SUPREME COURT OF QUEENSLAND

CITATION:	*N v State of Queensland & Anor* [2006] QSC 062
PARTIES:	**JENNIFER N (ON BEHALF OF HER SON N)** (appellant) v **STATE OF QUEENSLAND (ACTING THROUGH THE DEPARTMENT OF EDUCATION AND THE ARTS)** (first respondent) and **LOGAN PADAYACHEE** (second respondent)
FILE NO/S:	9845 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	3 April 2006
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2006
JUDGE:	Atkinson J
ORDER:	**The appeal is allowed.** **That the first respondent pay the appellant's costs of and incidental to the appeal**.
CATCHWORDS:	PROCEDURE – COSTS – appeal to Supreme Court from Anti-Discrimination Tribunal – where appellant failed to appear at hearing – whether, as a matter of natural justice, the applicant was given the opportunity to be heard on whether there was a 'reasonable excuse' for non-attendance.
COUNSEL:	Applicant in person SJ Hamlyn-Harris for the respondent
SOLICITORS:	Applicant self-represented Crown Solicitor for the respondent

[1] Jennifer N appealed to the Supreme Court from a decision of the Queensland Anti-Discrimination Tribunal ("the Tribunal") awarding costs in the amount of $28,168.25 against the appellant when she failed to attend at the hearing of complaints which had been referred to the Tribunal by the Anti-Discrimination Commission ("the Commission"). Such an appeal may be brought pursuant to s 217 of the Anti-Discrimination Act 1991 ("the ADA") on a question of law.

[2] The question of law in this case concerns the interpretation of s 202 and s 213 of the ADA. Section 202(1) provides that the Tribunal may dismiss a complaint and order the complainant pay costs to the respondent if the complainant does not attend a hearing "without reasonable excuse."

Costs order in the Tribunal

[3] After the respondent had been unsuccessful in its application to have one of the complaints dismissed pursuant to s 215A of the ADA, the complaints were set down for hearing on 22 August 2005. The appellant did not appear at the hearing and the President of the Tribunal dismissed the complaints and ordered the appellant to pay the first respondent's costs. The Tribunal ordered the first respondent to prepare a submission as to the amount of costs claimed and to post it to the Registry of the Tribunal and the complainant within fourteen (14) days. The Tribunal further ordered:

> "If the complainant wishes to advance any arguments as to the amount of costs which should be awarded, the complainant is to provide submissions about this to the Registry and the respondent within 14 days of receipt of the respondent's submissions."

[4] The Tribunal observed that it took into account of the factors found in s 213 (3) of the ADA which guide, but do not limit,[1] the Tribunal's discretion as to whether or not to order a party to pay costs. Section 213 (3) of the ADA provides:

> "(3) In deciding whether to order a party to pay costs, the tribunal may have regard to
>
> (a) the reasons for the enactment of this Act as stated in the preamble, and whether these reasons would be compromised or defeated in ordering the party to pay costs; and
> (b) the fairness of a costs order, having regard to the following
> (i) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding, including, for example, by
> (A) failing to comply with an order or direction of the tribunal without reasonable excuse; or
> (B) failing to comply with this Act; or
> (C) asking for an adjournment as a result of subsubparagraph (A) or (B); or
> (D) causing an adjournment; or
> (E) attempting to deceive another party or the tribunal; or
> (F) vexatiously conducting the proceeding;
> (ii) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
> (iii) the relative strengths of the claims made by each of the parties;

[1] ADA s 213(4)

(iv) whether a party reasonably believed there had been a contravention of this Act;
(v) the nature and complexity of the proceeding;
(vi) any other matter the tribunal considers relevant.

[5] The Tribunal particularly took account of the relative strengths of the claims made by the appellant and the respondent. It did not go through each of the factors mentioned in s 213 (3). While that would have been a preferable course, the terms of s 213 (3) do not make it mandatory.

[6] However the Tribunal was obliged by s 202 when making a costs order in default of appearance at the hearing to consider whether the failure to appear was "without reasonable excuse". This the Tribunal did not do. It gave the appellant the opportunity to make submissions about the amount of costs to be awarded against her; but not the opportunity to make submissions about whether she had a reasonable excuse for not attending. If the appellant had such an excuse then the occasion for awarding costs would not have arisen.

[7] It is apparent that before the Tribunal can make a final order for costs against a complainant who has failed to attend a hearing, it must make a finding that the failure was "without reasonable excuse." Before making such a finding the Tribunal must, as a matter of natural justice, give the complainant an opportunity to be heard. While costs orders are generally matters within the discretion of the Tribunal and so not usually disturbed,[2] this Court will intervene where there has been a failure to accord natural justice as it amounts to an error of law.[3]

[8] The long established rule of the common law of the right to be heard was referred to most recently by McPherson JA in *Australia Meat Holdings Pty Ltd v Douglas*,[4] where his Honour said:

> "The common law rule, said Barwick CJ in *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 109-110, is that "a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power …". The legislature, his Honour went on, may displace the rule and provide for the exercise of such power without any opportunity being afforded to the affected person to oppose its exercise; but, "if that is the legislative intention it must be made unambiguously clear". His Honour's statement has been followed and applied in later cases, as it was, for example, by Brennan J in *J v Lieschke* (1987) 162 CLR 447, 460, on which AMH relied here; and as it was earlier by the High Court in *Kioa v West* (1985) 159 CLR 550, at 609, where the same learned judge regarded the law as supplying an interpretative presumption requiring principles of natural justice to be observed: see *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194; 143 ER 414, 420."

[2] *House v The King* (1936) 55 CLR 499
[3] Cf *Tamawood Ltd v Paans* [2005] QCA 111
[4] [2005] QCA 437 at [7]

[9] In this particular instance, the complainant must be given an opportunity to make submissions not only about the quantum of costs but also about whether or not the complainant has any reasonable excuse for her failure to appear and any other matters relevant to the exercise of the discretion to award costs. To fail to allow the complainant an opportunity to do so is a breach of natural justice.

[10] The costs order should be remitted to the Tribunal to be decided in accordance with the law set out in these reasons. The appeal is allowed. Having heard submissions as to the costs of the appeal, I order that the first respondent pay the appellant's costs of and incidental to the appeal.