SUPREME COURT OF QUEENSLAND

CITATION:	*Willis v State of Queensland* [2016] QSC 80
PARTIES:	**SIMON WILLIS** (applicant) **v** **DR RINGROSE, DR HARDEN AND DR RICE CONSTITUTING THE GENERAL MEDICAL ASSESSMENT TRIBUNAL - PSYCHIATRIC** (first respondents) **STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	SC No 3695 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application for statutory order of review
DELIVERED ON:	24 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2016
JUDGE:	Bond J
ORDER:	**Delivered *ex tempore* on 24 March 2016:** **The orders of the Court are that:** **1. the tribunal's decision of 11 March 2015 insofar as it assessed the applicant's degree of permanent impairment at 5% be set aside.** **2. the matter be remitted to a differently constituted Medical Assessment Tribunal - Psychiatric to assess the applicant's degree of permanent impairment sustained from the applicant's adjustment disorder with anxiety and depressed mood.** **3. the second respondent pay the applicant's costs of the application, to be assessed on the standard basis.**
CATCHWORDS:	WORKERS' COMPENSATION - PROCEEDINGS TO OBTAIN COMPENSATION - DETERMINATION OF CLAIMS - PROCEDURE - where tribunal assessed applicant under s 502 of the *Workers Compensation and Rehabilitation Act 2003* (Qld) ("the Act") - where tribunal made findings in respect of the applicant's degree of permanent impairment - where applicant argued that the tribunal failed to comply with the procedures required by the Act and the Guidelines for Evaluation of Permanent Impairment ("the Guides") - whether the tribunal complied with the procedures required by the Act and the Guides

ADMINISTRATIVE LAW - FREEDOM OF INFORMATION - REASONS FOR ADMINISTRATIVE DECISIONS - ADEQUACY OF REASONS - where the reasons of the tribunal made reference to the categories of the Psychiatric Impairment Rating Scale ("PIRS") provided for in the Guides - where the applicant submitted that, on the face of the tribunal's reasons, the tribunal erred at law in its application of the PIRS - whether, on the face of the tribunal's reasons, the tribunal erred at law

Acts Interpretation Act 1954 (Qld), s 27B
Judicial Review Act 1991 (Qld), s 20
Workers Compensation and Rehabilitation Act 2003 (Qld)

Craig v The State of South Australia (1995) 184 CLR 163, cited
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219, cited
Ergon Energy Corporation Ltd v Rice-McDonald [2010] 1 Qd R 516, cited
Griffin v State of Queensland [2016] QSC 43, considered
Masters v McCubbery [1996] 1 VR 635, considered
Mentink v Minister for Home Affairs [2013] FCAFC 113, cited
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, cited
Thompson v WorkCover Queensland [2002] QSC 119, cited
Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480, considered
York v The General Medical Assessment Tribunal [2003] 2 Qd R 104, cited

COUNSEL: M A Robinson SC for the applicant
S A McLeod for the first and second respondents

SOLICITORS: Shine Lawyers for the applicant
Crown Law for the first and second respondents

[1] The applicant was physically injured in the course of his employment on 15 December 2013 when he fell off a ladder and landed on another person. He suffered injuries to his shoulder and his Achilles tendon.

[2] He was medically assessed by a psychiatrist at the request of WorkCover. That psychiatrist produced a report on 4 January 2015 and provided a subsequent opinion by email on 16 January 2015 the effect of which was that the physical injury and subsequent symptoms and loss of function had been the major significant contributing factor to the psychological or psychiatric injury from which he currently suffers. The doctor described that injury as "adjustment disorder with depressed moods".

[3] The applicant was then referred by WorkCover for assessment pursuant to s 502 of the *Workers Compensation and Rehabilitation Act 2003* (Qld) ("the Act") to the General Medical Assessment Tribunal – Psychiatric ("the tribunal") to determine –

(a) whether, when it made its decision, there existed in the worker an incapacity for work resulting from the injury for which the application for compensation was made, and

(b) whether the incapacity:

(i) is total or partial;

(ii) is permanent or temporary; and

(c) if the worker has sustained an injury resulting in a permanent impairment and the insurer asks, the DPI for the injury. ("DPI" is a reference to the degree of permanent impairment.)

[4] The tribunal convened on 11 March 2015 and examined the applicant. It issued a six-page written document dated the same day, recording its determination and setting out its reasons. The tribunal decided the applicant suffered a permanent partial incapacity for work and that the DPI was 5%.

[5] The applicant now applies for a statutory order of review pursuant to s 20 of the *Judicial Review Act 1991* (Qld) ("JR Act") in respect of the tribunal's decision. He contends the tribunal made a number of jurisdictional errors and/or errors of law on the face of the record, or, alternatively, that the tribunal constructively failed to exercise its statutory power in making the decision. He also complains of failures to accord him natural justice.

