

CITATION: *O'Brien v Gladstone Regional Council* [2015] QCATA 82

PARTIES: Shelley O'Brien
(Appellant)
v
Gladstone Regional Council
(Respondent)

APPLICATION NUMBER: APL565-14

MATTER TYPE: Appeals

HEARING DATE: 19 May 2015

HEARD AT: Brisbane

DECISION OF: **Member Howard**
Member Hughes

DELIVERED ON: 25 May 2015

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The appeal is allowed.**
- 2. The orders of the Tribunal dated 28 November 2014 are set aside.**
- 3. The matter is remitted to the Tribunal for determination according to law before a differently constituted Tribunal.**

CATCHWORDS: APPEAL – ANIMAL REGULATION – PROCEDURAL FAIRNESS – where direct evidence witness not made available for cross-examination – where hearsay evidence relied upon in determination – where applicant not given opportunity to test evidence – where decision-maker did not comply with requirements to disclose its documents-whether breaches of procedural fairness

Animal Management (Cats and Dogs) Act 2008 (Qld) s 89
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 3, s 4, s 21, s 28, s 142

Gollan v Vaccaneo [2013] QCATA 228
Lee v Brisbane City Council [2012] QCA 284

Lee v Brisbane City Council (No 2) [2012] QCATA 64
O'Brien v Gladstone Regional Council [2014] QCAT 618
Olindaridge Pty Ltd & Anor v Tracey & Anor [2014] QCATA 207

APPEARANCES:

APPLICANT: Mrs Shelley O'Brien by telephone

RESPONDENT: Mrs Brooke Saunders for Gladstone Regional Council by telephone

REASONS FOR DECISION

What is this appeal about?

- [1] Mrs Shelley O'Brien is the owner of a Great Dane, 'Boof'. The Gladstone Regional Council declared 'Boof' a 'dangerous dog', because he allegedly attacked another dog, 'Ollie'.¹
- [2] The Tribunal confirmed that decision.² Mrs O'Brien now seeks to appeal the Tribunal's decision. Mrs O'Brien submitted that the Tribunal did not provide her with procedural fairness, made findings of fact not available on the evidence and did not consider relevant evidence.

Was Mrs O'Brien provided with procedural fairness?

What does Mrs O'Brien claim?

- [3] Mrs O'Brien claims that she was denied procedural fairness in two ways.
- [4] First, the Tribunal received hearsay evidence from a third party who was not present and could not be cross-examined. Specifically, Mrs O'Brien claims that the Tribunal erred in relying on an account relayed by Sarah Kummerow, Local Laws Supervisor, from Alan Walker who did not provide a statement and was not present to give evidence.
- [5] Second, the Gladstone City Council withheld relevant evidence which disadvantaged her in preparing for hearing. In particular, the Council had recordings of interviews conducted during its investigations. Council sought to give the recordings to the Tribunal at the hearing. Although the Tribunal declined to accept the recordings, Mrs O'Brien submits that as a matter of procedural fairness she was entitled to them.

¹ *Animal Management (Cats and Dogs) Act 2008 (Qld) s 89(1)(a).*

² *O'Brien v Gladstone Regional Council* [2014] QCAT 618.

How did the Tribunal consider Mr Walker's evidence?

- [6] The learned Member helpfully set out the relevant evidence in her reasons for the Tribunal's decision (with our emphasis):³

Mr Walker's verbal account was recorded by Ms Kummerow who included that in her written statement dated 25 September 2014. *Mr Walker told Ms Kummerow* he had been reading a paper on the verandah of the B&B when he heard Mrs Duncan yell out suddenly with urgency and he stood up just in time to see Boof lurch across to the middle of the road and grab hold of Ollie. He yelled out for Mrs O'Brien but she had already heard the commotion and they both got downstairs about the same time. Boof dragged Ollie back into the B&B yard and dragged Mrs Duncan with him as she had hold of the lead. Boof then started shaking Ollie. At some point Mrs Duncan was dragging Boof harshly by the tail. Mrs O'Brien grabbed Boof by the muzzle and he soon let go of Ollie. Mrs O'Brien took Boof inside and Mr Walker drove Mrs Duncan and Ollie to the vet...

