

**CITATION:** *Machuca v Brisbane City Council* [2017] QCAT 19

**PARTIES:** Israel Antonio Quintanilla Machuca  
(Applicant)  
v  
Brisbane City Council  
(Respondent)

**APPLICATION NUMBER:** GAR227-16

**MATTER TYPE:** General administrative review matters

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Member Hughes**

**DELIVERED ON:** 24 January 2017

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **1. The Application is dismissed for lack of jurisdiction.**

**CATCHWORDS:** ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – JURISDICTION – REVIEWABLE DECISIONS – where application for food licence – where change of licensed premises – where Applicant sought to amend licence application rather than pay fee for new application - where enabling Act required ‘original decision’ and internal ‘review decision’ before applying for external review – where email exchange between applicant and council responded to applicant’s enquiries, reflected an exchange of views and did not constitute an ‘application’ leading to an ‘original decision’ or internal review – where to construe otherwise would be contrary to purpose of enabling Act – where no ‘reviewable decision’ under an enabling Act

*Acts Interpretation Act* 1954 (Qld), s 48A  
*Food Act* 2006 (Qld), s 8, s 9, s 74, s 85, s 236, s 237, s 238, s 239, s 241

*Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 17*

*Cayless v. Gold Coast Waterways Authority*  
[2016] QCAT 16

*Inki Group Pty Ltd v. Brisbane City Council*  
[2015] QCAT 32

*The Bell Hotel Pty Ltd v. Brisbane City Council*  
[2012] QCAT 320

## **APPEARANCES and REPRESENTATION (if any):**

This matter was heard and determined on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act).

## **REASONS FOR DECISION**

### **What is this Application about?**

- [1] Israel Machuca applied to the Brisbane City Council for a licence for his food stall and also for where the food is separately prepared. He paid an application fee of \$733 for each licence. The Council approved his applications, but then the operator preparing his food moved premises.
- [2] Mr Machuca believes he should be able to apply to amend the food preparation licence to the new premises, without having to again pay the full application fee of \$733. He is willing to pay \$155, which he estimates would cover the cost of a reinspection.
- [3] Mr Machuca has applied to the Tribunal to review what he says is a 'decision' of the Council. In response, the Council has applied to dismiss Mr Machuca's application for review on the grounds that there is no 'reviewable decision'.

### **Who can apply to the Tribunal for review?**

- [4] The Tribunal only has jurisdiction to review a 'reviewable decision' under an enabling Act.<sup>1</sup> The enabling Act here is the *Food Act 2006 (Qld)*.
- [5] Mr Machuca submitted that because the Council emailed him on 19 August 2016 about his food licence, an 'internal review' of an 'original decision' of 12 August 2016 "was undertaken as required under the Act" and "the section 241 requirement for external review is therefore satisfied".<sup>2</sup>
- [6] Chapter 9 of the Act governs reviews. Section 241 falls within Chapter 9 and provides for whom may apply for external review by the Tribunal.

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<sup>1</sup> *Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 17.*

<sup>2</sup> Applicant's Submission In Reply To The Application To Dismiss Proceedings filed 28 November 2016 at [18].

Section 241 provides (my underlining) that a person who has applied for the review of an original decision under part 1 and is dissatisfied with the review decision may apply to the Tribunal to review the review decision.<sup>3</sup>

- [7] Part 1 of Chapter 9 provides an initial internal review process by the Council. A person must undertake this process before applying to the Tribunal – by first applying to the Council to internally review an ‘original decision’. Section 241 only then provides a right to apply to the Tribunal for review of that ‘review decision’.<sup>4</sup>
- [8] Before a person can apply to the Tribunal for external review, section 241 therefore requires:
1. An ‘original decision’ by Council; and
  2. A ‘review decision’ by Council.

***Did the council make an ‘original decision’?***

- [9] The Council’s email to Mr Machuca of 12 August 2016 reads:

Unfortunately the advice you have received from Maria<sup>5</sup> is correct – the food business licence is attached to an address / premises and if you move premises you need to apply for a new food business licence.

I have spoken with Ellen and neither of us are (sic) aware of The Greenhive Kitchen’s intention to relocate.

If you require any further assistance please feel free to reply by email.<sup>6</sup>

- [10] The Tribunal is not satisfied that this is an ‘original decision’ about an amendment to Mr Machuca’s food licence,<sup>7</sup> because it is not in response to any application for a licence or amendment as required by the Act.<sup>8</sup>
- [11] In his submissions filed with the Tribunal, Mr Machuca referred to “an application to amend the licence based on the change of premises, as permitted under section 74 of the Act, was made on the 12 August 2016”.<sup>9</sup>
- [12] However, Mr Machuca did not file with the Tribunal any ‘application to amend’ under section 74 of the Act. Instead, Mr Machuca’s submissions noted that his “request also sought information on the application process...” and quoted an email to the Council on 12 August 2016.<sup>10</sup>

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<sup>3</sup> *Food Act 2006 (Qld)*, s 241(1).

