SUPREME COURT OF QUEENSLAND

CITATION:	*Whiteley v Stone & Anor* [2021] QSC 31
PARTIES:	**NEVILLE WHITELEY** (applicant) **v** **MARK STONE** (respondent) and **ATTORNEY-GENERAL OF QUEENSLAND** (intervenor)
FILE NO/S:	10089/2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2021
JUDGE:	Dalton J
ORDER:	**The application for judicial review is dismissed.**
COUNSEL:	A Scott for the applicant M Hickey with S Gibson for the respondent F Nagorcka for the Attorney-General
SOLICITORS:	DWF for the applicant Resources Safety & Health Queensland for the respondent Crown Law for the Attorney-General

[1] This is an application under Part 5 of the *Judicial Review Act 1991* (Qld) (JRA). At all relevant times the respondent was the Executive Director of Resources Safety & Health, a division of the Department of Natural Resources, Mines and Energy. In that capacity he had statutory authority under the *Coal Mining Safety and Health Act 1999* (Qld) (CMSHA) to cancel certificates of competency issued under s 197B of the CMSHA in certain circumstances. By letter dated 18 June 2020 the respondent advised the applicant that he had made a decision to cancel the applicant's certificate of competency. The applicant asks that this Court declare the respondent's decision to be of no force or effect.

[2] The respondent cross-applies asking that the applicant's application be dismissed pursuant to ss 12, 13 or 48 of the JRA. The respondent says that provision is made for appeal to the Industrial Magistrates Court from a decision cancelling a certificate of competency; the applicant should pursue that statutory route rather than invoke this

Court's jurisdiction under the JRA. In my view the respondent should succeed on this contention. I will give my reasons for that decision.

[3] The CMSHA has objects to protect the safety and health of persons at coal mines – s 6. It does this, *inter alia*, by imposing obligations on persons who operate coal mines. It contemplates that regulations and recognised standards for the coal mining industry will be made – s 7.

[4] The CMSHA provides that an open cut coal mine operator must appoint a person holding an open cut examiner's certificate of competency to carry out various responsibilities and duties prescribed by Regulation – s 59(1). The applicant held an open cut examiner's certificate of competency and as at June 2019 was appointed to the Middlemount coal mine.

[5] On 5 June 2019 the applicant was the nightshift examiner. On that nightshift pre-split holes were drilled on an area of work referred to as the Eastern Echelon. It seems these holes were preparatory to blasting work which later took place. On 22 June 2019 the applicant was the examiner on duty when one of the miners raised a safety concern with him concerning a hang-up hazard in that area. Apparently the blast had not brought down the entirety of the intended material, some of it was hung-up above the area where miners were working. The applicant says that in response to this information he directed the miners to construct an earth bench and then bring down the hung-up material using dozers. The applicant says that later that afternoon he returned to inspect that work and formed the view that the hang-up hazard had been adequately managed, and that the area was safe to work in.

[6] In fact the area was not safe; it collapsed on 26 June 2019 killing one of the miners.

[7] A supervisor on the site says that he told the applicant on 22 June 2019 that the use of benching and dozers had been unsuccessful in removing the hang-up. The applicant denies this. There is some evidence that a second miner also brought difficulties in this area to the applicant's attention on 22 June 2019.

[8] After the collapse the Department of Natural Resources, Mines and Energy made investigations including interviewing the applicant and other relevant witnesses. There are also photographs and recordings of radio communications which provide some contemporary evidence as to events relevant to the responsibility for the collapse.

[9] After investigation, and after allowing the applicant a chance to respond to the results of the investigation, the respondent cancelled the applicant's certificate of competency. The power to do so is given by s 197A(1) of the CMSHA. In this case subsection (a) was relied upon by the respondent, "the person has contravened a safety and health obligation". Safety and health obligations are dealt with by Part 3 of the CMSHA. The respondent relied upon s 39(2)(b) of the CMSHA, and reg 107 of the Coal Mining Safety and Health Regulation 2017 (the Regulations).

