FEDERAL COURT OF AUSTRALIA

Kelly v Australian Postal Corporation [2015] FCA 1064

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| Citation: | Kelly v Australian Postal Corporation [2015] FCA 1064 |
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| Appeal from: | Kelly and Australian Postal Corporation [2014] AATA 779 |
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| Parties: | **GARRY KELLY v AUSTRALIAN POSTAL CORPORATION** |
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| File number(s): | NSD 1223 of 2014 |
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| Judge(s): | **GRIFFITHS J** |
|  |  |
| Date of judgment: | 2 October 2015 |
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| Catchwords: | **ADMINISTRATIVE LAW** – appeal from a decision of the Administrative Appeals Tribunal (‘AAT’) affirming the respondent’s determination that the applicant no longer suffered from a previously accepted compensable injury – whether the AAT complied with s 43(2) and (2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) – whether the AAT’s reasons failed to disclose proper consideration or analysis of medical evidence – whether the AAT’s reasoning process in preferring certain medical evidence was illogical and/or unreasonable |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) ss 43(2), 43(2B), 44 *Federal Court of Australia Act 1976* (Cth) s 37N(4)*Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 5A, 5B, 62  |
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| Cases cited: | *Applicant* *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 75 ALD 630*Australian Postal Corporation v Hughes* [2009] FCA 1057; (2009) 50 AAR 267 *Haritos v Commissioner of Taxation* [2015] FCAFC 92; (2015) 322 ALR 254 *Lawrence Smith v Comcare* [2014] FCA 811 *Military Rehabilitation and Compensation Commission v SRGGG* [2005] FCA 342; (2005) 215 ALR 459 *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 308 ALR 280 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323*Munswamy v Australian Postal Corporation* [2015] FCA 678 *Smith v Comcare* [2015] FCAFC 24*Tarrant v Australian Securities and Investments Commission* [2015] FCAFC 8; (2015) 317 ALR 328*WZAQU v Minister for Immigration and Citizenship* [2013] FCA 327  |
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| Date of hearing: | 15 September 2015 |
|  |  |
| Place: | Sydney |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords  |
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| Number of paragraphs: | 65 |
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| Counsel for the Applicant: | Mr M Gilbert |
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| Solicitor for the Applicant: | North Coast Compensation Lawyers |
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| Counsel for the Respondent: | Mr G Johnson SC with Mr N Swan |
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| Solicitor for the Respondent: | Sparke Helmore Lawyers |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1223 of 2014 |

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| ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL |

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| BETWEEN: | GARRY KELLYApplicant |
| AND: | AUSTRALIAN POSTAL CORPORATIONRespondent |

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| JUDGE: | GRIFFITHS J |
| DATE OF ORDER: | 2 October 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The amended notice of appeal be dismissed.
2. The notice of objection to competency dated 23 March 2015 be dismissed.
3. The applicant pay the respondent’s costs of the proceeding, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL |

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| BETWEEN: | GARRY KELLYApplicant |
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| JUDGE: | GRIFFITHS J |
| DATE: | 2 october 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

## Introduction

1. The primary issue in the appeal is whether the Administrative Appeals Tribunal (**AAT**) complied with relevant provisions of the *Administrative Appeals Tribunal Act 1975* (Cth) (**the** ***AAT Act***) relating to the giving of reasons. Allegations of illogicality and unreasonableness in a legal sense are also raised.
2. The appeal, which is brought under s 44 of the *AAT Act* and is confined to a decision on a question of law, relates to a decision of the AAT delivered on 24 October 2014. The AAT decided to affirm the respondent’s decision under s 62 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the *SRC Act***).

