

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Total Driver Pty Ltd & Anor v Hedley* [2020] QCATA 81

PARTIES: **TOTAL DRIVER PTY LTD**

and

GENE CORBETT
(appellants)

v

DONNA HEDLEY
(respondent)

APPLICATION NO/S: APL225-19

ORIGINATING APPLICATION NO/S: MCDO 4/19 (Coolangatta)

MATTER TYPE: Appeals

DELIVERED ON: 26 May 2020

HEARING DATE: 29 April 2020

HEARD AT: Brisbane

DECISION OF: Member Gordon

- ORDERS:
- 1. The Appeal Tribunal's record is amended to show the name of the first appellant as Total Driver Pty Ltd.**
 - 2. The application made on 17 March 2020 by Total Driver Pty Ltd and Gene Corbett to put fresh evidence before the Appeal Tribunal is refused, however Gene Corbett's affidavit made on 20 August 2019 is admitted in evidence by the Appeal Tribunal.**
 - 3. Leave to appeal is refused. This means that the appeal fails.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN NO APPEAL LIES – where a party did not appear at the hearing but applied for an adjournment of the hearing on medical grounds – where this was refused by the Adjudicator at the hearing – where the party then unsuccessfully applied to reopen the proceeding – where section 139(5) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides that a decision on a reopening application is final and cannot be appealed against – whether it is fatal to this

appeal

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN NO APPEAL LIES – where the decision by an Adjudicator to refuse an adjournment applied for on medical grounds is challenged on appeal – where evidence in support of the appeal is totally unconvincing – whether the Adjudicator made the correct decision – whether any reasonably arguable grounds of appeal

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 57, s 93, s 139

Balemi v Ingles [2020] QCATA 58

Burns v James [2010] QCATA 101

Freemantle v Jenwen Pty Ltd t/a LJ Hooker Jimboomba [2013] QCATA 67

Todd v Downing [2011] QCATA 74

**APPEARANCES &
REPRESENTATION:**

Appellant: Self-represented but assisted by Benjamin O'Brien of Whitehead Crowther Lawyers

Respondent: Self-represented but assisted by Ian Martin of Gold Coast Community Legal Centre

REASONS FOR DECISION

- [1] This is an appeal brought by Total Driver Pty Ltd and Gene Corbett against a decision made by an Adjudicator in favour of Donna Hedley when hearing a minor civil dispute.
- [2] Ms Hedley claimed \$5,236 plus the filing fee from Total Driver and Gene Corbett. She claimed that she had done certain work for them and had not been paid for that work. She brought the claim on Form 3 (application where minor debt claim) and submitted numerous documents in support. In a formal written response, Mr Corbett filed numerous documents in reply.
- [3] The matter came before an Adjudicator for hearing on 17 April 2019. On that day the Adjudicator was not satisfied with the clarity of Ms Hedley's claim and directed that within 14 days, she deliver to Mr Corbett a spreadsheet detailing all works she had undertaken for the respondents and referring to the documentation and timesheets. The Adjudicator gave Mr Corbett 14 days to respond, and reserved the matter for rehearing.
- [4] The rehearing of the matter was listed for 5 June 2019 and both parties were notified of the date. At 10.52am on 4 June 2019, that is the day before the hearing, Mr Corbett sent an email to the tribunal requesting an adjournment. It stated:

To whom it may concern

I am unable to attend the hearing tomorrow due to the flu which I provided a medical certificate for

Apologies for any inconvenience

I am still unable to drive safely without getting vertigo. I have chronic headaches etc.

Regards and thanks

[5] The medical certificate which was attached was from a clinic and stated:

This is to certify that

Mr Gene Corbett

is receiving medical treatment and for the period

Wednesday, 29 May 2019 to Friday, 7 June 2019 inclusive

Gene Corbett will be unfit to continue his usual occupation

This Certificate was completed on 3/6/2019

Signed

(by a doctor)

[6] The application for adjournment was left for the Adjudicator to decide at the hearing the following day.

[7] At the hearing Ms Hedley attended but Mr Corbett did not. When the Adjudicator informed Ms Hedley about Mr Corbett's application for an adjournment her immediate reaction was 'happens every time'. When the Adjudicator enquired from her further, she said that Mr Corbett was always making 'excuses for not turning up in places when he doesn't want to show' and saying that he has a doctor's certificate.¹ She explained this further and gave examples of Mr Corbett avoiding his responsibilities, referring in this respect to a witness she had brought with her.² She also stated that Mr Corbett did not appear at the mediation on 6 March 2019.³ She confirmed her evidence about all these matters on oath.⁴

[8] A central issue which was of concern to the Adjudicator, was whether Ms Hedley had provided the spreadsheet to Mr Corbett as directed, and if so when. Ms Hedley explained that she had left it with a body corporate manager to give it to Mr Corbett on 23 May 2019 and the body corporate manager had confirmed to her that he had given it to Mr Corbett.⁵ She confirmed this when giving evidence on oath.⁶ She

¹ Transcript 1-3 line 35.

