QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Chadwick v Brisbane City Council* [2020] QCATA 99
PARTIES:	**BENJAMIN CHADWICK** (applicant/appellant) **v** **BRISBANE CITY COUNCIL** (respondent)
APPLICATION NO/S:	APL342-19
ORIGINATING APPLICATION NO/S:	GAR402-19
MATTER TYPE:	Appeals
DELIVERED ON:	3 July 2020
HEARING DATE:	26 June 2020
HEARD AT:	Brisbane
DECISION OF:	Member Roney QC
ORDERS:	**1. The Appeal is allowed.** **2. The Application for an extension of time to file the review application is granted.** **3. The matter is remitted to the Tribunal for a hearing of the review on the merits.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – application for extension of time to start review – where error of law – whether Tribunal below took into account relevant considerations – whether decision unreasonable or plainly unjust – whether there has been a failure to properly exercise discretion or give proper consideration to the issues raised – where discretion to extend time to review a decision to destroy a dog – where review application lodged weeks late *Animal Management (Cats and Dogs) Act* 2008 (Qld), s 127, s 180 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 19, s 33, s 61 *Lewis v Brisbane City Council* [2014] QCAT 283 *Thomas v Ipswich City Council* [2015] QCATA 97 *Spencer & Anor v Hutson & Anor* [2007] QCA 178 *Beale v Government Insurance Office of NSW* (1997) 48

NSWLR 430
Fletcher Construction Australia Ltd v Lines Macfarlane and Marshall Pty Ltd (No 2) [2002] 6 VR 1
CSR Ltd v Maddalena (2006) 224 ALR 1
Camden v McKenzie [2007] QCA 136; [2008] 1 Qd R 39
Drew v Makita (Australia) Pty Ltd [2009] QCA 66; [2009] 2 Qd R 219
Terera v Clifford [2017] QCA 181
R v Tait [1999] 2 Qd R 667

APPEARANCES & REPRESENTATION:	
Appellant:	Self-represented
Respondent:	Mr T Prisk Solicitor

REASONS FOR DECISION

[1] The appellant is the owner of an Alaskan Malamute breed dog called Diesel. It was kept in the appellant's yard at his home in Forest Lake in suburban Brisbane. In 2015, the dog was declared to be a Dangerous Dog by the respondent, the power for which arose under the *Animal Management (Cats and Dogs) Act* 2008 (Qld) **(the Act)**. This occurred on the basis that the respondent Council determined that Diesel had attacked another dog which had led to both the dog and its owner being injured. That was the first relevant attack by the dog. The effect of that declaration under the Act was that restrictions applied, those restrictions including that the dog was required to be muzzled in public, and was required to be under the effective control of a person at all relevant times.

[2] The declaration that the dog was a Dangerous Dog for the purposes of section 94 of the Act, was one which was made after notice had been given to the appellant with the proposal to make that declaration notice. The appellant did not make submissions at the time as to why the declaration should not be made.

[3] Subsequently, the respondent Council received a further complaint that in January 2019 Diesel had attacked another dog, with that other dog having sustained injuries which were so significant as to require treatment from a vet. That was the second attack.

[4] Then, again in May 2019, respondent Council received yet a further complaint that the dog had attacked another dog without provocation that again had caused such harm that veterinarian treatment had been required.

[5] The consequence of the three incidents was that the respondent Council investigated the complaints and found that they had been substantiated on the evidence.

[6] In May 2019, Council Officers went to the address where Diesel was kept, observed the dog and formed the view that the dog was not being kept in appropriate conditions required for a Dangerous Dog and made the decision to seize the dog. In August 2019, the respondent Council determined to make a Destruction Order for the dog pursuant to section 127 of the Act. Such a decision is a reviewable decision for the purposes of the *Queensland Civil and Administrative Tribunal Act* 2009

(Qld) (**the QCAT Act**). This Tribunal has review jurisdiction in respect of the Destruction Order.

[7] It comes before this Tribunal only after there has been an application for a review of the Destruction Order decision by way of internal review, the power for which is to be found in section 180 of the Act. The appellant applied for a review of the Destruction Order decision, however, on 2 September 2019, the respondent Council decided to confirm the original decision to destroy the dog.

