SUPREME COURT OF QUEENSLAND

CITATION:	*Wood v Department of Employment, Economic Development and Innovation* [2011] QCA 360
PARTIES:	**GREGORY MARK WOOD** (applicant) **v** **DEPARTMENT OF EMPLOYMENT, ECONOMIC DEVELOPMENT AND INNOVATION** (respondent)
FILE NO/S:	Appeal No 5616 of 2011 Appeal No 5618 of 2011 QCAT No 003 of 2008 QCAT No 029 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 149 and s 150 QCAT Act
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	12 October 2011
JUDGES:	Chesterman JA and Margaret Wilson AJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal No 5616 of 2011:** **That the application for an extension of time and for leave to appeal be refused.** **Appeal No 5618 of 2011:** **That the application for leave to appeal be refused.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the applicant was a commercial fisherman who was engaged in both crab fishing and net fishing – where the applicant held two fishing boat licences issued by the respondent – where the applicant failed to meet catch criteria – where the respondent renewed the applicant's licences but amended them to remove permission to engage in net fishing – where the applicant was involved in an accident in 1996 and argued this prevented him from engaging in net fishing – where the applicant appealed to QCAT in its original jurisdiction and the appeal was dismissed – where the applicant appealed to QCAT's appeal tribunal and the appeal was dismissed – where a tribunal

member directed the registry to prepare and issue notices to attend and/or produce to certain persons – where the tribunal member dismissed an application to issue notices to attend and/or produce to certain other persons – whether the member erred in dismissing the application for notices to attend and/or produce

PROCEDURE – COURTS AND JUDGES GENERALLY – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – where the applicant argued that one of the three members who heard and determined the appeal in the tribunal's original jurisdiction was biased as she used an overpowering manner – whether the tribunal member was biased

Fisheries Act 1994 (Qld), s 3
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142, s 150, s 151

Jones v Australian Competition and Consumer Commission (2002) 76 ALD 424; [2002] FCA 1054, cited

COUNSEL: The applicant appeared on his own behalf
M Nicolson for the respondent

SOLICITORS: The applicant appeared on his own behalf
Department of Employment, Economic Development and Innovation for the respondent

[1] **CHESTERMAN JA**: I agree with the orders proposed by Margaret Wilson AJA, for the reasons given by her Honour.

[2] **MARGARET WILSON AJA**: There are two applications before this court –

(i) CA 5616/11: an application for an extension of time and for leave to appeal against a decision made by the Queensland Civil and Administrative Tribunal ("QCAT") in its original jurisdiction on 9 December 2010; and

(ii) CA 5818/11: an application for leave to appeal against a decision of the appeal tribunal of QCAT on 25 May 2011.

Background

[3] The applicant is a commercial fisherman who for many years was engaged in both crab fishing and net fishing.

[4] Commercial fishing was at all material times regulated by the respondent Department pursuant to the *Fisheries Act* 1994 (Qld),[1] the main purpose of which was –

> "… to provide for the use, conservation and enhancement of the community's fisheries resources and fish habitats in a way that seeks to—

[1] Section 3(1).

(a) apply and balance the principles of ecologically sustainable development; and

(b) promote ecologically sustainable development."

[5] The applicant held two fishing boat licences issued by the respondent (QFV10092G, FHVF and QFV12183E, FYQT) which expired on 31 October 2004 and 30 June 2005 respectively. An "N1" symbol, allowing the licence holder to engage in net fishing, was attached to each.

[6] The respondent implemented a policy to eliminate excess fishing capacity in Queensland's east coast fisheries to assist in achieving the main purpose of the legislation. Pursuant to that policy it established a decision making process to amend licences to remove certain symbols, including "N1" symbols, if minimum past catch criteria were not met.

[7] The applicant failed to meet the minimum catch criteria over the period 9 April 1998 to 8 April 2002, and the respondent subsequently issued him with notices to show cause why the "N1" symbol should not be removed from his licences. In each case he was given the opportunity to demonstrate any "special circumstance" why the symbol should not be removed.

