Spyrou, Elle (SACAT)

From: SACAT Governance
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OFFICIAL

September 2023
Issue 19

Update from the Convenor

Dear COAT SA Members

This newsletter will provide you with summaries of some recent decisions which are particularly relevant to Tribunal members. We hope you find them useful.

The Committee was very pleased with the attendance at our seminar in March at which Her Honour Judge Katrina Bochner was the principal presenter, and the topic for discussion was Alternative Dispute Resolution in Tribunals: Post Pandemic. Our panel had some interesting observations to make about the impact of the pandemic on ADR in SA tribunals.

As you will be aware, the annual COAT conference was held in Sydney this year and we were very pleased to provide financial assistance to two COAT SA members which enabled them to participate online.

We have arranged a seminar later this month on the topic of Accessibility of Tribunals. I encourage you to attend. Our principal presenters are from the Aged Rights Advocacy Service, and we have

a panel I am confident will provide diverse perspectives – Anne Gale (Public Advocate), Natalie Wade from Equality Lawyers, and Thomas Kruckemeyer from the Australian Institute of Interpreters & Translators.

Barbara Johns
Convenor, COAT SA

Your COAT SA Committee

Barbara Johns, Convenor
Deputy President, SACAT

Anne Lindsay, Vice-Convenor
Principal Registrar, SACAT

Joanna Richardson, Treasurer
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Elle Spyrou, Secretary
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Marten Kennedy
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Kath McEvoy
Senior Member, SACAT

Jodie Carrel
Managing Commissioner, SAET

Peter Kassapidis
Commissioner, SAET

CONTACT US: For enquiries about the COAT SA Chapter please email governance@sacat.sa.gov.au and attention your email to “COAT SA”.

2023-24 Membership

2023-24 Membership fees are due!

Please find the 2023-2024 COAT SA Membership Invoice attached to this Newsletter. Please forward a copy of the completed invoice to Joanna Richardson, Treasurer.

COAT SA Upcoming Events

COAT SA SEMINAR

Carolanne Barkla and Chris Boundy
from the Aged Rights Advocacy Service
will speak on the topic of

Accessibility of Tribunals

Followed by a panel discussion from the experts
27 September 2023 at 5.00pm at the Administrative Appeals Tribunal
RSVP to governance@sacat.sa.gov.au

SAVE THE DATE !

Wednesday 22 November 2023 from 2.00pm

Megan Hunter from the High Conflict Institute

To be followed by the

COAT SA Annual General Meeting

More information to come !

COAT NSW Conference

The COAT NSW annual conference will be held both online and in person in Sydney on Friday 16 September. This year's conference, *Tribunals – providing justice for all*. You can find out more information here.

From the AAT

Michell and Dudfield (Child support) [2023] AATA 1186

Senior Member Dordevic (22 March 2023)

This is a review of a decision of a delegate of the Child Support Registrar to partly allow an objection made by the mother (D) in relation to the level of care her ex-husband had for his third child. The administrative child support assessment was amended to reflect that the father (M) had 50% care of a relevant dependent child from March 2022.

M has paid child support to D under a child support assessment in respect of their two children that has been in place since March 2017. M is the parent of a third child, MM, with his current wife W. MM was born overseas in April 2020 and lived overseas with W until September 2022, when they moved to Australia to live with M. M was only overseas with the child for about 4 months due to Covid-19 travel restrictions. W and MM are wholly financially dependent on M, of which M provided extensive evidence.

M notified Services Australia of MM's birth on 21 April 2020 and his child support assessment was amended to include a relevant dependent child from 19 April 2020. This resulted in the child support payable to D changing.

D objected this decision and the objection was allowed based on a finding that M did not have shared care of MM. On 14 June 2022, Services Australia made a new decision that M had care of MM and that the assessment should be amended from 17 March 2022. The objections officer partly allowed D's objection to that decision, finding that M had 50% care of MM and not 100% from 17 March 2022. M applied to the Tribunal for review of that decision and submitted that he has had 100% care of MM since his birth.

The Tribunal considered whether MM was a relevant dependent child in accordance with s 5 of the Act, and if so, what percentage of care M had. Consequent to this finding, the Tribunal had to determine from which date this should be reflected in the child support assessment and when the Registrar became aware of MM under s 73A.The Tribunal had reference to Government policy in the form of the Child Support Guide and considered the factors set out in the decision in *Polex & Stalker & Anor* in assessing M's percentage of care under s 50 of the Act. The Tribunal found that MM and W, who provided day to day physical care of the child, had no other sources of financial support apart from M. It was on this basis that the Tribunal concluded that M had 100% care of the child from birth. The Tribunal also found that M had advised Services Australia of MM's birth on 21 April 2020 and not 17 March 2022 as determined. The AAT set aside the decision and, in substitution, amended the administrative child support assessment to reflect that the father has had 100% care of a relevant dependent child from 19 April 2020.

