinions expressed in reports from two psychiatrists upon which opinions Mr York relied. No other written reports assessing Mr York's psychiatric condition were before the Tribunal. At least one of the members of the Tribunal was a psychiatrist.

[5] The respondent Mr York had been employed by the Building Industry Group, Apprentice Training Incorporated as a carpenter's apprentice. He suffered a muscular back strain on 4 March 1998, when he tripped and fell when carrying timber at a building site. He was paid Workers' Compensation for the period 5 March 1998 to 21 August 1998. When he returned to work, his injury was aggravated by another incident on 20 October 1998. A claim for compensation pursuant to the *WorkCover Queensland Act* 1996 (Qld) ("the Act") was referred by WorkCover to an Orthopaedic Assessment Tribunal pursuant to s 437 of that Act, and on 5 August 1999 that Tribunal determined that Mr York had a 5% permanent impairment of a pre-existing degenerative change in his lumbar spine. That determination entitled him to a lump sum compensation of $5,895.00 (record 177) and is not subject to any challenge in these proceedings.

[6] These proceedings arise out of a step Mr York took some seven weeks after that favourable determination. On 23 September 1999 he was examined by a Dr Gray, a psychiatrist whose report dated 26 October 1999 expressed the opinion that:

> "Seemingly as a response to his pain, loss of independence and inability to proceed through his valued apprenticeship in his desired way Mr York has become angry, depressed and dysphoric."

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1 Established as a body corporate by the *WorkCover Queensland Act* 1996 in Chapter 6 Part 1, and by s 542(1) thereof as the successor in law to the body corporate constituted by the Workers' Compensation Board.

2 The Tribunal is one of those established by Part 2 of Chapter 7 of the *WorkCover Queensland Act*, each of which by s 554 is the continuance in existence of corresponding medical boards and tribunals established under a former Act.

The Doctor concluded that a possible psychiatric diagnosis was that of a Pain Disorder with a General Medical Condition (intervertebral disc derangement) and Psychological Factors. Psychotherapy and pharmacotherapy were both recommended. It is relevant to note that Dr Gray reported that Mr York had said he occasionally smoked marijuana, but had denied the use of other illicit drugs.

[7] By letter dated 5 January 2000, Mr York's solicitors sent that report to WorkCover and suggested WorkCover might:

> "Kindly arrange for the degree of permanent impairment arising out of the psychiatric conditions diagnosed by Dr Gray to be assessed."

That was apparently an application for an assessment by WorkCover pursuant to Division 2 of Part 9 of Chapter 3 of the Act, and by reason of s 197(2), WorkCover were required to have the degree of permanent impairment assessed by a Medical Assessment Tribunal. This was because Mr York was prima facie claiming a psychiatric or psychological injury.

[8] On 11 April 2000 WorkCover caused Mr York to be assessed by a second psychiatrist, a Dr Byrne, and on 2 May 2000 he provided a report which described Mr York as meeting the DSM-IV diagnostic criteria for a Pain Disorder with a General Medical Condition and Psychological Factors. Significantly however, Dr Byrne also described the development of an Amphetamine Dependence Syndrome, which had probably also given rise to a degree amphetamine induced anxiety or dysphoria. That additional diagnosis derived from information Mr York gave Dr Byrne (not given, it would seem, to Dr Gray), that Mr York had been taking "speed" (amphetamine) orally and selling that drug as well, as a means of earning money. He had ended up working as an "enforcer" for suppliers of illegal drugs, which had involved Mr York having to "bash people" and threaten them. His own intake went from daily oral amphetamine to intravenous amphetamine intake towards Christmas of 1999, and he additionally began using heroin intravenously. Mr York told Dr Byrne he had not smoked any marijuana for "months" nor used any other illicit substances for about six months. He had been admitted to the Nambour General Hospital in December 1999 for drug detoxification, and was attending that hospital fortnightly for drug rehabilitation.