## Summary of background facts

1. The applicant lodged a claim for compensation for adjustment disorder with mixed anxiety and depressed mood, with a date of injury of 28 December 2011 (being the date of the applicant’s first relevant medical treatment). The respondent accepted this claim on 14 May 2012.
2. On 11 July 2013, the respondent determined that the applicant no longer suffered an “injury” or “disease” as defined in ss 5A and 5B of the *SRC Act* respectively. The respondent was not satisfied that, as at that date, it bore any liability to pay compensation under the *SRC Act* for the applicant’s previously accepted injury (**the reviewable decision**).
3. The reviewable decision was based on evidence before the decision-maker, which included reports by Dr Simone Shaw, a clinical psychologist, and Mr Edward Campbell, a clinical psychologist. At that time, Dr Shaw had prepared two reports, dated 14 March 2012 and 15 February 2013 respectively. Mr Campbell had also prepared two reports, dated 20 March 2013 and 6 July 2013 respectively. The applicant was informed by the decision-maker that she was:

…more persuaded by the opinion of Dr Shaw as such and I am not satisfied that Australia Post has present liability to pay you compensation as at today’s date, for your previously accepted condition of ‘adjustment disorder’ with mixed anxiety and depressed mood.

1. Although the reasons for the reviewable decision made no specific reference to other medical evidence which was before the decision-maker, it appears that there was such evidence. It included a report dated 11 April 2000 by Dr Derek Lovell, a consultant forensic psychiatrist; a report dated 20 January 2000 by Mr Charles Jenvey, a rehabilitation counsellor; and a brief report dated 22 April 2013 by the applicant’s treating general practitioner, Dr Hayward.
2. As is evident from the dates of some of those reports, the applicant’s complaints of disabling stress covered a lengthy period.

## The AAT proceeding

1. The applicant sought review of the reviewable decision by the AAT. He argued that the attitude of his immediate superior and the management team of Australia Post had continued to cause him anxiety and depression, which rendered him unable to work. He contended that he was unable to return to work until some prolonged process of discussion and acknowledgement of his concern was completed. He said that he did not trust the respondent’s senior management.
2. Both parties relied upon extensive medical evidence in the AAT, which included the earlier reports of Dr Shaw (as well as a later report by her dated 9 September 2013) and those of Mr Campbell. Neither Dr Shaw nor Mr Campbell gave oral evidence in the AAT.
3. In the AAT the applicant relied upon two medical reports dated 10 January 2014 and 19 August 2014 respectively by Dr Brian Parsonage, a consultant psychiatrist. Dr Parsonage concluded that, using criteria from the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (**DSM-IV**), the applicant was suffering from a chronic adjustment disorder with mixed anxiety and depressed mood. Dr Parsonage opined that this was:

…because he experiences symptoms of anxiety and depression in relation to problems associated with his work and his symptoms are significant in that they require on-going treatment and are causing significant impairment in his occupational functioning.

Dr Parsonage added that he believed that:

Mr Kelly’s employment with Australia Post is a substantial contributing factor to his condition in so far as Mr Kelly has felt unsupported by more senior management to do his management role and he believes that such past issues have not been satisfactorily addressed and he has no faith that further problems will be properly addressed, should he return to his management role.

1. Dr Parsonage’s second report responded to the opinions of Dr Selwyn Smith, a consultant psychiatrist, which were set out in a report dated 24 April 2014 (see further below at [14]). Dr Parsonage noted that he and Dr Smith disagreed about whether the applicant currently satisfied diagnostic criteria for an adjustment disorder with mixed anxiety and depressed mood. Dr Parsonage emphasised that, unlike Dr Smith, he considered that Mr Kelly had clinically significant symptoms for which he was having ongoing treatment. Dr Parsonage added that Dr Smith appeared to believe that the DSM-IV criteria for an adjustment disorder required both marked distress **and** significant impairment in functioning, whereas it was sufficient that only one of those requirements be met. Dr Parsonage was cross-examined in the AAT.
2. It will be necessary to further discuss Dr Parsonage’s evidence below.
3. It might be noted that there was no dispute in the AAT that the applicant had suffered an injury prior to 11 July 2013 and that the applicant’s work was a substantial contributing element to that disorder. The sole issue in the AAT was whether his injury was ongoing as at 11 July 2013.
4. In the AAT, the respondent relied on a lengthy psychiatric report dated 24 April 2014 by Dr  Smith, who opined that, as at 11 July 2003, the applicant no longer suffered from any incapacity resulting from a psychiatric condition. In Dr Smith’s view, the applicant’s incapacity was not due to any formal psychiatric disorder, but was rather related to “attitudinal factors closely underpinned by personality attributes”.
5. Dr Smith said that the applicant did not display “clinically significant symptoms that would preclude him from engaging in appropriate work”. Nor did he think that the applicant was functionally impaired. He said that he believed that the applicant’s rigidity, suspicion and obsessive thinking produced conflict at work and added to his difficulties in coping with change. Dr Smith said that he considered that the applicant’s insistence on a review of past grievances and a precisely planned return to work were not “stressors” that would satisfy the criteria for adjustment disorder. Dr Smith was cross-examined.
6. It will be necessary to further discuss Dr Smith’s evidence below.