[8] The applicant was involved in a boating accident in November 1996. There was a collision between his boat and that operated by Paul and Gary Smith, and he sustained personal injuries. He maintained that his injuries prevented him from engaging in net fishing and amounted to a special circumstance why the symbol should not be removed. The respondent did not accept this. By decisions made on 1 November 2004 and 30 June 2005, the licences were renewed, but the "N1" symbols were removed.

QCAT proceeding

[9] The applicant appealed to the Fisheries Tribunal by notice of appeal dated 8 August 2008.

[10] On 1 December 2009 that tribunal ceased to exist, and its functions were assumed by the newly created QCAT.

[11] On 12 August 2010 the respondent informed the applicant that it had conducted an internal review of its decisions, and that it refused to depart from them.

[12] There were several directions hearings in QCAT, including those conducted by Member Booth on 25 June 2010 and 17 August 2010 and one conducted by Member Cullen Mandikos on 27 August 2010.

[13] The appeal was heard by the tribunal in its original jurisdiction constituted by Senior Member Oliver, Member Cullen Mandikos and Member Jarrett on 15 November 2010. The applicant was represented by his solicitor. The appeal was dismissed on 9 December 2010.

[14] An appeal to the appeal tribunal constituted by the President (Justice Alan Wilson) and Member Howard was heard on 17 May 2011. The applicant appeared on his own behalf. The appeal was dismissed on 25 May 2011.

CA 5616/11

[15] By s 142 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) the only avenue of appeal against a decision of QCAT in its original jurisdiction is to the appeal tribunal. This court has no jurisdiction to hear such an appeal.

[16] Accordingly, the application for an extension of time in which to appeal should be refused.

CA 5618/11

[17] By s 150 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) an appeal against a decision of the appeal tribunal may be brought to the Court of Appeal only on a question of law and only with the leave of the court. Such an appeal must be brought within 28 days "after the relevant day" unless the court orders otherwise. In the present case the relevant day was the day the applicant was given the written reasons for the decision of the appeal tribunal.[2]

[18] Proceeding CA 5618/11 was filed on 28 June 2011.

The appeal to QCAT in its original jurisdiction

[19] In the proceeding before QCAT in its original jurisdiction, the applicant admitted that the catch history recorded in the logbooks did not satisfy the catch criteria required by the respondent's policy.

[20] The applicant leased one of his licences to Robert Bartlett between March 1997 and June 1999, and he leased the other to Greg Radley between September 2003 and October 2003 (outside the criteria period). The logbooks in evidence did not reveal any catch as a result of net fishing while the licences were leased. The Tribunal said at AR 259:

> "[28] The only evidence to support any fish caught in nets by Mr Bartlett or Mr Radley consists of Mr Wood's oral evidence that each told him that they utilised the N1 symbol for fishing. This evidence carries little weight when viewed alongside the log books, which do not record <u>any</u> fish being caught with the use of the N1 symbol. Mr Wood takes issue with the fact that the two pages of the log book relevant to Mr Radley are 'missing'. Neither of these potential witnesses have provided statements to support Mr Wood's contention, nor were they called to give evidence.
>
> [29] In the end, we do not need to take into consideration the matters relating to Mr Radley and Mr Wood further, as this Application is not about trying to establish catch history during the relevant period – Mr Wood admits that he did not comply with the policy in these respects. Rather, this Application is concerned with the identification of 'special circumstances'. In so far as special circumstances are concerned, there is no probative evidence capable of supporting Mr Wood's assertions that he could not use his N1 license, and therefore leased it."

[21] The respondent accepted that the boating collision in November 1996 had occurred and that the applicant had sustained serious injuries in it.

[22] The tribunal was not satisfied that personal injuries sustained by the applicant were such as to prevent him from engaging in net fishing.

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[2] Section 151.