<sup>4</sup> *The Bell Hotel Pty Ltd v. Brisbane City Council* [2012] QCAT 320 at [6].

<sup>5</sup> From the operator preparing the food.

<sup>6</sup> Email Rudi Martin, Senior Environmental Health Officer to Israel Machuca dated 12 August 2016.

<sup>7</sup> *Food Act 2006 (Qld)*, s 74.

<sup>8</sup> *Food Act 2006 (Qld)*, s 85(1)(d), (2).

<sup>9</sup> Applicant’s Submission In Reply To The Application To Dismiss Proceedings filed 28 November 2016 at [13].

<sup>10</sup> Applicant’s Submission In Reply To The Application To Dismiss Proceedings filed 28

- [13] Section 74 of the Act specifically requires that an application for amendment be accompanied by the licence and comply with section 85. Section 85 of the Act then requires an application for a licence or amendment to be in the approved form, signed by the applicant and accompanied by the prescribed fee.<sup>11</sup>
- [14] The Council informed the Tribunal of no prescribed fee for an amendment, other than for a minor amendment.<sup>12</sup> For the purposes of this application to dismiss, I will interpret this as meaning that Mr Machuca was not required to pay a prescribed fee to amend his application for a licence.
- [15] Although there would also appear to be no separate form approved for an amendment, the approved *Food Business Licence Application* form has a tick box for 'Amendment to current food business licence'.<sup>13</sup> The form also provides space to insert an existing licence number and an address of premises. In the absence of a separate form specifically designed for amendments, I am satisfied that on its face, this form is an approved form to apply to amend a licence, including the change of premises sought by Mr Machuca. The form allows for the insertion of details and accompanying documents, sufficient for the Council to consider an amendment to the premises.
- [16] The difficulty for Mr Machuca, however, is that his email of 12 August 2016 did not attach this, or any, form. Although the *Acts Interpretation Act 1954 (Qld)* permits substantial compliance with an approved form,<sup>14</sup> Mr Machuca's email did not provide information required to complete the form, but simply requested information on the steps to achieving an amendment to the licence.<sup>15</sup> Moreover, a form is not properly completed unless it is accompanied by required documents – in this case, the licence.<sup>16</sup>
- [17] While Mr Machuca and the Council exchanged a series of emails, it is apparent that the Council was merely responding to Mr Machuca's enquiries about the impact on his licence if he were to use the new premises, his available options and informing him that the food business licence is attached to the premises and that in its view, he will need to apply for a new licence for the change of premises.<sup>17</sup>
- [18] Even if the approved form is not considered an approved form to amend the premises for a licence, Mr Machuca's emails did not convey sufficient information for the Council to assess them as an application to amend.

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November 2016 at [13].

<sup>11</sup> *Food Act 2006 (Qld)*, s 85(2).

<sup>12</sup> Application To Dismiss Proceedings at [28].

<sup>13</sup> Application To Dismiss Proceedings, Annexure G.

<sup>14</sup> *Acts Interpretation Act 1954 (Qld)*, s 48A(1).

<sup>15</sup> Email Israel Machuca to Rudi Martin dated 12 August 2016 at 2.16pm.

<sup>16</sup> *Acts Interpretation Act 1954 (Qld)*, s 48A(2).

<sup>17</sup> Emails dated 11 August 2016, 12 August 2016, 15 August 2016, 19 August 2016 and 24 August 2016; *Cayless v. Gold Coast Waterways Authority* [2016] QCAT 16 at [16].

