IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2018 00863

NICOLA TARDIO — Applicant

v

HARNESS RACING VICTORIA — Respondent

JUDGE:	Cavanough J
WHERE HELD:	Melbourne
DATE OF HEARING:	16 November 2018
DATE OF JUDGMENT:	16 November 2018 (These revised reasons for judgment published on 21 November 2018)
CASE MAY BE CITED AS:	Tardio v Harness Racing Victoria
MEDIUM NEUTRAL CITATION:	[2018] VSC 722

ADMINISTRATIVE LAW – Appeal from Victorian Civil and Administrative Tribunal on questions of law – Tribunal made order dismissing proceeding for failure to comply with procedural steps – Where no reference in order or reasons to statutory basis for order – Where Tribunal registry later advises that order was based on s 78 of *Victorian Civil and Administrative Tribunal Act 1998* – Where no finding that applicant's conduct unnecessarily disadvantaged the respondent – Where no finding that the applicant did not have a reasonable excuse for failing to comply with procedural steps – Failure to take into account mandatory considerations – Error found – *Victorian Civil and Administrative Tribunal Act 1998* ss 78, 97, 98(1)(a), 148.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D O'Dea, solicitor	O'Dea Lawyers
For the Defendant	Mr A Anderson	–

HIS HONOUR:

1 This is an application for leave to appeal and, if leave be granted, an appeal, under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the *VCAT Act*'), against an order made by the Victorian Civil and Administrative Tribunal ('VCAT') on 23 July 2018.

2 The order was made in the Administrative Division of VCAT, in the Review and Regulation List.

3 The applicant in VCAT was Nicola Tardio (the present applicant) and the respondent was Harness Racing Victoria (the present respondent).

4 The matter before VCAT was an application for review of a decision of the Harness Racing Victoria Racing Appeals and Disciplinary Board ('the Board') under the *Racing Act 1958*.

5 On 21 February 2018 the Board had found Mr Tardio guilty of breaches of r 190(1) of the Australian Harness Racing Rules in relation to the administration of a drug (cobalt) to horses engaged in harness races. The Board had disqualified Mr Tardio for 18 months.

6 On 15 March 2018 Mr Tardio applied to VCAT, as of right, for a de novo review of the Board's decision.

7 On 19 March 2018 VCAT granted a stay of the Board's decision.

8 Between 16 April 2018 and 23 July 2018 there were various steps taken at VCAT. Those steps included procedural orders for the filing of witness statements and expert reports, for adjournments and for the payment of VCAT hearing fees. In particular, on 11 July 2018 VCAT made an order (which may have been intended to be in the nature of a self-executing order) requiring, in effect, that Mr Tardio, by 20 July 2018, file and serve an expert report in proper form (in accordance with PNVCAT2) from Professor Colin Chapman, whom Mr Tardio was proposing to call as an expert witness. The order of 11 July 2018 also required Mr Tardio to pay a hearing fee for a

further hearing day (although that further hearing day had not been fixed).

9 On 23 July 2018 VCAT made an order in chambers in the following terms:

> The stay granted on 19 March 2018 is revoked. The proceeding is otherwise dismissed.

This is the order now challenged.

10 The order was accompanied by a relatively brief (2 page) statement of reasons. It was composed mainly of a summary of the relevant prior procedural steps. In paragraph 7 of the statement of reasons, VCAT stated that Mr Tardio had failed to comply with the requirements relating to the report from Professor Chapman and to the further hearing fee.

11 However, as the evidence in this Court shows, Mr Tardio's solicitor had in fact served a copy of a compliant report of Professor Chapman on Harness Racing Victoria by 20 July 2018 and had attempted to email that report to VCAT on the morning of 20 July 2018. In the covering email, the solicitor also asserted that, to his understanding, a slip had been made by VCAT in the order of 11 July 2018 and that no further hearing fee was actually due. Unfortunately, however, the solicitor had not used VCAT's correct email address.

12 In VCAT's statement of reasons there was no recognition, or mention, of the service of a copy of Professor Chapman's report on the respondent or of the attempt to file the original or of the solicitor's purported explanation as to the hearing fee.

13 In the present proceeding, on 19 September 2018, Judicial Registrar Clayton refused an application by the applicant for a stay of VCAT's order. However, her Honour gave directions for an urgent final hearing, for the filing of and service of any further evidentiary material and for written submissions

14 On 14 November 2018 my Associate, on my behalf, drew the parties' attention to certain relevant authorities that had not been mentioned in the parties' written submissions. Later that day, in response, the respondent very fairly indicated that if

the applicant applied to amend his notice of appeal to reflect those authorities the respondent would not oppose the appeal.

15 Accordingly, on 15 November 2018, by email to the Court, Mr Tardio, by his solicitor, foreshadowed an application to amend his notice of appeal in accordance with a draft amended notice of appeal sent to the Court under cover of the email.

