QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Bond v State of Queensland & Anor* [2019] QCATA 60
PARTIES:	**ROBYN BOND** (appellant/respondent) v **STATE OF QUEENSLAND** (first respondent/first appellant) and **CHRISTINE THOMAS** (second respondent/second appellant)
APPLICATION NO/S:	APL170-17; APL191-17
ORIGINATING APPLICATION NO/S:	ADL089-15
MATTER TYPE:	Anti-Discrimination matters
DELIVERED ON:	10 May 2019
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Judge Allen QC, Deputy President Member Ann Fitzpatrick
ORDERS:	**1. The application for leave to appeal in APL170-17 is granted.** **2. The appeal in APL170-17 is dismissed.** **3. The application for leave to appeal in APL191-17 is granted.** **4. The decision in ADL089-17 is set aside.** **5. The Appeal Tribunal substitutes its own decision, namely, that leave is granted to the applicant Robyn Bond to amend her complaint to include allegations of victimisation by Sean Harvey as decision-maker in her public interest disclosure complaint to the Department of Justice and Attorney-General, limited to allegations of breach of natural justice through bias.**
CATCHWORDS:	HUMAN RIGHTS – DISCRIMINATION LEGISLATION – JURISDICTION AND PROCEDURE – QUEENSLAND – where the applicant made a number of complaints to the Anti-Discrimination Commissioner – where some of the matters complained about were out of

time – where the out of time allegations were not accepted by the Anti-Discrimination Commissioner – whether the out of time allegations were rejected by the Anti-Discrimination Commissioner – whether the allegations lapsed and could not be the subject of complaint in Tribunal proceedings – whether the Tribunal has the power to permit the inclusion of the out of time allegations in amended contentions before the Tribunal – whether the Tribunal should permit the inclusion of the out of time allegations in amended contentions before the Tribunal

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – JURISDICTION AND PROCEDURE – QUEENSLAND – where the applicant made a number of complaints to the Anti-Discrimination Commissioner – whether an allegation of victimisation was not dealt with by the Anti-Discrimination Commissioner – whether the allegation of victimisation was rejected by the Anti-Discrimination Commissioner – whether the allegation lapsed and could not be the subject of complaint in Tribunal proceedings – whether the Tribunal has the power to permit the inclusion of the allegation of victimisation in amended contentions before the Tribunal – whether the Tribunal should permit the inclusion of the allegation of victimisation in amended contentions before the Tribunal

Anti-Discrimination Act 1991 (Qld), s 136, s 138, s 139, s 141, s 142, s 175, s 178
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142

Aleksic v Commonwealth Bank of Australia [2011] QCAT 342
Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32
Bond v State of Queensland & Anor (No 2) [2017] QCAT 185
Brown & Ors v McArthur & Walters [2002] QSC 236
Buderim Ginger Ltd v Booth [2003] 1 Qd R 147
Cachia v Grech [2009] NSWCA 232
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388
McKenzie v Mackay and State of Queensland [2005] QADT 24
MM v State of Queensland [2014] QCAT 478
Quyd Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
X v Q (No 3) [2009) QADT 21

REPRESENTATION:

Appellant/respondent:	K.S. Bond, Legal Representative
First respondent/first appellant; and	
Second respondent/second appellant:	G.R. Cooper, Crown Solicitor

APPEARANCES:

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

REASONS FOR DECISION

[1] **JUDGE ALLEN QC:** I have had the benefit of reading the reasons of Member Fitzpatrick. I agree with her reasons and the orders she proposes.

MEMBER A FITZPATRICK:

Background

[2] The Appeal Tribunal has directed that APL170-17 and APL191-17 are to remain as separate proceedings but be heard together.

[3] None of the parties have applied for an oral hearing. Accordingly, the applications for leave to appeal and appeal have been determined on the papers.

[4] In this decision Mrs Bond will be referred to as the applicant or by her own name and the State of Queensland and Christine Thomas will be referred to as the first and second respondents respectively.

[5] APL170-17 is an application for leave to appeal and an appeal, by the first and second respondents in relation to an interlocutory decision of Senior Member Endicott, dated 2 May 2017, in application number ADL089-15.

[6] APL191-17 is an application for leave to appeal and an appeal by Mrs Bond in relation to a decision of Senior Member Stilgoe dated 5 June 2017 in a matter which arose out of the application before Senior Member Endicott.

[7] The decision of the Queensland Civil and Administrative Tribunal (QCAT) made 2 May 2017 was stayed by Order made on 12 September 2017.

Summary of issues

[8] In summary, Mrs Bond made several complaints to the Queensland Anti-Discrimination Commission (ADCQ). Some of the matters complained about occurred outside the time allowed to file a complaint and were not accepted by the Anti-Discrimination Commissioner. In relation to other matters, a dispute exists as to whether they were rejected by the Commissioner.

[9] The significant question for the Appeal Tribunal is whether an out of time complaint which is "not accepted" by the Queensland Anti-Discrimination Commission is:

(a) a complaint for the purposes of s 141(1) of the *Anti-Discrimination Act* 1991 (Qld) (the Act); and

(b) is in fact, "rejected" thereby engaging s 142 of the Act so that the complaint lapses and the complainant is not entitled to raise that complaint again.

[10] The alternative is that an out of time complaint which is not accepted does not form part of the complaint before the Commission and it cannot therefore be rejected, so as to lapse for the purpose of ongoing proceedings.

[11] The answer to the question is relevant to a determination of the scope of QCAT's power to amend a complaint to include matters not included in the complaint, under s 178 of the Act.

Legislative framework

[12] Because the matter involves questions of statutory interpretation it is convenient to set out relevant sections of the Act.

Section 136

Making a complaint

A complaint must -

(a) be in writing; and

(b) set out reasonably sufficient details to indicate an alleged contravention of the Act; and

(c) state the complainant's address for service; and

(d) be lodged with, or sent by post to, the Commissioner.

Section 138

Time limit on making complaints

(1) Subject to sub-section (2) a person is only entitled to make a complaint within one year of the alleged contravention of the Act.

(2) The Commissioner has a discretion to accept a complaint after one year has expired if the complainant shows good cause.

Section 139

Commissioner must reject frivolous, trivial etc complaints

The Commissioner must reject a complaint if the Commissioner is of the reasonable opinion that the complaint is -

(a) frivolous, trivial or vexatious; or

(b) misconceived or lacking in substance.

Section 141

Time limit on acceptance or rejection of complaints

(1) The Commissioner must decide whether to accept or reject a complaint within 28 days of receiving the complaint.

(2) The Commissioner must promptly notify the complainant of the decision.

Section 142

Reasons for rejected complaints

(1) If a complaint is rejected, it lapses and the complainant is not entitled to make a further complaint relating to the act or omission that was the subject of the complaint.

(2) If a complaint is rejected, the complainant may, within 28 days of receiving notice of the rejection, ask the Commissioner for written reasons.

(3) If requested, the Commissioner just promptly give the complainant written reasons for the rejection.

Section 175

Time limit on referred complaints

(1) The Tribunal must accept a complaint that is referred to it by the commissioner, unless the complaint was made to the commissioner more than 1 year after the alleged contravention of the Act.

(2) If the complaint was made more than 1 year after the alleged contravention, the tribunal may deal with the complaint if the tribunal considers that, on the balance of fairness between the parties, it would be reasonable to do so.

Section 178

Complaints may be amended

(1) The tribunal may allow a complainant to amend a complaint.

(2) Subsection (1) applies even if the amendment concerns matters not included in the complaint.

Chronology

[13] The following is a relevant chronology of uncontentious matters.

(a) Mrs Bond worked with her husband, Kirk Bond, in the Department of Justice and Attorney-General (DJAG).