Mrs O'Brien sought to cast doubt on the truthfulness of Mrs Duncan's account and *also of the evidence as gathered by Council*.

I accept the statement of Mrs Kummerow as an accurate version of what she was told. Why and how Mrs Duncan came to be pulling on Boof's tail I do not consider relevant to the question of whether Boof seriously attacked Ollie. I don't find that Mrs Duncan's later statement contradicts her statutory declaration. The later document is a more detailed account of what occurred. Mr Walker's recollection of the attack as related by Mr Kummerow corroborates what Mrs Duncan has said about being on the street with Ollie when Boof attacked.

The letters attesting to Boof's nature may express surprise that he was involved in an attack but they are certainly not evidence that the attack did not occur *when there are eye witnesses to the incident, one [of] whom is independent*.

I am satisfied that Boof attacked Ollie who was being walked in the street on a lead. I am satisfied that the attack was serious as Ollie suffered at the very least, bodily harm. I do not consider that Boof mistaking Ollie for a toy or merely engaging in play is relevant in determining whether a serious attack occurred. I do not find that Boof accidentally injured Ollie...

Mrs O'Brien sought to question the credibility of council officers and witnesses to the attack rather than accept her dog had caused such damage when it was really quite clear what had occurred...

Did the Tribunal rely upon Mr Walker's evidence in deciding the review?

- [7] It is a question of fact whether the actions of a dog amount to an attack,⁴ while the circumstances of the alleged attack are relevant to exercising the discretion to declare a dog dangerous.⁵ In discharging these functions, the learned Member at least partly relied upon Mr Walker's account of the attack – as told to Ms Kummerow.

³ Ibid, at [31], [35] - [38] and [56].

⁴ *Lee v Brisbane City Council* [2012] QCA 284 at [11].

⁵ *Lee v Brisbane City Council (No 2)* [2012] QCATA 64 at [30].

- [8] Although Mrs O'Brien was able to cross-examine Ms Kummerow, Ms Kummerow did not witness the attack herself. Her evidence of the alleged attack is based on her belief of what she was told by other persons, including Alan Walker.⁶ It is hearsay evidence. Other than Mr Walker, the other persons who were present during the incident gave statements and were available for cross-examination. Mrs O'Brien was one of the witnesses. Mrs Anne Duncan, the owner of Ollie, was a witness relied upon by the Council.
- [9] Mrs O'Brien claims to have witnessed at least part of the alleged attack and disputed Mrs Duncan's version of events. She claimed that Mrs Duncan 'yanked' Boof by the tail. The alleged attack and its circumstances are therefore contested questions of fact – both credit and corroboration are relevant.
- [10] Mrs Duncan is the owner of the other dog involved in the incident. Mr Walker was a guest at Mrs O'Brien's 'Bed and Breakfast' guest house. Mr Walker's evidence is therefore significant and relevant to the extent that it provides independent corroborative evidence of the alleged attack and its circumstances. The rules of evidence do not bind the Tribunal.⁷ However, the Tribunal must afford the parties procedural fairness.⁸
- [11] It is apparent from the above extract of the Tribunal's decision that the Tribunal relied upon the evidence of Mr Walker as reported by Ms Kummerow. The learned Member specifically relied upon it as corroboration of Mrs Duncan's version of events. In doing so, she attached weight to hearsay evidence given by the Council in circumstances when Mr Walker had not provided a statement. Further, even though Council relied upon his evidence, it had not sought orders from the Tribunal for a notice to issue requiring that he attend the hearing and give evidence.

What did procedural fairness require in respect of Mr Walker's evidence?

- [12] The requirements of procedural fairness are flexible and vary according to the circumstances.⁹
- [13] However, it is a well-settled requirement of procedural fairness, that a party must have the opportunity to test the evidence to be relied upon by the other parties. If the Council relied upon Mr Walker's account, it was obliged to make him available for cross-examination by Mrs O'Brien.¹⁰ His version of events could not be tested by cross-examining Ms Kummerow. Cross-examination of her could test only her recollection of what Mr Walker told her.