² Transcript 1-4 line 45.

³ Transcript 1-8 line 11.

⁴ Transcript 1-10 line 25.

⁵ Transcript 1-4 lines 7 to 40, 1-7 line 35.

⁶ Transcript 1-10 line 13.

also confirmed that Mr Corbett had not provided his response to the material as he had been directed to do.⁷

- [9] The Adjudicator decided to refuse the application for an adjournment. When giving reasons for this,⁸ the Adjudicator noted that Mr Corbett had not attended the mediation and had not complied with the directions to respond to the material submitted by Ms Hedley, nor had he made any complaint about that. Although not expressly stated by the Adjudicator, the decision seems to have been made on the basis that on the evidence provided by Ms Hedley the Adjudicator was not satisfied that Mr Corbett had a reasonable excuse for not attending the hearing, despite the medical certificate.
- [10] The Adjudicator proceeded to hear the application. The Adjudicator found in Ms Hedley's favour and made an order that Total Driver and Mr Corbett were to pay her the sum of \$5,356 within seven days.

Application to reopen

- [11] After receiving the tribunal's order of 5 June 2019, Mr Corbett was quick to apply on 10 June 2019 to reopen the proceedings. He applied on the same day to stay the order which was made. The following day he made a formal complaint about what the Adjudicator had done. In his applications he explained that he had submitted a medical certificate prior to the hearing. He submitted a number of other documents showing his defence of the claim. Amongst the documents were a list of treatments recommended by a naturopath and an email showing that he had seen the naturopath on 29 May 2019.
- [12] The application to reopen triggered the usual process of the tribunal when dealing with such applications. Submissions were sought from both sides and then the application was put before an Adjudicator for decision. Ms Hedley submitted much material in response including a statement from a witness, and a statutory declaration from another witness, attempting to show that Mr Corbett was disreputable. None of this material seemed to have any relevance to Mr Corbett's application to reopen.
- [13] All the material was considered by the tribunal and the application to reopen was refused.

The appeal

- [14] This appeal has been brought in the name of Total Driver Pty Ltd and Gene Corbett. The order in the tribunal was made against 'Total Driver' and Gene Corbett. The Appeal Tribunal has recorded the name of the appellants variously as 'Total Drive Pty Ltd' and Gene Corbett, and 'Total Driver' and Gene Corbett. The record should be changed to show the correct name of the appellant company as Total Driver Pty Ltd. Mr Corbett is the sole director and secretary of the company.
- [15] The grounds of appeal are:

⁷ Transcript 1-10 line 32.

⁸ Transcript 1-12 line 15.

- (a) A denial of procedural fairness because the Adjudicator did not grant the application for an adjournment made on 4 June 2019.
 - (b) Mr Corbett was served with Ms Hedley's supporting material five days prior to the hearing and he was sick with the flu and did not have enough time to consider it and file and serve material in response.
 - (c) Mr Corbett obtained a doctor's certificate and sent it and other supporting material to the tribunal on 4 June 2019 and was told by Registry staff that 'it should be fine' when speaking to them on the phone on 4 June.
 - (d) A denial of natural justice because Mr Corbett was denied the opportunity to present his case before the tribunal when it made its decision on 5 June 2019 in his absence and this was an error of law.
- [16] Mr Corbett's solicitors prepared submissions in support of the appeal. The submissions stated that Mr Corbett had received Ms Hedley's material in support of the claim on 29 or 30 May 2019 and so he had three business days to read, consider and respond to the material when the directions had contemplated that he had 14 days to do so.⁹
- [17] Various authorities were relied on, which stressed the importance of a party having a reasonable opportunity to present their case, and one where the Appeal Tribunal considered that a different decision would have been made if all the circumstances had been known.
- [18] The submissions also argued the merits of Ms Hedley's claim. These arguments put forward Mr Corbett's case and pointed out some discrepancies in Ms Hedley's evidence.¹⁰
- [19] Ms Hedley applied to strike out the appeal¹¹ but this application was dismissed on 11 March 2020.
- [20] Total Driver and Mr Corbett applied for leave to rely on 'fresh' evidence before the Appeal Tribunal.¹² This is evidence that was not put before the Adjudicator in the hearing in the tribunal. This application is also before me to hear and determine in this appeal.
- [21] The fresh evidence was submitted to the tribunal on 17 March 2020. The submissions in support explain that the fresh evidence demonstrates that the work done by Ms Hedley was so poor in quality that she does not deserve any further payment. It is said that the reason why the fresh evidence was not previously available was because Mr Corbett appointed a consultant who uncovered emails demonstrating the poor work. The application for fresh evidence includes an affidavit from Mr Corbett, a report from the consultant, an unsigned statement from someone who worked for Mr Corbett, a letter from Mr Corbett's solicitor addressed

