SUPREME COURT OF QUEENSLAND

CITATION:	*Virgin Blue Airlines Pty Ltd v Hopper & Ors* [2007] QSC 075
PARTIES:	**VIRGIN BLUE AIRLINES PTY LTD (ACN 090 670 965)** **(**appellant) V **THERESA STEWART** (first respondent) **NICOLE JULIE HOPPER** (second respondent) **MAUREEN MULHERIN** (third respondent) **CAROL PHYLIS DOWLING** (fourth respondent) **KEELY FRANCES BILL** (fifth respondent) **ALMA ELIZABETH FRANK** (sixth respondent) **LYNLEY GAY BOYES** (seventh respondent) **VIRGINIA MAY JEFFRIES** (eighth respondent)
FILE NO/S:	BS9387/05 BS9388/05 BS9390/05 BS9391/05 BS9392/05 BS9393/05 BS9394/05 BS9395/05
DIVISION:	Trial Division
PROCEEDING:	Appeal from the Anti-discrimination Tribunal
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	5 April 2007
DELIVERED AT:	Brisbane
HEARING DATE:	8 June 2006
JUDGE:	Moynihan J

ORDER: **1. Appeal dismissed**

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 appellants appealed against orders of Anti-Discrimination Tribunal – where appeal brought under s217 *Anti-Discrimination Act 1991* (Qld) - whether appellants denied procedural fairness – whether tribunal misconstrued or misapplied provisions of the *Anti-Discrimination Act 1991* (Qld) – whether tribunal took into account irrelevant considerations - whether tribunal's findings supported by the evidence – whether findings of fact supported by the evidence – whether tribunal reversed the onus of proof

Administrative Decisions (Judicial Review Act 1977 (Cth)
Anti Discrimination Act 1991 (Qld) s10, s 14(1)(a)(b), s 204, s 205, s206, s 208, s 217, s 304
Disability Discrimination Act 1992 (Cth)
The Racial Discrimination Act 1975 (Cth)
Uniform Civil Procedure Rules 1999 (Qld) s208(1)(b)-(e)
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, considered
Bligh, Cootes, Foster, Lenoy, Sibley, Sibley and Palmer v The State of Queensland [1996] HREOCA 28, cited
Boucher v Australian Securities Commission (1996) 44 ALD 499, cited
Durrisdeer Pty Ltd v Nordale Management Pty Ltd [1996] QCA 558, considered
Hehir and Financial Advisers Pty Ltd v Sandra Smith [2002] QSC 092, considered
HREOC v Mt Isa Mines (1993) 46 FCR 301, considered
Kioa v West (1995) 159 CLR 550, considered
Martin & Anor v Queensland Electricity Transmission Corporation Ltd [2003] QSC 309, cited
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, considered
Purvis v New South Wales (Department of Education and Training) (2003) 217 CLR 92, considered
R v District Court ex parte White (1966) 116 CLR 644, cited.
The Australian Gaslight co v Valuer General (1940) 40 SR NSW 126, considered
Thompson v Orica Australia Pty Ltd (2002) 116 IR 186, considered
Waterford v The Commonwealth (1987) 163 CLR 54, cited

COUNSEL: GC Martin SC with CJ Murdoch for the appellant.
S Hamlyn-Harris for the respondents.

SOLICITORS: Clayton Utz for the appellant.
Primrose Couper Crown Rudkin for the respondents.

Index

Introduction

[1] **MOYNIHAN J:** This is an appeal by Virgin Blue Airlines Pty Ltd (*the appellant*) against a finding by the Anti-Discrimination Tribunal (Queensland) (*the tribunal*) that *the appellant* had directly discriminated against each of the eight respondents (*the respondents*), who had unsuccessfully applied for employment as a flight attendant, on the basis of age.

[2] Section 217 of the *Anti Discrimination Act 1991* (Qld) (*the Act*) provides for an appeal to this court 'against a tribunal decision on a question of law'.

[3] The appeal was conducted on the basis that the evidence and material in the appeal against *the tribunal's* decision concerning one of *the respondents* (Nicole Julie Hopper) applied to each of the other *respondents* notwithstanding some factual differences between the cases. In other words the hearing proceeded as though there was one appeal. A similar approach had been followed before *the tribunal*.

[4] *The respondents'* originating applications to *the tribunal* complained of direct, indirect, intentional or unintentional, unlawful discrimination in various alternatives.

[5] It is sufficient for the moment to say that the basis upon which *the respondents* succeeded before *the tribunal* is that it was established that at a crucial stage of the

selection process assessors, who determined the suitability of applicants to proceed to the next stage, unconsciously preferred younger people (the assessors themselves falling into this group) to older people[1] in making an assessment of the competence of applicants.[2] Presumably for this reason *the tribunal's* reasons for its decision refer to categories in terms of under 35 or over 35.

[6] *The respondents* had experience as cabin attendants with another airline.

***The appellant's* recruitment process**

[7] *The respondents'* commenced proceedings in *the tribunal* on grounds of unlawful discrimination after they had failed to pass through a stage of the selection process *the appellant* put in place to select flight attendants.

[8] *The respondents* succeeded essentially because they persuaded *the tribunal* the selection process *the appellant* used to select people it employed was flawed in a way which discriminated against the applicants.

[9] *The appellant* adopted a 10 stage selection process in circumstances where, for reasons it is unnecessary to develop, the number of people seeking employment by *the appellant* as flight attendants was greatly in excess of the number of places available.

[10] Those seeking employment who were successful at a particular stage moved on to the next. Those who successfully passed through all the stages were eligible to be employed as flight attendants.

[11] Proceedings before *the tribunal* canvassed the early stages in the recruitment process but came to focus on a stage (the second) referred to as a group assessment. *The tribunal* found that discrimination occurred when *the appellant* failed to successfully negotiate this stage. It is therefore unnecessary to consider the whole process or each of the other stages in detail.

[12] Those applicants who had reached the group assessment stage of the process were grouped with a number of other applicants who had also done so. There were a number of groups. Group members engaged in prescribed activities designed to exhibit 'behavioural competence' which would be reflected in 'superior performance' as a flight attendant and so qualify an applicant to move to the next stage of the selection process. *The respondents* were allocated to different groups at different times.

[13] The performance of the prescribed activities by each member and of the group as a whole was observed by assessors and participants were rated for their performance. The outcome of this exercise determined who moved on to the next stage.

[14] Assessment paid particular regard to an applicant's individual performance and performance as a member of a group and to relating performance to competencies described as 'assertiveness, team work, communication and 'Virgin Flair' - a desire to create a memorable positive experience for customers - an ability to have fun …'[3]

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[1] *The respondents* falling into this group.
[2] *The respondents* were females aged from 36 to 56.
[3] Tribunal reasons dated 10 October 2005, para 26.

The activities and assessment processes are described in some detail in *the tribunal's* findings[4] but it is unnecessary to repeat that exercise here.

[15] *The tribunal* found that such a selection process rating behavioural competence was an established recruitment process in Australia.[5]

[16] *The tribunal* found that behavioural competency testing was designed to produce an age neutral result and had done so in applications other than those in issue here.[6] It went on however to find that had not occurred with *the respondents* and that direct discrimination on account of age was made out.

***The tribunal's* reasons for its decision**

[17] On 10 October 2005 *the tribunal* delivered its decision of direct discrimination and the reasons for that finding. On 29 March 2006 it determined the compensation paid to each *respondent* and published its reasons for doing so. These reasons are to be read together; see paragraph 52 of the 10 October 2005 reasons and the 29 March 2006 reasons.

[18] Paragraph 52 of the reasons stated that *the tribunal* would hear further submissions in respect of relief including individual assessment of damages. The paragraph went on noting that it had not at that stage dealt with issues of loss of opportunity for employment and related issues.

[19] References in these reasons are to the 10 October 2005 reasons unless otherwise stated.

[20] What follows is not intended to be an exhaustive review of *the tribunal's* reasons but to provide a context for consideration of the grounds of appeal.