Lifeful Coordination & Management Pty Ltd and National Disability Insurance Scheme [2023] AATA 155

Senior Member K Parker (15 February 2023)

This is a review of a decision of the NDIA to cancel a claim for payment made by Lifeful Coordination and Management (Lifeful C&M), the participant's plan manager, for reimbursement of a participant's rental payment.

Lifeful C&M is a registered NDIS service provider and provided plan management services to the participant. The participant made a rental payment, and Lifeful C&M reimbursed this payment to the participant. Lifeful C&M then made a claim to the NDIA for reimbursement of the payment. However, the NDIA decided not to pay the claim.

Lifeful C&M challenged the NDIA's approved statement of participant supports (SOPs) in the participant's plan because the NDIA did not approve funding for the rental amount.

Before considering the claim, the Tribunal needed to decide whether Lifeful C&M could appear as an applicant. To do so, Lifeful C&M would have to be a person whose interests were affected by

the NDIA's decision . The Tribunal also had to decide whether it has the power to review the NDIA's decision to refuse the claim for payment.

Lifeful C&M had unilaterally decided that the company would not seek reimbursement from the participant. The Tribunal found that this was a private matter between Lifeful C&M and the participant. Therefore, any loss incurred because of that private arrangement does not mean Lifeful C&M's interests have been affected by the NDIA's decision to approve the participant's SOPs.

The Tribunal was satisfied that Lifeful C&M's role was to manage the participant's funding in accordance with his NDIS plan. This did not include Lifeful C&M having any interests in whether certain supports were not included in their client's plan.

Further, as the participant had not sought an internal NDIS review of the decision, and no internal review decision had been made by the NDIA, the Tribunal did not have the power to review the decision.

The Tribunal decided that Lifeful C&M was not 'a person whose interests are affected' by a decision made by the NDIA. Therefore, Lifeful C&M did not have standing to bring an application for review. The Tribunal also decided that even if Lifeful C&M had standing, there was no reviewable decision because no internal review decision had been made by the NDIA under s 100 of the *National Disability Insurance Scheme Act 2013.*

From SACAT

Robusto Investments Pty Ltd v Essential Services Commission of South Australia [2023] SACAT 2

President Hughes, Member Bean (8 March 2023)

The applicant, Robusto Investments, sought a review of a price determination made by the Essential Services Commission in August 2021. This judgment concerned whether the determination under review was validly made, and if not, whether the Tribunal has jurisdiction to review that determination. As this determination had been superseded by another in July 2022, the Tribunal was also asked to consider whether the August 2021 determination is spent, and if so, whether the Tribunal has jurisdiction to review it and whether there would be utility in doing so.

The Essential Services Commission (the Commission) made a "price determination" dated 25 May 2021 pursuant to s 25 of the *Essential Services Commission Act 2002* (ESC Act). The price determination set the maximum total revenue that Robusto Investments could recover from its customers and the maximum prices that it was permitted to charge for a particular period. The applicant was dissatisfied with the Commission's determination. It applied to the Commission for an internal review under s 31 of the ESC Act. The Commission engaged an external consultant, HoustonKemp Economics, to prepare a report in relation to the internal review then varied its price determination on 26 August 2021. The applicant remained dissatisfied. The applicant filed an application for review by SACAT under s 32 of the ESC Act, challenging the 26 August 2021

determination. The applicant contended that the Commission had not made a decision on the internal review in the sense contemplated by the ESC Act and therefore the decision was not valid, in that the Commissioners adopted the HoustonKemp report without bringing their own active intellectual engagement to the task. During the course of the proceedings, the period covered by the decision under review expired and a subsequent determination addressing a subsequent period was made by the Commission in July 2022. The determination under review therefore had no ongoing effect.

The Tribunal held that it has jurisdiction to conduct a review of the Commission's decision irrespective of whether it was vitiated by the type of error about which the applicant complains, namely that the Commission did not engage with its task. In relying on the HoustonKemp report, the Commissioners either asked themselves the wrong question or failed to engage sufficiently with the actual issues that they were required to engage with, therefore the decision should be afforded little weight. The Tribunal also has jurisdiction to review the decision despite it being overtaken by the July 2022 determination. The issues raised on review have substance and are directly relevant to the current determination and future determinations for this applicant, therefore there is utility in reviewing the decision.