(b) Both Mrs Bond and Kirk Bond were employed as Youth Justice Conferencing Convenors.

(c) Mrs Bond asserts that from about November 2011 she was unlawfully discriminated against in her employment because of her marital status.

(d) Mrs Bond developed a psychological disorder and in April 2014 ceased work and lodged a claim for Workers' Compensation.

(e) On 6 February 2015 Mr and Mrs Bond lodged a joint complaint with the ADCQ alleging discrimination against their employer and against their direct supervisor, Christine Thomas, the second respondent.

(f) In the complaint, Mrs Bond relied on actions which allegedly occurred from November 2011 until Mrs Bond ceased work in April 2014.

(g) By letter dated 3 March 2015, the ADCQ asked Mr and Mrs Bond to explain why alleged incidents occurring prior to 6 February 2014, described in the complaint, should be accepted.

(h) In a letter dated 11 June 2015, the ADCQ advised Mr and Mrs Bond that the Commissioner had "decided not to accept the allegations under the Act made outside the statutory time limit".

The Commissioner considered the complaint form dated 6 February 2015, submissions of the parties, the respondents' response, Mr and Mrs Bond's reply together with statements of Mr and Mrs Bond, other submissions, attachments and the claimants' natural justice response by Mr Bond.

The Commissioner set out reasons for the decision including that:

(i) no good cause had been shown to accept a complaint lodged after the expiration of time set out in s 138(1) of the Act;

(ii) allegations outside the statutory time period are about two years and three months outside the limit;

(iii) the background circumstances of the complainants were accepted;

(iv) there were a number of reasons given by the complainants for the delay, however Mr Bond was a lawyer and should have been aware of statutory limitation periods. From at least May 2014 the complainants were aware of the right to complain and the limitation period but chose not to do so until February 2015;

(v) the complainants said they feared reprisals if they were to make a formal complaint while still working, but nevertheless did make complaints about their alleged treatment;

(vi) the complainants said they were both suffering psychological injuries, were pursuing a disputed WorkCover claim, were hoping to negotiate a return to work and were awaiting the WorkCover assessment to determine whether they were eligible to make a claim for damages. However, pursuit of other causes of action does not assist an applicant in establishing good cause for delay (*GCE v Anti-Discrimination Commissioner* [2006] QSC 58). The complainants have not shown that

they were unable or reluctant to pursue a disputed claim against their employer and Mr Bond was well enough to seek admission as a solicitor in July 2014. They have not shown that making a formal claim of discrimination would diminish their ability to return to work under alternative arrangements any more than the disputed Workcover claim or that waiting for the resolution of their WorkCover assessment would preclude them from lodging a claim under the Act;

(vii) Mr Bond had made an internal complaint of discrimination on behalf of himself and Mrs Bond that he described as formal, around the time of his leaving work on 12 May 2014, so it is difficult to understand why he did not or could not make a formal complaint to the Commission;

(viii) it was noted that the respondents have not claimed witnesses are unavailable or that records have not been preserved so that there is no actual prejudice to the respondents.

The Commissioner said that he formed his conclusion after weighing all the relevant factors. The decision set out relevant legislation and case law, not all of which is extracted here.

(i) On 2 July 2015, the ADCQ notified Mr and Mrs Bond that the ADCQ had accepted their complaint but excluded those allegations that predated 6 February 2015.

(j) The complaint was not able to be conciliated.

(k) On 11 August 2015, Mrs Bond made a request to the ADCQ for referral of her complaint to QCAT pursuant to s 164A of the Act.

(l) Mr Bond resolved his complaint with the respondents, leaving Mrs Bond to pursue her complaint referred to QCAT.

(m) Mrs Bond made further complaints to the ADCQ.

(n) On 26 August 2015, Mrs Bond lodged a complaint with the ADCQ. The Appeal Tribunal has not been provided with a copy of this complaint

(o) On 20 November 2015, the ADCQ notified the applicant that it had not accepted the applicant's 26 August 2015 complaint. The Appeal Tribunal has not been provided with a copy of this letter.

(p) On 23 November 2015, Mrs Bond lodged a further complaint with the ADCQ, alleging relationship status discrimination. A number of matters were raised in that complaint. I have extracted those parts which are relevant to the decision of Senior Member Stilgoe, the subject of this Appeal.

For ease of reference, parts of the complaint have been marked by me in bold.

The Complaint sets out a heading on page 4: **"Complaint of Victimisation in Contravention of Section 130 of the *Anti-Discrimination Act* 1991 and Complaint of Public Interest Reprisal in Contravention of Section 40 of the *Public Interest Disclosure Act* 2010".**

Mrs Bond sets out at paragraph 25 of the complaint, the terms of an email from her husband to the Executive Director of the Ethical Standards Unit of DJAG dated 17 October 2015 which includes at its third paragraph the following:

> The fact that Sean Harvey was appointed as the decision-maker in relation to our public interest disclosures makes a mockery of the entire investigation. Sean Harvey is directing the department's litigation position in relation to the *Anti-Discrimination Act* complaints that we lodged with QCAT. Moreover, his actions resulted in us filing reprisal complaints in the Anti-Discrimination Commission Queensland. **Clearly, the decision-maker, in relation to our public interest disclosures, was not unbiased. Thus, natural justice was absent from the decision-making process.** Mr Harvey is well aware that if Christine Thomas was determined to have been guilty of corrupt conduct, maladministration and lying, those facts would be devastating to the department's litigation position in relation to Robyn Bond's *Anti-Discrimination Act* complaint that is pending before QCAT.

Further in the email, Mr Bond requests that Sean Harvey's decision – that their allegations could not be substantiated, be voided on the ground that it was made in the absence of natural justice.

Mrs Bond sets out at paragraph [27] of the complaint the text of a complaint made by Mr and Mrs Bond to the Queensland Ombudsman on 29 October 2015, which relevantly includes the following:

> … I was informed by Lee Fairbank, the Manager for Youth, Justice, Workplace Health and Safety, that Sean Harvey was the person who would approve or reject any settlement offers. Moreover, Sean Harvey initiated a procedure against both of us that we allege was intended to medically terminate our employment. Because of Mr Harvey's actions, we lodged reprisal allegations in the Anti-Discrimination Commission. **We were stunned to learn that, of all people, Sean Harvey was the person who the department appointed as the decision-maker in relation to our public interest disclosure. Clearly, he is not an unbiased decision-maker. He is well aware that, if the complaints of misconduct and maladministration against our Service Leader are substantiated, her credibility would be destroyed and DJAG's potential for being found liable by QCAT would grow exponentially.**
>
> … **Natural justice was absent from the decision-making process. We respectfully request that Sean Harvey's decision be declared void** and that any and all reports that he relied on in making his decision be referred to a non-DJAG decision-maker so our public interest disclosures can be decided with the principles of natural justice.

In addition to the complaints about lack of natural justice affecting Mr Harvey's decision in relation to the Bonds' public interest disclosures, the 23 November 2015 complaint goes on to complain that Mr Harvey directed Mrs Bond to attend a medical examination which might result in her being medically retired from the public service. Mr Bond wrote to Mr Fairbank and others on 5 November 2015 objecting to the direction for Mrs Bond to attend a medical

examination and threatening to lodge a further ADCQ complaint in relation to the matter.

The 23 November 2015 complaint goes on at paragraph [35] to allege that Mr Harvey directed Mrs Bond to attend an independent medical examination, not for any legitimate reason, but rather as a reprisal for lodging a complaint with the Queensland Ombudsman in relation to Mr Harvey's decision in response to her public interest disclosures and for continuing to pursue her QCAT complaints of discrimination against DJAG and Ms Thomas.

