DISTRICT COURT OF QUEENSLAND

CITATION:	*Queensland Racing v Abbott & Anor* [2005] QDC 126
PARTIES:	**QUEENSLAND RACING** Appellant v **LAUREN MICHELLE ABBOTT** First Respondent and **DAVID JOHN PETERSEN** Second Respondent
FILE NO/S:	BD3846 of 2004
DIVISION:	
PROCEEDING:	Appeal
ORIGINATING COURT:	Racing Appeals Tribunal
DELIVERED ON:	26 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 March 2005
JUDGE:	McGill DCJ
ORDER:	**Appeal allowed; decision of Tribunal of 30 September 2004 set aside; order in lieu that the appeal to the Tribunal be struck out. No order as to costs.**
CATCHWORDS:	INFERIOR TRIBUNALS – Racing Appeals Tribunal – whether appeal to Tribunal within jurisdiction of Tribunal – whether appeal to District Court valid *Racing Act* 2002 ss 167(1)(a); 193. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 – distinguished *Calvin v Carr* [1980] AC 574 - applied *Collector of Customs v Brian Lawler Automotive Pty Ltd* (1979) 24 ALR 307 – applied *Craig v South Australia* (1995) 184 CLR 163 - applied *Khatry v Price* [1999] FCA 1289 – cited *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 – applied *Meyers v Casey* (1913) 17 CLR 90 - applied *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 – considered *Pezet v Pezet* (1946) 47 SR(NSW) 45 - cited

R v Jones (Gwyn) [1969] 2 QB 33 - cited
Schokker v Commissioner of Taxation [1998] 222 FCA - distinguished
Trajkovski v Telstra Corporation (1998) 153 ALR 248 - cited
Vakauta v Kelly (1989) 167 CLR 568 – applied.

COUNSEL: D C Andrews SC for the appellant
P J Callaghan SC for the respondents

SOLICITORS: Tress Cox Lawyers for the appellant
McDonald Leong Lawyers for the respondents.

[1] The first respondent was an apprentice jockey under an indenture with the second respondent dated 11 December 2001. By clause 11.1 that indenture was to continue for a minimum of four years, but by clause 11.2 the term might be extended:

> "(a) at the discretion of the Club for such further period as the Club considers is necessary to ensure that the apprentice has demonstrated competence in all learning outcomes as stipulated in the training program for apprentices to the satisfaction of the Club; or
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> (b) by agreement between the employer and the apprentice with the consent of the Club."

"The Club" was defined in clause 1.1 as the Queensland Principal Club established by the *Racing and Betting Act* 1980. It was common ground on the appeal that the appellant is the same entity, with a new name.

[2] Clause 11.1 referred to "a total period of apprenticeship, either with the employer or another qualified employer or employers, of a minimum of four years …" It was submitted by the appellant that that would cover time spent as an apprentice prior to the execution of this indenture, as well as time spent after the execution of it. This is of some relevance in the present case, since the first respondent had previously been indentured to other employers.

[3] On 2 June 2004 the first respondent wrote to an officer of the appellant "in reference to the possibility of the extension of my apprenticeship, which is due to end on 30 June 2004." Reference was made to her personal circumstances, including a history of illness and other difficulties which interfered with her training, and she continued: "I would be sincerely grateful if Queensland Racing would seriously consider my circumstances and give me the opportunity to continue my indentures, perhaps until the end of the year, or at least for a few more months. My indentures are due to be completed at the end of this month (June)."

[4] The reply from the appellant was dated 18 June 2004, and signed by Mr Mason, described as the "Integrity Services Manager". He referred to the letter of 2 June 2004 "requesting that you be granted an extension of your apprenticeship." He reviewed the history of that apprenticeship, referred to her having ridden 16 winners from 121 rides, and said that she had completed five years ten months apprenticeship compared with the usual period of four years. "Queensland Racing

considers you have completed your obligations as an apprentice and will not approve any further extensions." It was stated that she was eligible to apply for a jockey licence and that application forms were available from a website.

[5] By a Notice of Appeal dated 30 June 2004 in the form appropriate to an appeal to the Racing Appeals Tribunal ("the Tribunal") under s 167 of the *Racing Act* 2002 the first respondent purported to appeal against this decision, the decision being appealed being described on that form as 'the failure to extend my indentures." The grounds of appeal were stated succinctly: "I believe the decision not to extend my indentures was unfair as all the facts were not taken into consideration (time on the sidelines)."

[6] After a hearing extending over two days the Tribunal on 30 September 2004 made an order in the following terms: "The Tribunal considers it appropriate to order that QR issue the appellant with a licence or permit to ride as an apprentice entitling her to claim the various allowances and that that licence remain in force until 31 March 2005 whereafter she be entitled to apply after [sic] an open jockey's licence."

[7] By a Notice of Appeal filed on 27 October 2004 the appellant sought to appeal against this decision on various grounds set out in the Notice. The appeal proceeded with no unusual delays, but with no particular attempts to expedite the appeal, and came on for hearing before me on 30 March 2005, the day before the Tribunal's order (the operation of which was not stayed) ceased to have effect. Accordingly, in the circumstances, the appeal has been in a sense a waste of time and money. It does not appear that there was ever any attempt on the part of the appellant to expedite the appeal.

[8] The appeal is essentially on three grounds: that the Tribunal had no jurisdiction to entertain the appeal, which was against a decision not referred to in s 167 of the *Racing Act* 2002 which identifies those decisions from which an appeal may be brought to the Tribunal, and that the Tribunal erred in law in concluding that it had jurisdiction. In addition certain aspects of the procedure of the Tribunal were criticised, and finally it was said the Tribunal had erred in law in failing to conclude that the apprenticeship indenture was a sham, or had expired, or had been abandoned. The only part of this ground pursued on appeal was that the Tribunal ought to have found that the indenture had expired.