[9] On 5 February 2000 WorkCover referred to the Tribunal, pursuant to s 440(1) and s 442(1) of the Act respectively, the determination whether the matters alleged by Mr York constituted an injury to him and if so its nature, and the further determination of whether Mr York had sustained a degree of permanent impairment resulting from the injury, and the nature and degree of that impairment. Relevant to that determination Dr Gray reviewed Mr York's case on 20 June 2000, and supplied a report dated 21 June 2000, in which the Doctor advised that Mr York had developed a significant Chronic Pain Syndrome which met the DSM-IV diagnostic criteria for Pain Disorder with a General Medical Condition and Psychological Factors, complicated by the development of an Amphetamine Dependence Syndrome. In respect of the latter the Doctor provided a further short report dated 4 July 2000, advising that in his opinion the major significant contributing factor to the applicant's pain disorder was the injury sustained in the work place, and that Mr York's pain while definitely playing some part in the genesis of his amphetamine dependence was not the

only factor in its causation. Dr Byrne had earlier advised in his report that he considered the diagnosis of Pain Disorder associated with Psychological Factors and a General Medical Condition did meet WorkCover's requirement for the definition of a work related "injury", but that Dr Byrne had much more doubt about the amphetamine related diagnosis. With respect to that Dr Byrne advised that it was likely that Mr York's personality and other factors were also important in the genesis of that dependence.

**The Legislation**

[10] The referral by WorkCover of matters for determination to the Tribunal pursuant to s 440(1) and s 442(1) of the Act in its then form, (largely as appearing in Reprint No 4, being the Act as enforced on 1 September 2000)[3] was a step made necessary by the scheme established therein for managing workers who have sustained injuries in their employment. A provision of that scheme (as described in s 5(2) of the Act), is the regulation of access by those workers to damages in respect of those injuries. Applied to Mr York's circumstances, s 253(1)(c) entitled him as a worker within the meaning of the Act, who had not lodged an application for compensation for the injury (psychological or psychiatric) he claims to have suffered, to seek damages for the injury subject to the provisions of Chapter 5 of the Act. In his case those provisions relevantly included Division 5 of that Chapter, which permitted him to seek damages for the injury only if WorkCover gave him a damages certificate pursuant to s 265.

[11] That section provides that WorkCover may only give such a certificate if:

- WorkCover decides that the person was a worker when the injury was sustained (s 265(3)(a)); and
- WorkCover decides that the worker has sustained an injury (265(3)(b)); and
- The worker's degree of permanent impairment has been assessed (by the processes described in Chapter 3 Part 9 Division 2 of the Act being s 197 to s 201 (s 265(3)(c)).

[12] Section 197(2) requires that WorkCover must have the degree of permanent impairment assessed by a Medical Assessment Tribunal, when the asserted injury is a psychiatric or a psychological one. Section 197(3) provides that the degree of permanent impairment must be assessed in the way prescribed under a regulation, and a report must be given to WorkCover stating those matters taken into account and the weight given to them, in deciding the degree of permanent impairment and any other information prescribed under a regulation. The relevant regulation would seem to be in Part 6 of Schedule 2 to the *WorkCover Queensland Regulation* 1997 (Qld).

[13] WorkCover's obligation to have a Medical Assessment Tribunal assess the degree of permanent impairment from a psychiatric or psychological injury arises when a worker asks WorkCover (pursuant to s 197(1)) to have a worker's injury assessed, to decide if the injury **has** resulted in a degree of permanent impairment. Additionally to that obligation created by such a request,

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[3] For convenience, described herein as if unamended.

WorkCover has a discretion pursuant to s 437 to refer for determination by "the appropriate Tribunal":

- A worker's injury under s 265(3)(b) i.e. whether the worker has sustained an injury; and
- A worker's permanent impairment.

[14] Section 440(2) relevantly provides that on a referral of a worker's injury under s 265(3)(b), if WorkCover has not admitted that an injury was sustained by a worker and the nature of the injury, the Tribunal must decide:

- Whether the matters alleged for the purpose of seeking damages constitute an injury to the worker; and
- If so, the nature of the injury.