The appeal to QCAT in its appeal jurisdiction

[23] The appeal to the appeal tribunal was brought primarily on the ground of alleged bias on the part of Member Cullen Mandikos, who was one of the three members who constituted the tribunal in its original jurisdiction. In her reasons for dismissing the appeal Member Howard (with whom the President agreed) said -

> "[4] Mr Wood says that some months prior to the final hearing and in the course of a directions hearing, Dr Cullen-Mandikos made orders refusing to issue some notices to attend and/or produce documents which had been requested by him; and varied the basis on which several other notices were to issue. Mr Wood asserts that, on that occasion, Dr Cullen-Mandikos was negative towards him and more positive towards the DEEDI representatives. He says, in this appeal, that he considered she was biased.
>
> [5] The decision made at the directions hearing was not appealed, although Mr Wood asserts he was unaware that he could have sought to appeal. Mr Wood now says that he considers that his case at the final hearing was compromised as a result of that earlier decision.
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> ...
>
> [17] Mr Wood does not allege that Dr Cullen-Mandikos said anything, at the directions hearing or the final hearing, which led him to the view that she was biased against him. He merely says, in effect, that he considered she was more negative towards him and more positive towards DEEDI at the directions hearing, in that she did not make all of the directions he sought and he disagreed with some of her orders. A mere assertion of an earlier adverse decision is insufficient to establish apprehended bias.
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> [18] At the Appeal hearing he acknowledged that Dr Cullen-Mandikos, who was not the presiding Member, did not speak during the hearing of the proceeding. He raises his complaint of bias for the first time on appeal, having received a decision which was adverse to his application. He does not point to anything in the decision itself which suggests bias."

Questions of law sought to be agitated on appeal to this Court

[24] The applicant was self-represented before this Court. Two questions of law could be distilled from his submissions –

(a) whether the original decision ought to have been set aside by the appeal tribunal because it was tainted by errors made by Member Cullen Mandikos at the directions hearing on 27 August 2010 in relation to notices to attend and/or produce; and

(b) whether the original decision ought to have been set aside by the appeal tribunal on account of Member Cullen Mandikos' bias.

The directions hearing on 27 August 2010

[25] On 25 June 2010 Member Booth directed the registry to prepare and issue notices to attend and/or produce sought by the applicant in an application dated 8 April 2010. Subsequently, notices directed to the respondent's officers Mark Doohan, Frances Humphries, Mark Lightower and Phillip Gaffney were issued.

[26] The applicant was self represented at the directions hearing before Member Cullen Mandikos on 27 August 2010, when the following directions were given –

> "1. The Respondent to produce all logbooks relevant to FYQT and FHVF no later than 4.00 pm on 27 August 2010, and to file the original documents in the Tribunal no later than 4[.00] pm on 30 August 2010.
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> 2. The Applications for a Notice to Attend or Produce directed to the DEEDI Call Centre Manager, Mr Doug Zahmeld, Mr Paul Garry Smith, Mr Garry David Smith, Mr Scott Spencer and Minister Timothy Mulherin are dismissed.
>
> 3. A Notice to Attend or Produce directed to Mr Gregory Radley will issue.
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> 4. At the hearing of this matter, witnesses Mr Philip Gaffney, Ms Frances Humphries and Mr Mark Doohan will be called last, and only after the Member(s) with conduct of the matter make a determination that said witnesses may have relevant evidence to give to the Tribunal.
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> 5. Witnesses Mr Philip Gaffney, Ms Frances Humphries and Mr Mark Doohan have leave to appear by telephone, and the Respondent is to advise the Tribunal of their contact details of this purpose no later than 4.00 pm on 10 September 2010."

The applicant submitted to this Court that the member erred in dismissing his application for notices to attend and/or produce directed to the persons in paragraph 2.

[27] The applicant has not established that any of those persons could have been expected to give evidence relevant to the "special circumstance" in issue before QCAT.

(i) *The respondent's call centre manager*

The applicant wanted him to be required to produce all telephone records relating to him between 2003 and 2010. However, the respondent told the member that records kept by the call centre would indicate merely that a call was received from someone on a given day and passed on to a departmental officer, that the officer may or may not have made a file note in relation to the call, and that any file note would have been placed on the relevant boat file.

(ii) *Doug Zahmeld*

Mr Zahmeld was the log book co-ordinator at Fisheries Queensland. The applicant wanted him to produce log book records and file notes in

relation to the two licences. The respondent agreed to disclose the log book files for the licences and subsequently filed the original log books with the QCAT registry. The respondent advised that it kept a boat file in relation to each licence and that any files notes would be on the boat file. It agreed to file the boat files for the relevant licences in the registry.