[6] He seeks the following orders:

(a) that the tribunal's decision of 11 March 2015, so far as it assessed the applicant's degree of permanent impairment at 5% be set aside;

(b) that the matter be remitted to a differently-constituted tribunal to assess the applicant's DPI sustained from the applicant's adjustment disorder with anxiety and depressed mood; and

(c) that the respondents pay the applicant's costs of the application to be assessed.

[7] Counsel for the second respondent, which was the only active party before me, conceded that if I was persuaded to make the first order it would be appropriate to remit the matter to a differently-constituted tribunal.

[8] I turn to consider the relevant legislative framework. Section 179(1) of the Act provides an insurer may decide to have the worker's injury assessed to decide if the worker's injury has resulted in a degree of permanent impairment. Section 179(2) of the Act provides that the insurer must have the DPI assessed for a psychiatric or psychological injury by a medical assessment tribunal. Section 179(3), when read with s 183 of the Act, provides that the DPI must be assessed in accordance with the Guide for Evaluation of Permanent Impairment ("the Guides") to decide the DPI for the injury, and a report complying with the Guides must be given to the insurer.

[9] Section 500(1) provides for the insurer to refer to the tribunal on the medical matters involved, matters which include the worker's permanent impairment under s 179. Section 515(1) expresses a privative term, but s 515(2) expressly states that the term has no effect on the JR Act. There is, accordingly, no impediment to the applicant's ability to have the decision reviewed under that Act.

[10] Section 516(1) of the Act provides that a tribunal must give a written decision for any matter referred to it, with reasons for the decision. Section 27B of the *Acts Interpretation Act 1954* (Qld) relevantly provides that:

> If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision…the instrument giving the reasons must also -
>
> (a) set out the findings on material questions of fact; and
>
> (b) refer to the evidence or other material on which those findings were based.

[11] It is appropriate to interpolate some observations as to the content of the duty to give reasons and the significance of any failure by the tribunal to meet the requisite standard of reasons:

(a) Section 516 was considered specifically in *Ergon Energy Corporation Ltd v Rice-McDonald* [2010] 1 Qd R 516 by McMurdo J.

(b) At [13], his Honour referred with approval to observations by Muir JA, with whom Holmes JA and Daubney J agreed in *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219, and in particular the passage as follows (at [58]):

> The rationale for the requirement that courts give reasons for their decisions provides some guidance as to the extent of the reasons required. The requirement has been explained, variously, as necessary: to avoid leaving the losing the party with a 'justifiable sense of grievance' through not knowing or understanding why that party lost; to facilitate or not frustrate a right of appeal; as an attribute or incident of the judicial process; to afford natural justice or procedural fairness; to provide 'the foundation for the acceptability of the decision by the parties and the public' and to further 'judicial accountability'.

(c) His Honour noted in the same paragraph that the tribunal with which his Honour was dealing was entitled to apply its own professional expertise in reaching its decision. That such a tribunal brings to bear its own expertise has been recognised in a number of cases. I refer in particular to *Thompson v WorkCover Queensland* [2002] QSC 119 per Cullinane J at [12] and *York v The General Medical Assessment Tribunal* [2003] 2 Qd R 104 at 110-111 per Jerrard JA. Obviously, those observations apply with force to the tribunal in the current case.

(d) I also observe parenthetically that given the context within the Act that s 516 immediately follows s 515 and s 515 acknowledges the continued operation of the JR Act, it seems to me to be appropriate to regard one of the purposes of requiring reasons is to facilitate, or at least not to frustrate, the right of review under that Act.

(e) I return to observations by McMurdo J in *Ergon*. At [15], his Honour referred with approval to the observations by the Victorian Court of Appeal in *Masters v McCubbery* [1996] 1 VR 635, and in particular the following –

(i) per Winneke P (at 650-651):

> A medical panel is not required to do more than provide sufficient reasons to enable it to be seen by the court and the parties that it has arrived at its decision in accordance with its statutory functions … As I have already pointed out they are required to do no more than to provide a succinct statement of why they came to the conclusions which they did sufficient to enable the parties and the court to see that they have addressed their mind to relevant matters and have not acted unreasonably …

(ii) per Callaway JA (at 661), that the reasons had to be given in sufficient detail:

> ... to show the court and the worker that the question referred to the panel has been properly considered according to law and that the opinion furnished is founded on an appropriate application of the members' medical knowledge and experience.