[10] Section 39(2)(b) provides:

> "A coal mine worker or other person at a coal mine has the following … obligations –
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> …

(b) to ensure, to the extent of the responsibilities and duties allocated to the worker or person, that the work and activities under the worker's or person's control, supervision, or leadership is conducted in a way that does not expose the worker or person or someone else to an unacceptable level of risk;

…"

[11] Regulation 107 provides:

"(1) This section applies if, after inspecting a surface mine under section 106, the open-cut examiner for the mine decides an unsafe thing at the mine causes an unacceptable level of risk.

(2) If it is practicable, the examiner must ensure the thing is made safe immediately.

(3) If it is not made safe immediately, the examiner must immediately notify persons at the mine who may be exposed to the risk.

(4) Until the thing is made safe, the examiner must –

(a) erect a barrier to prevent persons from unknowingly entering the part of the mine where the unacceptable level of risk exists; and

(b) stop coal mining operations in, and withdraw all persons from, the part.

(5) If the thing is not made safe by the end of the shift in which the inspection was made, the examiner, at the end of the shift, must report the matter to the following persons –

(a) the examiner's immediate supervisor at the mine;

(b) an open-cut examiner who is required to make a similar inspection during the next shift."

[12] Regulation 106 provides that an open cut examiner for a surface mine must inspect the part of the mine where mining activities are to be carried out to decide whether the level of risk there is acceptable. The inspection must be carried out before the activities start around the excavation and periodically, as required under the mine's safety and health management system.

[13] The respondent cancelled the applicant's certificate of competency by letter dated 18 June 2020. That letter read in part:

"My decision is based on the ground that you have contravened the following safety and health obligations (see section 197A(1)(a) of the Act):

(i) the obligation, under section 39(2)(b) of the Act, to ensure, to the extent of the responsibilities and duties allocated to you, that the work and activities under your control, supervision, or leadership

> is conducted in a way that does not expose someone else to an unacceptable level of risk …
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> …
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> … I find that:
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> **Finding 1**: As the day shift open cut examiner between 19 and 25 June 2019, inclusive, you:
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> - ought reasonably have identified the Eastern Echelon pit wall in the Southern Terrace pit strip 19 as hazardous; and
> - could not reasonably have concluded that the level of risk in relation to this section of the pit wall was acceptable.
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> **Finding 2:** You failed to ensure that this section of the pit wall was made safe as required under section 107 of Regulation. This failure constituted a contravention of your obligation under section 39(2)(b) of the Act, read with section 37(1) of the Act."

[14] The applicant's point is that in order for the provisions of reg 107 to apply to him, he must have decided that an unsafe thing at the mine caused an unacceptable level of risk. In this case the applicant has consistently said that he never made that decision. The finding against him is not that he should be disbelieved and that in fact he did make such a decision, but that he ought to have made that decision. The applicant's point is that if all that is found is that he ought to have made the decision spoken of in reg 107(1), but did not, the remainder of reg 107 did not apply to him.

[15] The applicant raises an additional point. He says that finding 2 simply recites the statutory obligation, and does not specify what he failed to do. In respect of this latter point the applicant relies on *Kirk v Industrial Court of New South Wales*.[1] In that case there was no power under the statute to convict and sentence the employer:

> "… because no particular act or omission, or set of acts or omissions, was identified at any point in the proceedings, up to and including the passing of sentence, as constituting the offences of which Mr Kirk and the Kirk company were convicted and for which they were sentenced."

[16] Because I am not going to determine these points, I will refrain from expressing my views on them. It is however of significance that were I to declare that the respondent's decision was void, the respondent could again undertake the process of cancelling the applicant's certificate of competency. The grounds available to the respondent are not limited to those which he relied upon in the present case, and are not limited to grounds which require the respondent to find that in fact the applicant subjectively understood the hazard which caused the collapse – see for example s 39(1)(c). That is, if I were to grant the relief the applicant seeks, that declaration would not determine the merits of the underlying dispute between the parties, and could not confidently be expected to bring an end to the respondent's attempts to cancel the applicant's certificate.

