SUPREME COURT OF QUEENSLAND

CITATION:	*Ward v Medical Board of Qld* [2004] QSC 195
PARTIES:	**RODNEY WARD** (applicant) **v** **MEDICAL BOARD OF QUEENSLAND** (respondent)
FILE NO/S:	BS 2286 of 2004
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2004
JUDGE:	Muir J
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – QUEENSLAND – GROUNDS FOR REVIEW OF DECISION – ERROR OF LAW – where the applicant was prosecuted under the *Health Practitioners (Professional Standards) Act* 1999 (Qld) – whether the decision of the respondent was based on an erroneous finding - ss 20, 24 *Judicial Review Act* 1991 (Qld) *Health Practitioners (Professional Standards) Act* 1999 (Qld), s 165(2) *Judicial Review Act* 1991 (Qld), ss 20, 24 *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222
COUNSEL:	S A McLeod for the applicant R F D Logan SC for the respondent
SOLICITORS:	Harry McCay Solicitor for the applicant Gilshenan & Luton for the respondent

The Nature of the Application

[1] The applicant medical practitioner seeks, pursuant to sections 20 and 24 of the *Judicial Review Act* 1991 (Qld) to review the decision of the respondent Medical Board of Queensland dated 11 February 2004 whereby the respondent determined not to set aside its decision dated 5 November 2003. The decision was that a ground for disciplinary action was established and that the applicant be reprimanded for unsatisfactory professional conduct pursuant to s 165(2) of the *Health Practitioners (Professional Standards) Act* 1999 (Qld) ("the Act").

[2] There are three grounds for the application but the only one relied on by Mr McLeod, who appeared for the applicant on the hearing, was that the making of the decision was not justified by the evidence. That ground was particularised as follows:

> "The evidence before the Respondent did not establish that the Applicant had given a commitment to provide the information sought by AMP and that the Applicant proceeded to change the terms upon which he would provide the information to AMP."

Relevant Factual Matters

[3] Acting on a complaint by AMP Life Limited ("AMP"), the respondent, following the procedures laid down in the Act decided, pursuant to s 165(2) of the Act, to reprimand the applicant on the grounds that he refused to release information, namely a copy of a patient's record to the AMP in order "that a full assessment of his eligibility to claim income protection benefit under an AMP policy could be made, and that such action constitutes unsatisfactory professional conduct". In a letter to the applicant of 5 November 2003, the respondent stated –

> "The reasons for the Board's decision are that:
> - There was no professional, ethical or legal obligation preventing you from providing AMP with the information requested; and
> - The manner of your refusal to provide the information was considered unsatisfactory."

The applicant sought a reconsideration of the matter.

[4] On 11 February 2004, the respondent wrote to the applicant's solicitors responding to an assertion that the respondent had taken into account irrelevant matters. The letter stated that the respondent, at a meeting on 25 August 2003, considered:

(a) Submissions made on behalf of the applicant;
(b) That there was no professional, ethical or legal obligation preventing the applicant from providing the AMP with the subject information and that to do so would have been in the patient's interest; and
(c) That the applicant had initially given a commitment to provide the information requested, then proceeded to change the terms upon which he would provide the information.

[5] Enclosed with the letter was a copy of a minute of a meeting of the respondent held on 25 August 2003, which recorded:

"The Board discussed the submission made on behalf of Dr Ward. The Board considered that there was no professional, ethical or legal obligation preventing Dr Ward from providing AMP with the information requested and doing so would have been in the patient's interest. The Board also considered that Dr Ward had initially given a commitment to provide the information requested, then proceeded to change the terms upon which he would provide the information.

RESOLVED that:-

…

(iv) the reasons for the Board's decision are as follows:-

- There was no professional, ethical or legal obligation preventing Dr Ward from providing AMP with the information requested;

- The manner of Dr Ward's refusal to provide the information was considered unsatisfactory;"

[6] Minutes of a 9 December 2003 meeting of the respondent record:

"The Board noted that in making its decision with respect to taking disciplinary action against Dr Ward, it considered the nature of Dr Ward's behaviour in that he had initially given a commitment to provide the information requested, then proceeded to change the terms upon which he would provide the information. The Board also considered that Dr Ward had not acted in the best interest of the patient. It was on this basis that the Board considered that a ground for disciplinary action had been established.