[8] QCAT has power to review the confirmation decision pursuant to section 33 of the QCAT Act, however, the review application must be brought within 28 days after notification of the review decision, namely, 28 days after 2 September 2019. The appellant did not commence his application to review the decision until a period which was three weeks out of time.

[9] QCAT had power to extend the time for filing an application or review pursuant to section 61 of the QCAT Act. The appellant made that application, however, in reasons of this Tribunal delivered after a hearing on the papers, it determined to reject the application for an extension of time to start the review proceeding and dismissed the review application in its entirety on that basis. The hearing of that application occurred some time after the Tribunal has issued directions to the appellant to file an extension of time application with supporting submissions.

[10] In exercising the Tribunal's review jurisdiction the learned member was required to decide the review in accordance with section 19 of the QCAT Act and the Act. The purpose of the review was to produce the correct and preferable decision. The learned member was required to hear and decide the review by way of a fresh hearing on the merits. That fresh hearing on the merits was not conducted because the Tribunal refused the application to bring the review proceeding out of time.

[11] In the reasons for refusing the application, the learned member identified that the explanations given for not filing the application within the relevant period were that:

(a) The applicant was under unspecified work and family stress at the time when the application ought to have been filed, and that this led to the application not being successfully lodged in time;

(b) for some unspecified time the appellant had been out of the state for work purposes. Precisely, how this interfered with the ability to commence such a review application within time was not apparently specifically identified; and

(c) The applicant was told late by an Officer from the Council of the proposal to destroy the animal on the day following that notification and he claims that he was unaware of the need to file a review application before that.

[12] There is a conflict on the evidence as to whether the appellant received notice of the Destruction Order on 2 September or 6 September; however, in either case, the commencement of the application occurred out of time, that is even if the notice was not given to him until 6 September. The learned Tribunal member found on the evidence that the notice had not in fact been given until 6 September. Hence, the period by which the application was late was something short of three weeks. I was provided with a copy of the Notice in the course of hearing the argument in this appeal. It sets out over four pages the basis for the decision, refers to the three attacks in detail, and in the last section headed in bold font "RIGHT TO EXTERNAL REVIEW", reference is made to the need to file any review application

within 28 days of receiving the notice. The appellant says he did not see that or it did not register. In argument before me he said that he left for Melbourne for business soon after he got the notice and was there for a month. He did not intend to ignore the notice and had not decided to abandon any challenge. He acted promptly on it once a Council officer told him of the impending consequences of not challenging it.

[13] The learned member set out the following matters which he held to be 'typically considered' in deciding whether to extend time, based upon an application of the reasoning in *Lewis v Brisbane City Council* [2014] QCAT 283. He listed six matters namely:

(a) the length of delay and an explanation for it;

(b) whether there had been indications other than the appeal itself of an intention to challenge the decision;

(c) whether the applicant had an arguable case for a different outcome;

(d) whether the respondent had been prejudiced by the delay;

(e) the desirability of finality of proceedings; and

(f) overall, 'whether the interests of justice favour the grant of an extension of time'.

[14] In relation to these, the learned member concluded in relation to the first item, that the delay was 'not very long', but having arrived at that conclusion held that it was not a 'short delay such as a day'. Self evidently, that is true. Although to define a delay of only a day or two as being short, whilst self evidently true, that does not mean the delay of little over two weeks is not also short in circumstances in which the issues in question have involved a history of incidents going back more than four years and where the original Destruction Order, made on 13 August 2019, had been the subject of challenge which had delayed any further action on the decision. A two or three week delay in appealing could also be considered not only very long, but also 'short'.

[15] Again, in relation to the explanation for the delay, whilst holding that the appellant had in fact experienced work and family stress and had to travel for work, the explanation for the delay was 'not very satisfactory' in that it was held that 'similar challenges are faced by many people in the community'. Whilst it might be true that on the material before the learned member, the evidence did not appear to show a coherent connection between what was accepted to be work and family stress at the material time and the need for travel, and the delay in bringing the application, it is not difficult to envisage that the existence of those matters, particularly to an unrepresented party, may be inferred. The Appellant works as a sole trader in kitchen design and travels from time to time to other states for that purpose. The dog is a family pet and was meant to have been under supervision and not be permitted to escape the yard. When the third attack occurred he was not at home and the dog escaped through a fence.