[15] Section 442(2) relevantly provides that on a reference to a Tribunal of the assessment of a worker's degree of permanent impairment the Tribunal must decide:

- Whether the worker has sustained a degree of permanent impairment; and
- If sustained, the degree and nature of the permanent impairment resulting from the injury.

[16] The provisions in Part 3 of Chapter 7 of the Act permitting determination by either a General Medical Assessment Tribunal, or one of a number of speciality Medical Assessment Tribunals, of the matters referred to them interposes between a potential claimant for damages and the ultimate respondent/defendant (WorkCover, by reasons of its exclusive provision of accident insurance pursuant to Chapter 6 of the Act), an independent assessment of the merits of a potential claim at an early stage. The relevant Tribunal is empowered by s 447 to make a personal examination of the worker at any time, or to arrange for an examination to be made by a Doctor nominated by the Tribunal. This specific investigative power emphasises the importance of the role of the Tribunals, as does s 453 of the Act, which provides that on a reference the worker may be heard in person or by counsel, solicitor, or agent. The importance of the Tribunal's role is also underscored by the provisions of s 265(8) and (9), which provides that where WorkCover has made a decision about whether a worker has sustained an injury or a worker's degree of permanent impairment and a person does not agree with the decision, WorkCover must refer the matter to a relevant Tribunal for decision. All of this makes it important that those Tribunals consider with care and fairly the matters referred for decision.

**The Proceedings in the Tribunal**

[17] In the instant case Mr York was represented before the Tribunal by a solicitor, whose extensive trial note of the proceedings is at record 147-151. It records that the chairperson Dr Coghlan asked a number of preliminary questions of Mr York, and thereafter Tribunal member Dr Lawrence (a psychiatrist) conducted the questioning. The proceedings lasted approximately 40 minutes, during

which Mr York provided background information about himself, including that his GP had recommended he take anti-depressants and that Mr York did not want to take those because of the social stigma he considered was attached to "people with head problems". He confirmed that when working as a "collector" of money for amphetamine vendors he had bashed people, and had put a gun to another person's head; and further while he had been offered a job as a Real Estate Agent with Ray White at Maroochydore through family friends, he had not taken that offer up. This was because he believed he would be unable to handle the work because of the driving involved, and getting in and out of the vehicle. He told the Tribunal he had last used marijuana three weeks ago, and had last used either "speed" or heroin in December 1999. He had not experienced pain when working as an enforcer as he was then using "speed", and had "no pain and no morals". He was attending drug rehabilitation approximately once every six weeks, and took medication (Affexor) prescribed for him by his GP. He survived on sickness benefits.

[18] The Tribunal provided a six paragraph statement of its determination and the matters of fact upon which it apparently relied. The decision was as follows:

> "The Tribunal determined under s 440(2) that the matters alleged for the purpose of seeking damages do not constitute an injury.
>
> Mr York worked as an Apprentice Carpenter. He suffered his original back injury in March 1998, and was off work for a few months. He returned to work but there was an exacerbation of the injury and he required further time off work. When he returned to work after further treatment he found that the heavy work caused further problems and he was not able to continue.
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> When seen at the Orthopaedic Assessment Tribunal on 5 August 1999, he complained of low back pain and was diagnosed as having an aggravation of pre-existing degenerative change in the lumbar spine.
>
> Mr York has remained off work. He states that he is unable to perform any heavy physical work because of his back pain and that lengthy sitting or standing, would aggravate his problem.
>
> In early 1999 he became involved with extensive use of illicit drugs. Although he had used these previously, his use became more frequent and he had a variety of illicit drugs and he says he dealt in these. He did not reveal this to psychiatric assessors originally. Eventually his wife arranged for him to be admitted into a drug rehabilitation program which he still attends each six weeks for approximately one hour at a time. He has been on anti depressant medication since attending the drug rehabilitation centre and obtains this now from his local medical officers whom he sees infrequently.
>
> Mr York states that his main symptoms now are his back pain, his fear of further injury and lack of confidence. He states that he has been offered work recently but has declined it because he feels that

> the nature of the work is inappropriate and he says he will be unreliable."

