THE RELEVANCE OF *WEDNESBURY/LI* IN MERITS REVIEW

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The Queensland Civil and Administrative Tribunal (QCAT), like other '*super Tribunals*' in Australia, including the Administrative Appeals Tribunal, has jurisdiction conferred on it to review decisions of administrative bodies. In Queensland, s 20 of the *Queensland Civil and Administrative Tribunal Act* (*QCAT Act*) sets out the Tribunal's function:

(1) The purpose of the review of a reviewable decision is to produce the correct and/or preferable decision[1];

(2) The tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.[2]

It is often said that the Tribunal stands in the shoes of the original decision-maker.

In conducting a review application it is usually necessary for the Tribunal to engage in some fact finding process. It is the conclusions of fact reached, and the evidence relied on that may expose a decision to attack as being unreasonable in the *Wednesbury* (or *Li*) sense. This is what occurred in the matter of *Crime and Misconduct Commission v Flegg*.[3] The Crime and Misconduct Commission (CMC) applied to QCAT to review the sanction for misconduct imposed on Sergeant Flegg in failing to discharge his duties as a police officer in the search and rescue operation for the Department of Immigration vessel, the *Malu Sara*. The CMC contended that the sanction imposed by Assistant Commissioner O'Regan was, in the circumstances, too lenient. The Tribunal, at first instance, confirmed the Assistant Commissioner's decision.

This decision was then appealed to the Queensland Civil and Administrative Tribunal internal Appeal Tribunal. The sole ground of appeal to the QCAT Appeal Tribunal was that no reasonable Tribunal could have confirmed the decision of the Assistant Commissioner on sanction. The appeal was upheld on the ground of unreasonableness but in doing so the Appeal Tribunal interfered with certain findings of fact made by the primary tribunal.

There was then an appeal to the Queensland Court of Appeal. The decision of the Appeal Tribunal was reversed. The Court of Appeal, in the first decision, was critical of the Appeal Tribunal's interference with findings of fact made by the Tribunal at first instance when the sole ground of appeal was based on the reasonableness of the decision on the facts found by the primary tribunal. After receiving further submissions from the parties, in the second decision the Court of Appeal, by a majority of 2 to 1, held that the decision was reasonable, in the *Li* sense, on the facts as found by the Tribunal at first instance.

The circumstance that gave rise to the review application brought by the Crime and Misconduct Commission was, it contended, the inadequacy of the sanction imposed on Sergeant Flegg for his admitted misconduct. The sanction was a demotion from the rank of

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Sergeant 3.5 to rank of Senior Constable; the sanction was suspended for 2 years. The misconduct related to his role as the search and rescue coordinator involved in the search for the vessel *Malu Sara* on the evening of 14 October 2005 and the morning of 15 October 2005.

Background

Briefly, the facts concerning the case were that the vessel, *Malu Sara*, which was owned by the Department of Immigration and Multicultural and Indigenous Affairs left Saibai Island in the Torres Strait to sail to Badu Island on the morning of 14 October 2005. At 4:00 in the afternoon, the skipper of the vessel contacted Mr Stephen of the Department to say that the vessel was lost and in poor visibility. Sergeant Flegg, who had finished work at about 4pm that afternoon, was recalled to duty at 7:40pm to assume control of the search and rescue of the vessel. The vessel was not found and those on board perished.

Sergeant Flegg's conduct as search and rescue coordinator was investigated by the Queensland Police Service and ultimately he was charged with improper conduct in that he failed to take appropriate and required action in his role as search and rescue coordinator. Sergeant Flegg accepted that the charge against him was substantiated and after making submissions to the Assistant Commissioner as to the appropriate sanction to be imposed, the Assistant Commissioner imposed a sanction that Sergeant Flegg be demoted from the rank of Sergeant 3.5 to rank of Senior Constable 2.9 for a period of two years from 31 March 2011 to 31 March 2013. He was also directed to undertake certain courses and Performance Planning and Appraisals. The sanction was suspended for a period of two years.