The Legislation

[9] The Racing Appeals Tribunal was established by s 150 of the *Racing Act* 2002 ("the Act"). By s 166(1) "the tribunal has jurisdiction to hear and decide appeals made to it under this chapter." Subsection (2) provides for other jurisdiction but it was not suggested that that was relevant in this case. Section 167(1) provides as follows:

"Subject to subsection (4), a person aggrieved by any of the following decisions may appeal to the tribunal against the decision –

(a) a control body's decision to –

(i) refuse to grant or renew a licence; or
(ii) take disciplinary action relating to a licence; or
(iii) take an exclusion action against a person; or
(iv) impose a monetary penalty on a person;

(b) a decision of an appeal committee made in relation to an appeal against a monetary penalty imposed by, or other decision of, a steward;

(c) the imposition of a monetary penalty by, or other decision of, a steward of a control body if there is no appeal to an appeal committee against the decision;

(d) another decision of a controlled body prescribed under a regulation."

[10] Subsection (4) excludes from appeal certain specific decisions, none of which are relevant in the present case. Subsections (2) and (3) are not relevant in the present circumstances. It was not suggested that the decision to extend the indentures was one prescribed under a regulation, or that it amounted to an "exclusion action" as that term is defined in Schedule 3 of the Act. It obviously did not impose a monetary penalty, or amount to "disciplinary action" as defined in Schedule 3. The Tribunal held that there was jurisdiction to appeal to it because in substance the decision of the appellant was one to refuse to renew the first respondent's licence as an apprentice jockey, so that the decision came within subsection (1)(a)(i). That was challenged by the appellant on the appeal.

[11] By s 172(2), the Tribunal, in making a decision, must observe natural justice, is not bound by the rules of evidence, and may inform itself of anything in the way it considers appropriate. By s 176 evidence before the Tribunal must be given orally unless the Tribunal allows the evidence to be given in writing. By s 177 there is a power to summon witnesses who by s 179 may be required to take an oath or affirmation which the Tribunal may administer. By s 182(1) an individual party to an appeal must attend personally at the hearing unless excused by the Tribunal. By s 184 the Tribunal may join a person as a party to an appeal, including on its own initiative, if satisfied the person's interest will be affected by the outcome of the appeal. By s 189(1) the Tribunal's decision takes effect when it is given or on a later date stated in the decision.

[12] Section 193 of the Act provides:

"(1) A party to an appeal to the tribunal may appeal to the District Court against the tribunal's decision on the appeal, including an order about costs, but only on a question of law.

(2) Matters relating to appealing to the District Court are contained in the Uniform Civil Procedure Rules 1999."

Reasons of the Tribunal

[13] The reasons of the Tribunal run for 37 pages, including the order. The Tribunal found at p.2 that "the substance of the appeal is not about the extension of

indentures at all but about the revocation that her apprentice jockey's licence or permit to ride, and her ability to claim the allowances granted to apprentices under the Australian Rules of Racing and Local Rules of Racing." The Tribunal made that finding essentially because the first respondent must have been really concerned about an extension of an apprentice's licence, since the indenture had been entered into in December 2001 and was to last for four years, so that it did not expire until 11 December 2005. Accordingly as at June 2004 the first respondent had no need for an extension of the indenture. On the other hand, it was the appellant's function to licence participants, and the first respondent had a licence or permit to ride as an apprentice jockey, which expired on 30 June 2004. In June 2004 therefore what the first respondent needed from the appellant, in order to continue riding as an apprentice, was an extension or renewal of that licence or permit. Accordingly the Tribunal held that that was in substance what was being applied for, and the fact that the decision referred to a willingness to issue an ordinary jockey's licence confirmed that it was dealing with the renewal of a licence rather than the extension of the indentures.

[14] Apart from this, the Tribunal was understandably critical of the approach of the appellant in the original decision. Starting from p.6 the Tribunal noted that no consideration appeared to have been given to any issue other than the length of time, and "no evidence of enquiry or fair hearing of the decision-making process was apparent or was given." The background and history of interruption of the first respondent's apprenticeship and her medical condition were known to and should have been taken into account by the appellant but as far as could be judged from the letter from Mr Mason they were not.[1]

[15] Criticism of that decision by the Tribunal is unsurprising. I even have difficulty in seeing how, on the information in the letter of 18 June, it was possible to determine that the first respondent had completed a period of five years and ten months. The information set out indicates one year and eight and a half months with Mr Daffy between when the apprenticeship commenced and when those indentures were cancelled. There was then eleven and a half months with Mr Beaton from the time of the indenture until the first respondent was on loan to Mr McCullough, and she was with him for three months. There were then three months on loan to Mr Petersen, followed by one year of the indentures before they were indefinitely extended in December 2002, because training under the indentures had effectively stopped. It seems to me that this should be treated as a time when the indentures had ceased to run. There was then a further 12 months from 30 June 2003, but by the time that period had expired, disregarding, as plainly ought to have been the case, the period when the first respondent was unable to train because of her illness and surgery, I get only five years and two months, even assuming that she was fully back at work by 30 June 2003. The Tribunal found when going into the history more fully that that was too optimistic a view of the apprenticeship, since the first respondent's ill health actually began in September 2002, three months before the indefinite extension.