[19] An examination of the appeal record shows that each matter of fact described in the Tribunal's determination appears accurate. What is missing is any reference to the diagnoses made by the two psychiatrists whose reports were relied on by Mr York, and any opinion or view as to whether or not the applicant then had or had earlier had any psychiatric condition or psychological deficit satisfying the diagnostic criteria provided in the DSM-IV, or otherwise satisfying the description of a psychiatric or psychological injury assessed under the AMA Guide as required by Part 6 of Schedule 2 of the *WorkCover Queensland Regulation* 1997. The only hint that Mr York claimed a psychiatric or psychological injury is the reference to there having been psychiatric assessors.

**The Application for Judicial Review**

[20] Mr York brought his application for orders pursuant to the *Judicial Review Act,* complaining in terms of s 20(2)(b)(f) and (h) of that Act that:

- The decision of the Tribunal was not authorised by the enactment under which it was purported to be made;
- The decision involved an error of law;
- There was no evidence or other material to justify the making of the decision.

[21] The gravamen of Mr York's complaint on those grounds was that the Tribunal had (apparently) rejected the opinions of Doctors Gray and Byrne favourable to Mr York without sufficient justification for doing so. The learned primary judge rejected those three grounds of complaint, holding that consideration of the record made by Mr York's solicitor demonstrated that there had been questioning of Mr York by the Tribunal members, and that accordingly an examination of the variety contemplated by s 447 had apparently been undertaken by the Tribunal; which had acted on its own assessment of the claimant's condition based on that examination. The learned judge held that while the record of the examination of the applicant did not clearly reveal the Tribunal's reason for not accepting the opinions of Doctors Gray and Byrne, it did not show that the Tribunal's opinion was without foundation on the evidence before it.

[22] The judge, however, upheld Mr York's further complaint (reflecting s 20(2)(a) of the *Judicial Review Act*) that a breach of the rules of natural justice had happened in relation to the making of the Tribunal's determination. He accepted that that breach occurred when the Tribunal failed to inform Mr York of the Tribunal's apparent disagreement with the only medical evidence before it (the opinions of Doctors Gray and Byrne) from external sources and independent of the Tribunal's own examination, and which was relevant to the issue of the existence or non existence of the claimed psychiatric or psychological injury. His Honour noted that it would have been reasonable for Mr York's solicitor to approach the hearing believing that the evidence before the Tribunal on that issue was all one way and favourable to his client, and His

Honour held it was equally reasonable for that solicitor to conclude that nothing had emerged when the applicant was questioned to disturb that favourable position.

[23] The learned judge held that in those circumstances the Tribunal was obliged to notify the solicitor of its preliminary opinion contradictory to that of the two doctors upon whom Mr York relied, in order to give him the opportunity to address the Tribunal on that issue and possibly to call further evidence. His Honour referred to the decision of the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592. In that case the court relevantly held that where the exercise of a statutory power attracts the requirement for procedural fairness, a decision maker is required to advise a person likely to be affected by the decision of any adverse conclusion which has been arrived at and which would not obviously be open on the known material. The Full Court's reasons for judgment then provide that subject to qualifications, including the one just described herein of advising of adverse conclusions not obviously open, a decision maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

[24] The primary judge was satisfied that in the circumstances of this matter the Tribunal acted in breach of the rules of natural justice in not alerting Mr York's solicitor to its views about the non existence of a psychiatric or psychological injury, and set aside the Tribunal's decision. The judge considered that Mr York's solicitor was entitled to believe, unless otherwise advised by the Tribunal, that the evidence as to the existence of a diagnosable psychiatric condition to which employment was the major contributing factor was all in favour of his client.