[21] The *tribunal's* reasons noted that it was not alleged that *the appellant* expressly imposed an age limitation, rather that the recruitment process had 'consciously or unconsciously through a subjective assessment process' adopted an age criteria which in fact prevented *the respondents* being fairly considered for employment.[7]

[22] The reasons then dealt with a number of factual matters it is unnecessary to canvass. *The tribunal* then remarked that *the respondents* initially challenged the selection process as 'an elaborate ruse to mark an intentional choice by the assessors of the most physically attractive employees (male or female)'. It concluded that there was no factual support for such a claim and that that case of intentional direct discrimination was abandoned in address.[8]

[23] *The tribunal* rejected *the respondents'* contention that satisfactory behavioural competency testing as a prerequisite of employment per se adversely affected the prospect of older compared to younger applicants. It concluded that there was 'simply no proper factual basis' for any conclusion that the recruitment adopted by *the appellant's* recruitment process did other than produce an age neutral result.[9]

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[4] Ibid para 12-18.
[5] Ibid para 12.
[6] Ibid para 39.
[7] Ibid, para 1.
[8] Ibid, para 19.
[9] Ibid, para 20.

[24] There was no intentional indirect discrimination and *the tribunal* remarked that if the discrimination alleged could be made out it was because of *the appellant's* use of the subjective views of assessors about the behavioural competency of applicants.[10]

[25] *The tribunal* concluded that a natural person subjectively applying lawful criteria in an unlawful and discriminatory manner 'as the complainant's case must be' discriminated directly rather than indirectly. It was therefore unnecessary to consider whether direct or indirect discrimination could be demonstrated from the same facts.[11]

[26] The reasons go on to reject a number of components of the evidence relied on by *the respondents* before stating:

> The real case … was that [*the appellant*] encouraged a work culture that equated youth and its outward physical manifestations with (most directly) the ability to have fun – part of the 'behavioural competency' of 'Virgin Flair'.[12]

[27] *The respondents'* substantive case (in contrast to a case of intentional discrimination) was, *the tribunal* said, that the assessors 'unconsciously but invariably preferred younger people (largely of their own age) to older people … not that the assessors were consciously only interested in magazine models.'[13]

[28] The reasons concluded that there were:

> two substantive bases to support [*the respondents'*] case: (a) statistical evidence of the makeup or age of the workforce selected of a selection process; and (b) possible flaws in the selection process which might explain an apparent age bias in the statistics in (a).[14]

[29] Consideration of statistical evidence lead *the tribunal* to note that it supported a finding that the group assessment procedure 'did not work as it should have' and to reject *the appellant's* explanation for that being so before concluding that older applicants were treated less favourably than younger.

[30] The reasons concluded that the anomaly indicated that 'older' applicants were treated less favourably than 'younger' thus the complainants 'made out their complaints of discrimination based on age.'[15]

[31] *The tribunal* then examined a number of factors leading it to conclude that the group performance assessors in applying the 'otherwise age neutral system' were unconsciously discriminating on the basis of age causing statistical variance.[16]

[32] It referred to a number of factors bearing on unconscious discrimination, although it stated it was unnecessary to do so having regard to the findings it had already

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[10] Ibid, paras 20-21.
[11] Ibid, para 21.
[12] Ibid, para 26.
[13] Ibid, para 26 - the reference to magazine models is referable to evidence before *the tribunal* which was rejected.
[14] Ibid, para 29.
[15] Ibid, para 47.
[16] Ibid, para 48.

made.[17] The factors included pressure on the recruitment system, that it was designed for much smaller groups of applicants, that the assessors had comparatively little relevant training. The assessors called to give evidence were comparatively young recent recruits.

[33] The reasons then refer to 'an inevitable danger' of the behavioural competency assessment system adopted by *the appellant* was that assessors would identify with persons of the same age, experience and attitude as the assessors had and so bias the selection outcomes.[18] This was referred to in evidence before *the tribunal* as 'a similar to me effect'.

[34] *The tribunal* then concluded that a case of direct discrimination on the basis of age had been made out by each of *the respondents*.[19]

[35] As I have said on 29 March 2006 *the tribunal*, having received written submissions dealt with the question of compensation and related issues in published reason under the headings of 'The Complaint and Prior Findings',[20] 'Personal Loss'[21] and 'Economic Loss'.[22]

[36] The 29 March reasons stated that what *the respondent* lost by reason of the unlawful discrimination was the loss of a chance to be judged on merit and 'thus possibly obtained paid employment.'[23]

[37] They went on to note that the parties agreed that the economic loss should be assessed on this basis and that in the assessment 'certain parameters should apply.'[24]

[38] These, *the tribunal* noted, included agreement as to the difference between income each complainant would have earned in a year had she been employed and the complainant's actual income.

[39] *The tribunal* recorded that the parties had agreed that this difference was a total worth of possible loss. It noted that if there was a 10 per cent chance of obtaining employment the damages were calculated at 10 per cent of the agreed figure.

[40] In paragraph 8 of the 29 March reasons *the tribunal* noted that whilst in many cases this approach may or may not be appropriate 'the common assumption which underlaid the parties submission should be adopted' unless *the tribunal* was satisfied it was plainly wrong.

[41] As a consequence, *the tribunal* noted, it was only necessary to determine what chance there was of employment as to found any entitlement to economic loss. The method of calculation was then agreed subject to *the respondents'* submissions concerning mitigation.[25] It appears that failure to mitigate was ultimately not an issue.

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[17] Ibid, para 48.
[18] Ibid, para 48(f).
[19] Ibid, para 50.
[20] Tribunal reasons dated 29 March 2006, paras 2-10.
[21] Ibid, paras 11-18.
[22] Ibid, paras 20-30.
[23] Ibid, para 6.
[24] Ibid, para 7.
[25] Ibid, para 9.

[42] In paragraph 10 of the 29 March reasons *the tribunal* reviewed its findings noting that none of *the respondents* could pass the initial assessment stage of recruitment because of the unconscious bias of the assessors in respect of competence. It rejected evidence that some of the complainants were not behaviourally competent or would not have been employed for other reasons.

[43] In paragraph 11 of the 29 March reasons *the tribunal* referred to the recruitment process being the subject of 'much and widely disparate evidence'. It adopted 'an intermediate position' between *the respondents* and *the appellant's* cases with its findings as to the process based on 'a number of pieces of particular uncontroversial evidence' which it identified. The reasons went on to state it was important to bear those factors in mind when coming to the assessment of damages for three reasons largely but not wholly relevant to the personal damages on as distinct from economic loss.

[44] These reasons were:[26]

- The selection process was not as obviously lacking in merit as was contended by *the respondents*. 'If it was the affront to [*the respondents'*] rights would have been greater';

- On the other hand the process was not 'so obviously careful that apart from a then undiscovered deficiency in the assessors' skill a reasonable person could only have thought the process was obviously intended to be … apparently non-discriminatory';

- The process was one which 'a reasonable person could have thought (and the complainants all though it prior to knowing the result) was too cursory to properly test behavioural competence, rather than irrelevant personal features such as age'.

[45] After dealing with other considerations the 29 March reasons turned to the contention that the award should reflect the prospect of employment 'which in truth was low'.[27] It then made four points:

- Each *respondent* was entitled to by law to assessment for employment on their merit;

- Each may or may not have been employed;

- Each had a 20% prospect of employment;

- Each may or may not have been employed but was in any event injured by *the appellant's* discrimination.

[46] *The tribunal* remarked that even if a *respondents'* award was discounted on the basis that it was unlikely that *respondent* would have selected, the award would still not have been less than $5,000.[28]

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[26] Ibid, para 11.
[27] Ibid, para 17.
[28] Ibid, para 17(b).

[47] Turning to the head of economic loss *the tribunal* turned to *the appellant's* submission that a *respondent* could have been rejected at any stage even assuming they had properly passed the stage at which they failed.

[48] *The tribunal* remarked that the submission was made in a vacuum, *the appellant* neither disclosing nor tendering any particular document concerning the requirement of each stage, the number of people rejected at a particular stage and the reasons they were rejected.[29]

[49] The reasons of 29 March went on that *the respondents'* approach to this issue (and to the issue of considerations) was to assert that it had no legal onus to establish any such thing and regard must be had to the way the complainant sought to make out their case. *The tribunal* said this was not a suggestion the onus was on *the appellant*.[30]

[50] *The tribunal's* view in respect of those issues is in my view a valid statement of the position.[31]

[51] *The tribunal* then assessed the loss of a chance as 20 per cent of the loss claimed in the schedule of loss of each *respondent*. It rejected a submission that they were obliged to have mitigated and allowed $5,000 to each *resondent* for personal damages.[32]

The grounds of appeal

[52] The grounds of appeal are conveniently considered in terms of categories. Grounds 2(d) and (l) were not argued. *The respondents* contended that grounds 2(f), (g) and (i) did not constitute an error on a question of law.