## AAT’s reasons summarised

1. The AAT summarised the applicant’s own evidence and the history of his employment with Australia Post, including the difficulties he experienced with a particular manager. It noted that the applicant continued to allege discrimination and harassment by his senior managers even after the particular manager moved away. He gave evidence that he needed “a carefully planned and implemented return to work program”, which he said was supported by both Dr Shaw and Mr Campbell.
2. The AAT summarised some of the medical evidence, including that of Dr Parsonage, Dr Smith and Dr Shaw. However, the primary focus of the AAT’s summary of the medical evidence was on the competing views expressed by Dr Parsonage and Dr Smith.
3. Having regard to the matters which were pressed on appeal by the applicant, it is relevant to pay close attention to those parts of the AAT’s reasons which addressed the medical evidence and the reasons why the AAT ultimately preferred the evidence of Dr Smith.
4. In [11] of its reasons for decision the AAT summarised Dr Parsonage’s written and oral evidence:

11 The applicant was seen by psychiatrists for the purpose of obtaining medico-legal reports. Dr Parsonage believed that the applicant was experiencing “exacerbations and recurrences of his Adjustment Disorder” to which his employment with Australia Post was a substantial contributing factor. In oral evidence, he identified the “shark” in the swimming pool as senior management. He also noted that the applicant did not have a personality disorder, his condition was like a “phobic disorder” where the problems and distress were confined to the work scene. He thought that the applicant could return to work “in a role without managerial responsibilities” but a problem was that he was not sure that the applicant would accept such a lower level position. He agreed that a lack of trust or faith in management did not of itself produce a psychiatric condition. A lack of confidence might affect managerial ability and be so highly distressing as to be disabling. He agreed that personality traits short of a personality disorder could determine behaviour but might also pre-dispose a person to contracting a psychiatric disorder. He did not find the applicant to be obsessional or demanding of standards when he saw him on 10 January 2014.

1. The AAT then summarised Dr Smith’s written and oral evidence in [12] and [13]:

12 Dr Selwyn Smith, psychiatrist, assessed the applicant on behalf of Australia Post and gave the opinion that he did not suffer from incapacity from any psychiatric condition. In his opinion, “Mr Kelly’s current incapacity is not due to a formal psychiatric disorder but is rather related to attitudinal factors closely underpinned by personality attributes”. By this he meant that the applicant had an unrealistic perception of what was needed to get him back into work. He agreed with Dr Shaw that the applicant showed “dependent personality characteristics and other characteristics associated with individuals who demonstrate a paranoid personality disorder” and also agreed with Dr Lovell, psychiatrist, who had found him to be “an obsessional man who likes to be in control”.

13 Dr Smith’s opinion was that the applicant did not display “clinically significant symptoms that would preclude him from engaging in appropriate work”. He did not think the applicant was functionally impaired and his distress was within normal limits. He believed that the applicant’s rigidity, suspicion and obsessive thinking made conflict at work occur and also increased difficulty in coping with change. His view was that the applicant’s insistence on a review of past grievances and a precisely planned return to work were not stressors that would satisfy the criteria for Adjustment Disorder.