(f) In *Ergon*, McMurdo J accepted that it would not be necessary for such a tribunal to express its reasons in the same way as would a court in a judgment. That would not matter if it could be seen that the tribunal had applied itself to the statutory task and had not reached a result that was unreasonable in the *Wednesbury* sense.

(g) I observe that I would not regard as inconsistent with the approach of McMurdo J the observations by the High Court in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [48], that what is to be set out in the statement of reasons is the actual path of reasoning by which the tribunal arrived at the opinion it was

required to form, and that that must be done in sufficient detail to enable the Court to discern whether the opinion does or does not involve any error of law.

(h) Notwithstanding the different legislative context between the present case and that considered by the High Court, it seems to me that s 516 must be interpreted as carrying with it that requirement. I note that the same view was reached in *Griffin v State of Queensland* [2016] QSC 43 per Douglas J at [20]. I note also that in *Kocak* the High Court specifically held that failure to meet the requisite standard of reasons would itself be an error of law by the tribunal: see *Kocak* at [28] and [55].

[12] I have mentioned already that s 179(3) requires that DPI must be assessed in accordance with the Guides. It is appropriate to quote some parts of the Guides, in each case with emphasis that it is my own.

[13] The foreword to the Guides (at page 1) provides:

> When a person sustains a permanent impairment the Guide is intended for use by trained medical assessors to ensure an objective, fair and consistent method for evaluating the degree of impairment.
>
> The first edition of the Guide is based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA5 Guides)*. …
>
> Publications such as this only remain useful to the extent that they meet the needs of users and those injured who sustain a permanent impairment. **It is therefore important that the protocols set out in the Guide are applied consistently and methodically**.

[14] Clause 1.1(a) of the Guides provides:

> Assessing permanent impairment **involves clinical assessment on the day of the assessment taking account of the injured person's relevant medical history and all available relevant medical information** in order to determine, in accordance with the diagnostic and other objective criteria as detailed in this Guide: …

[15] Clause 1.23 of the Guides provides:

> Effective communication is vital to ensure that the injured person is well-informed and able to maximally cooperate in the process. Assessors should … ensure that the injured person understands how the evaluation will proceed

[16] Clause 1.29 of the Guides provides:

> A report of the evaluation of permanent impairment **should be accurate, comprehensive and fair**. It should clearly address the questions being asked of the assessing medical practitioner.

[17] Clause 1.30 of the Guides provides:

> The report should contain factual information based on all available medical information and results of investigations, the assessors own history taking and clinical examination. **The other reports or investigations that are relied upon in arriving at an opinion should be appropriately referenced in the assessor's report.**

[18] Clause 1.31 of the Guides provides:

> This Guide is to be used in assessing permanent impairment and **the report of the evaluation should provide a rationale consistent with the methodology and content of this Guide. It should include a comparison of the key findings of the evaluation with the impairment criteria in this Guide**. If the evaluation was conducted in the absence of any pertinent data or information, the assessor should indicate how the impairment rating was determined with limited data.

[19] Clause 1.43 of the guides provides:

> The degree of permanent impairment that results from the injury **must be determined** using the tables, graphs and methodology given in this Guide, and the applicable legislation. …

[20] Clause 1.56 of the guides provides:

> The report **must state the matters taken into account, and the weight given to the matters**, in deciding the degree of permanent impairment.

[21] I interpolate that the provisions of cll 1.29, 1.30, 1.31 and 1.56 seems to me to inform the content of, and emphasise the importance of, the reasons which s 516 of the Act requires to be given with the ultimate written decision. In *Griffin*, at [27], Douglas J took the same approach. It seems to me that it must be legitimate so to do. The legislature has plainly evidenced in s 179(3) the intention that DPI must be assessed in accordance with the Guides and the provisions that the Guides have, as I have indicated, emphasised matters concerning the content of the decision.

[22] Chapter 11 of the Guides is central to the applicant's case. It sets out the method for assessing psychiatric impairment.

[23] Evaluation of psychiatric impairment is conducted by a psychiatrist or a panel of psychiatrists who have undergone appropriate training in the assessment method – see clause 11.2.

[24] Clause 11.7 of the guides provides:

> It is expected that **the [tribunal] will provide a rationale for the rating based on the injured worker's psychiatric symptoms**. The diagnosis is among the factors to be considered in assessing the severity and possible duration of the impairment, but is not the sole criterion to be used. **Clinical assessment of the person may include information** from the injured worker's own description of his or her functioning and limitations; **from family members and others who may have knowledge of the person**. Medical reports, feedback from treating professionals, results of standardised tests, including appropriate psychometric testing performed by a qualified clinical psychologist, and work evaluations may provide useful information to assist with the assessment. Evaluation of impairment will need to take into account variations in the level of functioning over time. Percentage impairment refers to "whole person impairment".