[16] In submissions to this Tribunal the appellant identifies that he is not a person with sufficient means to engage legal representation, and believed there would be an opportunity to give evidence on the hearing of the application to extend time, but which was not given. The hearing was on the papers. Had it been a hearing in front of the member that issue might well have been teased out further, as it was before

me. That may explain the failure to demonstrate the relevant nexus which the member thought lacking.

[17] Written submissions on this appeal suggest that the appellant lacks sophistication in relation to an understanding of the legal and factual processes behind both the review of the original decision to this Tribunal to extend time. Until it was explained to him by me, he did not understand what this Tribunal was deciding in the context of this appeal. In those circumstances, it would not necessarily be fatal that there was not a particularly satisfactory explanation for the delay in filing the application. Indeed, the learned member held at [17] that the appellant was unaware that Council was not permitted to destroy the dog while a review in this Tribunal was under way.

[18] The learned member considered that the forms to bring an application in this Tribunal were 'straight forward enough to be successfully completed by most applicants within the allowed time' and that the appellant was indeed able to complete them speedily once an ultimatum was issued. That indicates of course that once he was aware that there was a time issue, he acted speedily to protect his interests. The fact that appreciation of the urgency of the situation led to a prompt response is a significant factor in favour of grant of the extension in this case. The fact that the appeal or review initiating forms could have been filled out quickly if the time limit had been appreciated is, in my view, a matter of no real moment because the time required to fill out the forms was not a factor leading to delay.

[19] Critically, however, the most telling factors for the allowance of the application to extend time were the member's findings that:

(a) destruction of the animal is a measure of last resort;

(b) the appellant may be able to show that he can take steps to manage future risk if the dog is not destroyed; and

(c) the appellant in fact had an arguable case that the dog had not in fact behaved in the way that the Council had decided that it had on the relevant occasions.

[20] As to the last point, the Appellant wishes to show a person was not injured in the first attack. He wishes to show the second attack was not by his dog at all. He wishes to show he was away and someone else who was meant to supervise the dog let him down when the third attack occurred. He also would show the property in question now has much better fencing.

[21] This appeal tribunal has previously observed in *Thomas v Ipswich City Council* [2015] QCATA 97 that there are no criteria for the making of a destruction order in section 127 of the Act. The following passages from *Thomas* are instructive:

> [16] In the absence of any specific criteria, the legislative intent must be ascertained from the legislative scheme. Section 3 provides that the purposes of the AM Act include providing for effective management of regulated dogs. Section 4 specifies how the purposes are primarily to be achieved. These means include imposing obligations on regulated dog owners; appointing officers to monitor compliance with the AM Act; and imposing obligations on some persons to ensure dogs do not attack or cause fear. Section 59 sets out that the purposes of 'Chapter 4 Regulated Dogs' include protecting the community from damage or injury, or risk of damage or injury, from regulated dogs; ensuring that regulated dogs are not a risk to community health and safety; and ensuring regulated dogs are kept in a way consistent with community expectations and the rights of individuals.

…

> [18] It is clear that the AM Act is primarily directed towards the effective management and responsible ownership of dogs and that the destruction of a dog is a 'last resort.' It is generally where the mechanisms in the Act for management fail, or are ineffective, that destruction arises. The essential question is whether the dog constitutes, or is likely to constitute, a threat to the safety of other animals or to people, by attacking them or causing fear, to the extent that the threat may only be satisfactorily dealt with by the destruction of the dog. (emphasis added; footnotes omitted)

[22] In a tribunal where matters are to proceed without undue formality and technicality such as this Tribunal, in the absence of significant prejudice to a party affected by the late bringing of an application, it would be a very serious matter for a party to be shut out of bringing what was accepted to be an arguable case to demonstrate that the dog had not committed the conduct of which it had been condemned on the basis that there was a delay in bringing the application in the Tribunal of less than three weeks against this historical background.