[53] The categories are:

- *the appellant* was not given appropriate notice of or opportunity to meet the case made out against it by *the respondents* and so was not afforded procedural fairness (grounds 2(a) and (b));
- *the tribunal* misconstrued or misapplied s 10 of *the Act* (grounds 2(c) and (e));
- *the tribunal* took into account irrelevant considerations (grounds 2(f) and (g));
- *the tribunal* made findings not supported by the evidence (ground 2(h));
- *the tribunal* failed to take into account relevant considerations (ground 2(i));
- *the tribunal* acted without reasonable basis or unreasonably (ground 2(j);
- *the tribunal* reversed the onus of proof; (ground 2(k)).

[29] Ibid, para 21.
[30] Ibid, paras 20-24.
[31] See 'Burden of Proof' chapter of these reasons.
[32] Tribunal reasons dated 29 March 2006, paras 28-30.

Appeal on a question of law

[54] As I have said s 217 of *the Act* confines appeals from the decisions of *the tribunal* to a decision on a question of law. *The respondents* contend that grounds 2(f), (g) and (i) do not satisfy that requirement and thus those grounds of appeal are incompetent. It is therefore necessary to consider the nature of an appeal from a decision on a question of law.

[55] The starting point for consideration of this topic, in my view, remains the judgment of Jordan CJ in *The Australian Gaslight Co v Valuer General*.[33] The judgment identifies the relevant considerations as:

> 1. The question of the meaning of an ordinary English word or phrase used in a statute is one of fact and not of law to be resolved by the tribunal considering the word in its context with the assistance of dictionaries and other books. Evidence is receivable as to the meaning of technical terms and the meaning of a technical legal term is a matter of law.
>
> 2. Whether a particular set of facts comes within the description of such a word of a phrase is one of fact.
>
> 3. A finding of fact cannot be disturbed if the facts inferred by the tribunal, upon which the finding is based, are capable of supporting its findings, and there is evidence capable of supporting its inferences.
>
> 4. A finding of fact of the kind referred to can be disturbed only if;
>
> (a) there is no evidence to support the tribunal's inferences, or
>
> (b) the facts inferred and supported by the evidence are incapable of justifying the finding of fact based on those inferences, or
>
> (c) the tribunal has misdirected itself in law.

[56] The judgment goes on:

> Thus, if the facts inferred by the tribunal from the evidence before it are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law … if, however the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a tribunal of fact cannot be disturbed by a superior Court which can determine only questions of law.

[57] In *Durrisdeer Pty Ltd v Nordale Management Pty Ltd*[34] Ambrose J with whom Pincus and McPherson JA's agreed stated that:

> if the making of a final decision was a question of fact determined against the appellant by the tribunal and there was evidence capable of supporting the finding it could only be disturbed if –

[33] (1940) 40 SR NSW 126, 137-138.
[34] [1996] QCA 558.

(a) there was no evidence to support the inferences on which it depended; or

(b) if the inferences which could be supported by the evidence were incapable of supporting the findings.

[58] The High Court in *Australian Broadcasting Tribunal v Bond*[35] dealt with the application of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and considered that for a determination to be reviewable as a 'decision of an administrative character ... under an enactment' it would generally, but not always be, a decision which at least in a practical sense was final, operative or determinative.

[59] A conclusion as a step in the course of reasoning towards the final decision would not ordinarily be reviewable unless the statute provided for the making of a finding or ruling on the fact. In that case a conclusion would be a decision under the enactment and so reviewable.

[60] *The respondents* in effect submit that this approach applies here. A conclusion which is not a step towards the final decision is not a decision of law. That is a relevant consideration particularly with paragraph 48 of the 10 October reasons which dealt with matters not necessary to deal with having regard to earlier conclusions.

[61] Thus, as was the case in *Australian Broadcasting Tribunal v Bond*,[36] determination of an issue of fact as an essential preliminary to the ultimate outcome or order was reviewable because it was not simply a step along the way to ultimate determination.

[62] In the context of judicial review, the making of findings and drawings of inferences in the absence of evidence is an error of law. But there is no error in simply making a wrong finding of fact: see *Australian Broadcasting Tribunal v Bond*;[37] *Waterford v The Commonwealth*[38] and *R v District Court ex parte White*[39] where Menzies J observed:

> [e]ven if the reasoning whereby the court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish faulty (e.g. illogical) inference would not disclose an error of law.

The burden of proof

[63] It is convenient to say something about the burden of proof in a general sense given ground of appeal 2(k) and some aspects of *the appellant's* submissions[40] before turning to consider the grounds of appeal.

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[35] (1990) 170 CLR 321.
[36] Ibid.
[37] Ibid, 355-366 (Mason J).
[38] (1987) 163 CLR 54, 77.
[39] (1966) 116 CLR 644, 654.
[40] See, eg, supplementary submissions to the effect that if *the respondents* 'seriously asserted' certain issues they should have specifically pleaded them and led evidence; see also, Tribunal reasons dated 29 March 2006, par 22.

[64] Sections 204, 205 and 206 of *the Act* deal with the burden of proof. Section 304 provides that, subject to ss 205 and 206, it was for *the respondents* to prove on the balance of probabilities *the appellant* had contravened the *Act*.

[65] Sections 205 and 206 deal with the cases of indirect discrimination and proof of an exception justifying what would otherwise be discrimination. Each is irrelevant to the situation in this case.

[66] Before *the tribunal*, *the respondents* bore the substantive or legal onus to make out their case by proving the facts in issue essential to establishing unlawful discrimination against them.

[67] The evidential onus of adducing sufficient evidence to raise an issue as to the existence or non-existence of such a fact also rested on *the respondents.* This might involve calling evidence to advance facts or opinions founding their own case or rebut evidence put before *the tribunal* by *the appellant* to refute their case.

[68] Once *the respondents* discharged this evidential onus it is for *the appellant* to determine whether to rely on demonstrating the relevant finding is not maintainable on the evidence before *the tribunal* or to call evidence to refute *the respondents'* or to advance its own case.

[69] The case is then decided on the basis of the whole of the evidence as it stands.[41]

[70] It should be noted that apart from the specific matters raised in ground 2(h) it is not contended there was no evidence to support the findings of fact which are essential to *the respondents'* case.

Grounds 2(a) and (b) – lack of procedural fairness

[71] It is convenient to start with these grounds, not only because they were first but because *the appellant* submitted,[42] in my view correctly, that if it was successful on this ground it was unnecessary to proceed to the other grounds and that the case be remitted to *the tribunal* to be determined according to law.

[72] Grounds of appeal 2(a) and (b) are in the following terms:

> 2(a) The Tribunal erred in law in that it found that the [*appellant*] had directly discriminated on the basis of age on a basis, namely, unintentional direct discrimination which was not:
>
> (i) pleaded,
> (ii) argued at a time when the [*appellant*] could have responded,
> (iii) the subject of an intimation that the tribunal might make such a finding at a time when the [*appellant*] could have responded.
>
> 2(b) The Tribunal erred in law in that it found that the [*appellant*] had indirectly discriminated on the basis of age on a basis, namely, unintentional indirect discrimination which was not:

[41] See, eg, D Byrne, JD Heydon, *Cross on Evidence* (Aust Ed, 1996) 7001-7067.
[42] Transcript of appeal proceedings, p5, line 50.

(i) pleaded by the [*respondents*];
(ii) argued by the [*respondents*] at a time when the [*appellant*] could have responded;
(iii) the subject of an intimation by the tribunal that it might make such a finding at a time when the [*appellant*] could have responded.