- [19] Specifically, Mr Machuca’s submissions conceded that “all the relevant applicant details (other than the new premises) had already been initially assessed and processed...”.<sup>18</sup> The important words here are “*other than the new premises*”. A main purpose of the Act is to ensure food for sale is safe and suitable for human consumption,<sup>19</sup> achieved primarily by providing for the licensing of particular food premises.<sup>20</sup> Details of the new premises are therefore critical to assessing whether food prepared there is safe and suitable for food consumption.
- [20] Mr Machuca’s submission that the Council would have this information from the kitchen operator’s separate licence application does not address the interaction of those particular premises with Mr Machuca’s food stall.<sup>21</sup> Although the Council might know the layout and construction of the premises *for the kitchen operator’s licence*, it would not know without further enquiries that those are the same premises that will be preparing food for Mr Machuca’s stall.
- [21] Given the risks to public health and safety and resource implications, the Council should not be required to glean or infer this information from email enquiries it receives or link applications from multiple entities. It is incumbent upon Mr Machuca as the operator of a business separate from the kitchen operator, to clearly nominate the premises preparing the food he sells.
- [22] Interpreting the emails as an ‘application’ leading to an ‘original decision’ would mean Mr Machuca could seek review, without first providing to the Council required information critical to assessing whether his food for sale is safe and suitable for food consumption – including details of the new premises from where his food is prepared. This cannot be the intention as it would be contrary to the Act’s purposes and circumvent the prescribed and proper process, designed to ensure information is provided to the Council in a clear and unified form for public health and safety.
- [23] Had Mr Machuca applied to the Council for an amendment in substantial compliance with the prescribed form by providing the required information and the Council then refused the application,<sup>22</sup> he may well be a person ‘entitled to be given an information notice for a decision under chapter 3’.<sup>23</sup> This means he could then have applied for internal review, before applying to the Tribunal for review.<sup>24</sup>

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<sup>18</sup> Applicant’s Submission In Reply To The Application To Dismiss Proceedings filed 28 November 2016 at [27].

<sup>19</sup> *Food Act 2006* (Qld), s 8(a).

<sup>20</sup> *Food Act 2006* (Qld), s 9(a).

<sup>21</sup> Applicant’s Submission In Reply To The Application To Dismiss Proceedings filed 28 November 2016 at [28].

<sup>22</sup> As foreshadowed in Application To Dismiss Proceedings at [28].

<sup>23</sup> *Food Act 2006* (Qld), s 236(1).

<sup>24</sup> *Food Act 2006* (Qld), s 236, s 241.

- [24] However, the Tribunal is not satisfied that the Council has made an 'original decision' and the application for review can be dismissed on this basis alone.
- [25] For completeness, I will also consider whether the Council made a 'review decision'.

***Did the Council make a 'review decision'?***

- [26] The Council's email of 19 August 2016 to Mr Machuca reads:

I have discussed your case with my leadership team at our meeting this week and my initial advice is confirmed – you will need to apply for a new licence at the location and pay the full fee.<sup>25</sup>

- [27] A 'review decision' is a further decision by a 'reviewer'.<sup>26</sup> A 'reviewer' is a person to whom an application for review of a decision under chapter 3, 4 or 5 has been made.<sup>27</sup> This first review would need to be done internally by another officer of the Council.<sup>28</sup>
- [28] The Tribunal is not satisfied the email of 19 August 2016 constitutes an 'internal review' because it does not show a 'review decision' made by another officer of the council.<sup>29</sup> All emails were exchanged between Mr Machuca and the same Council officer. At most, that officer sought further advice from others within the Council. Based upon that advice, the same officer confirmed his initial advice. That is not a 'review decision'.
- [29] Moreover, the Tribunal is not satisfied that Mr Machuca applied to the Council for an internal review.<sup>30</sup> Mr Machuca queried the Council's approach in an email exchange but that does not mean that he *applied* for internal review. Mr Machuca's emails to the Council do not '*state fully the grounds of the application*' for internal review as required by the Act.<sup>31</sup> The correspondence reflects only an exchange of views after an initial enquiry.
- [30] The Tribunal is not satisfied that the Council has made a 'review decision' under the *Food Act 2006* (Qld).

**Conclusion**

- [31] The Tribunal's jurisdiction to review must be conferred upon it by an enabling Act, to review a decision made under that Act.<sup>32</sup> Because the Council has not made an 'original decision' and a 'review decision' as required by the enabling Act, there is no 'reviewable decision'.<sup>33</sup>
- [32] The application therefore lacks jurisdiction and must be dismissed.

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<sup>25</sup> Email Rudi Martin, Senior Environmental Health Officer to Israel Machuca dated 19 August 2016.

<sup>26</sup> *Food Act 2006* (Qld), s 239.

<sup>27</sup> *Food Act 2006* (Qld), s 237.

<sup>28</sup> *Inki Group Pty Ltd v. Brisbane City Council* [2015] QCAT 32 at [6].

<sup>29</sup> *Inki Group Pty Ltd v. Brisbane City Council* [2015] QCAT 32 at [6].

<sup>30</sup> *Food Act 2006* (Qld), s 237, s 238.

<sup>31</sup> *Food Act 2006* (Qld), s 238(3).

<sup>32</sup> *Queensland Civil and Administrative Tribunal Act 2009*, s 17(1).

<sup>33</sup> *Queensland Civil and Administrative Tribunal Act 2009*, s 17(2).