[25] I make the same observation in relation to the requirement that a rationale be provided that I made in relation to cll 1.29, 1.30, 1.31 and 1.56 of the Guides.

[26] Psychiatric impairment is assessed by the tribunal using and applying the Psychiatric Impairment Rating Scale ("PIRS"), which is provided for in the Guides from cl 11.12 to the end of the chapter.

[27] Clause 11.12 of the Guides provides:

> Behavioural consequences of psychiatric disorder are assessed on six scales, each of which evaluates an area of functional impairment:
> • Self-care and personal hygiene (Table 11.1)
> • Social and recreational activities (Table 11.2)
> • Travel (Table 11.3)
> • Social functioning (relationships) (Table 11.4)
> • Concentration (Table 11.5)
> • Employability (Table 11.6)

[28] The clause makes it clear that the first three categories are concerned with the activities of daily living.

[29] Clause 11.13 of the guides provides:

> Impairment in each area is rated using class descriptors. Classes range from 1 to 5, in accordance with severity. The standard form must be used when scoring the PIRS. The examples of activities are examples only. The assessing psychiatrist should take account of the person's cultural background. Consider activities that are usual for the person's age, sex and cultural norms.

[30] There follows six tables, setting out class descriptors for each category listed in cl 11.12. The application of the descriptors would enable a classification in the range of one to five to be made in relation to each area. The descriptors for each class include:

(a) words which are simply descriptive, for example, class 1 of table 11.1, dealing with "self care and personal hygiene" provides:

> Class 1: No deficit, or minor deficit attributable to the normal variation in the general population

(b) words which are descriptive, but which are supplemented by words which list exemplars, for example, class 2 of table 11.1 and class 2 of table 11.2, which respectively provide:

> Class 2: Mild impairment: able to live independently; looks after self adequately, although may look unkempt occasionally; sometimes misses a meal or relies on take-away food.
>
> Class 2: Mild impairment: occasionally goes out to such events without needing a support person, but does not become actively involved (eg, dancing, cheering favourite team).

[31] The exemplars obviously are examples which are there to assist in understanding the intention of the class.

[32] The rating is, in effect, a score, with 1 being the least impaired and 5 the most impaired. There is then a methodology set out which explains how the median and aggregate scores deriving from the classifications which are selected are turned into a total percentage of DPI.

[33] The decision as to which class to place a worker in the range of class 1 to class 5 for each of the nominated areas of functional impairment is plainly the critical aspect of the decision of a tribunal charged with determining DPI in relation to psychiatric disorder. In order for a tribunal to discharge its obligations to give reasons, it is therefore critical that the tribunal explains, in the way that the authorities require, the decision made to select one as opposed to other classes in relation to each of the six areas.

[34] Against that background, it is appropriate to identify the way in which the tribunal, in this case, reached its decision and then move on to consider the grounds on which the applicant relies to have the decision of the tribunal set aside.

[35] The tribunal decision was structured in this way.

[36] It first recited some general background information and identified the task which s 502 required it to perform.

[37] Second, it identified the documents which had been provided to it. I observe parenthetically that although the submission dated 27 February 2015, which had been sent to the tribunal by the applicant's solicitors, is not listed in those terms, it is common ground that the document was before the tribunal and that the two references in the reasons to "worker submission" should be taken as references to that submission.

[38] Third, under the heading "Insurer Submission in Response to Worker Submission", it noted "no submissions received".

[39] Fourth, it noted that the applicant had been present with his partner, Ms Marshall, and that he had been interviewed and provided information.

[40] Fifth, it recorded medical details of the physical injury and previous medical history.

[41] Sixth, it recorded a section headed "Clinical Evaluation and Findings". It is appropriate to record that in full:

> **Clinical Evaluation and Findings**
>
> As a result of his injuries, Mr Willls's relationship with his partner deteriorated and eventually they parted. He became depressed, argumentative and socially withdrawn. Alcohol consumption increased significantly but is no longer excessive.
>
> Mr Willis developed suicidal thoughts and was referred to a psychiatrist. His orthopaedic injuries have continued to cause pain and he was referred to a pain specialist and a psychologist. Other symptoms included insomnia, depressed mood, agitation and impaired concentration.