[73] In essence *the appellant* complains that it was not given adequate notice of the case which succeeded before *the tribunal* and so did not have a proper opportunity to meet that case or to advance a contrary case. Had it known that *the respondents* were relying on the case they made out *the appellant* would have adduced evidence to deal with it; see the affidavit of Bronwyn Lightfoot.[43]

[74] *The respondents* accepted that these rules of procedural fairness applied and argued that *the appellant* had adequate notice of and opportunity to meet the case made out against them. Cases such as *Kioa v West*[44] and *Minister for Immigration and Multicultural Affairs v Eshetu*[45] support the position that the rules applied and that the precise nature of what constitutes procedural fairness will vary with the circumstances from case to case.[46]

[75] Procedural fairness obviously requires a sufficient delineation of the issues between the parties so that those issues can be effectively addressed; cf *Martin & Anor v Queensland Electricity Transmission Corporation Ltd*.[47]

[76] In *Hehir and Financial Advisers Pty Ltd v Sandra Smith*[48] Wilson J remarked that *the tribunal* was not a court and that Parliament did not intend that proceedings before it would follow all the procedures and formalities of court proceedings although its overriding duty was to accord procedural fairness; see also *Boucher v Australian Securities Commission*.[49]

[77] *The tribunal* is constituted by statute. Section 208 of *the Act*, although headed 'Evaluation of Evidence', deals more broadly with the conduct of proceedings before it. It relevantly provides:

208 Evaluation of Evidence

(1) The tribunal is not bound by the rules of evidence and--

(a) must have regard to the reasons for the enactment of this Act as stated in the preamble; and
(b) may inform itself on any matter as it considers appropriate; and
(c) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; and

[43] Affidavit sworn 21 December 2005 – court file index no 6.
[44] (1995) 159 CLR 550.
[45] (1999) 197 CLR 611.
[46] See, eg, *Kioa v West* (1995) 159 CLR 550, 585 (Mason J), 612 (Brennan J).
[47] [2003] QSC 309.
[48] [2002] QSC 092, [14].
[49] (1996) 44 ALD 499 (Full Court of that Federal Court).

> (d) must conduct itself in a way that will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties; and
> (e) may give directions relating to procedure that, in its opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties; and
> (f) may draw conclusions of fact from any proceeding before a court or tribunal; and
> …

[78] Although s 208 cannot effect the 'irreducible minimum' of procedural fairness spoken of in *Kioa v West*[50] as required by the principles of natural justice *the tribunal* is not bound by the rigor of formal court proceedings such as those reflected in the *Uniform Civil Procedure Rules* (UCPR); see s 208 (1)(b)-(e) of *the Act*.[51]

[79] For example 'pleadings' are useful in identifying issues so that a party can appreciate the case it has to meet and take steps to meet it. Before a body such as *the tribunal* however they do not have the consequence of confining admissible evidence to issues in the sense in which they do in proceedings conducted under the UCPR. Nor do they give rise to the considerations of formal amendment to align the pleadings to the issues which evolve as a case proceeds as those rules do.

[80] The question in these proceedings is whether in the particular circumstances *the appellant* had sufficient knowledge of the case which was ultimately made out against it so as to be afforded an opportunity to meet that case. That consideration involves a commonsense approach not constrained by technical or procedural considerations, but focussed on whether *the appellant* was afforded a proper opportunity in the circumstances. In order to deal with the issue it is necessary to consider the course of proceedings before *the tribunal* up to and during the hearing.

[81] It is fair to say that from the institution of proceedings to the final addresses before *the tribunal, the respondents'* case evolved and the issues and their definition shifted. It is also fair to say that the claim pleaded and presented focussed initially on intentional discrimination. That issue featured in the early part of the hearing but as evidence emerged was effectively abandoned as the hearing progressed.[52]

[82] Experience suggests that although undesirable it is not unusual in cases such as this. It is open to a party, for example to object to evidence as irrelevant to the issues, to seek an adjournment to deal with unexpected evidence or to apply to reopen its case to meet evidence that was not foreshadowed.

[83] The parties were represented before *the tribunal* by solicitors who instructed counsel to appear at the hearing. After the proceedings had commenced but before the hearing commenced the parties embarked on an exchange of pleadings with a view, it is to be assumed, to identify and clarify issues.

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[50] (1995) 159 CLR 550, 615 (Brennan J).
[51] Transcript of tribunal proceedings, p425, lines 40-50: *the tribunal's* remark about the case being decided on the pleadings is to be read in this context.
[52] See, eg, Tribunal reasons dated 10 October 2005, para 20.

[84] *The respondents'* original statement of claim was amended on a number of occasions before that approach was abandoned. *The respondents* then delivered points of claim dated 24 August 2004 and *the appellant* responded by points of defence. Those documents provided the basis on which the hearing proceeded.

[85] Paragraphs 14-16 of the points of claim dealt with the selection process including the group assessment to which I have previously referred. After dealing with other matters, paragraph 22 of the points of claim contended that:

> The only inference that can reasonably be drawn is that by the selection process in which [*the respondents*] took part, [*the appellant*] set out to select, as flight attendants, people who were significantly younger than [*the respondents*] in preference to applicants of or around the age of [*the respondents*].

[86] Paragraph 23 went on to allege that the selection process 'favoured applicants who were significantly younger than [*the respondents*]'.

[87] Paragraphs 29 and 30 of the points of claim state that discrimination on the basis of age need not be on the basis of 'precise numerical age' but may be on the basis of the 'general age group' to which the person belongs and that it was not necessary to clearly delineate where the younger and older (to which the applicants belonged and which was discriminated against) age group began. It will be recalled that *the tribunal's* reasons reflected that approach rather than dealing with the age of individual *respondents*.

[88] Paragraph 31 of the points of claim then alleged direct discrimination in terms of s 10 of *the Act* and alternatively indirect discrimination in terms of s 11 because of *the respondents'* age and because a *respondent* was in 'the older rather than younger age bracket'.

[89] The points of claim dealt with direct discrimination alleging that direct discrimination was a consequence of *the appellant* treating *the respondents* as a person with the attribute of a particular age less favourably than another person without that attribute would be treated in the same or similar circumstances.[53]

[90] The points of claim went on to deal with indirect discrimination, alleging that indirect discrimination occurred by *the appellant* imposing 'a requirement for the position … with which older applicants could not comply'.[54]

[91] Although *the tribunal* ultimately disposed of the matter on the basis of direct discrimination it may be noted that paragraph 40 of the points of claim set out to particularize the allegation of indirect discrimination in the following terms:

> Particulars
>
> [*The appellant*] imposed a condition or requirement that applicants for positions as flight attendants project a young image, have youthful attributes, or appear to be young or younger than persons of [*the*

[53] Points of claim dated 24 August 2004, para 37.
[54] Ibid, para 38. See also, Tribunal reasons dated 10 October 2005, para 21 where *the tribunal* concluded that the subjective application of lawful criteria in an unlawful manner was direct discrimination.

> *respondents'*] age or within her older age bracket. The condition or requirement was a term –
>
> (a) with which a person with [*the respondents'*] attribute does not and is not able to comply; and
> (b) with which a higher proportion of people without that attribute – that is, persons who are not in [*the respondents'*] older age bracket but in the younger age bracket – comply or are able to comply; and
> (c) that is not reasonable, because the suitability of a person to carry out the duties and requirements of a flight attendant do not depend in any way on a person being able to fulfil that requirement or condition.

[92] The points of defence relevantly, for present purposes, essentially put in issue or to refute *the respondents'* contentions and the allegations on which they were based.

[93] The proceedings before *the tribunal* over 6 days were largely on the basis of written evidence (affidavits and reports) supplemented by oral evidence with witnesses produced for cross-examination when that was required.

[94] As I have said, it is apparent from the transcript that because of this counsel and *the tribunal* had difficulties in isolating and stabilising issues from time to time before and during the hearing.

[95] It is also apparent from the transcript that *the tribunal* and counsel were aware of the difficulties.[55]

[96] In the course of his opening counsel for *the respondents* told *the tribunal* their case was that they were rejected because the selection process favoured younger applicants and were discriminated against on the basis of age. He then stated:[56]

> [i]n order to prove unlawful discrimination … we do not have to prove an intention to discriminate. Nor do we have to prove that there was any fixed cut off date for the employment of cabin crew and we don't seek to set out or to prove more than we need to in order to establish what we say is a strong inference of a discriminatory recruitment policy.[57]

[97] Counsel for *the respondents* relied on this as an early indicator that their case was not restricted to intentional discrimination.