[16] Apart from that, the mere passage of time is not much of an indication in itself of a person's competence. There does not seem to have been any systematic way in

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1 It appears that at some point the first respondent sought from the appellant reasons for that decision, and was simply provided with another copy of Mr Mason's letter.

which the competence of a person who had completed an apprenticeship as a jockey was assessed, other than, I suppose, the willingness of both parties to the apprenticeship agreement to bring it to an end. On the face of the letter from Mr Mason there was no consideration given to this issue at all, which is surprising since I would have thought the crucial issue in relation to any extension of apprenticeship was whether the apprentice required further training. By the time the matter got to the Tribunal there was a good deal of evidence on both sides dealing with the topic. The Tribunal expressed a clear preference for the evidence on behalf of the first respondent, and indeed was quite critical of some of the evidence on behalf of the appellant. The Tribunal appears to have concluded that after the decision was challenged the appellant had set about obtaining some evidence to justify the decision which had been taken earlier.

When did the indenture expire?

[17] Central to the Tribunal's reasoning that the relevant issue was whether a licence was to be renewed was the conclusion that the indenture did not expire until December 2005, so that it could not have been appropriate in June 2004 for the first respondent to be seeking an extension from the end of that month. That depends on whether the period of four years referred to in clause 11.1 includes time previously spent as an apprentice under other indentures. That depends on the true interpretation of the expression in clause 11.1 "such period as is necessary to ensure that the apprentice serves a total period of apprenticeship, either with the employer or another qualified employer or employers, of a minium of four years…" That is on any view a curious provision. Presumably one could not be an apprentice to more than one employer at a time, and therefore the reference to another qualified employer or employers would have to relate to something which happened in the past, or something which would or might occur in the future. If, however, the parties were intending that the first respondent be given credit for time spent as an apprentice prior to the making of this agreement, one would expect that that would be done by the parties agreeing on some adjustment to the period of four years to reflect that prior training, and specifying that adjusted period in clause 11.1 instead of the period of four years.

[18] On the other hand, reference to a future employer is also inapt. The indenture contains no provision for assignment of the position of employer, and in the case of a contract involving personal skill and confidence, and entered into for the personal advantage of the apprentice, one would expect that the position of employer would not be assignable anyway, although I note that clause 12.4(a) contemplates that the appellant may direct that an apprentice be transferred to another qualified employer during a period when the employer is suspended under the rules of racing. There would be no need to provide for a period in respect of any future employment, because any future indenture could provide for that.

[19] The clause is puzzling and unsatisfactory, and for that reason badly drafted,[2] but doing the best I can, in my opinion a more natural reading of it is that the period of four years does include any period of apprenticeship served by the first respondent with another qualified employer or employers prior to the commencement of this indenture. That in my opinion is the more natural meaning of the words used.

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2 The indentures appear to be in a standard form, possibly supplied by the appellant, although I do not think there is evidence of that.

Although the clause refers to the future and to that extent is expressed in the future tense, I expect that the word "serves" should have been in the future perfect tense rather than the present indefinite.

[20] One of the unsatisfactory features of this case is that, because of the view that the Tribunal took, it did not make any precise findings as to the period of apprenticeship served by the first respondent prior to commencing the apprenticeship with the second respondent. In so far as it dealt with the matter on pp.7 and 8, it appears to be consistent with the approach adopted by Mr Mason. It is unfortunately not possible to tell from this when the apprenticeship with Mr Beaton came to an end. I assume it came to an end in March 2001 when she went to Tasmania, but it may be that it did not come to an end until December 2001 when there was the indenture with the second respondent. On either view however the period of four years was up sometime in 2002, and the prior extension in June 2003 of 12 months meant that it was due to expire on 30 June 2004. It was not therefore inappropriate to be applying for a further extension for a period from that date.

[21] The Tribunal was also critical of the records of the appellant. It noted that at one point one of the appellant's witnesses swore that "there is no record of the [first respondent] ever having been registered or ever having a training licence since arriving in Queensland." As the Tribunal pointed out, there was a reference to the first respondent in the September edition of the Racing Calendar, and apart from that among the documents before the Tribunal was a "Queensland Racing Licensing File" which included a "history of appellant and extracts from QR Licensing database" which indicate that the first respondent held apprentice licence No 844, which was due to expire on 30 June 2004: p.500. The history detail form indicated that this licence was issued as a new licence due to expire on 30 June 2002 (presumably having been issued in the 12 months prior to that date) and that it was renewed twice so that the expiry date became respectively 30 June 2003 and 30 June 2004. It seems tolerably clear therefore that the first respondent did hold a licence of some kind from the appellant.

[22] Reference to the Act reveals that "licence" is defined in Schedule 3 as meaning a licence issued by a control body[3] to a licence holder for, among other things, a person suitable to be a participant in the control body's code of racing, including for example as a rider. As at June 2004 therefore the first respondent held an apprentice jockey's licence from the appellant, which was due to expire at the end of the month.

[23] The first respondent therefore needed two things from the appellant if she wanted to continue to ride as an apprentice after 30 June 2004: she needed an extension of her indentures, and she also needed a renewal of her apprentice jockey's licence. I do not know, and the material does not disclose, whether the former was a prerequisite for the issuing of the latter, but that is I think a fair assumption. It may well be that, if the indentures had been extended, the appellant would have been entitled to a renewal of her licence, and so in that sense the decision whether or not to extend the indentures was the substantial decision that the appellant had to make, and determined in a practical sense whether or not the apprentice jockey's licence would be renewed. It does not follow however, in my opinion, that a decision not to

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3 The appellant is the relevant control body so far as the first respondent is concerned.

extend the indentures is a decision not to renew the licence for the purpose of s 167(1)(a)(i) of the Act.