Section 219G of the *Crime and Misconduct Act 2001* (Qld) confers a right on the Commission to review a decision of the Queensland Police Service. The review is then conducted under s 20 of the *QCAT Act* but is limited to the evidence before the Commissioner.[4]

As Sergeant Flegg accepted that the charges against him were substantiated, the review was confined to the question of sanction only. In determining whether or not the decision of the Commissioner should be set aside or confirmed, the original Tribunal had to regard the seriousness of the conduct and also take into account the various mitigating factors relating to Sergeant Flegg's circumstances.

In the end, the decision of the Assistant Commissioner was confirmed. In confirming the decision the tribunal made the following findings of facts which are conveniently summarised in the judgment of Gotterson JA in the Court of Appeal:[5]

(a) The applicant commenced work at 8 am on 14 October 2005 and then, after finishing work that afternoon, was recalled to duty to at about 7.40 pm to assume control of the search and rescue of the *Malu Sara.*

(b) The *Malu Sara* was new, was owned by the Commonwealth Government, and was commissioned to operate in and around the islands of the Torres Strait in all weather conditions. It was reasonable for the applicant to have proceeded on the assumption that the *Malu Sara* was seaworthy.

(c) The applicant was 'overtasked in coordinating the search and rescue alone' and the (QPS) should have made available at least another officer to assist him. Subsequently, the QPS mandated that an officer in the applicant's position is not to operate alone.

(d) Fatigue was certainly a factor in the applicant's performance while coordinating the search and rescue mission and when the situation deteriorated in the early hours of the morning of 15 October 2005, his judgement was likely to have been impaired on that account.

(e) The applicant was not offered any relief during his work as Search and Rescue Mission Coordinator, nor was any available.

(f) There was 'extraordinary delay in finalising the disciplinary proceedings' and the incident 'stalled' the applicant's career and 'left him with anxiety and uncertainty'.

(g) The applicant had a 'good service record', and since the incident 'his conduct has been exemplary and he has acted up into the positions of Senior Sergeant which signifies the confidence his superiors have in him and the improbability that he is likely to engage in misconduct in the future'.

(h) There had 'been a significant financial impact' on the applicant after his transfer from Thursday Island.

(i) The applicant had accepted the charge against him was substantiated, and 'insight into his conduct and his failings' during the search and rescue mission.

(j) The applicant's conduct fell short of what was expected of an officer with his experience and knowledge in the circumstances that prevailed on the night in question and the applicant accepted that to be so.

How did the QCAT Appeal Tribunal fall into error?

The QCAT Appeal Tribunal set aside the decision at first instance confirming the Assistant Commissioner's sanction and imposed the same sanction of demotion but removed the suspension.

However, in doing so, the Appeal Tribunal disturbed two findings of fact with respect to the mitigating circumstances. It is critical to bear in mind that the only ground of appeal was based on the reasonableness of the original Tribunal's decision and did not seek to disturb any findings of fact. Those two findings of fact made which, presumably, justified the setting aside of the original Tribunal's decision were firstly, there was no basis to conclude that the immigration vessel, the *Malu Sara*, was seaworthy and, secondly, that Sergeant Flegg approached the search and rescue on the basis that the distress calls were made for the convenience of the vessel's crew,[6] thereby casting doubt on the legitimacy of the emergency.

Having rejected these two findings of fact the Appeal Tribunal went on to say that in light of those matters the sentence imposed 'can only be described as surprising'. Although the Appeal Tribunal approached the appeal on the question of reasonableness by having regard to the principles set out in *House v R*[7] the Court of Appeal's approach focussed on reasonableness in the *Wednesbury/Li* sense.

Grounds raised before the Court of Appeal

Sergeant Flegg then appealed to the Court of Appeal. The grounds were, relevantly, that the Appeal Tribunal relied on facts contrary to those found by the Tribunal and secondly that the

Appeal Tribunal failed to have regard to other facts found by the Tribunal in determining that the decision was unreasonable.