[98] In his response to *the respondents'* opening counsel for *the appellant* foreshadowed evidence that the selection process provided all candidates with an 'equal opportunity of demonstrating performance on a range of position relevant competencies'.[58]

[99] I have had regard to the transcript of the proceedings before *the tribunal* particularly to those passages to which my attention was directed in oral and written

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[55] Some examples are identified later in this chapter.
[56] Transcript of tribunal proceedings, p6, lines 30-40.
[57] Ibid, p8, line 25 and following.
[58] Ibid, p10, lines 1-10. See, eg, appellant's submissions, para 10; Ibid, p11-16 references; transcript of appeal proceedings, p8-16.

submissions and to those exhibits specifically identified as being relevant to the issues on this appeal.

[100] It would be impossible, without reiterating large slabs of the transcript, to reproduce this exercise in these reasons. The following narration is indicative of the course of events before *the tribunal*. My conclusions are the overall outcome of the process referred to in paragraph 99 rather than being based on any particular aspect or aspects of the proceedings or reasons.

[101] *The respondents'* counsel told *the tribunal* their rejection was because they were discriminated on the basis of their age, the selection process favoured younger applicants. It was 'based largely on observation by assessors not on the basis of any experience or qualification … of any interview etc'.[59]

[102] *The tribunal* raised the question, from the perspective of indirect discrimination, of the class of comparators being inappropriate but had no firm view of it.[60] It was remarked that *the respondents'* case was that *the appellant's* policy operated differently on each applicant 'who had the attribute of being over 35, than it would on a person under 35'.[61]

[103] *The respondents'* counsel spoke of an inference that *the appellant* was endeavouring to be true to a particular image for cabin crew and that involved characteristics consistent with *the appellant's* brand value.

[104] He went on that discrimination on the ground of age, generally speaking, could be overt without any secrecy at all or not overt but covered by pretence. *The tribunal* then remarked that you 'might just do it unintentionally' and the outcome was just arrived at by the 'earnest application of the selection criteria'.

[105] After the close of evidence the parties exchanged written submissions and there were a series of exchanges between *the tribunal* and counsel about the content of those submissions and then oral submissions to supplement those in writing.

[106] *The tribunal* remarked that it did not think that *the respondents'* case was of an unintentional effect based on the honest application of objective criteria to which their counsel responded that it was inherent and implicit in the particulars in the points of claim under the direct discrimination headings.

[107] Counsel for *the respondents* stated he was not asking *the tribunal* to find that the assessors deliberately applied policy which they knew to be unlawfully discriminatory.[62]

[108] Later on the same page he stated:

> [i]t really comes down to this point, that the way in which the process was applied was – either consciously or unconsciously favoured young people that it was open to find that they did so consciously but that in the end 'in my submission it doesn't matter whether it's conscious or unconscious.

[59] Ibid, p6, line 48.
[60] Ibid, p268.
[61] Ibid, p271.
[62] Transcript of tribunal proceedings, p476.

[109] Relevantly for present purposes *the tribunal* asked counsel for *the appellant* to identify specific findings in terms of the pleadings, referring to the debate between counsel as being 'like two ships passing in the night'.[63] In the course of this exchange counsel for *the appellant* referred to a 'swirling undercurrent partially revealed on that day … but not terribly clear… about unconscious discrimination'.[64]

[110] *The tribunal* responded to the effect that it would not stop submissions that a case was not properly pleaded and so could not be made out, it went on to say that before 'we get involved in the intricacies whether it was pleaded and whether you had proper notice' it was necessary to understand what was happening.[65]

[111] The affidavit of Bronwyn Lightfoot[66] deals with expert opinion evidence that *the appellant* would seek to call if there was to be a further hearing before *the tribunal*. This would deal with issues as to unconscious bias, its detection and measures to take it into account and deal with it.

[112] It is in this context pertinent to note that *the appellant* called expert opinion evidence from Dr Amanda Jane Gudmundsson.[67] It canvassed most, if not all, of the issues the proposed evidence would canvass. Dr Gudmundsson for example dealt with the 'similar to me effect' and other factors bearing on bias in the selection process and how it might be dealt with in her evidence before *the tribunal*. Dr Gudmundsson's evidence was referred to in the reasons.[68]

[113] In the course of her cross-examination, Dr Gudmundsson was asked, for example whether the indicators of customer relationships, assertiveness and 'Virgin Flair' might favour attractive younger rather than 'much' older candidates and she rejected the suggestion.[69]

[114] She thought that there were probably a number of areas where the selection process could fall down.[70] She was asked about a natural inclination to believe someone who 'relates to you' and Dr Gudmundsson noted that this was known as a 'similar to me effect' in psychological literature.

[115] She went on to say that there was a potential for this bias regardless of whether someone was young or old and went on to explain that the use of 'very detailed descriptives … of the positive and negative indicators. Strong behavioural indicators and multiple raters helped to alleviate its effect'.[71]

[116] In re-examination Dr Gudmundsson was reminded of having mentioned the concept of 'similar to me' and whether it could be 'minimized by well anchored indicators'. She indicated that she agreed and was asked about the indicators in the assessment process. She answered that there were:

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[63] Ibid, p425, line 38 and following. See also Ibid, p470-476.
[64] Ibid, p478.
[65] Ibid.
[66] Affidavit sworn 21 December 2005 – court file index no 6.
[67] Affidavit sworn 15 April 2005 – tribunal exhibit no 73; transcript of tribunal proceedings, p407 and following.
[68] Tribunal reasons dated 10 October 2005, para 46.
[69] Transcript of tribunal proceedings, p407, line 18.
[70] Ibid, p408, line 28.
[71] Ibid, p410, lines 8-55.

> strong anchors, the positive indicators and there's negative indicators for each competency. Each competency had multiple implicators under the positive category ... two, for the negative indicators and at least two for strong indicators which is providing an assessor with, you know, a range of observable behaviours to make a judgment of.

[117] Put shortly there was evidence called by *the appellant* before *the tribunal* bearing on the basis on which *the tribunal* decided the case. The evidence *the appellant* proposes to call if the matter returns to *the tribunal* seems to relate to issues dealt with or similar to matters dealt with in Dr Gudmundsson's evidence before *the tribunal*.

[118] *The appellant's* submissions went on to say that if *the respondents* seriously asserted matters they should have specifically pleaded and led expert evidence to deal with the matters or cross examine 'to demonstrate … the facts necessary to ground (the case)'. It was therefore submitted that *the tribunal* could not find that either of these matters intruded into the assessment process.

[119] As I have indicated, in my view, *the respondents* bore the substantive onus of proving the facts in issue essential to establishing their case.[72] They also bore the evidential onus of adducing sufficient evidence to raise facts founding findings in their favour and to controvert *the appellant's* evidence. It was then for *the tribunal* to evaluate the whole of the evidence and reach a decision subject to the consideration of adequate notice; that is what occurred in this case.

[120] The supplementary submissions set out to refute *the respondents'* assertion that the evidence did not establish the selection process was capable of accurately and reliably assessing behavioural competency.

[121] The exchange of written outlines and the discussion which they generated was followed by oral addresses. In the course of final oral addresses *the tribunal* referred to having read the written submissions and said to counsel for *the appellant* that they (the submissions) seemed like 'two great ships in the night', the points raised for *the appellant* 'were not taken up by [*the respondents*] and that to some extent [*the appellant*] did not respond to the complaints of the other side'.[73]

[122] In the course of *the appellant's* counsel's oral submissions he referred to *the respondents'* attack on the way the assessors had done their job. He submitted that it was unfair for his client to be criticized for lack of empirical evidence in respect of this aspect.