Heyne v Commissioner for Consumer Affairs [2023] SACAT 27

Senior Member Lazarevich (11 April 2023)

The applicant sought review of a decision made by the Commissioner for Consumer Affairs to refuse the applicant's application for a building work contractor licence and building work supervisor registration under the *Building Work Contractors Act 1995.* The Commissioner refused the applications on the basis that the applicant is not a fit and proper person. The applicant has a criminal history and a recent conviction of assault which occurred in the course of a monetary dispute over a work-related contract. The applicant submitted that he is a fit and proper person and made submissions to explain and mitigate his offending.

Held, affirming the decision under review:

- Maintaining public confidence in the building profession is an important function of the licensing scheme and the protection of the public is a paramount consideration;
- The applicant has demonstrated more than one instance of concerning behaviour in respect of unpaid invoices and involving disputes with customers, of which he has little insight as to the inappropriateness of his actions, combined with the other offending leads to a concern that similar behaviour may occur in the future;
- Given the proximity of recent offending and the current lack of insight he has demonstrated, the applicant is not a fit and proper person to hold a building work contractor licence and building work supervisor registration.

From SAET

Paterakis v Return to Work Corporation of South Australia [2023] SAET 7

President Justice Dolphin (10 February 2023)

The primary question for determination was whether an application for review of a decision by the compensating authority (respondent) to reject a $90.00 medical expense was an abuse of process that ought to be dismissed or struck out pursuant to s41(1)(c) of the *South Australian Employment Tribunal Act 2014* . The Tribunal held that it was and dismissed the application.

The applicant had previously lodged two applications for review relating to a rejection of his claim for compensation arising from an injury, after having a Covid-19 vaccination 'required by work' (the primary dispute) and a consequential psychological injury (the psychological injury dispute).

The applicant then sought review of the respondent's decision where it rejected liability for two medical accounts (the $90.00 dispute) on the basis that the applicant's injuries were not compensable. The respondent relied on its initial decision rejecting the applicant's claim in the primary dispute.

The President raised the question as to whether the application was an abuse of SAET's processes, given the primary dispute put all compensation questions regarding the alleged injury in issue. His Honour ordered that the application be heard and determined 'on the papers', as proceeding in the ordinary way would involve a disproportionate use of SAET's resources given the amount at stake.

The President held that the $90.00 dispute was "a dispute on paper only", for it merely duplicated what was claimed in the primary dispute and/or the psychological dispute and was therefore an abuse of process.

The President stated that medical expenses applications, on work injury claims already in dispute, with the associated creation of an entitlement to costs under Return to Work legislation would overstretch SAET's resources, which would not be in the best interest of the administration of justice and bring SAET into disrepute.

The President also held that the applicant was not "required" to lodge an application for review as at the time the $90.00 expense was incurred, he did not have any entitlement to medical expenses under the RTW Act. His claim for compensation had been rejected, and the primary dispute proceedings, which dealt with what compensation the applicant was entitled to, had been underway for months.

Finally, the President noted that s 65 of the SAET Act allows for, with the consent of all parties, an enlargement of proceedings to include a question not presently at issue. If the applicant had particular concern over the $90.00 expense, the primary dispute could have been enlarged to include that issue and there would have been no valid reason for the parties to withhold their consent.

In dismissing the $90.00 dispute, the President noted that the applicant was not disadvantaged as he had the ability to recover compensation for the expense in the pre-existing proceedings.

Houghton v The State of South Australia in the Right of the Department of Human Services (SA) [2023] SAET 61

Deputy President Judge Rossi (14 July 2023)

The issue in this dispute was whether SAET should exercise its coercive power to direct a worker to attend a medical examination arranged by the respondent. The respondent sought an order that the applicant be examined by an orthopaedic surgeon it had selected because the applicant's treating orthopaedic surgeon recommended further investigation before determining whether surgery should be performed and, if so, the form of surgery. The respondent sought a further order staying the proceedings if the applicant did not attend the examination, The applicant opposed the orders sought.

The Honourable Deputy President noted SAET's discretionary power to make an order directing workers to attend scheduled medical examinations. Whether it was reasonable to require a worker to attend a medical examination arranged by a compensating authority is a question of fact. The onus being on the compensating authority to persuade SAET that the examination was reasonably required, and that the intervention of SAET is reasonably sought, in the interests of justice. If satisfied, the onus then shifts to the worker to establish that SAET should nonetheless refuse to intervene.