> In February 2015, he was admitted to Belmont Private Hospital with a pain disorder and what was regarded as Major Depression.
>
> Currently, his sleep is disturbed. The reason is partly due to pain and partly due to the psychological problems. His appetite is excessive and his weight has increased 20 kilograms. He still sees his friends, but states that previously he had been becoming anti-social.
>
> He is able to drive a motor vehicle but this is limited by pain. He describes himself as sitting around all day, doing very little. Occasionally he feels suicidal and was recently admitted to Princess Alexandra Hospital for a few days.
>
> He currently sees his psychiatrist on a weekly basis, psychologist twice per week and his general practitioner every fortnight. He is currently on significant antidepressant medication. He is also taking Oxazepam, together with Norspan patches for relief of pain and a significant dose of Celebrex, an anti-inflammatory agent.
>
> Mr Willis was tearful at times during the interview. He complained of ongoing continuous pain in his shoulder, which fluctuated in intensity. He states that he feels useless and is unable to support his family.
>
> When asked about his future, he stated he was trying to focus on a plan but cannot handle his problems and is unsure about his future. His concentration is impaired and he is restless. He has no other significant interests.
>
> The Tribunal is of the opinion that Mr Willis is suffering from an Adjustment Disorder with Anxious and Depressed Mood. Mr Willis was tearful and at limes agitated throughout the interview.

[42] Seventh, under the heading "Diagnosis and Reasons for Decision":

(a) the decision recorded the diagnosis as "Adjustment Disorder with Anxiety and Depressed Mood";

(b) the decision recorded the reasons for diagnosis as "History and examination revealed significant symptoms of the condition";

(c) it recorded psychiatric treatment as "antidepressant medication, psychiatric treatment and psychology counselling"; and

(d) it recorded that the nature of the psychiatric impairment was stable and stationary.

[43] Then the decision dealt with what I have described as the critical decisions of the classifications in relation to the six functional areas. It did so in the following way:

PIRS category	**Class**	**Reason for decision**
Table 11.1 - Self-care and personal hygiene	1	Managing self-care
Table 11.2 - Social and recreational activities	1	Interacts with friends frequently
Table 11.3 - Travel	1	No restriction with travel
Table 11.4 - Social functioning	3	Relationship separation
Table 11.5 - Concentration, persistence and pace	2	Loses concentration easily such as when watching a movie
Table 11.6 - Employability	2	Unable to work full time in the previous job

[44] Finally, the decision applies the relevant methodology to the scores in the classes set out, so as to get a 5% DPI. I interpolate that no one advances any criticism of the mechanism by which the scores were dealt with to get the 5 per cent DPI.

[45] I turn now to address the grounds on which the applicant relies. Section 20 of the JR Act relevantly provides –

(a) Section 20(2)(a) "that a breach of the rules of natural justice happened in relation to the making of the decision".

(b) Section 20(2)(b) "that procedures that were required by law to be observed in relation to the making of the decision were not observed".

(c) Section 20(2)(e) "that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made".

(d) Section 20(2)(f) "that the decision involved an error of law (whether or not the error appears on the record of the decision)".

(e) Section 20(2)(h) "that there was no evidence or other material to justify the making of the decision.

[46] The applicant combines a number of these grounds and applies them differentially in relation to different aspects of the tribunal's decision. It is convenient to analyse the application in the headings I use below.

Grounds in relation to the classification decision concerning PIRS category 1 - "Self-care and Hygiene"

[47] The relevant aspect of the decision is that the applicant was placed into class 1, which from table 11.1 of the guides, is "No deficit, or minor deficit attributable to the normal variation in the general population" and the sole reason expressed for that is "managing self-care".

[48] The applicant's submissions submitted that the classification decision was in direct contrast to and inconsistent with the tribunal's earlier finding under the heading "Clinical Evaluation and Findings" that the applicant's appetite was excessive and his weight had increased by 20 kilograms. The applicant submitted that the tribunal provided no explanation for the discrepancy and that this was plainly not rational. From this proposition, the applicant invited me to infer that the relevant consideration of the excessive appetite and weight increase was not taken into account.

[49] The applicant pointed out other evidence which was before the tribunal, which he suggested plainly sounded against the finding that was made, and the applicant submitted that it might be inferred from the absence of any discussion of the evidence in the reasons for classification that other relevant evidence must not have been taken into account.

[50] The evidence was:

(a) the report of Luke Van Every, physiotherapist, of 22 October 2014, which described the applicant as an "…overweight and deconditioned-looking gentleman";

(b) the records of the Belmont Hospital, which confirmed the applicant was admitted to the psychiatric hospital following writing a suicide note only one month prior to the decision's decision during the period of 17 to 24 February 2015; and

(c) the fact that the same records noted that the applicant looked markedly dishevelled.

[51] The applicant says that this evidence must not have been taken into account, by reference to the comparison between the outcome which was reached and the classification made, and the descriptor for class 2 in the same category, namely:

> Mild impairment: able to live independently; looks after self adequately, although may look unkempt occasionally; sometimes misses a meal or relies on take-away food.