[123] *The tribunal* stated that it wasn't a question of criticism but the case was one where 'that's the state of the evidence' and the case has to be decided on the state of the evidence and not 'by super adding some sort of inferences about how you've chosen to conduct the case, because there's nothing critical about the way you have chosen to conduct the case.'[74]

[124] Counsel for *the appellant* went on to deal with the attack made on the validity of the selection process and the 'unconscious discrimination thesis that appears to have

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[72] See 'Burden of Proof' chapter of these reasons.
[73] Transcript of tribunal proceedings, p450-452.
[74] Ibid, notably p452, lines 25-40. There is in my view a strong element of hindsight in the appeal grounds and submissions.

been developed by *the respondents*.'[75] *The tribunal* intervened stating 'it had to be unconscious. The case hasn't been conducted on the basis of anything but it being unconscious.' [76]

[125] In his submissions immediately following this counsel for *the appellant* referring to unconscious discrimination or:

> similar to me effect which was fleetingly mentioned by Dr Gudmundsson … one would have expected … properly grounded evidence … what might cause a person to behave like that … If it's (his client's case) was to be attacked its should be attacked by an expert not someone saying 'Oh well, you know, we can't prove that the assessors did it intentionally, therefore it must have been unconscious.[77]

[126] *The tribunal* then intervened to say:

> … the case was never run on the basis that it was conscious. It had never put to any of the assessors that they despite the charade of a recruitment system based on behavioural competencies, were simply intent on choosing people with a particular look
>
> … it's never been, never since the case started … since your witnesses were cross examined, … and there wasn't any positive evidence … of an intentional system.[78]

[127] A review of the proceedings shows that *the tribunal*, which was in a far better position that I am to judge, was correct in these remarks.

[128] A review of the pleadings and proceedings founds the conclusion that it became apparent that *the respondents'* case was not conducted on the basis it was restricted to intentional discrimination at the time of the opening and that:

- It became apparent that there were issues about the group assessment stage of the selection process and its outcomes in the context of *the respondents'* claims of discrimination.
- Those issues bore on discrimination in favour of younger and against older applicants because of defects in the process.
- There was evidence being led by both parties before *the tribunal* bearing on those considerations.
- Although it may be the case that:
  - initially at least there was focus on intentional attributes of the selection process being focussed on recruiting 'younger' rather than 'older' applicants;
  - there were obvious difficulties in a stable joinder of issues between the parties;

[75] Ibid, p452, line 50.
[76] Ibid, p453, line 3.
[77] Ibid, p453.
[78] Ibid, 453.

the respondents' case was not pleaded so as to be restricted to intentional discrimination and it was not conducted on that basis.

[129] Counsel for *the appellant* on occasion complained or expressed concern about the course of *the respondents'* case by reference to the pleadings. I have not however been directed to any occasion where there was an objection taken which was upheld or overruled by *the tribunal* as to the admission of evidence on that basis it is way outside the case pleaded or to submissions that elements of *the respondents'* case could not be made out because of that. I have not been directed to any application for an adjournment or to re-open *the appellant's* case to deal with an unexpected turn in the case.

[130] The combined effect of the issues canvassed is that I am not persuaded that *the appellant* has made out its case that it was not given adequate notice of the case made out against it by *the respondents* depriving it of the opportunity to meet it so that it was deprived of procedural fairness. Grounds of appeal 2(a) and (b) have not been made out.

Grounds 2(c) and (e) – *The tribunal* misconstrued or misapplied provisions of the *Anti Discrimination Act 1991* (Qld)

[131] Grounds 2(c) and (e) complain that *the tribunal* misconstrued or misapplied s 10 of *the Act*. The grounds are conveniently considered together.

[132] Section 10 deals with direct discrimination and defines it in the following terms:

> (1) Direct discrimination on the basis of an attribute happens 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.
>
> (2) It is not necessary that the person who discriminates considers the treatment is less favourable.
>
> (3) The person's motive for discriminating is irrelevant.
>
> (4) If there are 2 or more reasons why a person treats, or proposes to treat, 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.
>
> (5) In determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant.

Ground 2(c)

[133] Ground 2(c) is that *the tribunal* erred in law in holding that direct discrimination in breach of s 10 could be unintentional or unconscious.

[134] In contending that *the tribunal* erred in law in concluding direct discrimination could be unintentional or unconscious *the appellant* submitted that the use of the term 'treatment' in the section implied an intention to 'treat in a particular way' a

construction said to be reported by the reference to 'reasons for treatment' in s 10(4) of *the Act*.

[135] *The appellant* also relied on the offending discrimination being in the 'pre-work' category which required a 'decision'; see s 14(1)(a)(b) of *the Act*. A 'decision', it was contended, could not be unconscious or unintentional.

[136] *The appellant* referred in some detail to *Purvis v New South Wales (Department of Education and Training)*[79] (*Purvis*) particularly the passage in the joint judgment of Gummow, Hayne and Heydon JJ.[80] *Purvis*[81] was a case under the *Disability Discrimination Act 1992* (Cth). The High Court upheld the decision of the Full Court of the Federal Court to the effect that the exclusion of a pupil from a state school on the grounds that his violent behaviour, caused by a disability, endangered others was not unlawful discrimination.

[137] Gleeson CJ concluded that it was lawful for a decision maker to identify, as the basis of a decision to treat a person with a functional disorder in a particular way, because of the threat to others in particular circumstances.

[138] The passage in the joint judgment[82] relied on by *the appellant* is *obiter* and addressed the issue of whether there was less favourable treatment 'because of disability' to use the terminology of the Commonwealth Act.

[139] The judgment concluded that it was doubtful that the distinction between 'motive, purpose or effect' would greatly assist resolving issues about whether discriminatory treatment was 'because of' disability. It would be a mistake to treat those words as substitutes for that phrase.

[140] The 'central question' was why was the aggrieved person treated as they were? If the aggrieved person was treated less favourably was it 'because of', 'by reason of' that person's disability.[83] Motive, purpose and effect might bear on the question but as the judgment indicated it may be distracting to consider them.

[141] In my view the passage does little to advance *the appellant's* argument. In any event the central 'why' question in *Purvis*[84] would seem to be answered as being the risk of harm to others. Intention or consciousness would appear irrelevant in the circumstances of dealing with that. The issue raised by s 10 is however, whether the consequence of a decision is discriminatory.

[142] The *Racial Discrimination Act 1975* (Cth) makes similar provisions. The issue of intention under that Act was considered in some detail in *Bligh, Cootes, Foster, Lenoy, Sibley, Sibley and Palmer v The State of Queensland*[85] where the Commission concluded that the preponderance of authority was in favour of intention to discriminate not being an element of the unlawfulness defined by the Act after an examination of a number of decisions.

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[79] (2003) 217 CLR 92.
[80] Ibid, paras [234]-[236].
[81] Ibid.
[82] Ibid, paras [234]-[236].
[83] Ibid, para [236].
[84] Ibid.
[85] [1996] HREOCA 28, 20.

[143] Consideration has been given to the question of motive or intention in *HREOC v Mt Isa Mines*[86] and *Thompson v Orica Australia Pty Ltd*[87] to which my attention has been directed. Those cases seem to me to illustrate the need to focus on the terms of the statutory provision emphasised by the High Court in *Purvis*.[88]

[144] In this case s 10(2) and (3) of *the Act* specifically provide that it is not necessary that the person who discriminates considers the treatment less favourable and that the motive for discrimination is irrelevant.

[145] Subsection (4) deals with situations where there are two or more reasons for discrimination by providing that the deciding consideration is whether a relevant attribute is a substantial reason for the treatment.

[146] These specific statutory provisions seem to me to weigh heavily against *the appellant's* contention that *the tribunal* erred in law insofar as it held that direct discrimination could be unintentional or unconscious. I am not satisfied that ground 2(c) is made out.

Ground 2(e)

[147] Ground 2(e) is that *the tribunal* failed to correctly apply s 10 in failing to consider:

> (i) whether [*the respondents*] were treated less favourably than a person who was aged below 35 years of age; and
>
> (ii) whether in the event that there was favourable treatment it occurred in circumstances that, as between [*the respondent*] and the person who was aged less than 35 years of age, were the same or not materially different.

[148] *The appellant* submitted that *the respondents* were required to prove less favourable treatment in the context of 'circumstances' that, as between a *respondent* and a person under 35 were the same and not materially different apart from age.

[149] It was submitted that the circumstances attending to the treatment given to a *respondent* must be identified and then consideration be given to what would have been done in those circumstances if the person concerned was under the age of 35.

[150] It was then submitted that there was no finding or consideration given for whether the circumstances for a *respondent* and the comparator class were the same or not materially different so that the finding of direct discrimination should be set aside.