(q) By letter dated 14 January 2016, the ADCQ responded to the 23 November 2015 complaint. The Commissioner articulated what the Commission understood to be the aspects of DJAG's conduct said to be discriminatory:

(i) failure to accept a psychiatrist's opinion that Mrs Bond was medically unfit to attend an Independent Medical Examination (IME);

(ii) making an offer to resolve Mr Bond's complaint by including a term that Mrs Bond resign and drop her complaints;

(iii) victimisation by directing Mrs Bond attend an IME as a reprisal for lodging a complaint with the Queensland Ombudsman in relation to Mr Harvey's decision in response to the Bonds public interest disclosures;

(iv) victimisation by directing Mrs Bond attend an IME as a reprisal for continuing to pursue Mrs Bond's complaints of discrimination against DJAG and Ms Thomas.

The Commissioner said that none of the allegations come under the Act or the *Public Interest Disclosure Act* 2010 (Qld). He said that there are insufficient details to indicate a breach of the Act. In relation to the victimisation complaints he says that there is no information to indicate the necessary causal nexus between Mr Harvey's involvement in the direction to attend an IME and the ADCQ complaint and that there is no information to show that Mr Harvey's direction to attend an IME three days after the complaint to the ombudsman was an act of reprisal.

(r) On 1 December 2015, Mrs Bond filed Contentions in QCAT, setting out allegations of actions by the respondents from November 2011 to April 2014, that is the Pre-6 February 2014 Allegations.

(s) On 11 January 2016, the respondents served Mrs Bond with Contentions asserting that a number of Mrs Bond's Contentions should be struck out because they contained allegations that were out of time, scurrilous, vexatious and irrelevant and insufficiently particularised.

(t) On 6 February 2016, Mrs Bond's representative, Mr Bond, sent to QCAT and to the respondents' solicitors a proposal to amend her Contentions to remove all out of time allegations in an effort to expedite the matter.

(u) On 16 February 2016, Mrs Bond filed and served an Application seeking leave to amend her Contentions to remove the objectionable Contentions.

(v) On 17 February 2016, the respondents filed a strike-out Application.

(w) On 9 June 2016, a hearing of the Applications took place before Senior Member Endicott. The matter was resolved by the issue of Directions for the filing of new Contentions.

(x) On 29 June 2016, Mrs Bond filed a new set of Contentions and filed an Application seeking leave to amend her complaint to include:

(i) the Pre-6 February 2014 Allegations;

(ii) an allegation of victimisation against the second respondent Christine Thomas. The allegation is that the second respondent victimised the applicant by subjecting her to the embarrassment and humiliation of being the subject of a tabloid news article, by submitting a lie to WorkCover, in response to a good faith allegation by Mrs Bond, that the second respondent had contravened the Act (the Victimisation by a lie to WorkCover Allegation);

(iii) an allegation of victimisation raised in the 23 November 2015 complaint, related to a direction for Mrs Bond to attend an Independent Medical Examination (IME) (the Victimisation by IME Allegation);

(iv) an allegation of victimisation by an employee of the first respondent, Mr Harvey, whose alleged bias and failure to provide natural justice when investigating Mrs Bond's public interest disclosure, is said to have been a reprisal for Mrs Bond making complaints that the second respondent had contravened the Act (the Victimisation by breach of Natural Justice Allegation).

[14] The Application was decided by Senior Member Endicott on 2 May 2017. Leave was granted to amend the complaint:

(a) to include the Pre-6 February 2014 Allegations; and

(b) to include the Victimisation by a lie to WorkCover Allegation.

Decision dated 2 May 2017

[15] Senior Member Endicott held in relation to the Pre-6 February 2014 allegations that:

(a) the ADCQ did not accept the out of time allegations. The out of time allegations were never part of a valid complaint. They have never been rejected and there can have been no lapsing in terms of s 142 of the Act;

(b) section 178 of the Act provides power to the Tribunal to consider whether out of time allegations, not included by the ADCQ in the complaint, should be added to the complaint by way of amendment.

[16] In relation to the Victimisation by a lie to WorkCover Allegation, the Senior Member found that this allegation was made in the original complaint and was not rejected, however Mrs Bond must clarify the content of her allegation.

[17] Leave was refused to include the allegations of discrimination and victimisation the subject of the 23 November 2015 complaint which related to a direction for Mrs Bond to attend an IME. Those complaints were found to have been rejected. That aspect of the decision is the not subject of this appeal.

[18] The Senior Member ordered that further submissions be filed in relation to the Victimisation by breach of Natural Justice Allegation.

Decision dated 5 June 2017

[19] The Victimisation by breach of Natural Justice Allegation was dealt with by Senior Member Stilgoe in a decision of the Tribunal dated 5 June 2017. It was found that the allegation formed part of the rejected 23 November 2015 complaint; accordingly the complaint had lapsed and could not be dealt with by QCAT under s 142 of the Act.

Leave to Appeal - APL170-17 and APL191-17

[20] The question whether or not leave to appeal should be granted is usually addressed according to established principles: Is there a reasonably arguable case of error in the primary decision?[1] Is there a reasonable prospect that the applicant will obtain substantive relief?[2] Is leave necessary to correct a substantial injustice to the applicant caused by some error?[3] Is there a question of general importance upon which further argument, and a decision of the appellate court or tribunal, would be to the public advantage?[4]

[21] Leave to appeal is required because the decisions the subject of the appeals are not final - s 142(3)(a)(ii) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

[22] The Act is an important piece of remedial legislation. The scope of claims and entitlement of complainants to bring complaints to the ADCQ and to QCAT outside the period of limitation prescribed in the Act, is an important matter which affects many people. An understanding of the interplay of sections in Chapter 7 of the Act is difficult and is a matter of general importance for litigants.

[23] I consider that the respondents have a reasonably arguable case in relation to error on the part of the primary decision-maker.

[24] For these reasons, the Appeal Tribunal grants leave to appeal in APL170-17.

[25] In relation to APL191-17, this decision arose out of the decision appealed in APL170-17.

[26] To the extent that the matters are interlinked, it is fair to all parties that this appeal receive consideration.

---

1 *Quyd Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

2 *Cachia v Grech* [2009] NSWCA 232 at 2.

3 *Quyd Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

4 *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388 at 399.

[27] I agree with Mrs Bond that it is a matter of general importance as to whether a person is precluded from making a further victimisation complaint if she did not include it in an earlier complaint.

[28] To the extent that the decision involves the exercise of discretion, that is not a matter with which this Appeal Tribunal will lightly interfere. However, there is a reasonably arguable case that QCAT made an error and there are reasonable prospects that Mrs Bond would be granted orders in her favour.

[29] I do not accept Mrs Bond's submission that leave to appeal should be granted in this matter because the public should be assured that complaints by whistle-blowers of a denial of natural justice in the decision-making process will not be disallowed unless clear evidence exists that the ADCQ considered the allegation and rejected it. I consider the status of Mrs Bond as a whistle-blower to be irrelevant to the questions raised in the decision below.

[30] The respondents in APL191-17 submit that leave should not be granted unless an error, whether of law or fact on the part of the decision-maker below, can be demonstrated. For the reasons set out below, this Appeal Tribunal considers that there has been appealable error in the 5 June 2017 decision which justifies the granting of leave to appeal.

[31] Leave to appeal is granted.

APL 170-17

Orders sought by the respondents

[32] The Orders sought from the Appeal Tribunal are:

(a) set aside the decisions:

(i) to grant leave to the respondent to amend her complaint to include allegations of discrimination that pre-dated 6 February 2014; and

(ii) to grant leave to Mrs Bond to amend her complaint to include an allegation of victimisation against Christine Thomas in terms of paragraph 39 of the Contentions filed on 29 June 2016 (falsehood allegation);

(b) substitute its own decision, namely that:

(i) Mrs Bond not be allowed to amend her complaint to include allegations of discrimination that pre-dated 6 February 2014; and

(ii) Mrs Bond not be allowed to amend her complaint to include an allegation of victimisation against Christine Thomas in terms of paragraph 39 of the Contentions filed on 29 June 2016.