⁹ Paragraph 64 of submissions dated 20 December 2019.

¹⁰ Paragraphs 89 to 96 of submissions dated 20 December 2019.

¹¹ Application of 18 October 2019.

¹² Application of 17 March 2020.

‘to whom it may concern’ describing some allegedly unlawful behaviour of Ms Hedley, and some recent prints of social media conversations.

- [22] Bearing in mind the appeal concerns whether or not the Adjudicator provided Mr Corbett with a fair hearing it is difficult to see how any of the new material in the application of 17 March 2020 is relevant to the appeal. For this reason I decline to give leave for it to be put before the Appeal Tribunal.
- [23] Mr Corbett has put other material before the Appeal Tribunal, some of which is also new, but not in a formal application to present fresh evidence. This material is attached to his application for leave to appeal or appeal, and also in resubmitted applications to stay the original decision and to reopen the original proceeding. In particular, Mr Corbett has attempted to give evidence to the Appeal Tribunal in an affidavit made on 22 August 2019. I consider this affidavit below.
- [24] Ms Hedley also appears to seek to rely on fresh evidence in the appeal. She has submitted an affidavit to the Appeal Tribunal to which she deposes to having served Mr Corbett with the material in support of her claim ‘in the first week of May’.¹³ She supports this with a photocopy of an entry in her diary for 3 May 2019 where it is written ‘paperwork to Corbett – Main Beach’. This is in marked contrast to the evidence she gave to the Adjudicator at the hearing that she had served it on 23 May 2019. In its directions of 26 September 2019 the Appeal Tribunal required any application to put fresh evidence before the Appeal Tribunal to be by way of formal application. Since this was not done, I do not regard Ms Hedley as having made such an application.

The appeal hearing

- [25] There was an appeal hearing on 29 April 2020 before me. Only Mr Corbett attended the appeal hearing. He appeared by telephone. The hearing was in the afternoon. A number of attempts had been made by the tribunal in the morning of the appeal hearing to contact Ms Hedley and again during the hearing itself, but the calls simply went to voicemail. Her legal advisers were also contacted but said that they were unable to assist.
- [26] At the appeal hearing neither I nor my hearing support officer, nor the case manager, were aware that Ms Hedley had made an application on Form 40 (application for miscellaneous matters). This was stamped as received by the tribunal on 24 April 2020. In that application Ms Hedley said that she sought an order that Mr Corbett provide the fresh evidence on which he wished to rely in the appeal, because she had not received it. Ms Hedley also sent an email to the tribunal on 23 April 2020. In that email she said that she was asking for an order that Mr Corbett serve the fresh evidence on her and she be allowed sufficient time to compose her response, and:

that the oral hearing of this matter be adjourned until such time as I have been allocated to file and serve my response to the fresh evidence materials

- [27] Since Ms Hedley’s application for an order and for a postponement had not been processed by the tribunal by the time of the appeal hearing, it did not appear on the file until afterwards.

¹³ Paragraph 6(a) of her affidavit made on 20 January 2020.

- [28] It appeared to me at the appeal hearing on the balance of probabilities that Ms Hedley had simply decided not to appear, and this explained why attempts to contact her by telephone were unsuccessful. This seemed to be reinforced by the fact that she had already filed detailed submissions and an affidavit giving her side of the matter, and by the fact that she had already received the payment of \$5,356 from Mr Corbett.
- [29] Even if I had seen her applications of 23 and 24 April 2020, I would have formed the same view because the tribunal had not communicated with her about the applications at all, although it is possible there had been an automatic acknowledgement of their receipt. This meant that from Ms Hedley's standpoint she had asked for a postponement of the appeal hearing but had not heard back about it. On this basis, her proper assumption would have been that the appeal hearing was going ahead and she needed to make herself available if she wished to attend.
- [30] I decided to proceed with the appeal hearing in Ms Hedley's absence.
- [31] It was apparent from the submissions made by Mr Corbett for the appeal and from what he said in the appeal hearing that neither he or his solicitors had considered the impact of section 139(5) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) on the appeal. Mr Corbett was unable to deal with the point in the appeal hearing. For this reason, I made directions giving both sides the opportunity to make submissions about section 139(5) before a final decision in the appeal was made.
- [32] Ms Hedley must have received those directions because she emailed the tribunal on 5 May 2020 querying how the directions could have been made without any 'correspondence to myself'. There was no explanation in this email as to why Ms Hedley did not make herself available on the telephone on the day of the appeal hearing.