1. In [14] of its reasons for decision, the AAT made reference to records and reports of the applicant’s local treating doctor (Dr Hayward) and “the psychologists who had seen the applicant” (which appears to be a reference to Dr Shaw and Mr Campbell) and noted that the authors did not give oral evidence. The AAT further noted that the applicant had been prescribed anti-depressant medication on and off from 1994 onwards and with continuously increasing doses from 1998 onwards.
2. The essence of the AAT’s reasons for affirming the respondent’s decision is reflected in the following two paragraphs which appear under the heading “Discussion”:

15 The respondent’s case is that from 11 July 2013 the applicant may have been annoyed and upset by his continued inability to force his superior to discuss and analyse events of the past but such feelings are not symptoms or substance of a psychiatric disorder. In this case they arise from the personality structure and inflexible attitudes of the applicant rather than from outside stressors. When the particular superior moved away the applicant’s grievances were redirected to all of the state management team. He has retained those fears and grievances. He has insisted on formal retraining, elaborate graduated preparation and an uncritical atmosphere before he will return to work. He is distressed when others decline to agree with his program but this does not constitute continuation of an Adjustment Disorder. The applicant’s case is that he reacts with extreme anxiety to direction and correction by his superiors and the Adjustment Disorder continues.

16 I prefer the opinions of Drs Smith and Shaw that the effects of the Adjustment Disorder had dissipated by 11 July 2013 and were supplanted by the effects of the applicant’s personality traits and fixed attitudes. Dr Smith regarded his presentation as showing a “normative stress reaction”, that was not a reaction “outside the boundaries of normal mental functioning and behaviour” (*Comcare v Mooi* (1996) 69 FCR 439 at 444). Dr Parsonage and Mr Campbell are of the contrary view but I prefer the other explanation given the long history of inability to adapt to change, the extension of his anxieties to include all of the state management and the difficulty in putting into practice any program of return to work.

1. The AAT concluded that the applicant was not entitled to compensation for adjustment disorder as at 11 July 2013. Accordingly, the reviewable decision was affirmed.

## The appeal

1. The applicant was given leave at the outset of the hearing to file and rely on a further amended notice of appeal (on condition that he bear the costs thrown away by the amendments). The following four purported questions of law were raised in that document:
2. Whether the Tribunal complied with s 43(2) of the *AAT Act* and gave adequate reasons for its decision.
3. Whether the AAT complied with s 43(2B) of the *AAT Act* and set out its findings on material questions of fact and referred to the evidence or other materials on which its findings were based.
4. Whether the AAT erred in finding that the applicant was not, as at 11 July 2013, suffering from an injury within the meaning of s 5B of the *SRC Act*.
5. Whether the AAT misdirected itself as to the evidence that could be sufficient in determining whether the applicant was, as at 11 July 2013, suffering from an injury and thereby failed to undertake its review function according to law.
6. At the hearing, Mr Gilbert (who appeared for the applicant) said that he did not press question of law 3. Accordingly nothing more needs to be said about it.
7. The following four grounds of appeal were raised:
8. The AAT failed to give sufficient reasons for its decision in that the reasons it gave do not disclose that there was any proper consideration or analysis of the medical evidence offered by each party in the proceeding.
9. The decision of the AAT was inconsistent with both the evidence in the proceeding and the AAT’s comments made in the course of the hearing.
10. In preferring the expert evidence of Dr Smith to that of Dr Parsonage the AAT erred in that its reasoning process was illogical and failed properly to explain the reasons for that preference.
11. The AAT’s decision to accept Dr Smith’s expert evidence over that of Dr Parsonage was such that no reasonable decision-maker could have made that decision.
12. Mr Gilbert confirmed at the hearing that appeal ground 2 was not pressed. Accordingly nothing more needs to be said about it.
13. The respondent filed a notice of objection to competency. Mr Johnson SC (who appeared with Mr Swan for the respondent) conceded that questions of law 1 and 2 were properly formulated for the purposes of s 44 of the *AAT Act*. However, he challenged the form of question of law 4 which, he submitted, was difficult to understand and, in any event, was based on a false premise that the AAT had misdirected itself. I agree that question of law 4 is not well drafted, but I consider that it is capable of being reworded so as to raise a question as to whether the AAT’s reasoning process in preferring Dr Smith’s evidence to that of Dr Parsonage was illogical and/or unreasonable in the legal sense identified in cases such as *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 (***Li***)*.*  Grounds 3 and 4 are relevant to that question of law.