Grounds of appeal

[33] ***The first ground of appeal***

The learned member erred in law in holding at paragraph [17] of the Decision that if the ADCQ does not exercise the discretion to include the out of time allegations made by the respondent (which is what the ADCQ did, in fact, do):

(a) the out of time allegations were never part of a valid complaint;

(b) the out of time allegations were never rejected by the ADCQ; and

(c) the out of time allegations did not lapse in terms of section 142 of the Act.

Submissions by the respondents filed 20 November 2017

[34] The respondents submit that:

(a) a complaint that was not accepted by the ADCQ because it was out of time, lapses under the Act. It is submitted that in interpreting sections 138 and 142 of the Act, a consideration of its context in the Act is required, including a consideration of its general purpose and policy objective;[5]

(b) having regard to the purpose of Chapter 7, Part 1, Division 1, Sub-Division (1) of the Act and of the clear words of s 138(2) of the Act, a complaint alleging a contravention of the Act that was not made within one year of the alleged contravention of the Act is still a complaint.

(c) in *Aleksic v Commonwealth Bank of Australia*[6] it was found:

> The Commission has a statutory responsibility in section 141 to make a decision about a complaint. The decisions are limited: either to accept or reject. There is no third option for a complaint to remain undecided in section 141. The only conclusion that can be drawn in this case is that those parts of the original complaint that were not expressly accepted must have, in reality, been rejected by the Commission.
>
> A rejected complaint lapses and cannot be the subject of a further complaint. Ms Aleksic is seeking to make what amounts to a further complaint against Ms McAlister and Mr Swan with allegations of contravention of the Act that have been rejected by the Commission. The Tribunal's jurisdiction is to determine referred complaints. The complaints against Ms McAlister and Mr Swan could not have been referred to the Tribunal. The use of the amendment powers in section 178 cannot confer jurisdiction on the Tribunal where otherwise there was no jurisdiction to entertain a complaint.

(d) a similar conclusion was reached in *Bond v State of Queensland & Anor (No. 2)*[7] where Senior Member Stilgoe said:

> Section 142(1) of the *Anti-Discrimination Act* states that, if a complaint is rejected, it lapses and the complainant is not entitled to make a further complaint relating to the act or omission that was the subject of the complaint.

---

5 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500 at [41] per French C.J. and Crennan J.

6 [2011] QCAT 342.

7 [2017] QCAT 185.

> Ms Bond says that I should read that section subject to the Tribunal's power to amend a complaint even if the amendment concerns matters not in the complaint. It would be an odd reading of the *Anti-Discrimination Act* to find that the prohibition on reventilating a rejected and lapsed complaint could be circumvented by allowing an amendment of the complaint now before the Tribunal.

(e) an error was made in the course of elaborating the applicable law, particularly in construing a relevant statutory provision. Whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law.

(f) QCAT erred in law in holding that complaints made by Mrs Bond that were not made within one year of the alleged contraventions of the Act had not lapsed under s 142 of the Act. Such complaints were rejected, had lapsed under the Act and cannot be reventilated by QCAT exercising discretion under s 178 of the Act.

Findings in relation to the first ground of appeal

[35] Chapter 7 of the Act sets out the way in which a complaint is made to the ADCQ, the way in which it is received and how the ADCQ deals with accepted complaints.

[36] Section 138 of the Act sets out the status of complaints by reference to the time limit prescribed in the Act.

[37] It is an interpretation of this section which aids in an understanding of what is a complaint and what is not.

[38] By s 138(1) the "entitlement" to make a complaint is limited. The alleged contravention of the Act must have occurred within one year of the making of the complaint. If the time frame is met there is a complaint under the Act. If the time limit is not met there is no entitlement to make a complaint. The word "entitled" is critical to understanding the meaning and effect of s 138(1) of the Act. Without an entitlement to make a complaint, there can be no complaint.

[39] There is therefore no complaint under the Act, unless the Commissioner exercises the discretion to accept a complaint after one year has expired, if the complainant shows good cause.

[40] In the decision of 11 June 2015, the Commissioner did not address the substance of the complaints but rather addressed whether good cause had been shown to accept the complaints lodged after the expiration of the time set out in s 138(1) of the Act. The reasons for the decision discussed the period of time outside the limit, the reasons for the delay and any prejudice which might be occasioned by the delay. The Commissioner has not rejected the complaints because they were frivolous, trivial, vexatious or lacking in substance. The Commissioner did not accept the out of time complaints because they were out of time and no good cause was shown to justify the exercise of a discretion to accept them.

[41] I do not accept the respondents' submissions that a complaint which is not accepted must necessarily have been rejected.

[42] Sections 139, 140 and 168 set out the bases on which a complaint may be rejected. Those bases are that the complaint is frivolous, trivial, vexatious, misconceived, lacking in substance or there are other proceedings which will deal with the matter.

[43] In *Buderim Ginger Ltd v Booth*[8] Justice Atkinson, sitting in the Court of Appeal, said in relation to s 138(2) that:

> [22] Although it is not essential to show that there is a reason for and justification for the delay in order to show good cause, such a consideration is always relevant to such a decision …
>
> [23] Before the discretion to accept the complaint can be exercised, as I have observed, the Commissioner must firstly be satisfied, as she was, that it is a complaint of an alleged contravention of the *Anti-Discrimination Act*. The Commissioner need not look further at the merits of the complaint in the consideration of whether "good cause" has been shown under section 138. The Commissioner has a separate duty set out in section 139 of the Act to reject a complaint when of the reasonable opinion that the complaint is:
>
> "(a) Frivolous or vexatious; or
>
> (b) Misconceived or lacking in substance."

[44] It is clear from Atkinson J's analysis that rejection of a complaint is a separate step undertaken by reference to a different section of the Act. Exercise of the discretion under s 138(2) of the Act is not a step taken to reject a complaint.

[45] If there has been no rejection of a complaint, s 142 has no application in terms of treating the complaint as lapsed and unable to be the subject of further complaint.

[46] I reject the submissions that the learned Member erred in law at paragraph [17] of the decision. I agree with Senior Member Endicott that if the ADCQ does not exercise the discretion to include the out of time allegations made by the respondent:

(a) the out of time allegations were never part of a valid complaint, because there was never any entitlement to make a complaint;

(b) the out of time allegations were never rejected by the ADCQ because the Commissioner has not addressed the substance of the allegations; and

(c) the out of time allegations did not lapse in terms of s 142 of the Act as a result.

[47] I consider that the respondent's reliance on the decision in *Aleksic v Commonwealth Bank of Australia*[9] is misplaced.

[48] I agree with the Senior Member that the decision in *Aleksic* related to the exercise of the statutory obligation under s 141 to reject complaints against particular individuals, not to the exercise of the discretion under s 138(2) of the Act. I agree that the later decision of *MM v State of Queensland*[10] is a preferable construction of the Act.

---

8 [2003] 1 Qd R 147.
9 [2011] QCAT 342.
10 [2014] QCAT 478.

[49] I do not think that a rejection under s 141 is the same as the exercise of a discretion not to accept a complaint under s 138(2) of the Act. Section 141 requires the Commissioner to accept or reject a complaint. Guidance as to what is relevant in accepting a complaint is found in the preceding s 138. That is, the complaint is within time or good cause has been shown to accept the complaint if it is outside of time. Guidance as to what is relevant in rejecting a complaint is found in the preceding sections 139 and 140. Likewise, the reasoning in *Bond v State of Queensland (No 2)*[11] relied on by the respondents does not assist in their attempt to characterise the exercise of a discretion not to accept an out of time complaint as a rejected complaint. In *Bond (No 2)* the Senior Member is discussing the effect of s 142 of the Act, not s 138 of the Act.