[151] The evidence before *the tribunal* was that all applicants for employment underwent the same selection process which *the appellant* contended and *the tribunal* found was age neutral.

[152] It cannot therefore be contended that the circumstances of the two groups at the stage of the selection process where discrimination was found to occur were other than 'the same or not materially different'. *The tribunal* found discrimination was a consequence of the process not working as it should have.[89]

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[86] (1993) 46 FCR 301.
[87] (2002) 116 IR 186 at 157.
[88] (2003) 217 CLR 92.
[89] Tribunal reasons dated 10 October 2005, paras 46-47.

[153] It is true that the reasons do not expressly state that the less favourable treatment of applicants in the older rather than the younger category occurred in circumstances that were the same or not materially different.

[154] It was, as I have said, not in issue before *the tribunal* that the applicants from both age groups participated in the same recruitment and selection process which *the appellant* contended and *the tribunal* found were designed to produce (and in other applications did) an age neutral result.

[155] There is therefore no basis for suggesting or concluding that the circumstances of the two groups (older and younger applicants) were other than the same or not materially different. The discrimination arose because of unconscious bias by those who assessed the performance of all individual applicants and of the group.

[156] Relying on *Purvis*[90] *the appellant* contended that what was to be examined was what would have been done in the circumstances of a person under the age of 35. As I have already indicated, in my view that was implicit in what *the tribunal* did, with circumstances applying to the younger being the same as those applying to the older applicants. *The tribunal* determined that *the respondents* were less favourably treated than the younger applicants on the basis of the statistical evidence[91] and the flawed working of the selection process canvassed in the reasons. It therefore follows in my view that ground 2(e) has not been made out.

Grounds 2(f) and (g) – Irrelevant considerations taken into account

[157] Grounds 2(f) and (g) are that *the tribunal* erred in law by taking into account different irrelevant considerations but are conveniently to be considered together.

[158] Ground 2(f) states that the irrelevant consideration was the age of employees at appointment contained in Exhibit 2 before *the tribunal*. These figures are said to be irrelevant in deciding whether there was direct discrimination at the assessment stage.

[159] *The appellant* submitted that the age of employees at appointment was irrelevant because that was not the step at which discrimination was alleged to have occurred. It was then submitted that *the tribunal* acted 'unreasonably and illogically in deciding there was direct discrimination at the assessment stage on the apparent sole basis of statistical evidence at the age of employees at the time of employment (and not assessment)'.

[160] The error was said to have been compounded by a further irrelevant consideration of the age of persons appointed prior to September 2001[92] notwithstanding the earlier finding that the evidence was of not much use.

[161] Paragraphs 6 and 7 of the reasons simply record that before the relevant period a 'very significant number' of female applicants for employment were under the age of 35 years and the number of older females was much lower with the consequence that statistical evidence of participation prior to the commencement of the relevant period is of little use in detecting discrimination in the relevant period.

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[90] Ibid.
[91] Tribunal reasons dated 10 October 2005, paras 47-48.
[92] Ibid, para 40.

[162] There was direct evidence of the age of each of *the respondents* at the time at which she attended the assessment centre stage and evidence to support a conclusion the time between completion of the assessment process and final selection of successful applicants was relatively short.

[163] It follows that every successful applicant was younger at the assessment centre stage than at appointment. That *the respondents* may have been discriminated against at the assessment stage rather than at appointment does not render irrelevant the consideration of the age of employees at appointment as set out in Exhibit 2.

[164] There is evidence to support *the tribunal's* conclusion that the selection process favoured younger applicants on the basis dealt with in the reasons and there was not an error on a point of law in this respect.

[165] *The appellant* refers to *the tribunal* having concluded that the statistical evidence about participation by age in *the appellant's* workforce prior to 'say September 2001' is of very little use in detecting age discrimination in the selection process for the relevant period (the period September 2001 to September 2002) during which *the respondents* applied for and were refused employment.[93]

[166] It was then submitted that *the tribunal* erred in paragraph 41 of the reasons by taking into account a further irrelevant consideration, the age of persons appointed prior to September 2001, notwithstanding that it had earlier been considered as of little use in detecting the presence of age discrimination.

[167] This does not reduce the significance of what is said in paragraph 41 of the reasons that 'based on *the respondent's* pleadings' 90 per cent of applicants were in the 18 to 35 age bracket and 10 per cent aged 36 or over while one of approximately 750 successful applicants for employment in the relevant period was over 36. That was a conclusion open on the evidence and relevant to *the tribunal's* deliberation.

[168] I am therefore not persuaded that grounds 2(f) and (g) constitute an error of law justifying interference with *the tribunal's* decision.

Ground 2(h) - Findings not supported by the evidence

[169] Ground 2(h) is that *the tribunal* erred in law in making findings of fact not supported by any evidence. These instances are particularised as follows:

(i) the appellant employed up to six (6) assessors only;
(ii) that sixty (60) or thereabouts applicants were assessed at any one time;
(iii) that assessments were not being conducted as designed;
(iv) that a behavioural competency testing in the instant case did not produce an age neutral result;
(v) there were no multiple raters;
(vi) ten percent of applicants for employment with the appellants were aged 376 or over;
(vii) there existed a statistical variance after the Assessment Centre stage of the recruitment process.

[93] Ibid, para 7.

[170] Grounds 2(h)(i) and (ii) are to the effect that *the appellant* 'employed up to six assessors only and that 60 (or thereabouts) applicants were assessed at any one time' are conveniently dealt with together.

[171] The figures are found in paragraph 48(b) of *the tribunal's* reasons. Paragraphs 46 and 47 of the reasons concluded that the statistical evidence supports a finding the group assessment procedure did not work as it should have.

[172] Paragraph 48 stated, given that finding it was unnecessary to do so, said there were a number of factors founding a conclusion of unconscious discrimination on the basis of age and refers to the figures. There is therefore point to *the respondents'* submissions to the effect that these are not findings of facts founding *the tribunal's* decision.

[173] Paragraphs 14 and 15 of the reasons appear to be the source of these figures. They speak of 'only 60 or thereabouts being assessed at a time, employment 76 assessors … for every 10 applicants'. Those paragraphs are part of *the tribunal's* dealing with the assessment process.

[174] One of the witnesses called by *the appellant* and who was its employee at the relevant time was Leigh Richardson. He was a recruitment co-ordinator assisting in running the assessment centres. He spoke of there being 'generally four assessors' but the number of applicants invited to assessment sessions depended on the number of assessors available and referred to six to eight and to there being six assessors available.[94] Dr Gudmundsson's report[95] also deals with the figures.

[175] It therefore cannot be said there was not any evidence to support the matters referred to in 2(h)(i) and (ii). There is in any event much to be said for the view that these are not findings providing a basis for *the tribunal's* findings of discrimination.

[176] In my view grounds 2(h)(i) and (ii) are not made out.

Ground 2(h)(iii) and (iv)

[177] These grounds are conveniently considered together. Ground 2(h)(iii) is that assessments were not being conducted as designed. Ground 2(h)(iv) is that the testing did not produce an age neutral result. These are matters of conclusion based on evidence and inference rather than findings of fact and *the tribunal's* reasons expose the considerations on which it acted.

[178] *The tribunal* returned to the issues in paragraph 48 of the reasons which it will be recalled refers to a number of factors leading to the conclusion that the assessors were unconsciously discriminating although it was unnecessary to do having regard to the earlier findings.

[179] In paragraph 40 of the reasons however *the tribunal* concluded that the behavioural competency testing had not produced an age neutral result as it was designed to do and had in fact done so in other applications.

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[94] Transcript of tribunal proceedings, p327-328.
[95] Affidavit sworn 15 April 2005 – tribunal exhibit no 73, annexure 12.

[180] The proportion of people over 35 selected in the September 2001 to 2002 period (the relevant period) was lower than the proportion under 35 and rejected *the appellant's* statistical analysis seeking to demonstrate the opposite.

[181] Paragraph 41 of the reasons then commenced by rejecting that this statistic was merely a consequence of the age makeup of applicants for employment. *The tribunal* concluded that based on *the appellant's* pleading,[96] 90 per cent of applicants were in the 18-35 age bracket and 10 per cent 36 or over.[97] Only one of the approximately 750 successful applicants for employment during that period was over 36 years.