[24] The Act makes provision for control bodies to make policies dealing with various matters, including for a licensing scheme: s 81(c). The policies are statutory instruments: s 79. Section 87(2) identifies a large number of matters which must be provided for in the control body's policy for its licensing scheme, including in para (g) "the duration of a licence, its renewal and the procedure for surrendering it." Plainly this is the licence, the renewal of which, if refused, can be challenged by way of appeal to the Tribunal under s 167(1)(a)(i). By way of contrast, there is no reference in the Act so far as I can see, and I was not referred to any, to any exercise by a control body of any power in relation to the indentures of an apprentice. That does not mean that the appellant as a control body cannot exercise such a power; but it is consistent with the Act not making any provision for an appeal to the Tribunal from any exercise by the appellant of such power. The power to extend an apprenticeship is one which derives from the terms of the indenture, not from the statute.

[25] It was submitted on behalf of the respondents that the terms of the request from the first respondent were really a distraction, because what mattered was the actual decision taken by the appellant and the appellant could easily have taken a decision which was not responsive to the request. I agree that that would be possible, but I do not think that that means that the terms of the request are irrelevant. They are part of the context of the decision, and, where the decision itself is ambiguous, that is part of what must be looked at when interpreting it.

[26] Counsel for the respondents relied on the application in *Schokker v Commissioner of Taxation* [1998] 222 FCA of passages in the judgment of Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 to emphasise that what mattered was the practical effect of the decision. It was submitted that the practical effect of the decision was that it was determinative of the first respondent's rights in relation to her apprentice jockey's licence. I accept that that was the case, but those decisions were concerned with a somewhat different issue from the issue which arises in the present case. Each of those decisions was concerned with the question of whether there had actually been a decision, so that there was something to review under the *Administrative Decisions Judicial Review Act* (Cth).

[27] Mason CJ was concerned to examine the scope of the word "decision", and after noting that there were some considerations which favoured a wide interpretation and others which suggested a relatively limited field of operation, went on to conclude that at least in general it described a decision which was final or operative or determinative, at least in a practical sense, of the issues of fact falling for consideration, and which was a substantive determination: p.337. His Honour was essentially concerned with distinguishing between those steps in a process of decision making which were susceptible to challenge under the ADJR Act, and those which were not. In that case the court held that conclusions as to certain conduct on the part of an individual associated with the licensee holding a commercial television licence, as a result of which the tribunal decided that the licensee was no longer a fit and proper person to hold the licence, were not

susceptible of review as decisions, even though the decision in relation to the licence was a reviewable decision.

[28] The issue in *Schokker* was similar, in that it was submitted on behalf of the respondent that a decision not to refer a matter to a prosecuting authority was not a reviewable decision because what mattered as to whether or not there would be a prosecution was the substantive decision undertaken by the prosecuting authority or the Australian Federal Police. It was submitted that a decision not to refer the matter to them was just a step along the way to the possible making of an ultimate decision to investigate and prosecute made by those bodies. However, the effect of deciding not to refer the matter to those bodies was necessarily that there would be no further investigation by them, and therefore necessarily no prosecution instituted. For practical purposes therefore the decision was operative in that it meant that nothing further would be done. Accordingly the respondents' argument was rejected.

[29] In the present case that is not the issue. It is indisputable that the appellant took a decision which was recorded in the letter of 18 June 2004. The issue is whether it was a decision which fell within the category of decisions specified in the statute as being susceptible to an appeal to the Tribunal, or whether it was not. That was not the sort of matter which was being considered either by the High Court in *Bond*, or by the Federal Court in *Schokker*. Accordingly the approach adopted in those cases is not applicable.

Conclusion in relation to jurisdiction

[30] The Tribunal erred in law in concluding that it had jurisdiction in relation to the appeal that the first respondent actually brought to it. No doubt the Tribunal was led astray by the practical significance of any decision not to extend the indentures for the purposes of any application to renew the licence, and by the unsatisfactory nature of the decision itself. Nevertheless, in my opinion, a decision on an application for an extension of the indentures and a decision on an application to renew a licence are two different things. What the first respondent had sought expressly by the letter of 2 June was an extension of the indentures, and that was how the letter was understood, as appears from the first sentence of the reply of 18 June. That reply communicated a decision not to extend the indentures. Although it referred to her applying for an ordinary jockey's licence, that was not inconsistent with the nature of the decision; presumably once her indentures had expired she was entitled to apply for an ordinary jockey's licence. For that reason it does not mean that the letter should be interpreted as communicating a decision not to renew the existing licence, rather than a decision not to extend the indentures.

[31] I do not know whether an application for renewal of a licence is required to be on any particular form, but in my opinion, by no legitimate process of interpretation can the letter from the first respondent of 2 June 2004 be characterised as an application for a renewal of the apprentice jockey licence. Apart from anything else, that was no doubt premature, because at that stage the first respondent had not obtained an extension of her indentures. The first respondent needed two things from the appellant, and no doubt needed them in a particular order. It might have been possible to apply for both at once, and for both to have been granted at once,

but it is unsurprising that they would have been sought consecutively, and, the first having been refused, it became unnecessary for either party to deal with the second.