[25] It is relevant to record at this point that neither before the primary judge nor before this court on appeal was there any contention made that that decision was not one to which the *Judicial Review Act* applied, and nor was there any argument that Mr York was not a person aggrieved as defined in s 7 of that act. Nor does the appellant argue on this appeal that the Tribunal's statutory powers to decide the matters referred do not attract the requirements for procedural fairness or the obligation to afford natural justice. Instead, the appellant submits that the rules of natural justice did not require the Tribunal to identify in advance its preliminary views or attitudes, or even tentative adverse conclusions, or what the appellant's written submission describes as the Tribunal's sceptical reaction to Mr York's claim.

[26] In support of its general proposition that the Tribunal was not required to identify its preliminary views or attitudes the appellant cites observations from Lord Diplock in *F Hoffman-La Roche & Co AG v Secretary for Trade & Industry* [1975] AC 295 at 369, from Davies J in *El Sayed v Minister for Immigration Local Government and Ethnic Affairs* (1991) 22 ALD 767 at 773-774, from the Full Federal Court in *Sinnathamby v Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502 at 505-506, observations of Keely and Gummow JJ in *Somaghi v Minister for Immigration Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 103 and 119 respectively, of the Full Federal Court in *Telstra Corp Ltd v Kendall* (1995) 55 FCR 221 at 230, observations of Goldberg J in *Laycock v Forbes & Australian Securities*

*Commission* (1997) 150 ALR 186 at 196, and the same comments in *Alphaone* as were relied on by the primary judge. It argues that the general rule described in those judgments, that a decision maker is not obliged to make or seek comment on his or her preliminary views before making a final decision applies here, and is not subject to any of the qualifications identified in the judgment of Merkel J in *Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal and Torres Straight Islander Affairs* (2000) 103 FCR 539 at 557.

[27] In that judgment Merkel J remarked that the overriding principle remains that the decision maker must bring to the applicant's attention the critical issue or factor on which the decision is likely to turn (as was said by Mason J as he then was in *Kioa v West* (1985) 159 CLR 550 at 587). The appellant argues that Mr York obviously knew that the critical issue was whether or not he suffered from a psychiatric or psychological injury, that not being admitted by it, since that non admission was the very reason for referral of the matter to the Tribunal. It submits that it was clearly open to the Tribunal to reach a view contrary to the opinions of Doctors Gray and Byrne, and that the very reason for referring the decision to the Tribunal was because of its specialist knowledge and experience. It submits that the matter was before the Tribunal so it **could** make its own assessment of the plausibility of the claim by Mr York, and that the Tribunal was in no way bound to accept Mr York's "evidence" before it.

[28] One can agree, as I do, with all of those last quoted submissions. I consider the appellant still faces the difficulty that the Tribunal's decision does not actually reveal the reasons on which its critical determination was based. The facts recited avoid any reference to the existence or otherwise of a psychological or psychiatric injury, and it is possible that the Tribunal members actually agreed with the diagnoses of both doctors that there did exist either one or both of the two disorders or syndromes described in their respective reports. However, the operative definition of "injury" in s 34 of the Act at the relevant time was that of an injury to the causation of which the worker's employment was the major contributing factor. The Tribunal may have determined that Mr York's employment was not the major contributing factor to either of the two existing and diagnosed disorders or syndromes, or that only one existed, or that some other disorder or disorders existed, but that in any event the employment was not the major contributing factor to any of them. Alternatively the Tribunal may have determined that accepting all that Mr York said there was nevertheless no existing disorder and never had been; or it may have just disbelieved Mr York as to the facts he asserted. The problem is that it did not say why it reached the conclusion it did.