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[1] (2010) 239 CLR 531, [74] followed in *Harrison v President, Industrial Court* [2017] 1 Qd R 515 and *Hill-Mac Pty Ltd v Chief Executive, Office of Liquor and Gaming Regulation* [2014] QCA 19.

[17] Section 236A of the CMSHA provides an appeal against the respondent's decision to the Industrial Magistrates Court. The applicant has in fact started such an appeal. Section 240(2) of the CMSHA provides that the Industrial Magistrates Court hears that appeal, "by way of rehearing, unaffected by the original decision-maker's decision." The Industrial Magistrates Court is not bound by the rules of evidence although it must observe natural justice – s 240(4). Appeal from the decision of the Industrial Magistrates Court is to the District Court, but only on a question of law – s 242 of the CMSHA.

[18] The cross-application is brought relying on ss 12, 13 and 48 of the JRA. In my view it is s 12 which is relevant. It provides:

> "… the court may dismiss an application under section 20 to 22 or 43 that was made to the court in relation to a reviewable matter because –
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> (a) the applicant has sought a review of the matter by the court or another court, otherwise than under this Act; or
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> (b) adequate provision is made by a law, other than this Act, under which the applicant is entitled to seek review of the matter by the court or another court."

[19] In *Stubberfield v Webster*[2] Thomas J dealt with an application for a prerogative order under the JRA in respect of a Magistrate's decision in civil proceedings. The applicant before him had the alternative course of applying for leave to appeal in the District Court. Such leave would not be granted unless the Court was satisfied that some important principle of law or justice was involved. Mr Stubberfield had lost the opportunity to apply for leave to appeal to the District Court because he had not exercised his right within the time limited by the statute. Thus, at the time he appeared before Thomas J in the Supreme Court, the only remedy he had was under the JRA. Thomas J took the view that because this was a result of Mr Stubberfield's deliberate and informed choice, Mr Stubberfield could not rely upon that choice to "improve his position" in the Supreme Court – p 215.

[20] Thomas J dismissed the application under the JRA relying on both s 12 and s 13. He said:

> "As a general rule judicial review should not be seen as a substitute for the appellate process in the civil courts. Of course particular circumstances may yield different results, as for example in a case of obvious jurisdictional abuse when the liberty of a citizen is at stake … and other situations which I do not purport to limit. Applications like the present one are unlikely to produce a satisfactory result for the disgruntled civil litigant but are still likely to take up considerable time of the courts. It is therefore important that it be clearly understood that this remedy is not to be regarded as a substitute for the appellate system within the ordinary judicial process." – p 217.

[21] In remarking that the judicial review process in that case was not likely to produce a satisfactory result for the civil litigant, Thomas J was referring to the fact that, on

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2 [1996] 2 Qd R 211, 217.

examination of his material and arguments. Mr Stubberfield really wanted a merits review, rather than an administrative or process review – see p 214.

[22] Here the legislature has provided an appeal path from the decision of the respondent to the Industrial Magistrates Court and then from there, on a matter of law, to the District Court. The applicant has in fact instituted an appeal in the Industrial Magistrates Court. That appeal will be a full hearing on the merits and will involve witnesses giving evidence. In my view that is a much more suitable avenue for the resolution of the question of whether or not the applicant ought have his certificate of competency cancelled than an administrative review (not going to merits) in this Court. In particular, there is a conflict of evidence as to what the applicant was told after he issued his first direction to remove the overhang with benching and dozers. A full hearing on the merits in the Industrial Magistrates Court is the best forum to resolve that conflict.

[23] The points raised in this application are legal points. However, they can be agitated before the Industrial Magistrate and decided by the Industrial Magistrate. Again, the hearing in the Industrial Magistrates Court is more appropriate to resolve the underlying disputes between the parties. The rehearing is to be one "unaffected by the [respondent's] decision". In contrast, if I were to decide these legal points in the applicant's favour that would not be the end of the matter; the respondent could begin the process of cancelling the applicant's certificate again. It would be open to the respondent to rely upon different safety obligations in terms of identifying a breach and to make different findings of fact as to the applicant's acts, omissions or state of mind.