[50] I agree with Senior Member Endicott that if a complaint is not accepted, it does not form part of the complaint. It is not capable of rejection because of its substance as contemplated by the sections of the Act which specifically deal with "rejection" of a complaint. As a result, the matter does not fall within the reach of s 142 of the Act to be treated as a lapsed complaint never to be revived.

[51] For these reasons, I find that the Pre-6 February 2014 complaints were not rejected and therefore had not lapsed under the Act. It is not the case that the complaints could not be reventilated by QCAT exercising discretion under s 178 of the Act. There has been no error of law as alleged by the respondents. The Senior Member has properly construed sections 138, 139, 141 and 142 of the Act.

[52] ***The second ground of appeal***

The learned member erred in law in holding at paragraph [19] of the Decision that based on the conclusion that a valid complaint can only include in time allegations, unless the ADCQ has exercised discretion to include out of time allegations, section 178 of the Act provides power to the Tribunal to consider whether out of time allegations should be added to the complaint by way of amendment.

[53] It is submitted that:

(a) the learned member was wrong to find that valid complaints can only include in time allegations unless the ADCQ has exercised discretion to include out of time allegations.

(b) if a complaint is rejected, it lapses and that includes complaints that are rejected by the ADCQ on the basis that they are out of time.

(c) the Tribunal erred in law in holding that complaints made by Mrs Bond that were not made within one year of the alleged contraventions of the Act, had not lapsed under s 142 of the Act. Such complaints were rejected and had lapsed under the Act.

[54] ***The third ground of appeal***

The learned member erred in law in holding at paragraph [19] of the Decision that even though the ADCQ expressly considered whether discretion should be

---

[11] [2017] QCAT 185.

exercised to allow the out of time allegations and found against exercising that discretion, the Tribunal's power to amend a complaint under section 178 of the Act cannot be limited or negated by the result, holding that the Tribunal's power under section 178 of the Act is unfettered and what must be determined is whether the amendment would be in the interests of justice.

[55] It is submitted that:

(a) QCAT can amend a complaint, but its discretion is fettered to the extent of allegations of contraventions of the Act that were rejected by the ADCQ.

(b) section 178 of the Act allows new claims, but not ones rejected by the ADCQ.

(c) if claims are rejected, for whatever reason, but including that they were made out of time, then the complainant may seek a judicial review of those complaints to the Supreme Court of Queensland.[12]

(d) Mrs Bond, before QCAT, relied exclusively upon the decision of *MM v State of* Queensland[13]. *MM* is not authority for the propositions advanced by her and is not an authority which has anything to say about whether QCAT may amend a complaint to include a complaint rejected by the AD.

(e) Mrs Bond's out of time complaints are not new claims. They are claims rejected by the ADCQ.

(f) the learned member erred in law in holding at paragraph [19] that even though the ADCQ expressly considered whether discretion should be exercised to allow the out of time allegations and found against exercising that discretion, QCAT had power to amend a complaint under s 178 of the Act.

Findings in relation to the second and third grounds of appeal

[56] In relation to the second and third grounds of appeal, the respondents underpin their submissions on the argument that the out of time allegations were rejected by the ADCQ. For the reasons given earlier, I do not consider that the out of time allegations were rejected pursuant to the sections of the Act which deal with rejection. The out of time allegations were not accepted and therefore did not form part of any complaint before the ADCQ.

[57] I reject the submissions of the respondents that the decision of *MM v State of Queensland*[14] is not a relevant authority.

[58] The decision of *MM* has not been appealed. It sets out a comprehensive analysis of the scope and effect of s 178 of the Act.

[59] Member Roney QC said:

> [31] I turn then to what, in my view, is the meaning and effect of section 178 … This Tribunal has discretion to allow a complainant to amend a complaint even if the amendment concerns matters not included in the

---

12 *Brown & Ors v McArthur & Walters* [2002] QSC 236.
13 [2014] QCAT 478.
14 Ibid.

> original complaint. That in my view is sufficiently broad to encompass a situation where it involves not only claims which arise out of the same factual matrix as the original complaint does, but also those which do not. It may even go further, although I need not decide this here, and permit amendments to be made to bring in matters which are entirely unrelated to the matters originally included in the complaint.
>
> [32] The ADCQ performs an important function, inter alia, in receiving, reviewing, filtering in one sense, and referring to this Tribunal what are recognised as valid complaints. Accepting that to be so, there is no reason in principle why a Member of this Tribunal would not be capable, on proper evidentiary material, to decide that in relation to a matter already before the Tribunal, it was appropriate to include other matters which have not been referred to the Commission. In other words, it could not be said that in general this Tribunal, having been seized of a matter, is less capable of making a decision about the nature and character of a complaint than the ADCQ.

[60] Member Roney QC referred to the decision of Mr Savage QC in *McKenzie v MacKay and State of Queensland.*[15]

[61] That decision preceded amendments to s 178 of the Act which inserted sub-section (2) so that the Tribunal may allow a complainant to amend a complaint even if the amendment concerns matters not included in the complaint.

[62] Mr Savage QC said:

> 39. The adoption of a construction which prohibited any amendment produces in many circumstances a manifestly inconvenient outcome. There are many cases in the Tribunal where there is a continuum of activity alleged, some of which is omitted from the original complaint. In those circumstances, by the time the complainant comes to agitate the complaint in the Tribunal, the one year time limit will have already expired. Thus, the complainant may be denied the opportunity of agitating those matters albeit they are in many circumstances entitled to rely upon them as evidence in the hearing to corroborate the referred complaint … I can see no good purpose in adopting a construction that has these effects.
>
> 40. If in truth the amendment provision is to be regarded as a quasi-jurisdictional provision, there is nothing in principle wrong with the legislature investing power to a Tribunal it creates by one of such general words as in section 178.

[63] That approach was followed by Mr Savage QC who was, by then, President of the Anti-Discrimination Tribunal, in *X v Q (No. 3).*[16] The judgment in *X v Q* was the subject of an appeal to the Supreme Court and came before de Jersey CJ on 15 November 2010. The Chief Justice agreed with the Tribunal President that s 178 of the Act accorded a completely unfettered discretion to amend a complaint.

[64] Member Roney QC in *MM's* case said:

---

15 [2005] QADT 24.

16 [2009] QADT 21.

> [42] In my view, it is clear that the amendments which were made to section 178 were facilitative, established in the Tribunal an unfettered discretionary power to allow an amendment to raise a matter notwithstanding that it was not included in the original complaint, and expected this Tribunal to exercise that power in ways which, inter alia, facilitated the just and expeditious hearing of the matters in dispute, to minimise inconvenience and cost associated with that process, and to avoid unnecessary technicality and formality in this process … As the Chief Justice concluded in *X -v- Q*, even before the 2009 amendments to section 178 of the ADA, section 178 gave an "unfettered discretion" to allow amendments to bring new claims.

[65] I am of the view that the unfettered discretion to allow new claims to be incorporated into complaints determined by QCAT includes a discretion to include allegations previously found by the Commission to have been out of time.

[66] That conclusion is consistent with the structure of the Act which provides for a further exercise of discretion by QCAT over matters already considered by the Commission.

[67] Section 175 of the Act expressly requires QCAT to consider, on the balance of fairness between the parties, whether it is reasonable to accept a complaint referred to it which includes a complaint made more than one year after the alleged contravention of the Act.