[29] If any of these possible views other than the last one was the reason for the determination, I am satisfied that the obligation to afford procedural fairness required that in this case Mr York's solicitor have the opportunity to argue against, or even lead further evidence in his favour, on whatever provisional or preliminary views adverse to his client the Tribunal held. It still remains unknown what the Tribunal's views actually were. All that is known is the final determination but not the basis for it. The feature of the Tribunal's determination that the recital of facts therein omits the critical ones of the favourable or supportive diagnoses provided by Mr York, and of the Tribunal's own assessment of those and their weight, and of the Tribunal's assessment of

Mr York, somewhat starkly reflects the fact that in the proceedings Mr York's solicitor was not directly alerted in any way to the possibility that those favourable diagnoses would apparently be either ignored or not accepted by the Tribunal.

[30] I agree with the conclusion of the learned primary judge that a number of the possible grounds on which the Tribunal may have reached its decision could fairly be described as an adverse conclusion arrived at which would not obviously be open on the known material (*Commissioner for ACT Revenue v Alphaone* at FCR 591-592; *Somaghi v Minister for Immigration* at FCR 108 and 120, that last reference being to observations by Gummow J citing remarks of Deane J in *Kioa v West* at CLR 633). Those judgments emphasise the importance in procedural fairness of giving an opportunity to present information or argument on a matter not already obvious but in fact regarded as important by the decision maker.

[31] That this is made more important when the decision maker is not obliged to give reasons is emphasised in the judgments in *Public Service Board of New South Wales v Osmond* (1986) 63 ALR 559, wherein the High Court reminded and declared that in the common law currently applicable in this country there is no general rule, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely effect the interests or defeat the legitimate or reasonable expectations of other persons[4]. In that regard I accept the submission ultimately made by senior counsel for the appellant, and conceded by the respondent, that in making that particular determination the Tribunal was not under any specific statutory or other obligation to give reasons. The judgments in *Osmond* recognised that in special or exceptional circumstances natural justice may require that a decision maker give reasons, (ALR report at 568 per Gibbs CJ, with whom Brennan J and Dawson J agreed; and 573 per Deane J) but I do not think that either the particular circumstances of this case nor the power being exercised by the Tribunal makes the circumstances of its exercise so special or exceptional as to take it out of the general rule described in *Osmond*.

[32] Gibbs CJ wrote in his leading judgment in *Osmond* that:

> "Where the rules of natural justice require that a body making a decision should give the person affected an opportunity to be heard before the decision is made, the circumstances of the case will often be such that the hearing will be a fair one only if the person affected is told of the case made against him. That is quite a different thing from saying that once a decision has been fairly reached the reasons for the decision must be communicated to the party affected." (At ALR 563).

The Chief Justice went on, after an examination of Canadian decisions cited to him, to hold that:

> "Upon examination it will be seen that all of these cases decide, not that reasons must be given for a decision finally reached, but that a person or body which is considering making a decision which will

4 *Public Service Board v Osmond* (supra) at 563 and 572

> adversely affect another should generally give notice to that other of the reasons why the proposed action is intended to be taken so that the person affected will have a fair opportunity to answer the case against him." (At ALR 565).

[33] To the like effect are the observations of Deane J who wrote (at ALR 572):

> "Nonetheless the stage has not been reached in this country where it is a general prima facie requirement of the common law rules of natural justice for procedural fair play that the administrative decision maker, having extended to persons who might be adversely affected by a decision an adequate opportunity of being heard, is bound to furnish reasons for the exercise of a statutory decision making power."

Those observations and those earlier cited of Gibbs CJ emphasise that the decision maker **not** obliged to give reasons is particularly obliged to give an opportunity to be heard on the real issues before the final decision is made. Those considerations are apposite here. I consider that advising Mr York (or his solicitor) of the Tribunal's views, whatever they were, of the weight it would attach to the two favourable reports he had placed before it (one commissioned by him and one by the appellant) was a step necessary to give him procedural fairness; even if it also answers the description of exposing to him the mental processes or provisional views of the Tribunal.

[34] In these circumstances I am satisfied this appeal should be dismissed, and that the appellant should pay the respondents' costs of and incidental to this appeal to be assessed on the standard basis.