16 When this proceeding came on for hearing before me today, the respondent confirmed its prior indication that it did not oppose the application for leave to amend the notice of appeal; and confirmed that, if leave to amend were to be granted, it did not oppose the application for leave to appeal or the proposed appeal itself.

17 In those circumstances, and after hearing from the legal representatives of the parties, I was satisfied that leave to amend and leave to appeal should be granted, that the appeal should be allowed, and that the order of VCAT made on 23 July 2018 should be set aside. In short summary, I was so satisfied for the following reasons:

(a) Neither VCAT's order nor its reasons refers to any provision of the *VCAT Act* on which the order was based.

(b) Some days after the order was made, the VCAT registry advised the parties that the order was based on s 78 of the *VCAT* Act. However, counsel for the respondent informed me that his client had made no application against Mr Tardio under s 78. Arguably, the power of VCAT to take action under s 78 may only be exercised on the application of a party claiming to be suffering unnecessary disadvantage by the way in which another party is conducting the proceeding, and not on VCAT's own initiative.[1] That point need not be decided. But, if the order was based on s 78 of the *VCAT Act*, it was necessary for that to be stated expressly in the order or in the reasons.[2] As already mentioned, that did not occur.

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1 Compare s 78 with ss 75(4) and 76(3), and with, more generally, ss 60(2), 72(4), 96(2) and s 119(2); but compare also s 79(1).

2 *Martin v Fasham Johnson Pty Ltd* [2008] VSC 289 (Kyrou J), [34].

(c) Further, there was no express finding by VCAT under s 78(1) of the *VCAT Act* that VCAT believed that Mr Tardio had been conducting the VCAT proceeding in a way that unnecessarily disadvantaged the respondent.

(d) Nor was there any express finding under s 78(1)(a) of the *VCAT Act* that Mr Tardio had 'no reasonable excuse' for any failure on his part to comply with an order or direction of the Tribunal.

(e) Further again, I am satisfied that VCAT did not address itself to, or take into account, the full range of mandatorily relevant considerations bearing on whether Mr Tardio's application for review was appropriately to be brought to an end summarily and without a hearing on the merits.[3]

(f) In addition, due in part to the unfortunate administrative error on the part of Mr Tardio's solicitor on 20 July 2018, VCAT did not give Mr Tardio the opportunity which VCAT itself had actually intended to give him to proceed with his application for review. This involved a denial of procedural fairness and also 'error in fact' of a kind that involved non-compliance with the *VCAT Act* (especially ss 97 and 98(1)(a)) and which vitiated VCAT's decision in law.[4]

18 Both parts of VCAT's order of 23 July 2018 must be set aside. It appears that the revocation of the stay of the Board's order was done as a mere consequence of the (summary) dismissal of the proceeding. In any event, it is just and appropriate that the revocation of the stay be itself set aside by this Court's order.

19 I have heard the parties as to costs. Both sides claimed costs, at least to some extent. Mr Tardio had not clearly articulated in his original notice of appeal or in his written

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3 See *Bell Corp Victoria Pty Ltd v Stephenson* [2003] VSC 255 (Ashley J), [51]-[52] (as may be qualified by *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175) (see Thomson Reuters, *Victorian Administrative Law* (at Update 186) [VCAT.78.40] but compare *Rozenbilt v Vainer* (2018) 356 ALR 26, 30-31 [9]-[17], 40-43 [62]-[76], though noting that the *Civil Procedure Act 2010* does not apply (directly) to VCAT). See also the authorities to which the parties were referred on 14 November 2018, namely *Preferential Administration Service Centres Pty Ltd v Commissioner of Taxation* (2012) 295 ALR 52 (Federal Court of Australia, Full Court), 62-63 [43]-[44] and *Mainstream Construction (Aust) Pty Ltd v Carr Electrical Pty Ltd* [2014] VSC 317 (Cavanough J), esp [91]-[94].

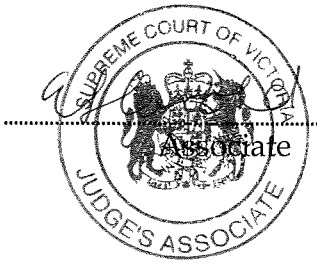
4 See and compare *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, esp at 605-606 [14]-[15] (Gleeson CJ).

submissions the matters by reference to which his appeal has now succeeded. Significant costs were thereby generated on both sides (including the costs of the stay application dealt with by Judicial Registrar Clayton on 19 September 2018). In all the circumstances, I have formed the view that the parties should bear their own costs of this proceeding (including the reserved costs of the unsuccessful stay application and any other reserved costs).

CERTIFICATE

I certify that this and the 4 preceding pages are a true copy of the reasons for Judgment of the Honourable Justice Cavanough of the Supreme Court of Victoria delivered on 16 November 2018, as revised on 21 November 2018.

DATED this twenty first day of November 2018.



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Associate