QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*McWilliam v Australian College of Information Technology Ltd & Ors* [2021] QCATA 38
PARTIES:	**NIKOLA MCWILLIAM T/AS MCGRATH LEGAL** (appellant) **v** **AUSTRALIAN COLLEGE OF INFORMATION TECHNOLOGY LTD** **AUSTRALIAN STAR ENTERPRISES PTY LTD** **SONYA MCGUIRE** (respondents)
APPLICATION NO/S:	APL128-20
ORIGINATING APPLICATION NO/S:	MCDO51692/19
MATTER TYPE:	Appeals
DELIVERED ON:	17 March 2021
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Hughes
ORDERS:	**1. Leave to appeal granted.** **2. Appeal allowed.** **3. The Order made on 17 March 2020 is set aside.** **4. The proceedings are remitted to a differently constituted Tribunal for rehearing.** **5. The application for miscellaneous matters filed by the appellant on 31 July 2020 is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – leave to appeal – where settlement negotiations conducted during hearing – where parties not given natural justice – where error of law for which leave should be granted to correct substantial injustice *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 3, s 4, s 28, s 146 *Baldwin v Von Knorring* [2015] QCATA 107

Cachia v Grech [2009] NSWCA 232
Coulton v Holcombe (1986) 162 CLR 1
Dearman v Dearman (1908) 7 CLR 549
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388
Lewis v Jeffrey Hills & Associates Pty Ltd [2011] QCATA 241
Mataitini v North Shore Realty Sunshine Coast [2020] QCATA 154
McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577
Minister for Immigration and Citizenship v SZMDS & Anor (2010) 240 CLR 611
Piric & Anor v Claudia Tiller Holdings Pty Ltd [2012] QCATA 152
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
Slater v Wilkes [2012] QCATA 12

APPEARANCES & REPRESENTATION:

Appellant:	Self-represented
Respondents:	Self-represented

REASONS FOR DECISION

What is this appeal about?

[1] Because an Adjudicator found that Nikola McWilliam trading as McGrath Legal had not complied with her obligations to recover professional fees from the Respondents, he awarded her only $900.00 of her claim for $3,960.00 plus interest and costs.[1] Ms McWilliam appealed this decision on a number of grounds, most of which lacked merit.

[2] Unfortunately, however, the learned Adjudicator did err in law by not giving natural justice when attempting to facilitate a settlement of the claim during the hearing. The conduct of settlement negotiations in proceedings can be a delicate exercise:

> There are some occasions when on the day of the hearing it is appropriate for the presiding Member to offer the parties the opportunity to resolve the dispute before the proceeding commences. However (sic) it is not appropriate to carry out those negotiations with the parties on the record and then proceed with the hearing. The parties should leave the hearing room to conduct those discussions. Alternatively (sic) another member (if available) could chair a compulsory conference.
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> If the member allocated to conduct the hearing conducts a conference they should only do so off the record and after explaining to the parties that in all likelihood they will not be able to continue the hearing if the matter does not resolve.

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1 Order dated 17 March 2020.

> [An] indication by the learned Member as to the likely outcome before and after the hearing commenced, and the conducting of settlement negotiations during the giving of evidence [can mean] that the parties were in all likelihood confused about the process which meant they were not given a satisfactory opportunity to present their case.[2]

[3] Alternative dispute resolution is critical to the Tribunal's efficient conduct of proceedings. It helps the Tribunal to fulfil its statutory mandate to conduct proceedings in an informal way that minimises costs to parties and is as quick as is consistent with achieving justice.[3]

[4] Unfortunately, on this occasion the learned Adjudicator's worthy intention has resulted in the parties not being given natural justice. The transcript reveals several instances where during the hearing but before delivering his reasons, and while the parties were still giving their evidence and were on the record, the learned Adjudicator suggested what he considered to be an appropriate outcome:

> ADJUDICATOR: Now, I'm just going to put something to you, Ms McGuire. Are you willing today to pay the sum of $2000 to satisfy this matter?[4]
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> ADJUDICATOR: I'm asking you a question. Right. You can roll the dice, and I'll make up my mind about this matter, but one person will lose 100 per cent here, and the other one will win 100 per cent, because I don't split things in half. If you're a business person you work out where your losses and wins might be. Okay. But if you want to settle this today, I'm putting to you do you want to pay $2000?[5]
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> ADJUDICATOR: Would you like to take $2000 and walk out of here today and settle this matter?[6]

[5] It is understandable that the learned Adjudicator encouraged a settlement within the context of a heavily-contested hearing and interruptions from Ms McWilliam[7] - even when the learned Adjudicator was attempting to deliver his reasons.[8] The learned Adjudicator was attempting to manage a difficult situation within the context of pressing time constraints and a demanding list: the Tribunal processes tens of thousands of minor civil dispute applications each year with limited resources.

[6] The Tribunal must therefore deal with minor civil disputes fairly, quickly and economically.[9] Within this context, the Tribunal is not bound by the rules of evidence,[10] and may inform itself in any way it considers appropriate.[11] However, in

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2 *Baldwin v Von Knorring* [2015] QCATA 107, [40] - [42].
3 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 4(c) ('QCAT Act').
4 Transcript, page 1-37, lines 10 to 12.
5 Transcript, page 1-37, lines 22 to 27.
6 Transcript, page 1-40, lines 44 to 45.
7 Transcript, page 1-14, lines 11, 16, 20 to 21, 25; page 1-17, lines 11, 15 to 16.
8 Transcript, page 1-41, lines 30 to 31, 35, 41, 46 to 47; page 1-42; page 1-48, line 4; page 1-49, lines 4 to 17, 21 to 22, 46; page 1-50, lines 14, 21 to 22.
9 QCAT Act, s 3, s 4.
10 QCAT Act, s 28(3)(b).