[68] Section 175 of the Act is predicated upon the Commissioner having exercised a discretion to include such a complaint for it to reach QCAT. The legislature has left it open for QCAT to cut across the decision of the Commissioner and to exclude the out of time complaint. The legislature has then given QCAT an unfettered discretion in s 178 of the Act to amend complaints to include matters not previously included. It is consistent with the structure of the Act that QCAT may come to a different conclusion than the Commissioner, for QCAT to include out of time allegations by way of amendment.

[69] For these reasons, I find that QCAT has power under s 178 of the Act to amend a complaint to include out of time allegations which have not been accepted by the ADCQ. Accordingly, the Pre-6 February Allegations were properly included in the complaint to be determined by QCAT.

[70] There has been no error of law on the part of the Senior Member.

[71] ***The fourth ground of appeal***

The learned member erred in law at paragraph [34] of the Decision by exercising discretion to allow the amendment to Mrs Bond's complaint to include the out of time allegations, because the learned member:

(a) ***failed to take into account relevant considerations, namely:***

(i) ***the ADCQ had rejected the out of time complaints;***

(ii) ***Mrs Bond did not seek judicial review of the ADCQ out of time decision; and***

(iii) ***at the directions hearing on 9 June 2016, Mrs Bond informed the Tribunal she would not be proceeding with the out of time complaints[17] and did not appeal the Orders by the Tribunal on 9 June 2016 made in consequence of that information; and***

(b) ***acted on wrong principles, namely:***

(i) ***that to allow Mrs Bond to amend her complaint to include the out of time allegations would provide her with an opportunity to protect her rights to work in a non-discriminatory workplace in the event her complaint is ultimately found to disclose unlawful behaviour by her employer and line manager; and***

(ii) ***to allow Mrs Bond to amend her complaint to include the out of time allegations would provide the respondents with an opportunity to establish they had not acted in a discriminatory manner and will put an end to the allegation of discriminatory conduct during the entire period in question from November 2011 to April 2014.***

[72] The respondents submit that:

(a) the Senior Member's decision was affected by the errors of law made and referred to in grounds of appeal 1, 2 and 3.

(b) as a consequence, the Senior Member erred in exercising discretion under s 178 of the Act to allow the amendment to Mrs Bond's complaint to include the out of time allegations.

(c) out of time complaints that were rejected by the ADCQ cannot be the subject of an exercise of discretion by QCAT under s 178 of the Act to allow them to be added to Mrs Bond's complaints before QCAT.

(d) the Senior Member erred in law in this regard.

Findings in relation to the fourth ground of appeal

[73] I do not consider that Senior Member Endicott failed to take into account relevant considerations.

[74] For the reasons given, it was not a relevant consideration that the ADCQ had rejected the out of time complaints.

[75] Accordingly, it is not relevant that the respondent did not seek judicial review of the ADCQ out of time decision.

[76] In relation to Mrs Bond informing QCAT that she would not be proceeding with out of time complaints, she nevertheless did so by filing an application seeking leave to amend her complaint and filing a new set of contentions containing the out of time allegations. That course of action ran counter to the 9 June 2016 Directions made by the Senior Member to resolve the matter.

---

[17] Transcript of 9 June 2016 at page 1-2, lines 16-33 and appellant's written submissions dated 4 August 2016 at [8].

[77] Despite that, the Senior Member was prepared to deal with Mrs Bond's application to amend the complaint in the interests of justice and gave the respondents a full opportunity to be heard on the matter. The Senior Member considered the submissions of the respondents but exercised her discretion by reference to the interests of justice and the fact that the Act is protective legislation which should be beneficially interpreted. I do not intend to interfere with the discretion of the Senior Member as to how she has managed the proceeding before her.

[78] I do not consider it is a wrong principle to enable amendment of a complaint to include out of time allegations so that an opportunity is given to an applicant to protect her rights and for respondents to defend themselves from the allegations against them. The Act is remedial legislation. The Act is to be interpreted broadly to ensure the objects of the Act are achieved. The Senior Member was simply addressing the objects of the Act by way of explanation for the decision she reached. That is not a wrong principle.

[79] The decision of the Senior Member granting leave to amend the complaint to include the Pre- 6 February 2014 allegations is affirmed.

[80] ***The fifth ground of appeal***

The learned member erred in law at paragraph [47] of the Decision by exercising the Tribunal's discretion to allow an amendment to Mrs Bond's complaint to include the first allegation of victimisation made against Ms Thomas (the Victimisation by a Lie to Workcover Allegation). Section 178 of the Act did not confer power on the Tribunal to amend the Mrs Bond's complaint to include the victimisation allegation as the allegation or the factual basis for the allegation had been rejected by the ADCQ because it was out of time.

[81] The respondents refer to Mrs Bond's submissions dated 18 August 2016 at paragraph [21] which asserted:

(a) one of the "out of time allegations of discrimination" was Christine Thomas shouting at Mrs Bond and her husband when Ms Thomas observed Mrs Bond rubbing sunburn cream on her husband's back.

(b) the allegation that Ms Thomas victimised Mrs Bond when she lied to WorkCover in response to that alleged contravention is an in time alleged contravention that is implicitly contained in the referred complaint.

(c) including that alleged contravention in her application to amend her complaint, Mrs Bond is merely seeking to clarify what she characterises as Ms Thomas' lie as an instance of victimisation. Accordingly, it would be a proper basis of QCAT's discretion to allow Mrs Bond to amend her complaint to characterise Ms Thomas' lie to WorkCover as an allegation of victimisation.

[82] It is said that the Senior Member erred in law because:

(a) on Mrs Bond's own submissions referred to above, the victimisation allegation against Ms Thomas was rejected by the ADCQ as being out of time; and

(b) for the reasons in respect of grounds of appeal 1, 2 and 3, s 178 of the Act does not confer power on QCAT to amend a complaint to include allegations rejected by the ADCQ because they were out of time.

[83] ***The sixth ground of appeal***

The learned member erred in law at paragraph [48] of the Decision by exercising the Tribunal's discretion to allow an amendment to Mrs Bond's complaint to include the victimisation allegation (the lie to WorkCover allegation), because the learned member:

(a) ***took into account irrelevant considerations, namely that it was preferable for the Tribunal to give leave to amend the complaint so that it is clearly within the complaint that will be determined by the Tribunal, when it was not expressly identified in the original complaint; and***

(b) ***mistook the facts, namely, by finding at paragraph [47] that an allegation of victimisation based on the comments made by the second applicant in May 2014 were not rejected by the ADCQ.***

[84] The respondents submit that:

(a) irrelevant considerations or mistakes of fact will result in an error in law.

(b) the allegation or the factual basis for the complaint was rejected by the ADCQ because it pre-dated 6 February 2014.

(c) it was irrelevant that it would be preferable to give leave to amend so that the allegation is clearly within the complaint.

(d) it was irrelevant that a preference for the allegation to be included was expressed when the allegation or factual basis for the complaint was rejected by the ADCQ because it pre-dated 6 February 2014. On Mrs Bond's own submissions, the allegation was rejected by the ADCQ as being out of time. The Senior Member found at [48] that grounds of that complaint of victimisation "… was itself expressed in the document", being the complaint to the ADCQ.

(e) the Senior Member also mistook the fact that the allegation of victimisation was not rejected by the ADCQ.

(f) for the reasons given in respect of grounds of appeal 1, 2 and 3, s 178 of the Act does not confer power on the Tribunal to amend a complaint to include allegations rejected by the ADCQ because they were out of time.

(g) the Senior Member's decision is vitiated by errors of law.