[32] In my opinion where there were two distinct powers which the appellant had to exercise, and an appeal lies in relation to only one of them, it is important properly to identify which power was being exercised. In the present case in my opinion it was not the power identified in s 167(1)(a)(i). I do not consider that that provision contains an implied right to appeal against a decision to refuse to extend indentures. In law that is a distinct step, whatever the practical relationship between such a decision and the decision to renew the licence in the case of an apprentice. Every person who holds a licence to ride and wants to continue to ride, whether or not an apprentice, will require the renewal of the licence as a rider; only a person who is an apprentice and whose apprenticeship is about to expire[4] and who is subject to indentures which require the consent of the appellant to an extension of the term of the apprenticeship requires an extension of the term of the apprenticeship.

[33] The Tribunal referred to a decision of Cullinane J as Chairman of the Queensland Thoroughbred Racing Galloping Appeals Authority under the *Racing and Betting Act* 1980, handed down on 4 November 1991. In that case the principal club decided to cancel some indentures and re-indenture an apprentice to another trainer, and in connection with that suspended his permit to ride for a period of six months. It was held in that case that the Authority had jurisdiction because of the decision to suspend the permit to ride. In the present case there was no equivalent decision to suspend, or indeed not to renew, the apprentice jockey licence, and in my opinion that decision is distinguishable on that ground.

[34] Senior Counsel for the appellant submitted that there was a different mechanism for appeal available to the first respondent in respect of a failure to extend the indentures, in that the indentures could have been extended by the Training and Employment Recognition Council under the *Vocation Education Training and Employment Act* 2000: see s 77(2), (3). From a decision of the Council an appeal lies to the Industrial Commission: s 230(1)(b). Whether or not that is the case is, in my opinion, irrelevant to the proper interpretation of s 167(1)(a)(i) of the Act, except in the very general sense that it is consistent with the Act not providing for the regulation of contracts of apprenticeship, because there is other legislation which deals with that matter. It is plausible that both Acts, or neither, would provide for an appeal from such a decision.

[35] The position was simply that the first respondent assumed that the Tribunal would have jurisdiction to entertain an appeal from a refusal to extend the indentures. So much appears from the grounds stated in the Notice of Appeal to that Tribunal. It appears to have been only when the matter came on for hearing before the Tribunal that there was any realisation of the difficulties with that position.

[36] In my opinion in this matter the jurisdiction of the Tribunal was never properly invoked. There was no decision of the appellant to refuse to renew a licence, and there was no decision from which a person aggrieved could appeal to the Tribunal under s 167(1) of the Act. No other provision was sought to be relied on, and it

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4 Or, perhaps, has expired.

follows that the jurisdiction of the Tribunal was never properly invoked. The Tribunal erred in law in concluding to the contrary. In these circumstances, it is strictly unnecessary for me to consider the other matters raised by the appellant. I shall however do so, on a precautionary basis.

Cross-examination of second respondent

[37] On the second day the solicitor for the first respondent submitted that the second respondent supported and joined in the appeal, and referred to an affidavit by him and another trainer confirming a willingness to agree to an arrangement under which the first respondent would be loaned to that other trainer for a period: p 117.[5] On the following page Counsel for the appellant indicated that he wanted to cross-examine the second respondent, who was at that stage apparently in Japan. The Tribunal was not prepared to take evidence by telephone, and the matter was left, although at the conclusion of the argument that day, the chairman of the Tribunal said at p.184: "If we think we need Petersen, we will probably – you know, we will just have to do the best. … but, you know, I need time to see if I can … before I decide whether we need …"

[38] It was submitted that in these circumstances it was reasonable for the appellant to expect that it would be given the opportunity to cross-examine the second respondent at some time prior to the conclusion of the hearing. In the event however the Tribunal delivered its judgment without any further hearing for that purpose.

[39] There is among the papers at p.186 an unexecuted affidavit of the second respondent. It is not apparent that the Tribunal ultimately had any regard to it. No reference seems to have been made to it by the Tribunal in its decision, and the Tribunal may well have taken the view that, rather than delay matters, it would simply disregard Mr Petersen's evidence, and in those circumstances it was unnecessary for him to be cross-examined.

[40] In my opinion that approach was open to the Tribunal. But apart from that, it was open to the Tribunal to receive evidence in writing, and the Tribunal was not bound by the rules of evidence. If it had been bound, arguably the statement of Mr Petersen would have been admissible anyway under s 92 of the *Evidence Act*, on the ground that Mr Petersen was out of the State and it was not reasonably practicable to secure his attendance, or on the ground that it appeared to the Tribunal that having regard to all the circumstances of the case undue delay or expense would be caused by calling him as a witness: s 92(2)(c), (f). The Tribunal was concerned about the question of expense and delay as appears from of the concluding remarks, particularly in the circumstances where the first respondent's solicitor was flying down from Townsville for the purpose of the hearing.

[41] I have looked at the affidavit of the second respondent. He referred to the arrangement for the first respondent to go on loan to a Brisbane trainer, and expressed the opinion that she had a lot to learn before she could become a senior jockey, and that at the time when she came to him from Victoria she knew very

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5 Page references are to the appeal book.

little about racing. He also confirmed her evidence about her illness and the effect it had on her work as a jockey. He stated he had not been approached by anyone from the appellant in relation to the first respondent's competency, and expressed the opinion that it would be unfair to the first respondent if she was not allowed to continue as an apprentice. The Tribunal had other evidence in relation to all of those matters, and may well have acted on it. Most of it was not directly contradicted by any evidence from the appellant.

[42] The appellant also referred to the requirement of s 182(1) that a party attend personally at the hearing of the appeal. In relation to this, the second respondent was joined as a party, apparently without notice and on the initiative of the Tribunal, on the second day of the hearing and after he had left for Japan. In these circumstances, it is hardly surprising that he was not present, but in any event s 182(4) meant that a breach of subsection (1) did not prevent the Tribunal hearing the appeal or making a decision in his absence. Even if he had attended, unless he was called as a witness, it would not have been open to counsel for the appellant to cross-examine him.