⁶ Statement of Sarah Elizabeth Kummerow sworn 25 September 2014 and Transcript of original hearing page 1-38.

⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) s 28(3)(b).

⁸ *Ibid*, s 28(3)(a).

⁹ *Kioa v West* (1985) 62 ALR 321.

¹⁰ *Olindaridge Pty Ltd & Anor v Tracey & Anor* [2014] QCATA 207 at [42].

- [14] Mrs O'Brien was entitled to the opportunity to test Mr Walker's version of the events. Although she did not, the Tribunal attached weight to it and relied upon the untested account of Mr Walker's version of events as reportedly relayed to Ms Kummerow, as corroborative of Mrs Duncan's evidence. In doing so, it denied Mrs O'Brien procedural fairness.
- [15] Testing of Mr Walker's evidence through cross-examination by Mrs O'Brien may or may not produce a different outcome. However, the proceeding must be properly determined according to law.

What is the significance of the Council's recordings of interviews?

- [16] Mrs O'Brien does not complain that the Tribunal took the recordings into account. Indeed, she concedes it did not accept them into evidence when the Council offered them at the hearing. The issue she raises is that she was unable to properly prepare her case for the hearing because Council did not provide the recordings. She submits that Council selected information from the recordings supporting its case.

Should the recordings have been made available?

- [17] Procedural fairness fundamentally requires that a party is entitled to know the case against him or her, and must be afforded a reasonable opportunity to respond to it. However, it is '*a flexible obligation to fair procedures which are appropriate and adapted to the circumstances of the particular case*'.¹¹ It is appropriate to consider any particular or special procedural steps required which may extend or restrict what is required to afford procedural fairness in the exercise of a particular statutory power.¹²
- [18] In its review jurisdiction under the QCAT Act, the Tribunal reviews decisions made at first instance by officers within government departments and agencies. The review conducted is a review on the merits, in which the Tribunal effectively stands in the shoes of the government decision-maker and makes its own decision.¹³ The purpose of Tribunal's review is produce the correct and preferable decision.¹⁴
- [19] The decision-maker (in this case the Council) has special obligations in review proceedings as set out in s 21 of the QCAT Act. The decision-maker must use its best endeavours to help the Tribunal to make the decision on the review.¹⁵ In other words, given the purpose of the review, it must assist the Tribunal to reach the correct and preferable decision. Without placing limitations on that requirement, specifically, the decision-maker must provide to the Tribunal no more than 28 days after service upon it of the review application, any document or thing in the decision-

¹¹ *Kioa v West* (1985) 62 ALR 321at 347, per Mason J.

¹² *Ibid* 346 per Mason J, 367-370 per Brennan J.

¹³ QCAT Act s 20(2).

¹⁴ *Ibid*, s 20(1).

¹⁵ *Ibid*, s 21(1).

maker's possession or control that may be relevant to the Tribunal's review of the decision.¹⁶

- [20] Although ordinarily procedural fairness requires a party know the case made against him or her and have reasonable opportunity to meet it, we consider that the special requirements prescribed for the Tribunal's review jurisdiction - in this case providing documents and things – affects the requirements of procedural fairness to Mrs O'Brien. The Council was obliged to provide the recordings to the Tribunal promptly after the application was served upon it. It did not do so. Instead, the Council sought to tender them at the hearing (although they were not accepted and relied upon by the Tribunal in its decision).
- [21] Not having the opportunity to access the recordings meant that Mrs O'Brien was denied the opportunity to know their content and use that information to prepare for hearing. Had the recordings been available to her, she may have been alerted to other potential witnesses who might have assisted her case. Alternatively, the recordings may have alerted her to potential shortcomings in the evidence presented in the Council's case, about which she could have cross-examined.
- [22] Whether or not Mrs O'Brien, with the benefit of access to the recordings, would have prepared her case differently (by obtaining additional supportive witness statements because of information on the recordings or by asking additional questions in cross-examination) is not known. Whether access to the recordings would made a difference to the outcome is also not known. The recordings may reveal nothing favourable or helpful to Mrs O'Brien in the review.
- [23] That said, in the context of the Tribunal's review and the obligations on the Council under the QCAT Act, Mrs O'Brien was entitled to have access to the contents of the recordings in preparing her case and testing the evidence of the Council's witnesses. She did not have access to them. We consider this amounts to a breach of procedural fairness in these circumstances.