[23] The learned member held that the Council had not pointed to any particular prejudice associated with relevant delay, although the delay in question that it pointed to, was said to be 'additional cost to it in housing the dog for an extended period'. That factor is minimal if one is considering a delay of just in excess of two weeks. It is not a relevant consideration that pending an appeal being heard in this Tribunal there would be a necessity to house the dog. In other words, it is not the delay attributable to the progression of an appeal in this Tribunal which is relevant, but any prejudice associated with the delay in bringing the application in time. There is nothing to suggest the additional cost of caring for the dog for those additional weeks is a significant factor. The dog has been kept in a Council dog facility in its own pen but where other dogs were kept as well for the entire period.

[24] The next matter to be considered concerned what the learned member said was the desirability of finality in proceedings. Reference was made to a statement of the Court of Appeal in *Spencer & Anor v Hutson & Anor* [2007] QCA 178 at [28] that time limits set the important purpose of bringing finality to litigation and are not lightly to be ignored.

[25] The context of that statement in the Court of Appeal decision was a case involving a six month delay and which the Court held was deliberate. That is not the present case.

[26] In that decision of *Spencer & Anor v Hutson & Anor* Keane JA, with whom the rest of the Court agreed said:

> The prescribed time limits for appeals serve the important purpose of bringing finality to litigation. They are not lightly to be ignored. An applicant for an extension of the time for bringing an appeal must show that there is good reason for the court to relieve that party of the consequences of the expiration of the prescribed period for bringing an appeal. A demonstration that there is a good reason to extend time will usually involve an explanation for that party's delay.

[27] The emphasis there is clearly on whether there is a good reason for the court to relieve that party of the consequences of the expiration of the prescribed period.

[28] In his ultimate conclusions, the learned member in this case held as follows:

> [25] There are factors for and against extending time in this case. On the one hand, Mr Chadwick is keen to preserve Diesel, the delay is not very long, and there is no suggestion of specific prejudice to the Council in presenting its case as a result of the delay. On the other hand, the explanation for the delay is not very satisfactory, and time limits should not be readily ignored. It is also relevant to take into account that Diesel is impounded and will remain impounded for an extended period if the review proceeds, pending an outcome. The keeping of a dog in a pound for other than temporary purposes is undesirable for both the dog, which is confined, and the community, which bears added cost. This adds to the importance of promptness by an owner in pursuing any review.
>
> [26] Weighing up these considerations, I do not consider that the interests of justice favour an extension of time.

[29] That analysis does not reference the undesirability of destroying a loved animal and the principle the member referenced earlier in the reasons that such destruction ought to be a matter of last resort.

[30] There is nothing helpfully said to indicate how those matters were weighed up or balanced to arrive at the conclusion. At a fundamental level, it has been said that for reasons to be sufficient or adequate in a given case, it will in general terms require that they deal with how and why the conclusions based on those findings of fact have been reached. That would almost always involve stating upon what basis it is that the decision maker has arrived at the conclusion that there is a preference for some part of the evidence in preference to another competing part, or some other inconsistent aspect of the case. See *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 431; *Fletcher Construction Australia Ltd v Lines Macfarlane and Marshall Pty Ltd (No 2)* [2002] 6 VR 1 at 31-33.

[31] As was said by Justice Kirby in *CSR Ltd v Maddalena* [2006] HCA 1; (2006) 224 ALR 1 at [46]:

> A judge cannot, in his or her reasons, expound all of the considerations that influence the decision in hand. "[T]ime and language do not permit exact expression" of every factor that has contributed to a judicial decision. However, trial judges in Australia know the common disapproval of appellate courts of attempts to render trial conclusions appeal-proof by expressed reliance on the demeanour and appearance of witnesses where that is unnecessary or inappropriate. They also know the scientific unreliability of many such assessments. They are aware of the general desirability of founding judicial conclusions (as far as possible) on rationality and logic.

[32] In part the rationale for this rule is to ensure not only that justice is done, but it is seen to be done in an impartial sense. As Justice Keane said in the Queensland Court of Appeal in *Camden v McKenzie* [2007] QCA 136; [2008] 1 Qd R 39 at [31]:

> As a general rule, observance of these requirements is necessary to demonstrate that litigation has been determined fairly and rationally. Adherence to these requirements ensures that rights of appeal are not rendered meaningless, and that a party affected by a decision adverse to his or her interests is not left with a justified sense of grievance that the case has not been properly considered. In short, these standards promote the conscientious public discharge of the responsibilities of a judge to litigants, as well as to the community, which has a vital interest in the integrity of the judicial process.