The Court of Appeal explained that the grounds of appeal were 'developed from an underlying principle that, as a matter of law, the Appeal Tribunal was constrained to decide the appeal to it on the facts as found by the Senior Member. That is to say, the Appeal Tribunal was not at liberty to make findings of fact anew'. There is of course nothing novel in this proposition insofar as it relates to appeals. This is particularly so where findings of fact are not challenged in the original appeal. The Court of Appeal made reference to what Brennan J said in *Waterford v The Commonwealth*[8] which allowed an appeal from a decision of the Repatriation Review Tribunal '*on a question of law*':

> A finding by the AAT on a matter of fact cannot be reviewed on appeal unless the finding is vitiated by an error of law. Section 44 of the AAT Act confers on a party to a proceeding before the AAT a right of appeal to the Federal Court of Australia 'from any decision of the Tribunal in that proceeding' but only 'on a question of law'. The error of law which an appellant must rely on to succeed must arise on the facts as the AAT has found them to be or it must vitiate the findings made or it must have led the AAT to omit to make a finding it was legally required to make. There is no error of law simply in making a wrong finding of fact. Therefore an appellant cannot supplement the record by adducing fresh evidence merely in order to demonstrate an error of fact.

The Court of Appeal then went on to say that because of the nature of the ground of appeal before the Appeal Tribunal was:

> … one of unreasonableness in a *Wednesbury* sense, necessarily posits as the relevant frame of reference, the facts as found by the Senior Member. It is against those that the alleged unreasonableness of his decision is to be assessed. With this ground of appeal, there could be no scope for fact finding anew by the appellant tribunal.[9]

The above passage from the judgment of Gotterson JA demonstrates the critical importance of the fact finding process in a review application. Save for any challenge to them, it is the facts as found by the decision-maker on review from which a determination can be made as to whether the conclusion reached in the review application is said to be reasonable.

An Appellate Tribunal/Court cannot invent grounds of appeal where none are raised

The Court of Appeal had regard to the new findings of fact made by the Appeal Tribunal. It was against those findings that the Appeal Tribunal assessed the question of reasonableness. Because the Court of Appeal found that as there was no basis for disturbing those two findings of fact it concluded that the Appeal Tribunal failed to adhere to the underlying principle that as there was no specific challenge to the findings of facts in the application for leave to appeal, the question of whether ultimately the decision was reasonable had to be considered on the facts as found.

The appeal was allowed but rather than remit the proceeding to the Appeal Tribunal to consider the substantive ground of appeal of reasonableness, given the long history of this matter, the Court of Appeal decided to call for further submissions on the substantive issue in the appeal as it was in as good a position as the Appeal Tribunal to decide the issue.

On 11 March 2014 the Court of Appeal delivered its final decision on the substantive appeal. The Court was split, with the President, Justice Margaret McMurdo, concluding that the primary Tribunal decision was unreasonable and ought be set aside upholding the sanction imposed by the Appeal Tribunal. The majority, Gotterson JA and Margaret Wilson J, dismissed the appeal.

The majority judgment was written by Gotterson JA. In considering the only ground of appeal, the unreasonableness of the primary decision, he had regard to the High Court's consideration of *Wednesbury* reasonableness in *Minister for Immigration and Citizenship v Li*[10]. His Honour particularly commented on what the High Court said about the close analogy between judicial review of administrative action and the review of a judicial discretion in the context of unreasonableness to the principles governing the review of judicial discretion articulated in *House v The King*[11] and in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*. He referred to what the High Court said in *Li* at paragraph [76]:

> The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

Justice Gotterson also had regard to what French CJ said in *Li,* that the ground of unreasonableness is not a vehicle for challenge to a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters, or has made an evaluative judgement with which the court disagrees, even though that judgement is rationally open to the decision-maker. Gageler J also described a test for unreasonableness as being stringent, noting that judicial determination of *Wednesbury* unreasonableness in Australia has in practice been rare.