RESOLVED that:-

(i) advice be sought from the Board's solicitors with respect to the submissions made by United Medical Protection on behalf of Dr Ward;

(ii) in preparing the brief to the Board's solicitors, it must be clearly set out the Board's decision to take disciplinary action was not based on whether there was any obligation to provide the medical records, but the nature of Dr Ward's conduct with respect to not providing the information after giving a commitment to do so."

The Parties' Contentions

[7] Mr McLeod argues that it may be seen from the minutes of 25 August 2003 and 9 December 2003 that the respondent's February 2004 decision was based on the erroneous finding that the applicant changed the terms upon which he would provide the subject information to AMP after having given a commitment to provide the information.

[8] Mr Logan SC for the respondent submitted that:

(a) The applicant had not shown that the decision of the respondent was based on any erroneous finding of fact or that the respondent would have decided differently had it not erred;

(b) It was impermissible for the respondent to rely on "an ex post facto minute" to determine the basis of the respondent's decision at an earlier date;

(c) In order to determine the basis of the respondent's decision it was necessary to go to its letter of 5 November 2003 which expressly stated its reasons and then recorded, at considerable length, the respondent's "decisions on material questions of fact … and the evidence on which those decisions were based …".

(d) The function of judicial review is to review decisions not findings of fact.

[9] Mr Logan SC, although not expressly conceding that there was no evidence to support a finding that the applicant had initially given a commitment to provide the information requested by the AMP but had proceed to change the terms on which he would do so, did not attempt to justify or support the finding. The finding is contrary to the evidence.

Applicable Principles

[10] Both parties relied on *Minister for Immigration and Multicultural Affairs v Rajamanikkam*[1] as containing an authoritative statement of the principles to be applied on the determination of this application. In particular, it was common ground that there was no material difference between the provisions of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) under consideration in that case and their counterparts in the *Judicial Review Act* 1991 (Qld). The reasons of Gleeson CJ[2] in that case referred with approval to the following passage from the reasons of Black CJ in *Curragh Queensland Mining Ltd v Daniel.*[3]

> "Section 5(3)(b) does not require the identification of some single particular fact that may be said to be the foundation of the decision. A decision may be based upon the existence of many particular facts; it will be based upon the existence of each particular fact that is critical to the making of the decision."

[11] The approach of Gaudron and McHugh JJ appears from the following passage in their reasons:[4]

> "The word 'particular' in s 476(4)(b) is of significance. Had that paragraph been expressed in terms of a decision 'based on the existence of a fact', it might have been apt to refer to any fact taken into account in the reasoning process leading to the decision in question. The word 'particular' indicates that the paragraph is intended to have a more limited operation. And when regard is had to the requirement that the decision be 'based ... on ... a particular fact', the paragraph, in our view, is to be understood as referring to a finding of fact without which the decision in question either could

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1 (2002) 210 CLR 222.
2 At 234.
3 (1992) 34 FCR 212 at 220-221
4 At 240-241.

not or would not have been reached. In this sense, it is, in our view, appropriate to speak of a 'fact critical to the making of the decision'.

Whether a decision could or could not have been reached without a particular factual finding may depend either on logic or on the law to be applied. To the extent that a decision could not have been reached without a particular factual finding because of the law to be applied, there may have been some overlap between pars (a) and (b) of s 476(4) although, of course, par (a) imposed a less stringent test.

Whether a decision would or would not have been made without a particular factual finding depends on indications to that effect in the decision, the reasons for decision or the decision making process. *And unless it is possible to say on a proper analysis of the decision, the reasons for decision or the decision making process that, had a particular finding not been made, the decision in question would not have been reached, it is, in our view, impossible to say that the decision was based on that finding."*

[12] Kirby J,[5] in discussing the approach of Black CJ in *Curragh*, said:

"A decision will be '*based* ... on the existence of a particular fact' where a finding of that fact is critical to the decision. Where a decision is found to be *based* on the existence of more than one fact, Black CJ employed a metaphor to explain the circumstances in which judicial review might be granted in such a case. A decision would be 'based' on a particular fact even where that fact is but "[a] small factual link in a chain of reasoning ... and there are no parallel links". In the summary of his reasoning, Black CJ said:

> 'A decision may also be based on a finding of fact that, critically, leads the decision-maker to take one path in the process of reasoning rather than another and so to come to a different conclusion.'