Findings in relation to the fifth and sixth grounds of appeal

[85] In relation to the fifth ground of appeal it is necessary to consider whether the ADCQ had rejected the victimisation allegation or whether the factual basis for the victimisation allegation was not accepted because it was out of time

[86] I do not see the Victimisation by a Lie to WorkCover Allegation was addressed by the ADCQ in its letter of 20 November 2015 rejecting a 26 August 2015 complaint, which dealt with IME allegations. Nor was it dealt with in the 14 January 2016 letter from the ADCQ referring to the 23 November 2015 complaints. The victimisation complaints raised in the 23 November 2015 complaint related to the IME allegations. Senior Member Endicott refers to a general complaint of victimisation in the original, within time complaint. The Senior Member found that this part of the complaint had not been rejected.

[87] The respondents point out that Mrs Bond, in her 18 August 2016 submissions, categorised the lie to WorkCover allegation as being one of the out of time allegations of discrimination. Mrs Bond responds that the factual basis for the allegation occurred on 22 May 2014, roughly 8½ months before she lodged her complaint with the ADCQ, well within the Act's one-year limitation period. I accept that is the case.

[88] I find that the lie to WorkCover allegation of victimisation was not rejected by the ADCQ. It is a more fully ventilated complaint than the matter raised in the initial complaint and referred to QCAT. I consider that the Senior Member properly exercised the power under s 178 of the Act for inclusion of the allegation in Mrs Bond's contentions.

[89] In relation to the sixth ground of appeal, I reject the submissions that the Senior Member took into account irrelevant considerations or mistook the facts.

[90] Given that the factual basis for the allegation fell within time, there has been no mistake. Given that the complaint of victimisation was expressed in the original accepted complaint, it is reasonable that the allegation be properly addressed in the proceedings.

[91] I find that the Senior Member properly exercised her discretion under s 178 of the Act to amend the complaint to include the Victimisation by a Lie to Workcover Allegation.

[92] The decision of the Senior Member granting leave to amend the complaint to include the allegation is affirmed.

APL 191-17

Decision dated 5 June 2017

Grounds of appeal

[93] Mrs Bond says that the learned member erred:

(a) in mixed fact and law at paragraphs [12] and [14] of the Decision in finding that the issue Mrs Bond wants the tribunal to add to her complaint was rejected and it cannot be revived.

(b) in fact, with respect to the matters at paragraphs [6] and [11] of the Decision in finding that the ADCQ complaint lodged on 29 October 2015 which formed part of the 23 November complaint contained reference to a request that Mr

Harvey's decision be declared void, because natural justice was absent and he was a biased decision maker.

(c) in law in holding at paragraphs [9], [10] and [11] of the Decision that the reason Mrs Bond did not include a victimisation complaint based on a denial of natural justice, is a relevant consideration.

[94] The Orders sought are for the Appeal Tribunal to:

(a) set aside the decision to refuse the applicants' application to amend her complaint to include allegations of victimisation by reason of the appointment of Sean Harvey as decision-maker in her public interest disclosure complaint to the Department of Justice and Attorney-General.

(b) substitute its own decision, namely, that leave is granted to the applicant to amend her complaint to include allegations of victimisation by reason of the appointment of Sean Harvey as decision-maker in her public interest disclosure complaint to the Department of Justice and Attorney-General.

Submissions of Mrs Bond filed 28 July 2017

[95] Mrs Bond submits that:

(a) there is no mandate in the Act to make all known discrimination and victimisation claims in a single complaint. Mrs Bond says that she sought leave from QCAT to amend her complaint to include the victimisation claim a mere eight months after the alleged contravention. No legal bar exists for her to amend her complaint to include it in these proceeding.

(b) Senior Member Stilgoe, in the 5 June 2017 decision, acknowledged that the allegations in the November 2015 complaint and those in her proposed amendment in this proceeding are differently pleaded.

(c) even though Senior Member Stilgoe determined that Mrs Bond did not include the complaint about bias and denial of natural justice in her November 2015 complaint, she concluded that the Commission somehow rejected that non-existent complaint and it lapsed. The decision is said to be obviously flawed.

(d) Senior Member Stilgoe's decision had the effect of reversing legal determinations made by Senior Member Endicott in her 2 May 2017 decision that she "is not precluded from the amendment that she seeks the Tribunal to make" once QCAT determined that the subject matter of the amendment had not been made to the ADCQ. In overturning Senior Member Endicott's decision, Senior Member Stilgoe acted extra jurisdictionally and Mrs Bond will suffer a substantial injustice if leave is not granted to appeal the erroneous decision.

(e) there are a number of factual errors in the decision. For example, Senior Member Stilgoe asserted that the respondents say that the complaint Ms Bond wants to add is the same as the complaint rejected by the ADCQ, despite the fact that in their final submissions, the respondents submit that the applicant made a conscious decision not to make, in November 2015, the allegations now sought to be made in the applicant's contentions.

(f) Senior Member Stilgoe stated that she did not accept Mrs Bond's explanation for failing to include the allegation in her complaint. Mrs Bond says that she did not offer an explanation.

(g) she did not assert that the Senior Member should revive a lapsed victimisation claim by reading s 142(1) of the Act subject to the QCAT's power to amend a complaint. It is submitted that Mrs Bond had simply never made the victimisation claim.

(h) the Senior Member erred in simultaneously deciding that Mrs Bond did not make a victimisation complaint based on a denial of natural justice to the ADCQ and that the ADCQ rejected the unmade complaint and it lapsed pursuant to s 142(1) of the Act.

The Respondents' submissions filed 21 August 2017

[96] The respondents refer to paragraphs [32] to [38] of Mrs Bond's draft Amended Contentions which they attach to their submissions. The respondents refer to Mrs Bond alleging that she was victimised by the first respondent by way of a denial of natural justice through bias by Mr Harvey.

[97] The Respondents then point to paragraphs [18] to [36] of the applicant's November 2015 complaint to the ADCQ. Those paragraphs are said by the respondents to refer to the following:

(a) the fact that Mrs Bond had made a public interest disclosure.

(b) Mr Harvey, Assistant Director-General of Youth Justice Services of the Department was appointed as decision-maker with respect to investigation of her allegations.

(c) Mr Harvey's decision not to substantiate her allegations.

[98] The respondents say that Mrs Bond made an allegation of victimisation against Mr Harvey.

[99] The respondents then refer to pages 17 and 19 of Mrs Bond's submissions dated 24 October 2016 to the effect that paragraphs [32] to [38] of the draft Amended Contentions allege the first respondent victimised Mrs Bond by denying her natural justice in relation to a public interest disclosure that she and her husband made against Ms Thomas. Those submissions are attached as Attachment "C" to the respondents' submissions.

[100] The respondents make the following submissions:

(a) Mrs Bond submitted that the allegations now sought to be made were not raised in 23 November 2015 because her legal representative did not have the knowledge of the Act at the time to make the current allegation.

(b) Mrs Bond asserts the allegations in the draft Contentions are not the same as those in the 23 November 2015 complaint to the ADCQ because:

(i) the draft Amended Contentions concern a victimisation complaint in relation to denial of natural justice by appointing Mr Harvey to decide if Ms Thomas committed violations of the Public Service Code of Conduct; and

(ii) the 23 November 2015 ADCQ complaint was based on an allegation that Mr Harvey retaliated against the applicant by directing her to attend a medical examination. That was the allegation rejected by the ADCQ.

[101] The respondents say they submitted to the Senior Member that the draft Amended Contentions and the November 2015 complaint were essentially the same. In the alternative, in response Mrs Bond's assertion that the allegations in the draft Amended Contentions were not made in the November 2015 complaint because Mrs Bond's legal representative did not have the knowledge of the Act, such an excuse was neither reasonable nor explicable and recognition of a claim of a denial of natural justice should have been self-evident.