The majority was not satisfied, when reference was made to the findings of fact with respect to the mitigating circumstances relating to Sergeant Flegg, that, in adopting the words of the plurality in *Li*, the conclusion lacked evident and intelligible justification. It should be noted that the CMC did not contend, either before the Appeal Tribunal or the Court of Appeal, that the primary decision lacked evident or intelligible justification.

Once the issues of the vessel's seaworthiness and the occupants' motivation for the distress call were considered, as found by the primary Tribunal, and when the two mitigating factors of fatigue and being overtasked (as well as the delay, good service record, financial impact and insight), not considered by the Appeal Tribunal, were brought back into focus, it could not be said the primary Tribunal's decision lacked evidence or intelligible justification.

The President, Justice McMurdo, in her dissenting judgment, applied the *Li* test[12], whether the decision lacked an evident and intelligible justification when all relevant matters were considered, and concluded that the test was satisfied. She did so on the basis of Sergeant Flegg's failure to contact the Australian Maritime Safety Authority at 2.26am when he first became aware that the vessel was sinking. This also had to be considered when regard was had to the central function of the Queensland Police Service to render help 'reasonably sought, in an emergency…by members of the community'.[13] As this finding was open because these facts were undisputed, she was of the opinion the test was satisfied.

Conclusion

This series of decisions relating to Sergeant Flegg's conduct, demonstrate the following:

1. Where a Tribunal embarks on the review of an administrative decision, standing in the shoes of the original decision-maker, the ultimate decision must be able to withstand the reasonableness test as described in *Li.*
2. An appellate body is simply not permitted to substitute its own findings of fact in the absence of a specific challenge to the findings made by the decisionmaker.

3. The fact finding function, if there is one, is critical in order to establish that there is an evident and intelligible justification to the conclusion reached. It is unlikely that an appellate body will disturb findings of fact even when challenged, and it is these factual findings which demonstrate whether the conclusion is reasonable.
4. The High Court, in *Li*, has raised the bar in applying the *Wednesbury* reasonableness test to Tribunal decisions in a merits review, by specific reference to the need to establish that the decision lacks evident and intelligible justification on the facts as found by the primary Tribunal.

Despite the formulations by the High Court, this case demonstrates that the question of reasonableness still comes down to the subjective opinion of those casting a critical eye over the decision and the reasons for it.

Endnotes

1 The legislation in Queensland and Western Australia uses 'and': *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(1); *State Administrative Tribunal Act 2004* (WA) s 27(2). Other jurisdictions rely on the common law which has accepted 'or': *Shi v Migration Agents Registration Authority* (2008) 235 CLR 285 at [35], [72] per Kirby J, at [98] per Hayne and Heydon JJ, and at [140] per Kiefel J with whom Crennan J agreed.
2 Comparable legislation: *Victoria Civil and Administrative Tribunal Act 1998* (VIC), s 51; *State Administrative Tribunal Act 2004* (WA), s 27; *Administrative Decisions Review Act 1997* (NSW), s 63; *Civil and Administrative Tribunal Act 2013* (NSW), s 30; and *Administrative Appeals Tribunal Act 1975* (Cth), s 25.
3 [2012] QCAT 74.
4 *Crime and Corruption Act 2001* (Qld) s 219H – unless the Tribunal gives leave to lead further evidence.
5 *Flegg v CMC and Anor* [2013] QCA 376 at [20].
6 *CMC v Flegg* [2013] QCATA 029 at [19]-[20].
7 (1936) 55 CLR 499.
8 (1987) 163 CLR 54.
9 *Flegg v CMC* [2013] QCA 376 at [31].
10 (2013) 87 ALJR 618.
11 (1936) 55 CLR 499.
12 *Flegg v CMC and Anor* [2014] QCA 42 at [3].
13 *Flegg v CMC and Anor* supra [6] and[7].