[52] In relation to all of the matters with which I have just dealt, the applicant submits that if, contrary to his submission, the matters were taken into account, then it logically must follow - from the absence of any discussion of the evidence in relation to the decision to which the tribunal came - that the tribunal failed to comply with its duty to give reasons and that that failure must be regarded as an error of law.

[53] For completeness, I record that the applicant sought to support its argument by reference to the evidence of Ms Marshall, the applicant's former de facto partner, where in her affidavit, she recorded the applicant's poor eating habits and grooming. I record that I am unable to see how it is legitimate to refer to that evidence, which was not before the tribunal, on any other basis than the natural justice complaint which the applicant advanced and which I will deal with later in these reasons.

[54] The thrust of the second respondent's response to the applicant's complaint was as follows:

(a) there was evidence before the tribunal on which it could have reached its conclusion, namely that the applicant was "neatly groomed" and that there was no impairment to him showering;

(b) although the tribunal noted that the applicant's appetite was excessive and his weight had increased 20 kilograms, the examples provided in table 11.1 do not refer to the issue of a person's weight;

(c) there was no basis to assert that the tribunal failed to read or take the said hospital records into account. The tribunal's reasons refer to the records and state that they were taken into consideration during the decision-making process, and the tribunal's reasons expressly note the applicant occasionally felt suicidal and that he was admitted recently to the Princess Alexandria Hospital. Plainly, the second respondent submitted, the tribunal was aware of the applicant's history of suicidal ideation.

[55] I agree that I should conclude that the tribunal did not overlook the evidence to which the applicant points. However, I do not think that this is sufficient to meet the complaint made by the applicant.

[56] The legislation requires the question of DPI to be assessed in accordance with the Guides and requires the tribunal to express reasons for its decision. The Guides, in turn, emphasise the content of the reasons, as I have already noted. The Guides then require an assessment of six areas of functional impairment by scoring each area of a scale of 1 to 5 by placing the individual into a class. Descriptors and examples are given for each class within each area of functional impairment. In *Mentink v Minister for Home Affairs* [2013] FCAFC 113, the full court of the Federal Court observed, at [44]:

> …that, where a decision-maker has provided reasons for a decision and the decision-maker is obliged to have regard to mandatory criteria (or, in some cases, a submission or representation), the relevant question is whether or not there has been an active intellectual engagement with the mandatory criteria (or the submission or representation) (see, for example, *Tickner v Chapman* [1995] FCA 1726; (1995) 57 FCR 451 at [39]; *Lafu v Minister for Immigration and Citizenship* [2009] FCAFC 140; (2009) 112 ALD 1 at [47] and, see generally, *Minister for Immigration and Citizenship v Khadji* [2010] FCAFC 145; (2010) 190 FCR 248 at [63]-[66]).

[57] It is difficult to conclude that there has been an active intellectual engagement with the decision between class 1 and class 2 of PIRS category 1, in light of the complete absence of any discussion of the evidence relevant to the decision. It is possible that there is merit in the applicant's contention that the tribunal did not take the relevant considerations into account in the way required. However, that is not the ground on which I would found my decision.

[58] The ground on which I would found my decision is that the tribunal has not met with the required standard in respect of its reasons. One cannot discern from its decision the actual path of reasoning by which the tribunal arrived at the classification decision in relation to PIRS category 1. The decision does not do the things which clauses 1.29, 1.30, 1.31 and 1.56 require it to do. The reasons do not reveal any active engagement with the evidence

which was apparently significant to the decision. The tribunal's failure in this regard must be regarded as an error of law which justifies setting aside the decision.

Grounds in relation to the classification decision concerning PIRS category 2 - "Social and Recreational Activities"

[59] The relevant aspect of the decision was classing the applicant in class 1 within this category, namely:

> No deficit, or minor deficit attributable to the normal variation in the general population; regularly participates in social activities that are age, sex and culturally appropriate. May belong to clubs or associations and is actively involved with these.

[60] The reason given was the bare statement: "…interacts with friends frequently".

[61] The applicant's submissions submitted that the classification decision was inconsistent with the tribunal's earlier findings under the heading "Clinical Evaluations and Findings", that:

(a) "he became depressed, argumentative and socially withdrawn";

(b) "he describes himself as sitting around all day, doing very little";

(c) "occasionally he feels suicidal and was recently admitted to Princess Alexandria Hospital for a few days";

(d) "he has no other significant interests"; and

(e) "[he] was tearful and at times agitated throughout the interview".