Considering the appeal

- [33] One of Mr Corbett's difficulties in this appeal is that since he applied to reopen the original proceedings but was unsuccessful, there is an impediment to an appeal in section 139(5) of the QCAT Act.
- [34] Section 139(5) is in strong terms:
- (5) The tribunal's decision on the application is final and can not be challenged, appealed against, reviewed, set aside, or called in question in another way, under the *Judicial Review Act 1991* or otherwise.
- [35] The 'application' referred to here is the application to reopen. An application to reopen will not be successful unless there is a reopening ground. A reopening ground is defined in Schedule 3 of the QCAT Act as follows:
- reopening ground**, for a party to a proceeding, means—
- (a) the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing; or
- (b) the party would suffer a substantial injustice if the proceeding was not reopened because significant new evidence has arisen and that evidence

was not reasonably available when the proceeding was first heard and decided.

- [36] The reopening provisions in the QCAT Act provide a quick and efficient way to correct unfairness where a party has a reopening ground. It is likely that the reason why no appeal is permitted from a decision on a reopening application is to achieve some finality and also to stop a party trying to have second chance to reopen having failed in the first attempt.
- [37] It is clear that Mr Corbett's application to reopen relied on ground (a). The tribunal in refusing the application to reopen must have decided that he did not have a reasonable excuse for not attending the hearing. This is the precise decision made by the Adjudicator at the hearing on 5 June 2019.
- [38] In submissions about this made on behalf of Mr Corbett by his solicitors following the appeal hearing, it is suggested that section 139(5) only prohibits an appeal from an application to reopen and would not apply to an appeal against a decision to refuse to grant an adjournment.
- [39] I do not agree with this submission. I think in this appeal these two things have merged into one. This means that section 139(5) is engaged and prohibits Mr Corbett's appeal. In such circumstances the Appeal Tribunal has held that section 139(5) is fatal to the appeal.¹⁴ On this basis, I would not grant leave to appeal and so the appeal fails.
- [40] However, in *Balemi v Ingles* [2020] QCATA 58 I was of the view that section 139(5) is not always fatal to appeals of this sort. And since Mr Corbett's solicitors claim to have found a distinction between the prohibition in section 139(5) and this appeal, it may be convenient if I consider the merits of the appeal in the alternative.
- [41] Whether or not to grant an adjournment of a hearing where an application is made prior to the hearing supported with a medical certificate, is a matter of discretion for the Adjudicator conducting the hearing.
- [42] Here, when exercising that discretion, the Adjudicator had before him credible evidence that Mr Corbett did not have a reasonable excuse for not attending the hearing. That evidence was a combination of Mr Corbett's failure to engage with the tribunal's processes (failure to attend the mediation and failure to comply with the tribunal's directions), and the evidence from Ms Hedley and the potential evidence from the witness in attendance, that he was accustomed to use the excuse of sickness backed up by a medical certificate to avoid his responsibilities. As the Adjudicator explained when making the decision about this at the hearing, Ms Hedley could apply to reopen. Ms Hedley did so and submitted further evidence to the tribunal about his absence, none of which the tribunal found convincing.

¹⁴ Examples are *Burns v James* [2010] QCATA 101, [13] and *Todd v Downing* [2011] QCATA 74, [12], both decisions of Justice Alan Wilson, President.

- [43] An appeal against the exercise of discretion may be more difficult to prosecute than other types of appeal. As was said by Justice Carmody in *Foxworth Pty Ltd t/as Mango 4 Office Technology v Belz* [2016] QCATA 194.¹⁵

Even a questionable discretionary decision will be left intact unless it is marred by vitiating error in the *House v The King* sense such as the application of a wrong principle, a mistake of fact, reliance on irrelevant considerations or overriding unreasonableness, irrationality or injustice.