[24] The applicant submitted that here there were particular circumstances of the type envisaged by Thomas J which took this case outside the general rule he spoke of. The applicant faces criminal proceedings in the Industrial Magistrates Court for breaches of s 34 of the CMSHA. The subject matter of the charges is the same conduct which is relevant to the decision to cancel his certificate. The defendant is one of three defendants in that criminal proceeding and it appears that the proceeding is progressing slowly. It could not be expected to be heard in 2021.

[25] It is said that to run the appeal from the respondent's decision in the Industrial Magistrates Court will likely involve the applicant having to give evidence. It is said that ought not happen before the criminal charges are concluded because it will interfere with the applicant's right to silence and may involve his waiving privilege.[3] I quite accept those propositions.

[26] The applicant says that it puts him in an invidious financial situation. He has all but used his available leave since the decision of 18 June 2020 and fears that he cannot remain employed unless he successfully challenges the respondent's decision to cancel his certificate of competency. If this Court were to make an order in the applicant's favour, the appeal in the Industrial Magistrates Court would be discontinued.

[27] The difficulty with the applicant's submissions in this regard is that even were I to accede to his wishes and determine this application in his favour, the respondent has

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[3] Although in relation to the waiver of privilege it is to be noted that the applicant has already given several versions of events to the Department of Mining.

the right to cancel the certificate of competency again, based on the same facts, but avoiding error in process. The applicant would be back in exactly the same difficult position, in which he now finds himself.

[28] This applicant also submitted that there was a public interest consideration which would militate in favour of this Court determining his application. He relied upon comments made in a decision of *Nelson v Q-Comp*.[4] There it was said:

> "The respondent is an administrative decision maker and its processes are quite different to that of the next stage of review provided for under the [WorkCover Queensland] Act which is the appeal to the Industrial Magistrates Court. There is a distinct public interest in ensuring that the decision making entrusted to the respondent fulfils its object. In the circumstances in which the respondent made the decision in this matter, weight should be given to the public interest in ascertaining whether the respondent did err in failing to provide procedural fairness to the applicant before making the decision. The appeal to the Industrial Magistrates Court would not be able to consider that matter."

[29] In this matter there are not general questions raised as to the respondent's conduct, for example (as in *Nelson*), whether the respondent was obliged to accord procedural fairness to the applicant. If the respondent has erred, he has erred having regard to factual findings particular to this case and in relation to failure to specify the particular conduct (by way of act or omission) which this applicant has engaged in. Furthermore, the Industrial Magistrates Court is in a superior position to resolve the underlying conflict between the parties, as explained at [22] and [23] above. This case is different from that described in the *Nelson* above.

[30] I would add however that I think it would be rare that questions as to a particular statutory decision-maker's adherence to procedure would raise questions of public interest sufficient to take matters outside the general rule described by Thomas J in *Stubberfield*. The Court does not have a function to provide legal advice to statutory decision-makers as to how they should go about their tasks. What would be helpful to all concerned is a recognition within Government that statutory decision-makers should be provided with legal advice and support when undertaking their decision-making.

[31] In conclusion, I cannot see that there are any particular circumstances in this case which take the matter out of the general rule expressed by Thomas J in *Stubberfield*. The legislature has provided a specific path for appeals from decisions of the respondent. It is a path which seems particularly appropriate in this case.

[32] It remains to add that the Attorney-General intervened in this matter to submit that this case, and in particular ss 12, 13 and 48 of the JRA, provided no occasion to engage s 48 of the *Human Rights Act* 2019 (Qld). I accept that as correct; neither the applicant nor the respondent contended otherwise.

[33] I dismiss the application for review. I will hear the parties as to costs.

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4 [2004] QSC 167, [45].