all proceedings, the Tribunal must still act fairly and according to the substantial merits[12] of the case and observe the rules of natural justice.[13]

[7] The Appeal Tribunal cannot be satisfied the parties were afforded natural justice where the learned Adjudicator:

(a) Indicated during the proceedings an appropriate outcome;[14]

(b) Attempted to facilitate a settlement of the dispute on the record during the course of the hearing with specific proposals;[15] and

(c) Led the negotiations between the parties on the record.[16]

[8] The learned Adjudicator's settlement efforts may have confused the parties and affected their perception of the proceeding. The hearing began with the parties giving unsworn evidence, evolved into settlement discussions on the record led by the learned Adjudicator, continued with more evidence and concluded with Ms McWilliam attempting to give still more evidence and make further submissions (to which the learned Adjudicator responded) while the learned Adjudicator was giving his reasons.

[9] It is certainly appropriate for an Adjudicator or Member of the Tribunal to encourage the parties to settle a proceeding. However, this must never create any impression of prejudgement. On this occasion, it was open to the parties to conclude that the learned Adjudicator had formed a view before testing all the evidence and hearing submissions.[17]

[10] At the very least, the fluid nature of the proceeding would have affected the way the parties presented themselves, their evidence and their submissions.[18] The conduct of settlement negotiations with an outcome suggested from the Bench, during the giving of evidence and while on the record, meant that the parties were in all likelihood confused about the process.[19] They were not given a satisfactory opportunity to properly frame and present their case.[20]

[11] The parties were self-represented. They were entitled to expect that the learned Adjudicator would hear their evidence and submissions and then make a decision.[21] Any attempt by the learned Adjudicator to facilitate a settlement should have been done at the start of the proceeding and before the taking of any evidence from the parties.

[12] The Appeal Tribunal is satisfied that the parties were not given natural justice. This is an error of law for which leave should be granted to correct a substantial injustice. [22] Because of this, the learned Adjudicator's findings of fact must be set aside and it

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11 QCAT Act, s 28(3)(c).
12 QCAT Act, s 28(2).
13 QCAT Act, s 28(3)(a).
14 *Baldwin v Von Knorring* [2015] QCATA 107, [24].
15 *Baldwin v Von Knorring* [2015] QCATA 107, [24].
16 *Baldwin v Von Knorring* [2015] QCATA 107, [30].
17 *Baldwin v Von Knorring* [2015] QCATA 107, [35].
18 *Baldwin v Von Knorring* [2015] QCATA 107, [36], [43].
19 *Baldwin v Von Knorring* [2015] QCATA 107, [42].
20 *Baldwin v Von Knorring* [2015] QCATA 107, [42].
21 *Baldwin v Von Knorring* [2015] QCATA 107, [34].
22 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

is appropriate that the matter be remitted for rehearing[23] where the parties will be given a fresh opportunity to present their cases in a manner which affords them procedural fairness.[24]

[13] The remaining grounds of appeal relating to the learned Adjudicator having regard to extraneous factors and his findings of fact are without merit and are dismissed. In determining whether to grant leave, the Tribunal will consider established principles including:

(a) whether there is a reasonably arguable case of error in the primary decision;[25]

(b) whether there is a reasonable prospect that the appellant will obtain substantive relief;[26]

(c) whether leave is needed to correct a substantial injustice caused by some error;[27] and

(d) whether there is a question of general importance upon which further argument, and a decision of the Appeal Tribunal, would be to the public advantage.[28]

[14] The Appeal Tribunal will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.[29] A decision cannot properly be called erroneous, simply because the Tribunal preferred one conclusion over another.[30] The learned Adjudicator preferred Ms McGuire's evidence over that of Ms McWilliam. That is unremarkable. The learned Adjudicator referred to the evidence to support his ultimate findings, which he was entitled to weigh accordingly.

[15] The learned Adjudicator was also entitled to consider his own experience when making his findings.[31] An application for leave to appeal is not an occasion to re-try the case presented at trial, as if the latter were a 'preliminary skirmish'.[32] Leave will not be granted where a party seeks to re-argue the case on existing or additional evidence.[33] Attempting to explain away the learned Adjudicator's findings with a possible alternative inference does not demonstrate error.

What are the appropriate orders?

[16] The application for miscellaneous matters filed by Ms McWilliam on 31 July 2020 to make submissions in reply to the Respondents' submissions is otiose and

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23 QCAT Act, s 146(c).
24 *Baldwin v Von Knorring* [2015] QCATA 107, [102].
25 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
26 *Cachia v Grech* [2009] NSWCA 232, 2.
27 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
28 *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 577, 580.
29 *Dearman v Dearman* (1908) 7 CLR 549, 561; *Fox v Percy* (2003) 214 CLR 118,125-126.
30 *Slater v Wilkes* [2012] QCATA 12, [6], citing *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611.
31 *Lewis v Jeffrey Hills & Associates Pty Ltd* [2011] QCATA 241, [21].
32 *Mataitini v North Shore Realty Sunshine Coast* [2020] QCATA 154, [12] citing *Coulton v Holcombe* (1986) 162 CLR 1, 7.
33 *Piric & Anor v Claudia Tiller Holdings Pty Ltd* [2012] QCATA 152, [12] (Wilson J).

dismissed. Making unsolicited submissions is contrary to the Tribunal's mandate to observe the rules of natural justice and ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice.[34]

[17] Because the Appeal Tribunal is not satisfied that the parties were given natural justice during the conduct of the hearing, leave to appeal must be granted and the appeal allowed. The Order made on 17 March 2020 is set aside. The matter is remitted for rehearing before a differently constituted Tribunal.

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34 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 4(c), s 28(3)(a).