- [44] In an appeal against a refusal to grant an adjournment in the circumstances pertaining here however, there seems greater room to consider whether the discretion was exercised properly having regard to all the circumstances. Mr Corbett's submissions in support of the appeal relied on *Freemantle v Jenwen Pty Ltd t/a LJ Hooker Jimboomba* [2013] QCATA 67 where this happened. The Appeal Tribunal considered that the party who had not attended the hearing had a reasonable excuse for not doing so judging from a medical certificate given to the tribunal on the day of the hearing. It was not clear whether or not the medical certificate had been given to the Adjudicator prior to the decision to proceed with the hearing. Despite that, a new hearing was ordered because of the risk of an inadvertent denial of natural justice. It should be noted that in that appeal there had been no application to reopen, the matter simply went straight to the Appeal Tribunal, so section 139(5) had no impact in that appeal.

- [45] For this reason I think I should admit into evidence Mr Corbett's affidavit made on 20 August 2019. That explains in detail why he did not attend the original hearing and exhibits all relevant medical evidence including the documents from the naturopath. This affidavit was attached to the application for leave to appeal and appeal and was clearly intended for the Appeal Tribunal, although there was no formal application that it be admitted as fresh evidence as required by the Appeal Tribunal's directions.

- [46] The difficulty though, is that the contents of the affidavit are totally unconvincing. At the appeal hearing I took Mr Corbett through a number of errors in the affidavit and I was not satisfied with his answers.

- [47] There are in fact six obvious incorrect dates in the affidavit of matters which are not controversial. More importantly, Mr Corbett stated in his affidavit:¹⁶

I did not receive any supporting documents from the Respondent until 31 May 2019 which was 5 days prior to the hearing.

On 31 May 2019 I found documentation time sheets and invoices from the Respondent that appeared to comply with the directions of the Tribunal in my mail box. I check that mail box daily.

- [48] This statement is in marked contrast to Mr Corbett's statement in his application to reopen that he had been provided with this material on 24 May 2019.¹⁷ That the material was served late is one of Mr Corbett's central points in this appeal, and is

¹⁵ [10].

¹⁶ Paragraphs 5 and 6.

¹⁷ Paragraph 6 of application to reopen.

said to clinch the appeal in his favour, because (it is said) he had insufficient time to respond to Ms Hedley's filed material and by that time he was too ill to do so.

[49] In fact the date of 24 May 2019 corresponds with the evidence given on oath by Ms Hedley at the hearing that she left the material with the body corporate manager on 23 May 2019. This was the date relied on by the Adjudicator at the hearing.

[50] Mr Corbett was unable to explain the discrepancy in the appeal hearing. I do not accept Mr Corbett's evidence in the affidavit about the date he received the material. In this respect it is noted that the late service of Ms Hedley's material was not something Mr Corbett mentioned when he sought an adjournment of the original hearing, and again the Adjudicator relied on this fact when refusing to allow the application for an adjournment.

[51] Another point made by Mr Corbett in submissions in support of the appeal and in the appeal hearing was that he was reassured by the court staff that his application for an adjournment 'should be fine'.¹⁸ The way it is put in his affidavit of 22 August 2019 is:¹⁹

Also on 3 June 2019 I contacted the Coolangatta Court house and explained the situation, requested that the hearing be set aside for a new date and I was told by Court staff and did verily believe that there would be no issues. I was advised to send the request though via email.

In reliance on what I had been told by the registry staff I did not attend the hearing on 5 June 2019.

[52] My view is that it is very unlikely that court staff would make a comment of this sort. Despite Mr Corbett's evidence about this, I do not believe the comment was made. In this respect it is noticeable that he did not say that anything like this had been said to him in his application to reopen, or his application to stay the original order or in his complaint of 11 June 2019. This is despite any such comment obviously being highly relevant to these things.

[53] There is a third error of substance in the affidavit which is less important but which demonstrates that the contents of the affidavit cannot be relied on. Mr Corbett exhibits the documents that he claims to have submitted to the tribunal when he sought the adjournment on 4 June 2019.²⁰ However, it can be seen from the tribunal file that he has added some significant documents. The only document he sent to the tribunal for the original hearing apart from his email was one medical certificate as recited above.

[54] In the light of the above, I take the view that even with the benefit of the best evidence that Mr Corbett can provide, the Adjudicator's decision that Mr Corbett did not have a reasonable excuse for not attending the hearing on 5 June 2019 was correct.

¹⁸ Paragraph 3 of his application for leave to appeal or appeal.

¹⁹ Paragraphs 10 and 16.

²⁰ Exhibit GC2.

Conclusions in the appeal

- [55] In matters such as this, leave to appeal can only be given if there appears to be a reasonably arguable ground of appeal. In this appeal there is no reasonably arguable ground of appeal and so leave to appeal should not be given. This means that the appeal fails.