[62] The applicant submitted that the tribunal provided no explanation for how, given those findings, it could have made the decision that the applicant fell into class 1, let alone done so by expressing the reason it did. From this proposition, the applicant invites me to infer that these considerations cannot have been taken into account. The applicant goes further and invites me to conclude that the contrast between the evidence accepted by the tribunal and the result to which the tribunal came should lead me to infer that there was impermissible error of law of some kind, which must have caused the tribunal to identify a wrong issue, to ask itself a wrong question, to ignore relevant material or to rely on irrelevant material (cf, *Craig v The State of South Australia* (1995) 184 CLR 163 at 179).

[63] The applicant contends that it is not possible to say which of these errors was made, but the result itself bespeaks error, using the language of Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 369 [85].

[64] The applicant pointed out other evidence which was before the tribunal which he suggests plainly sounded against the finding, and the tribunal, it may be inferred from the absence of any discussion of the evidence in the reasons for the classification, must not have taken that evidence into account. The other evidence was:

(a) at page 8 of the assessment given by a psychiatrist at the request of WorkCover, to which I have earlier referred, the doctor recorded that the applicant:

> …started to withdraw to himself, as previously he used to be quite a social person…started to feel ashamed of himself and not want to talk to anyone else.

(b) The Belmont Private Hospital patient self-report admission, dated 17 February 2015, regarding social impact, recorded in the applicant's answer to the question "during the past two weeks to what extent have problems interfered with normal social activities with family, friends, neighbours or groups?" as "extremely", and recorded the applicant's answer to the question "during the past three days how much has physical/emotional problems interfered with social activities?" as "all of the time", and

(c) Belmont Private Hospital patient self-report discharge, dated 24 February 2015, recorded the applicant's answer to the questions that I have previously identified in exactly the same way.

[65] In relation to all of the matters with which I have just dealt, the applicant submits that if, contrary to his submission, the matters were taken into account, then it logically must follow, from the absence of any discussion of that evidence in relation to the decision to which it came, that the tribunal failed to comply with its duty to give reasons, and that that error must be regarded as an error of law.

[66] For completeness, I record that the applicant again sought to support its argument by reference to evidence obtained from the applicant's former de facto partner, relevant to the issue I am considering under this heading. I record that I reject the relevance of this evidence to establish this ground of attack. As before, this material is only relevant to the natural justice complaint.

[67] The thrust of the second respondent's response to the applicant's complaint was as follows:

(a) There was an evidentiary basis upon which the tribunal could reach the conclusion it came to.

(b) in its reasons, the tribunal recorded that the applicant still sees his friends but states that previously he had been becoming antisocial. The affidavits read of two of the tribunal members each recorded that the applicant visited friends daily, and one of the tribunal members made reference to "two friends daily". Another recorded "sees friends daily" and "sees friends as much as possible".

(c) Contrary to the applicant's contention, there has been no error of fact or law and nor has the tribunal misunderstood the nature of its jurisdiction. The matters relied on by the applicant to demonstrate the tribunal has somehow acted in direct contrast to its previous findings is not made out.

[68] I agree that there was evidence which justified the tribunal concluding that the applicant interacted with his friends frequently. However, as I have previously emphasised, that is not enough. As was the case with the decision in relation to PIRS category 1, it is difficult to conclude that there has been an active intellectual engagement with the decision between class 1 and class 2 in relation to PIRS category 2, in light of the complete absence of any discussion of the evidence relevant to that decision.

[69] As I did in relation to PIRS category 1, I would found my decision as to the existence of reviewable error on the same basis, namely that the tribunal has not met with the required standard in respect of its reasons. One cannot discern from its decision the actual path of reasoning by which is arrived at the classification decision in relation to PIRS category 2. The decision does not do the things which clauses 1.29, 1.30, 1.31 and 1.56 require it to do. The reasons do not reveal any active engagement with the evidence which was apparently significant to the decision. The tribunal's failure in this regard must be regarded as an error of law, which justifies setting aside the decision.

Grounds advanced in relation to the classification decision concerning PIRS category 4 - "Social Functioning"

[70] The relevant aspect of the decision was to place the applicant in class 3, namely:

> Moderate impairment: previously established relationships severely strained, evidenced by periods of separation or domestic violence. Spouse, relatives or community services looking after children.

[71] The reason expressed was limited to "relationship separation".

[72] The applicant submitted that:

(a) the tribunal failed to take into account the impact that the injury had on the applicant's relationship and his ability to care for his children;

(b) given the earlier clinical evaluation and findings of the tribunal, including the separation from his partner and his recent history of inpatient attendances at hospital for suicidal ideations, the impact on the applicant's ability to care for his dependants must have been self-evident. If there was no such impact, the tribunal should have explained in its reasons; and

(c) alternatively, the tribunal should have asked the applicant about this impact in order to come to an informed assessment under the Guides, as required.