[182] *The tribunal* went on that the evidence did not disclose precisely how many unsuccessful applicants passed the group assessment but failed in the later stages of the process.

[183] It then concluded that could not affect the result to the extent necessary to dispel the conclusion that the assessments were not being conducted as designed. The conclusions by *the tribunal* reflected in grounds 2(h)(iii) and (iv) were therefore open on the evidence and no error on a question of law has been demonstrated.

Ground 2(h)(v) No multiple raters

[184] *The appellant* apparently contends that there is evidence supportive of there being no multiple raters but that could not be extrapolated beyond five centres.[98] In the context of the way in which the case was conducted and the whole of the evidence the conclusion complained of was open to *the tribunal.*

Ground 2(h)(vi) - 10 percent of applicants were aged 36 or over

[185] The points of defence pleaded to the effect that there were approximately 90 per cent fewer applicants older than the age bracket referred to in paragraph 22 of the points of claim. That bracket was from about 18 years to about 35 years. During the course of the hearing, *the tribunal* asked *the appellant's* counsel whether the points of defence meant that 10 per cent of all applicants were over 35 and that was confirmed.[99]

[186] *The appellant's* submitted that it was not correct to decide in paragraph 41 of the reasons that 10 per cent of the applicants were aged 36 or over.

[187] It was further submitted that the use of 35 allowed *the respondents* to claim only one person in the 'older age bracket' category was employed prior to the relevant 28 October 2002 cut-off but if those who have turned 35 were utilised there were six people who had turned 35 prior to that date.

[188] Those were essentially matters of submissions to be made to *the tribunal* and it seems to be sought to review this by characterising *the tribunal's* analysis in paragraph 41 as not being based on the evidence. In my view *the appellant* has not demonstrated that *the tribunal's* dealing with the matter constituted a finding of fact not supported by any evidence.

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[96] Transcript of tribunal proceedings, p412.
[97] Ibid, p300, line 35; Ibid, p301, line 20.
[98] Tribunal reasons dated 29 March 2006, para 40.
[99] Transcript of tribunal proceedings, p300, lines 35 - p301, line 20.

Ground 2(h)(vii) - a statistical variance after the assessment centre stage of the process

[189] The reference to statistical variances in paragraph 48 of the reasons is in the context of a conclusion that the assessors applying the otherwise age neutral selection system were unconsciously discriminating on the basis of age and that this caused the statistical variance.

[190] *The tribunal's* reference to statistical variance is apparently a compendious reference to the process reflected in paragraphs 33 to 46 of the reasons which is a conclusion that the statistical evidence supported the finding that the group assessment procedure did not work as it should have. In paragraph 47 *the tribunal* rejected *the appellant's* explanation and concluded that the discrimination based on age case had been made out.

[191] It will be recalled that paragraph 48 went on, although it was unnecessary to do so, having regard to the previous findings to identify a number of factors leading to the conclusion of unconscious discrimination on the basis of age so causing the statistical variance.

[192] The existence of a statistical variance may be illuminated or explained by identifying its causes but doing so will not necessarily eradicate the conclusion there was such a variance.

[193] In my view ground 2(h)(vii) has not been made out.

Ground of Appeal 2(i)

[194] Ground of appeal (2)(i) stated:

> (i) that persons over 35 were employed during the period that was contemporaneous to [*the respondents'*] application for employment and attendance at an Assessment Centre;
>
> (ii) that persons who passed the Assessment Centre stage might not continue on to employment for a variety of reasons and that they did not all "fail" in the further stages of recruitment;
>
> (iii) whether [*the respondents'*] in fact failed to display the behavioural competencies that were assessed at the Assessment Centre stage;
>
> (iv) the evidence of [*the appellant's*] expert witness, Dr Amanda Gudmundsson to the effect that [*the appellant's*] well anchored behavioural competencies ameliorated any problems that might arise as a result of a "similar to me" effect;
>
> (v) that there were nine subsequent stages of [*the appellant's*] recruitment and selection process at which a person might be rejected or withdraw between the Assessment Centre stage of [*the appellant's*] recruitment and selection process and appointment.

[195] These considerations were, it was submitted, directly relevant as to whether a proper inference of discrimination could be drawn. *The appellant's* submissions did not descend to particular detail with respect to this ground.

[196] As I have said *the tribunal's* reasons of 10 October 2005 and 29 March 2006 are to be read together. In my view, on a fair reading, particularly of the 29 March reasons, these issues were addressed by *the tribunal*.

[197] Ground 2(i),(i) persons over 35 were employed during the period to which *the respondents'* applications were made.

Ground 2(j) – no basis for over 35 attributes

[198] This contends that *the tribunal* erred in law in accepting (*the respondents'*) attribute for the purpose of *the Act* of being 35 or over when there was no reasonable basis for that to be accepted.[100]

[199] It is self evident that discrimination may be a consequence of a particular age group being too old. This results in discriminating against anyone falling in that age group without it being necessary to give particular consideration to that person's precise age at a particular stage.

[200] The case was conducted on the basis of the attribute of age being defined not by a specific cut-off point but in terms of a younger and an older age group with *the respondents* belonging to the latter.[101] There was no error on a question of law involved in *the tribunal*, in the circumstances of this case, proceeding on that basis.

[201] There is therefore, in my view, no substance in this ground.

Ground 2(k) – reversal of onus of proof

[202] Ground 2(k) is that *the tribunal* reversed the onus of proof by requiring *the appellant* to demonstrate that there was a more probable explanation of the statistics of age of cabin crew at appointment than discrimination. This, it was submitted, was a question of law.

[203] The ground arises in this way. In paragraph 29 of its 10 October reasons *the tribunal* stated there were two substantive bases to support *the respondents'* complaints, first the statistical evidence of the makeup by age of the workforce selected by the selection process at the relevant period.

[204] The reasons then set out to consider the statistical evidence. In paragraph 32 *the tribunal* referred to determining the significance of the statistics that no-one over the age of 35 was employed in the relevant period despite a significant number of over 35's applying and that no-one over the age of 36 was appointed.[102]

[205] *The tribunal* referred to the absence of any evidence from a statistician and concluded that this was not necessary.[103] It went on to say that what was required in each case was a judgment about 'whether all the evidence, including statistical evidence, requires a proper inference (in accordance with established methods of legal reasoning) of discrimination'.[104]

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[100] As I understand, there was evidence of the date of birth of each of *the respondents*.
[101] Tribunal reasons dated 10 October 2005,para 1.
[102] Ibid, para 32.
[103] Ibid, para 36.
[104] Ibid, para 37.

[206] The reasons then 'shortly stated' the relevant factors, they fell into six categories, bearing on the inferences to be drawn from the statistical evidence. The reasons stated that the statistical evidence supported a finding that the group assessment process did not work as it should have and rejected *the appellant's* explanation for the result before concluding that the anomaly indicated that older applicants were treated less favourably.[105]

[207] It is submitted for *the appellant* that paragraphs 36 to 47 of the reasons made it evident that *the tribunal* embraced the statistics in Exhibit 2 and considered whether there was any other evidence to explain why an inference of discrimination should not be drawn.

[208] It was submitted this was notwithstanding that the statistics 'merely supported'[106] not proved or demonstrated a finding of discrimination and so the burden of proof was wrongfully transferred to *the appellant* by requiring it to prove 'there was a more probable explanation available'.

[209] As I have said *the respondents* bore the onus of proof on the balance of probability that *the appellant* had breached *the Act*. Evidence 'merely' supporting" in my view means the issues raised by evidence capable of an inference favourable to *the respondents*.

[210] Paragraph 37 of the reasons properly states the position which arose in the circumstances. The reasons then go on to consider whether there was any basis for not inferring discrimination.[107] Those considerations were canvassed in *the appellant's* submissions to *the tribunal*.

[211] The statement in *the tribunal's* reasons that the statistical evidence supported the finding that the group assessment procedure has to be read in the context of the reasons which were dealing with the whole of the evidence. *The tribunal* did not reverse the onus. *The appellant* failed to dissuade it from concluding as it did on the evidence before it.

Conclusion

[212] The appeal is dismissed for the reasons I have canvassed.

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[105] Ibid, para 47.
[106] Ibid, para 46.
[107] Ibid, paras 38-44.