I accept this approach to the meaning of s 476(4)(b) of the Act in question in this appeal. I also agree with what Black CJ went on to say:

> 'If a decision is in truth *based*, in the sense I have described, on a particular fact for which there is no evidence, and the fact does not exist, the decision is flawed whatever the relative importance of the fact. Accordingly, I agree with the conclusion of Lee J in *Akers v Minister for Immigration and Ethnic Affairs* that there is no reason to read s 5(3)(b) in a way that would limit its operation to a predominant reason for the decision under review.'"

[13] Callinan J's formulation[6] is to be found in this passage in his reasons:

"It is important nonetheless to give the words 'based the decision' full weight. 'Based' certainly implies in my opinion, something more than 'had regard to' or 'took into account'. For s 476(4)(b) to apply the Tribunal must have used the non-existent fact as a base for, or, if a synonym be required, as a foundation for the decision."

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5 At 257-258.

6 At 271.

[14] Mr Logan placed particular reliance on the reasons of Gaudron and McHugh JJ, which arguably pose a somewhat more stringent test than those approved in the other judgments. It is appropriate however that I apply the *Curragh* test: it was applied indirectly by Gleeson CJ, expressly by Kirby J and is consistent with Callinan J's formulation.

Application of Relevant Principles

[15] Mr Logan, referring to the 25 August 2003 minutes, placed emphasis on the words "The Board also considered" which preceded the finding of a change in the terms upon which information would be provided. That language was said to demonstrate that the matter relied on by the applicant was of an incidental nature and not one without which the same conclusion would have resulted. It does not seem to me that the minute bears this construction. The reasons are formally stated in paragraph (iv). There are two limbs to the reasons. The first is simply that there was no impediment to the applicant's providing the information. The second limb is that the manner of the applicant's refusal to provide the information was unsatisfactory. As far as one can glean from the minute, tied up in the unsatisfactory manner of refusal is the initial commitment to provide the information and the change in the terms upon which the information would be provided.

[16] When the respondent came to consider the matter further on 9 December 2003, it again noted that in making its decision it "considered the nature of (the applicants') behaviour" in initially giving the commitment and then proceeding to change the terms upon which the information would be provided. It went on to record "The Board also considered that Dr Ward had not acted in the best interest of the patient". It was then resolved that clear instructions be given to the respondent's solicitors that the respondent's decision was based on "the nature of (the applicants') conduct with respect to not providing the information after giving a commitment to do so."

[17] There is no reason to suppose that in arriving at its decision of 11 February 2004 the respondent did not continue to act on the premise that it had originally based its decision on the erroneous finding. The respondents' letter of 11 February 2004 to the applicants' solicitors, in fact, makes it plain that the respondent, having further considered the matter, was content with its original conclusions.

[18] The letter of 11 February 2004 and the minutes to which I have referred show that the finding about a change of mind after a commitment were central to the respondents' decision making process. The finding was "critical" to the making of the decision or, in the language of Callinan J, it was "a foundation for the decision".

[19] A curious feature of the case is that the detailed findings by the respondent in its 5 November 2003 letter make no reference to the subject finding. Moreover, the detailed finding would have provided ample justification for the respondent's decision. However, for the reasons I have given, the applicant has established that the subject decision was based on a non existent fact. The decision is thus flawed and the applicant is entitled to have it set aside.

[20] Such an order, by itself, will not assist the applicant as the original decision will remain in place. Under s 30 of the *Judicial Review Act* 1999 (Qld) an order may be made "declaring the rights of the parties in relation to any matter to which the

decision relates" or the matter may be remitted to the decision maker for further consideration.[7]

[21] As the appropriate form of order was not the subject of any detailed submission I invite the parties to make further submissions in this regard. It is necessary also that there be submissions on costs. In that regard, it is relevant that the applicant succeeded only on a ground that was added to the application by leave on the day of the hearing.

[7] *Judicial Review Act* 1991 (Qld) s 30.