[73] For completeness, I again record that the applicant sought to rely on material in the affidavit of Ms Marshall on this ground and that I regard that as irrelevant because it was not before the tribunal and is relevant only to the natural justice ground.

[74] For its part, the second respondent contended -

(a) the reasons of the tribunal reveal that it was plainly cognisant of the fact that the applicant's relationship with Ms Marshall deteriorated, and eventually they had parted, and this was as a result of his injuries;

(b) the applicant proceeded to state that the tribunal failed to take into account his ability to care for his children but that it would be wrong to regard that issue as a mandatory requirement which must be taken into account; and

(c) in any event, the applicant had given details to the tribunal about his children and his stepchild.

[75] It seems to me that it is obvious enough that the tribunal took the separation issue into account. It is less obvious that it took the question of the relationship with children into account. But as it has been with other grounds, the critical flaw is the inadequacy of the tribunal's reasons.

[76] One cannot discern from the tribunal's decision the actual path of reasoning by which the tribunal arrived at the classification decision in relation to PIRS category 4. Why, I ask rhetorically, did the breakdown of the relationship justify a conclusion of class 3 and not class 4, when the exemplars in the tables set out in the guide seem to suggest that ending, rather than straining of relationships, would be a pointer towards class 4, not class 3? The applicant and the Court is left entirely in the dark.

[77] There may well be a proper rationale. It may be that information attained at the hearing or the clinical judgment of the tribunal members themselves is a complete and proper justification for the decision. But if that is so, it is not evident, and it should be. The decision does not do the things which clauses 1.29, 1.30, 1.31 and 1.56 require it to do. The reasons do not reveal any active engagement with the evidence which was apparently significant to the decision. The tribunal's failure in this regard must be regarded as an error of law which justifies setting aside the decision.

Grounds advised in relation to the classification decision concerning PIRS category 4 - "Employability"

[78] The tribunal's decision was that the application was class 2:

> Mild impairment. Able to work full time but in a different environment from that of the pre-injury job. The duties require comparable skill and intellect as as those of the pre-injury job.

[79] The tribunal's reasons were simply: "Unable to work full-time in the previous job".

[80] It will suffice to say in relation to this aspect of the decision that I find that the ground of inadequacy of reasons is made out here as well, and for the same reasons. There is a

complete absence of discussion of evidence which was referable to the decision which was made.

Conclusion

[81] The conclusion that I have reached regarding the inadequacy of the reasons of the tribunal on a number of grounds justifies setting aside the decision of the tribunal. The Delphic phrases which the tribunal used to justify its classification decisions were completely inadequate and did not even approach what the law requires.

[82] Although other bases of review were advanced by the applicant, save in one respect it is not necessary to analyse them.

[83] I will briefly make reference to the alleged breach of the laws of natural justice. The complaint here is particularised in this way:

> (i) Refers to the Applicant's de facto partner who attended the First Respondent's medical examination not being provided with an opportunity to provide information when they told her and the Applicant at the commencement of the examination that she would be provided with an opportunity at the end. Given the findings of the First Respondent about the Applicant's impaired concentration and high doses of medication - it was critical that the Applicant's de facto partner be provided an opportunity to elaborate as was promised. She did not interject during the interview because she was informed she would have her chance at the end. She was denied such opportunity by the First Respondent.
>
> (ii) The First Respondent would not permit the Applicant to answer the questions properly and they cut him off in order to ask the next question.
>
> (iii) The First Respondent failed to ask the Applicant questions which would have allowed them to properly assess which category of the PIRS the Applicant should be in. For example, they did not explore the impact the separation had on seeing children which could place him into a higher category.

[84] In relation to this ground, there was a conflict in the evidence. The evidence of the applicant's former de facto partner supported this case, but the second respondent provided evidence from each of the medically qualified tribunal members in a form which, if accepted, would, in my view, have defused the complaint, and although the tribunal members were available for cross-examination on the day of this hearing, senior counsel for the applicant declined that opportunity.

[85] I do not find that there is any persuasive consideration as to why I would prefer the evidence of the applicant's former de facto partner over that of the tribunal members. Accordingly, I would not make the findings which would be necessary to support this ground.

[86] For the reasons which I have articulated, the order that I will make is as follows:

> (a) That the tribunal's decision of 11 March 2015 insofar as it assessed the applicant's degree of permanent impairment at five per cent be set aside;
>
> (b) That the matter be remitted to a differently constituted Medical Assessment Tribunal – Psychiatric to assess the applicant's degree of permanent impairment sustained from the applicant's adjustment disorder with anxiety and depressed mood.

[87] I will hear the parties on costs.

…

[88] I will order the second respondent pay the applicant's costs of the application, to be assessed on the standard basis.