Our conclusions

- [24] We therefore consider that Mrs O'Brien was not afforded procedural fairness in respect of the two issues she has raised on the appeal. Because breach of procedural fairness is an error of law, we would allow the appeal on this ground.
- [25] The orders of the Tribunal must therefore be set aside and the proceeding remitted to the Tribunal for determination according to law, before a differently constituted Tribunal.

What about the other grounds of appeal?

¹⁶ Ibid, s 21(2)(b).

- [26] Mrs O'Brien submitted other grounds of appeal including tone of voice and body language used during the hearing, findings of fact not being made on the available evidence and accepting Council's evidence over Mrs O'Brien's evidence.
- [27] Because we have allowed the appeal on the basis that that Mrs O'Brien was not afforded procedural fairness, it is not necessary for us to determine these remaining grounds of appeal. We would, however, make the following observations to assist the parties' understanding.
- [28] Mrs O'Brien submitted that she was intimidated by the Council Officer's body language. We would make the observation that upon carefully listening to the recording of the original hearing and reading the transcript, there is nothing to suggest that Mrs O'Brien was intimidated or anything untoward occurred in the conduct of the hearing by the learned Member. Mrs O'Brien did not raise any concerns of intimidation with the learned Member. It is clear to us that the learned Member gave each party the opportunity to present their case and was respectful and measured in her tone and demeanour, within pressing time constraints.
- [29] Mrs O'Brien also submitted that the learned Member interrupted her on several occasions and broke her '*train of thought*'. While the recording and transcript do reveal some interruptions, these were entirely appropriate within the context of a hearing where the Tribunal is mandated to ensure, so far as is practicable, that all relevant material is disclosed to the Tribunal to enable it to decide the proceeding with all relevant facts.¹⁷
- [30] To fulfil this mandate, parties must expect some degree of exploration and discussion of issues by Members during the usual course of a hearing.¹⁸ Sometimes – and we emphasise this is not the case here - voices may even be raised.¹⁹
- [31] The interruptions were part of managing the hearing by directing the parties to what is relevant and to allow the learned Member to make notes. Nothing in the recording or the transcript suggests that Mrs O'Brien was denied a fair hearing by these interruptions.
- [32] Mrs O'Brien also submitted that the learned Member did not allow her to call all her witnesses to give oral evidence. When we explored this further with Mrs O'Brien, she conceded that she had no further evidence to add to her witness's written statements that were duly considered by the learned Member. We have also noted that the Council did not require Mrs O'Brien's witnesses to give oral evidence.
- [33] The Tribunal is mandated to deal with matters in a way that is accessible, fair, just, economical, informal and quick²⁰ by ensuring proceedings are conducted in an informal way that minimises costs to the parties, and is as

¹⁷ Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 28(3)(e).

¹⁸ See for example *Gollan v. Vaccaneo* [2013] QCATA 228.

¹⁹ See for example *Schepis & Anor v. QM Properties Pty Ltd* [2012] QCAT 197.

²⁰ Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 3(b).

quick as is consistent with achieving justice.²¹ The learned Member duly considered the written evidence of Mrs O'Brien's witnesses in accordance with this mandate and procedural fairness.

What are the appropriate Orders?

[34] Because of breaches of procedural fairness we are satisfied that the Tribunal erred in law.

[35] Because of this, the appropriate orders are:

1. The appeal is allowed.
2. The orders of the Tribunal dated 28 November 2014 are set aside.
3. The matter is remitted to the Tribunal for determination according to law before a differently constituted Tribunal.

[36] We will also make directions on the original Tribunal file for the filing and serving by the Council of its documents required under s 21(2) of the QCAT Act and for Mrs O'Brien to have the opportunity to file and serve any further witness statements she intends to rely upon.

²¹

Queensland Civil and Administrative Tribunal Act 2009 s 4(c).