[43] In my opinion s 182 is really irrelevant, and there was no basis for criticism of the Tribunal. In my opinion that is not a case where any particular significance was attributed to evidence which had been accepted without allowing the appellant a proper opportunity for cross-examination. No doubt ordinarily witnesses who give oral evidence should be subject to cross-examination, but ultimately the Tribunal is not bound by the rules of evidence and may inform itself of anything in the way it considers appropriate. I do not consider that there was any failure to accord natural justice to the appellant in the present case in relation to this.

Denial of natural justice

[44] There were also five other matters where the appellant submitted that, alone or in combination, there was a denial of natural justice. The first of these was in failing to identify in its reasons the basis upon which it reached the conclusion that it had jurisdiction, but in my opinion that basis emerges from the reasons given, and in any case, even if a failure to give reasons now amounts to an error of law, it was not, at least not traditionally, regarded as a breach of the rules of natural justice.[6]

[45] The next matter referred to was the failure to allow the appellant to cross-examine the second respondent, which I have already dealt with, and the failure to give reasons for doing so. There were no specific reasons given for this, but the position I think emerges fairly clearly in the closing remarks on the second day, by implication from the statement to the effect that, if the Tribunal thought it should receive evidence from the second respondent, then the appellant would be given the opportunity to cross-examine him. The inference is that the Tribunal did not think it was necessary to have evidence from him.

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6 De Smith "*Judicial Review of Administrative Action*" (second edition 1968) p.179. A different view has now been expressed by a majority of the Court of Appeal in *R v Civil Service Appeal Board; ex parte Cunningham* [1991] 4 All ER 310. See de Smith (5th Ed, 1995) p.472.

[46] A more substantial criticism is that, towards the end of the first day, the representative of the appellant left the hearing room with the consent of the Tribunal to make a phone call, and while he was out, there was some conversation between the Tribunal and the solicitor for the first respondent, in the course of which the Tribunal suggested joining the second respondent, and having him at the hearing at some stage. It discussed when the solicitor's submissions would be ready, and discussed the possibility of appearing by video conference. It also suggested that he refer to the indentures themselves and to some policy document. There was then some further discussion about who had the power to extend indentures. There were also other matters referred to, on which one member or another of the Tribunal suggested that it would be helpful to have submissions.

[47] This is something which ought not to have occurred, although by way of mitigation the chairman of the Tribunal did tell the solicitor for the appellant after he returned that there had been some conversation with the solicitor for the first respondent in his absence. What occurred in the Tribunal was being recorded and it is apparent from what happened on the following hearing day that the appellant was provided with a copy of that recording and was able to make its own transcript from it. Certainly what occurred would have been quite inappropriate for a court. The content of the principles of natural justice or procedural fairness, and in particular the requirement that both parties receive a hearing, does not necessarily require, in the case of administrative decision makers, that there be an oral hearing, and, in some circumstances, where there is no oral hearing, a party will not necessarily be appraised of and given the opportunity to comment on all of the material obtained by the Tribunal.[7] In the present case however the legislation plainly contemplates that there will be ordinarily an oral hearing, at which the parties are required to be present, and accordingly the Tribunal ought not to have been speaking to the representative of one party about the substance of the proceeding in the absence of the representative of the other party.

[48] The final submission appeared to be directed more to some concern about some apparent bias on the part of the Tribunal, an issue which arose in relation to some of the other matters to be referred to below. It was suggested that the Tribunal, by raising these various matters, was trying to help the first respondent. It seems to me however that the Tribunal was rather raising issues which it appeared had not been properly addressed on behalf of the first respondent at that stage, and in that respect was doing nothing particularly unusual. It is not uncommon for a court, where it appears that one party has failed to address a relevant issue, to invite submissions in relation to that issue, sometimes even after the hearing is concluded, and indeed in some circumstances it may be inappropriate to take into account such an issue without giving the parties, and perhaps more importantly the party for whom that issue is a difficulty, the opportunity to address the issue. In my opinion there is no particular problem with the content of what was said to the first respondent's solicitor in the absence of the solicitor for the appellant; the problem was just that it was said in his absence.

[49] The appellant was aware during the hearing that this had occurred, and indeed on the second day when counsel appeared for the appellant he complained to the

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7 See for example *R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456, although in that case the party was entitled to request an oral hearing but had not done so.

Tribunal about the behaviour. He did not however ask the Tribunal to disqualify itself or object to the continuation of the hearing of the matter by that Tribunal. In those circumstances, when the opportunity arose to deal with the matter before the Tribunal itself but was not taken, in my opinion it is not appropriate for it to be raised now on appeal.[8]

[50] The next issue raised was that the Tribunal took into account an irrelevant consideration, being its criticism of the approach taken by the appellant in making the decision appealed from. Of course on the basis that the Tribunal did not have jurisdiction to entertain an appeal from that decision, so that all the Tribunal ought to have been considering was the issue of jurisdiction, that was an irrelevant consideration. But in circumstances where the Tribunal concluded that it did have jurisdiction to entertain an appeal from that decision, the question of whether that decision was wrong, and therefore liable to be criticised, was the very thing the Tribunal had to decide. Besides, the original decision was obviously thoroughly unsatisfactory, and there is much about it which invites objective criticism. The fact that something which is deserving of criticism is criticised is not an indication of bias, or any want of procedural fairness.