[33] In *Drew v Makita (Australia) Pty Ltd* [2009] QCA 66; [2009] 2 Qd R 219 at [58], Muir JA said:

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

[34] The respondent concedes in its submissions that the question of whether the discretion to refuse the extension of time was erroneous poses an issue of law. It submits that the applicant has not demonstrated that there has been an error related to the exercise of that discretion which ought to be corrected. Reference is made to the decision in *Terera v Clifford* [2017] QCA 181 at [9]:

> On application for an extension of time the issues are whether:
>
> (a) good reason for the delay has been shown;
>
> (b) it is in the interests of justice to grant the extension; and
>
> (c) that may necessitate a provisional assessment of the strength of the proposed appeal, the prejudice to the respondent, and the length of the delay.

[35] Those points were a summary of what had been decided in other cases.

[36] Referring to several previous decisions of this Court, McMurdo P, Thomas JA and Cullinane J observed in *R v Tait* [1999] 2 Qd R 667 at [5]:

> … These suggest that the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court will be able to assess whether the prospective appeal is viable or not, but when it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant's appeal, and take that into account in deciding whether it is a fit case for granting the extension. Other factors include prejudice to the respondent, but in the case of criminal appeals this is not often a live issue. Another factor is the length of the delay, it being much easier to excuse a short than a long delay.

[37] That passage makes clear that the Tribunal's role was to consider overall whether it was in the interests of justice to grant the extension. That was not, as the reasons of the member in this case seem to suggest, one factor to be considered along with others. It is the overriding principle.

[38] In a case involving a four month delay in bringing an appeal, the Court of Appeal in *Pershouse v Queensland Police Service* [2013] QCA 296 at [16] allowed an extension, and in applying these principles held:

> The explanation that Mr Pershouse has given for the delay is dependent upon his account of the telephone call with SPER. He did not give evidence of it, hence his account was not tested by cross-examination. Whilst the explanation given is, for that reason, less than satisfactory, I would not refuse the extension of time solely on that basis.

[39] It is hardly surprising that Courts do not treat the existence of less than satisfactory explanations for delay as fatal.

[40] In my view, there are two elements of these findings which are of concern. The first is that it cannot be relevant to take into account in this context that the dog would be impounded for an extended period if the review proceeds because that is not an outcome that results from bringing of the application out of time, but results from a bringing of the application itself. Had the application been brought within time, the matter would still be for the Tribunal awaiting an outcome. It is noteworthy that it is only now this Appeals Tribunal has had an opportunity to consider the appeal, and it has taken a period of more than seven months to have been determined. In my view, it is erroneous to treat the delays associated with determinations in this Tribunal as a relevant or at least significant factor in deciding whether to grant an extension of time of a matter of weeks to bring the application.

[41] I would not wish to speculate about what time might have been taken for the matter to be heard and determined on the merits if the original application for review had been commenced within time, however, it is reasonable to assume that it would not have been an insignificant period, and as the learned member identified, there would have been an effective automatic stay in place which prevented the Council from destroying the dog while the review was before the Tribunal.

[42] The second matter of concern is that there is little, if anything, to identify in the reasons how it is that the relevant considerations were said, having weighed them up, to arrive at the proposition that the interests of justice did not favour an extension. It is telling that in consideration of the matters relevant to deciding where the interests of justice lay, the learned member made no reference to the merits of the application or his finding that there was an arguable case that the dog did not behave in the way alleged and also as to whether there might be methods to acceptably manage the risk posed by the non-destruction of the animal.

[43] The absence of prejudice to the Council and the shortness of the delay, in circumstances where there was an arguable appeal which if upheld would best serve the purposes of the Act ought to have led to the Application for an extension of time to start the review proceeding being granted. The decision to refuse it was, in my view unreasonable and based on an erroneous application of legal principle.

[44] I allow the appeal and make an order that the Application for an extension of time to start the review proceeding being granted.

[45] I accept the submission for the respondent that the only order that this Tribunal can make if it decides to allow the appeal is to remit the matter to the Tribunal here and decide the review of the reviewable decision by way of a fresh hearing on the merits and I so order.