(iii) *Paul Garry Smith and Garry David Smith*

These were the fishermen involved in the collision in November 1996. The occurrence of the incident was not in issue.

(iv) *Scott Spencer*

Mr Spencer was a former secretary of the QFMA (Queensland Fisheries Management Authority). The applicant wanted him to produce records and files before 1991 and about meetings in 1995, the relevance of which was not established.

(v) *The Minister*

The applicant wanted the Minister to produce all files relating to the relevant licences, licence transfers to Barlett and Radley from 1997 to 2004, and three other fishermen who had allegedly tried to kill him on Moreton Bay from 1996 to 1997. The respondent had agreed to file the log book records and boat files relating to the two licences for the applicant to view. Otherwise, the evidence the documents sought by the applicant were not relevant to the issue before the tribunal.

[28] Before the hearing, the respondent disclosed all of its files relating to the applicant and his licences. In the circumstances the applicant was not placed at any disadvantage by the direction that Mr Doohan, Ms Humphries and Mr Gaffney be called last and only after a determination that they had relevant evidence to give, or by the direction that they might appear by telephone.

[29] In short, I am unpersuaded that the appeal tribunal erred in law in not setting aside the decision of the tribunal in its original jurisdiction on the ground it was tainted by errors made by Member Cullen Mandikos at the directions hearing on 27 August 2010.

Bias

[30] Member Cullen Mandikos was one of the three members who heard and determined the appeal in the tribunal's original jurisdiction. She did not say anything during the hearing from which bias might be inferred or even apprehended; indeed, as the applicant acknowledged before the appeal tribunal, she did not speak during the hearing. There was nothing in the tribunal's reasons for dismissing the appeal from which bias might be inferred or apprehended. Of course, the mere fact of an earlier adverse decision is insufficient to establish apprehended bias.

[31] The applicant's complaint of bias relates to the Member's conduct of the directions hearing. The applicant's complaint was essentially about the member's manner: he said her voice was "overpowering"; that "all of the fight went out of [him]"; that "it was the way she dealt with [him]". A transcript of that directions hearing was in the appeal record before this court. The applicant was asked to give examples of what he was talking about, but he could not do so. Indeed, a perusal of the transcript reveals that the member was at all times courteous, that she listened patiently, and that she tried to explain what matters were relevant.

[32] In my view there is absolutely no basis for the assertion of any bias, either actual or apprehended.

[33] The applicant was represented by his solicitor when the appeal was heard by the tribunal in its original jurisdiction. No point about the member's alleged bias in the conduct of the directions hearing was taken. Even if there had been any substance in the point, the failure to raise it may have constituted waiver[3] – but in the circumstances it is not necessary to determine this question.

Fresh evidence

[34] In his written submissions to this court the applicant said that since the appeal tribunal hearing it had come to light that the licences were leased to Gregory Bradley during the criteria period. It is not clear whether there was a typographical error – that is, it is not clear whether he meant "Radley" or "Bradley". Certainly the issue of Radley leasing the licences was known to the applicant prior to the hearing.

[35] The applicant did not make any formal application to adduce further evidence on the appeal; nor did he seek to tender an affidavit containing the further evidence. Moreover, it is difficult to see how the existence of such further evidence might give rise to a question of law in relation to which leave to appeal might be given.

[36] In the circumstances his statement that he had fresh evidence that the licences were leased during the criteria period is irrelevant to the determination of the application for leave to appeal to this court.

Conclusion in CA 5618/11

[37] In my view the proposed appeal does not have any prospects of success, and thus any necessary extension of time and leave to appeal should be refused.

Orders

[38] Both applications should be refused. Counsel for the respondent told the court his client would not seek costs orders against the applicant if his applications were unsuccessful.

[39] I would order as follows –

(a) In *CA 5616/11* – that the application for an extension of time and for leave to appeal be refused; and

(b) In *CA 5618/11* – that the application for leave to appeal be refused.

[40] **McMEEKIN J**: I agree with the reasons of Wilson AJA and the orders proposed.

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[3] As, for example, in *Jones v Australian Competition and Consumer Commission* [2002] FCA 1054 at [126] per Weinberg J; (2002) 76 ALD 424.