The Deputy President also noted that the respondent had already received medical reports regarding compensability and whether the proposed surgery should be performed. Furthermore, the respondent determined the claim for pre-approval of the cost of surgery after it was aware of the recommendation for further investigation. Where the respondent had not used its own powers prior to determination to require a worker to undergo a medical examination, there was a heavy onus on the respondent to persuade SAET to utilise its powers.

The Deputy President held that the respondent did not present any evidence to prove that whatever further medical opinions it might reasonably seek could not be addressed by either the occupational physician or the pain management physician and without further examination of the applicant, or that an opinion of an orthopaedic surgeon was reasonably required. His Honour noted that the respondent's reasons for seeking a report from an orthopaedic surgeon indicated a 'potentially wide-ranging request for opinion'. The respondent had not discharged either its evidentiary or legal onus and the application was refused.

From around Australia

Towle v Registrar of Motor Vehicles [2023] SASC 92

This was an appeal of a decision of the South Australian Civil and Administrative Tribunal to affirm a determination of the Registrar of Motor Vehicles to downgrade the drivers' licence of Mr Towle such that he was no longer permitted to drive heavy duty vehicles.

The appeal was made on a number of grounds, including that the Tribunal erred in arriving at its decision absent of the appropriate medical evidence, and further, that the Tribunal failed to accord

the Appellant procedural fairness by failing to grant him an opportunity to be heard adequately, including that the Tribunal failed to:

- give an opportunity to make submissions as to asserted inconsistences or errors in respect of a letter before the Tribunal and the possibility that another patient may have been confused for the Appellant.
- consider the submission that the letter was provided for an improper purpose – that of unlawful discrimination.
- consider or adequately address the Appellant's submission that there was an apprehension of bias in relation to the original decision of the Registrar of Motor Vehicles.
- consider two statutory declarations provided by the Appellant.
- consider video evidence and a practical demonstration that the Appellant did not have any disability preventing safe driving.

The Court refused leave to appeal, finding that none of the grounds put forward were reasonably arguable, that the Appellant had a reasonable opportunity to present his case to the Tribunal and that the Tribunal had arrived at the correct and preferrable decision.

Secretary, Department of Education v Derikuca [2023] NSWCA 94

The respondent had been working as a cleaner in a public school when a complaint was made against him. After a series of events, his employer, a government contractor, dismissed him. The applicant subsequently made a decision to place the respondent's name on a not to be employed list. There were three main issues on appeal. The first was whether the second decision should have been quashed. The second was whether the declaration in respect of the first "decision" should be set aside. The third was whether the directions with respect to the potential claim for inducement of breach of contract should be set aside.

The Court of Appeal held that the primary judge had erred in raising the possibility that a party could make a claim in the tort of inducing breach of contract in circumstances where the contract was not before the Court and the final hearing had concluded. There is a difference between resolving the controversy brought before the Court and fomenting further disputes. The primary judge had gone beyond the role of the Court in assisting self-represented litigants.

Webb v Secretary, Department of Communities and Justice [2023] NSWCATAP 213

An Appeal Panel refused leave to appeal from a decision of the Tribunal to refuse to allow the appellant to appear in the substantive hearing via audio visual link. The Tribunal's discretionary decision was only fettered by its obligation to act judicially and in furtherance of the guiding principle. The appellant had failed to provide evidence to demonstrate that she would suffer a materially greater than usual prejudice if she was required to attend in person.

Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020

A man jailed during a routine property dispute with his former wife has successfully sued a sitting judge who made "serious and fundamental errors" before falsely imprisoning him.

The Federal Court found that Judge Vasta made a series of basic errors, exceeded his jurisdiction, and engaged in a “gross and obvious irregularity of procedure” when he locked up the man in late 2018, and awarded the applicant $309,450 in damages.

It was found that Judge Vasta falsely imprisoned the man and left him without a “modicum” of procedural fairness and that he was not entitled to judicial immunity because he had acted outside his jurisdiction.

Justice, but not in my language – ABC Law Report

The ABC Law Report recently published a podcast on interpreters in courts and tribunals.

Hundreds of thousands of Australian residents, a figure now approaching one million, don't speak English well, or at all. The growing demand for interpreters and the shortfall in those who are suitably qualified to work in the legal sector is putting severe pressure on Australia's busiest courts.

You can listen to the podcast on ABC Listen here.

COAT
COUNCIL OF AUSTRALASIAN TRIBUNALS
SOUTH AUSTRALIA

Something to share?

Do you have something to share across COAT SA? Let us know for the next newsletter at governance@sacat.sa.gov.au