[51] It was also submitted that the Tribunal was critical of the appellant's conduct of the appeal, both in the course of the oral hearing and in the course of its reasons. To some extent this arose because of the Tribunal's view that everybody including the appellant had missed the point, which was that the real issue was whether the first respondent's apprentice jockey licence was to be renewed. If that had been the real issue, the Tribunal would have been entitled to be critical of the behaviour in a number of respects of both the parties, including the appellant. The Tribunal also took the view that there had been a failure on the part of the appellant properly to respond to various directions which it had made. The appropriateness of that criticism I think depends essentially on whether there really had been a failure properly to respond to directions of the Tribunal. If there had, it cannot have been inappropriate for the Tribunal to criticise that failure.

[52] As a general proposition, it is not an error of law for a Tribunal to criticise, but obviously it is better if the criticism is justified. If the criticism is unjustified, there may have been an error of law in concluding that it was, but that is strictly speaking a different matter. No doubt it is possible for an administrative Tribunal to display such hostility to one party in the course of the hearing as to prevent that party from being able properly to present its case, although it would seem to me that that would be more appropriately characterised as an example of apparent bias, unless of course the Tribunal was equally hostile to both parties. This may be a matter of greater significance in the case of a self-represented litigant, since legal practitioners[9] are expected to have thicker hides. The submissions for the appellant identified a number of passages said to reflect this unjustified criticism. It would be tiresome to go through all of them in detail; I have considered them and am entirely unpersuaded that either alone or together with anything else they could amount to a

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8 *Vakauta v Kelly* (1989) 167 CLR 568 at 572.

9 Especially barristers, and most especially Senior Counsel, whose fees are assumed to include an allowance for danger money.

denial of natural justice, or indeed any significantly inappropriate conduct on the part of the Tribunal.[10]

[53] Overall in my opinion the appellant has not shown any failure to provide natural justice in the conduct of the proceeding of the Tribunal.

Validity of this appeal

[54] The remaining issue is as to the appropriate disposition of the appeal. The difficulty arises here because the Tribunal has jurisdiction to hear and decide only appeals to it, relevantly under s 167. If there was no decision of the appellant identified in s 167 from which an appeal could be brought to the Tribunal, the Tribunal therefore had no jurisdiction to hear and decide the appeal. The jurisdiction of the Tribunal was never properly invoked. The jurisdiction of this court is to entertain an appeal, on a question of law "against the Tribunal's decision": s 193(1). But if the Tribunal had no jurisdiction to hear and decide an appeal of this nature, there was no "decision" of the Tribunal for the purposes of the Act, and therefore no decision from which an appeal could be brought to this court. Section 193 is different from some sections in other Acts,[11] where this court is given jurisdiction to entertain an appeal on the ground of want of or excess of jurisdiction, and therefore has presumably a statutory authority to determine that the jurisdiction of that Tribunal was never properly invoked. But ordinarily if the jurisdiction of an administrative Tribunal has not been properly invoked its proceedings and any decision it produces are a nullity, that is to say, there is in law no decision at all.[12]

[55] It would have been open to the appellant to take proceedings in the Supreme Court to obtain a declaration that the appeal and any purported decision of the Tribunal were a nullity, and an injunction restraining the first respondent from acting upon it, or to challenge the decision under the *Judicial Review Act*. But where there was no valid appeal to the Tribunal was the purported decision of the Tribunal something against which an appeal could be brought to this court under s 193 of the Act? If not the jurisdiction of this court has also not been properly invoked, although that does not mean that it lacks jurisdiction to decide that that is the case, or to determine the question of costs.[13] The appeal is in that situation incompetent, and must be struck out.

[56] There are decisions where this theory has been applied to deny the validity of an appeal from a purported decision which was a nullity[14] and on other occasions various judges have expressed doubt about how there can be an appeal against something which is a nullity.[15] There are however two fairly well established bases

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10 The presiding member may have tended to talk too much during addresses, but that is hardly an error of law for a tribunal or for that matter a court. *Tacite* is not a principle of law.

11 For example, see the *Commercial and Consumer Tribunal Act* s 100(1)(b).

12 *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 at [51] per Gaudron and Gummow JJ; [153] per Hayne J.

13 *District Court of Queensland Act* 1967 s 85(5).

14 See for example *R v Jones (Gwyn)* [1969] 2 QB 33, where an appeal against a sentence to the (statutory) Court of Criminal Appeal was struck out as incompetent in circumstances where the committal for the sentence in the first place was a nullity.

15 *Harman v Official Receiver* [1934] AC 245 at 251 per Lord Tomlin; *McPherson v McPherson* [1936] AC 177 at 189 per Lord MacMillan.

upon which an appeal can in these circumstances be justified. The first is the proposition that a tribunal[16] like a court[17] necessarily has jurisdiction to decide whether its own jurisdiction has been properly invoked, so that although the actual decision of the Tribunal to allow the appeal was a nullity because there was before it no valid appeal to allow, its decision that there was a valid appeal before it was not a nullity, and therefore was capable of supporting the appeal to this court.

[57] Alternatively, the matter can be dealt with on the basis of the true construction of the statutory provision allowing for an appeal to this court, s 193. Although that sections speaks of an appeal by "a party to an appeal to the tribunal", which assumes that there was actually an appeal to the tribunal from which the appeal could be brought, and to "the tribunal's decision on the appeal", the real issue is whether the legislature when using the term "decision" was intending to confine the right of appeal to a decision which was of legal effect. Once the matter is seen in that light, it seems unlikely that the legislature would have intended that the party to an appeal would be entitled to challenge the decision of the Tribunal by way of an appeal to this court if there was something wrong with it as a matter of law, but that if the legal deficiency had the effect there was no jurisdiction to make the purported decision, it was necessary for the dissatisfied party to take other proceedings in the Supreme Court.