[102] The respondents refer to paragraphs [10] and [11] of the 5 June 2017 decision, pointing to Mrs Bond's legal representative, Mr Bond, asking DJAG to void Mr Harvey's decision on the ground it was made in the absence of natural justice and that reports be provided to an unbiased decision-maker. They also refer to Senior Member Stilgoe saying that in the complaint to the Ombudsman made on 29 October 2015, which formed part of the 23 November 2015 complaint, Mrs Bond asked that Mr Harvey's decision be declared void because natural justice was absent and he was a biased decision-maker. The issue was clearly within Mrs Bond's contemplation. The Senior Member's comment was that Mrs Bond did not need a lawyer to point out what she already knew.

Findings

[103] The relevant question for determination is whether the Victimisation by Breach of Natural Justice Allegation was rejected by the ADCQ and therefore lapsed and was unable to be referred for consideration by QCAT.

[104] I reject Mrs Bond's submission that Senior Member Stilgoe was bound to make the amendment to include the Allegation, if she found that the complaint was not the same as the complaint which had been rejected by the ADCQ. Senior Member Stilgoe was free to make her own decision on the facts before her. She was not bound by Senior Member Endicott's suggestion that if the complaint was not rejected then Mrs Bond is not precluded from making the amendment.

[105] I find that the factual basis for the victimisation complaint was set out in the 23 November 2015 complaint under the heading - "COMPLAINT OF VICTIMISATION IN CONTRAVENTION OF SECTION 130 OF THE *ANTI-DISCRIMINATION ACT* 1991 and COMPLAINT OF PUBLIC INTEREST REPRISAL IN CONTRAVENTION OF SECTION 40 OF THE *PUBLIC INTEREST DISCLOSURE ACT* 2010".

[106] The complaint states that natural justice was absent from Mr Harvey's decision-making process. That is set out in the letter to DJAG's Ethical Standards Unit dated 17 October 2015 and the letter to the Queensland Ombudsman dated 29 October

2015. Both those letters are included in the 23 November 2015 complaint. I find that they form part of the complaint.

[107] Both letters state that if Mr Harvey had found the complaints of misconduct and maladministration substantiated as against the second respondent, Ms Thomas, those facts "would be devastating to the department's litigation position in relation to Robin Bond's anti-discrimination complaint that is pending before QCAT"[18] and "… If the complaints of misconduct and maladministration against our Service Leader are substantiated, her credibility would be destroyed and DJAG's potential for being found liable by QCAT would grow exponentially."

[108] Despite these facts, the Commissioner did not treat the complaint about Mr Harvey failing to afford natural justice when investigating the public interest disclosures as an allegation of victimisation. The Commissioner treated allegations against Mr Harvey in relation to Directions for Mrs Bond to attend an Independent Medical Examination, as constituting allegations of victimisation. Those latter allegations were rejected as constituting contraventions of the Act. The Commissioner did not seek to categorise the natural justice complaint as a victimisation allegation. He did not say that anything arising out of the natural justice complaint was accepted or rejected. It was ignored.

[109] Considering the heading of victimisation in the complaint and the clear factual basis for a complaint of victimisation being set out, it is reasonable to think that such a complaint was being made, even though it was not picked up by the ADCQ.

[110] I do not think it is possible to deal with the appeal on the basis that the Victimisation by breach of Natural Justice Allegation was rejected by the ADCQ and that it has therefore lapsed.

[111] I find that the victimisation complaint was made, but it was not dealt with. It was not rejected, nor was it accepted and referred.

[112] On this basis, it is possible that the allegation can be incorporated into the complaint by the exercise of QCAT's discretion under s 178 of the Act.

[113] As to the respondents' submissions, they say that the 5 June 2017 decision involved Mrs Bond seeking the exercise of a discretion to allow an amendment under s 178 of the Act. They refer to the principles upon which an appeal may be made against discretionary decisions.

[114] I consider that there has been appealable error in the 5 June decision. In particular, the Senior Member was mistaken in concluding that the Victimisation by breach of Natural Justice Allegations had been rejected by the ADCQ.

[115] The argument before Senior Member Endicott does not appear to have addressed whether it is in the interests of justice for the amendment to be made to include victimisation as a result of a breach of natural justice through bias.

[116] In their submissions made to Senior Member Stilgoe, the respondents submitted that the natural justice allegation had been made in the 23 November 2015 complaint and rejected and therefore should not be re-enlivened. However, it was submitted that if

[18] Letter to DJAG's Ethical Standards Unit dated 17 October 2015.

QCAT rejected that submission and decides it does have discretion to allow the amendment under s 178 of the Act, then QCAT should not allow the amendment for the following reasons:

(a) the applicant could have made the very broad complaint of victimisation she now makes, but did not do so and clearly made a conscious decision not to do so.

(b) it is unfair that the respondents must now respond to a complaint of victimisation against Mr Harvey by way of the applicant trying to amend her allegations when she could have made the complaint on 23 November 2015.

(c) the way in which the applicant now seeks to amend her complaint before QCAT is because of the unsuccessful complaint made to the ADCQ on 23 November 2015.

(d) the applicant has tried to dress up her complaint of victimisation about Mr Harvey to avoid the effect of the decision of the ADCQ not to accept her complaint, being a decision in respect of which she did not seek a review pursuant to the *Judicial Review Act* 1991 (Qld).

(e) both allegations of alleged victimisation on the part of Mr Harvey are said to be in reprisal for the applicant's public interest disclosures.

(f) the applicants' contentions are a rebadging or re-characterisation of her ADCQ complaint of victimisation against Mr Harvey.

[117] In their submissions dated 22 September 2016, the respondents asked whether the power in s 178 of the Act extends to complaints which are re-characterised, or rebadged, arising as these allegations do, out of the same facts. The respondents say that the public interest disclosure matter was lodged with the ADCQ as a complaint of victimisation on 23 November 2015. It was rejected and lapsed.

[118] I have found that the complaint was not rejected by the ADCQ. It was made but ignored. It is a different complaint to the complaints which were rejected by the Commissioner. I do not characterise the complaint as a mere re-badging of an old rejected complaint. The alleged reprisal in the rejected complaints was the direction to undertake an independent medical examination. The alleged reprisal in the allegation in question is a failure to accord the Bonds natural justice in considering their public interest disclosure.

[119] On balance I think that it is in the interests of justice that the allegation be dealt with as part of the contentions. There appears to be a nexus between the matters alleged against Mr Harvey and Mrs Bond's complaint to the ADCQ. Further, the allegation is one which has been apparent to the respondents since 23 November 2015 despite questions as to whether it had been rejected by the ADCQ.

[120] It is in the interests of all parties that this matter proceeds to a final determination. For that reason, the Appeal Tribunal intends to substitute its own decision for that of Senior Member Stilgoe.

[121] I propose to:

(a) set aside the decision to refuse the Mrs Bond's application to amend her complaint to include allegations of victimisation by reason of the appointment of Sean Harvey as decision-maker in her public interest disclosure complaint to DJAG.

(b) substitute the Appeal Tribunal's decision, namely, that leave is granted to the applicant to amend her complaint to include allegations of victimisation by reason of the appointment of Sean Harvey as decision-maker in her public interest disclosure complaint to DJAG.

Orders

[122] The Appeal Tribunal orders:

(a) the application for leave to appeal in APL 170-17 is granted.

(b) the appeal in APL170-17 is dismissed.

(c) the application for leave to appeal in APL 191-17 is granted.

(d) the decision in APL 191-17 is set aside.

(e) the Appeal Tribunal substitutes its own decision, namely, that leave is granted to the applicant Robyn Bond to amend her complaint to include allegations of victimisation by Sean Harvey as decision-maker in her public interest disclosure complaint to the Department of Justice and Attorney-General, limited to allegations of breach of natural justice through bias.