[58] To confine a "decision" to a decision which was not a nullity because of some want of jurisdiction would mean that parliament in enacting s 93 was really contemplating two separate methods of review, by two different courts, in respect of decisions or purported decisions of the tribunal. The inconvenience of that interpretation has been recognised in other situations. For example, in relation to appeals to the Administrative Appeals Tribunal, it has been held that there is a right of appeal so long as there is what was described by Sir Nigel Bowen as a "decision in fact."[18] There is also the consideration that the appeal to the District Court is only on a question of law. Accordingly the legislation contemplated that it was only errors of law that the District Court appeal was intended to rectify. This is a common limitation on appeals from various statutory tribunals, particularly expert tribunals. Nevertheless, it produces a particularly acute difficulty if the formula does not permit a valid appeal from a purported decision which is a nullity because of a want of jurisdiction.

[59] Although in the present case there was no jurisdiction of the tribunal because its jurisdiction was never validly invoked, there can be a want of jurisdiction in other circumstances. Indeed, as a general proposition an administrative tribunal lacks jurisdiction to make a decision otherwise than in accordance with the law, so that when an administrative tribunal falls into an error of law it exceeds its authority or powers, and makes a jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[19] On this basis, if s 193 was not intended to provide for an appeal from a "decision" which was void for jurisdictional error, there is precious little work for it to do.

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16 *Trajkovski v Telstra Corporation* (1998) 153 ALR 248.
17 *Pezet v Pezet* (1946) 47 SR(NSW) 45 at 51; *Khatry v Price* [1999] FCA 1289 at [15].
18 *Collector of Customs v Brian Lawler Automotive Pty Ltd* (1979) 24 ALR 307 at 317.
19 *Craig v South Australia* (1995) 184 CLR 163 at 179.

[60] Accordingly it is well established in England that even a purported decision which is of no legal effect is capable of supporting a statutory appeal.[20] Australian authorities to the same effect begin with *Meyers v Casey* (1913) 17 CLR 90. In that case which also involved horse racing an issue arose as to the validity of an appeal under the rules of racing to the committee from a decision of the stewards which the stewards had no power to make. Isaacs J, with whom Rich J agreed, said at p.116: "In my view, the committee have jurisdiction to entertain an appeal – that is, an application to redress or set right an error – whenever the stewards have in fact given a decision disqualifying a man or a horse." Subsequently the Privy Council in *Calvin v Carr* [1980] AC 574[21] held that there could be a valid appeal to the committee of the Australian Jockey Club under the rules of racing from a decision of a stewards' enquiry which itself was void as being contrary to natural justice. More recently, there have been a series of High Court decisions where Kirby J, referring to what he described as "an old legal paradox", has rejected the notion that the invalidity of a defective order removes it from the scope of appellate review.[22]

[61] Accordingly, applying a purposive interpretation of s 193, in my opinion on its true construction it permits an appeal to this court even from a purported decision of the tribunal which was in law of no effect at all, became of an absence of jurisdiction. Accordingly the present appeal is not susceptible of being struck out. Rather, the appeal should be allowed, the decision of the tribunal of 30 September 2004 is set aside, and in lieu thereof the appeal to the tribunal is struck out as incompetent.

Costs

[62] With regard to the question of costs of the appeal, the appellant has been successful and ordinarily the costs would follow the event. However, the appeal was not just confined to the jurisdictional ground, and in other respects the appellant was unsuccessful. Although ordinarily a plaintiff or appellant who is successful on one basis will recover costs even though other alternative grounds or claims are unsuccessful, I am concerned that in this case a good deal of the costs will be attributable to matters where the appellant was not successful. For example, a voluminous appeal record was prepared, although almost nothing in it needed to be referred to for the purpose of the jurisdictional issue. Indeed, much of it was not referred to for the purpose of any issue. This is a factor which I think tells against awarding costs in favour of the appellant.

[63] There is also the consideration that, bearing in mind that the decision of the Tribunal was only operative until the end of March 2005 anyway, these proceedings were essentially a waste of time. By the time I came to hear the appeal, I was being asked to set aside a decision which would cease to take effect anyway the following day. Indeed, even if I had attempted an ex temporé decision, this judgment has

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20 *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 at 187 per Lord Hailsham, p.194C per Lord Fraser, p.203 per Lord Keith. For a more recent example see *R v Secretary of State for the Environment; ex parte Bath and North East Somerset DC* [1999] 1 WLR 1759 at 1767. The issue is discussed in Wade and Forsyth "*Administrative Law*" (9th Edition, 2004) at p.950.

21 Also in (1979) 53 ALJR 471.

22 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [69]; *Re Minister for Immigration; ex parte Miah* (2001) 206 CLR 57 at [220] (where the words quoted come from); *Minister for Immigration v Bhardwaj* (supra) at [101] – [108].

already been so long that I would probably not have had time to finish delivering it before the day on which the decision of the Tribunal expired. As a means of challenging the actual decision under appeal these proceedings were therefore a waste of time and money.

[64] It may be that the appellant was concerned to establish some general principle which would be of assistance to it in other matters, but that I think is not a particularly good reason for ordering the present respondents to pay the appellant's costs of this appeal. In all the circumstances I think there is sufficient justification for me to depart from the ordinary consequence that costs follow the event, and I will make no order as to the costs of the appeal.