## The applicant’s submissions summarised

1. The applicant emphasised the brevity of the AAT’s reasons, including that the explanation why Dr Smith’s evidence was preferred to that of Dr Parsonage was dealt with in one sentence at [16] of those reasons (see [23] above).
2. The applicant argued that, given the complex factual evidence and detailed medical evidence, a proper analysis required more detail. The applicant also complained that the AAT’s consideration of his own evidence was inadequate. It made no reference to his claim that he had continued throughout 2013 and beyond to suffer from symptoms which the AAT itself described in the course of the hearing as “really extreme”. Dr Parsonage had also described them as “clinically significant”.
3. The applicant said that it was common ground in the AAT that a diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood is based on the DSM-IV.
4. The applicant summarised Dr Parsonage’s written and oral evidence. In his evidence in chief and also in cross-examination Dr Parsonage ruled out a diagnosis of personality disorder. He described the applicant’s condition as akin to a “phobic disorder”.
5. The applicant emphasised that, during the course of Dr Parsonage’s oral evidence, the AAT made the following observations:

I’m attracted by the proposition of Dr Parsonage that attitudinal factors might well predispose to an adjustment disorder.

…

Dr Parsonage referred to it really as sort of a phobic response which is not a bad description. It involved insomnia, fatigue, memory loss. Really extreme.

1. The applicant was critical of Dr Smith’s evidence. He claimed that Dr Smith’s report misstated the diagnostic criteria set out in DSM-IV and that Dr Smith had to be given an opportunity to correct his error in cross-examination. The applicant criticised Dr Smith’s evidence on the basis that no reference was made in his report to the clinical records of Dr Hayward, particularly in respect of the period between February and September 2013. The applicant contended that, while Dr Smith accepted that he had been given a copy of Dr Hayward’s clinical records, he had no recollection of the documents and did not study them closely. The applicant submitted that Dr Smith’s performance in cross-examination was “less than satisfactory”, yet the AAT failed to make any finding that his evidence was deficient in any respect.
2. The applicant contended that Dr Smith’s medical opinion was inconsistent with the evidence because it was based on the conclusion that the applicant was not suffering from any clinically significant symptoms and had no significant impairment of occupational functioning, but Dr Smith did not explain how the applicant’s diagnosable psychological condition had “morphed” into the effects of his “personality traits and fixed attitudes”.
3. The applicant further contended that the AAT failed to discuss the diagnostic criteria in DSM-IV that would justify Dr Smith’s evidence being preferred, which led to the AAT’s conclusion that the applicant did not continue to suffer from adjustment disorder as at 11 July 2013. Indeed, the applicant submitted that the AAT’s own reasons justified a diagnosis of adjustment disorder at the relevant time, because the AAT found that the applicant had “[m]arked distress that is out of proportion to the severity or intensity of the stressor”. The applicant contended that Dr Smith had said that it could be argued that the applicant’s hyper-reaction to the manner in which he was treated by the respondent fitted “squarely into the indicator for adjustment disorder in DSM-IV”. The applicant complained that the AAT never explained why it arrived at a conclusion which was different from the observations it made during the course of the hearing (see [34] above).

## Consideration

1. In view of their central importance in the appeal, it is convenient to set out both s 43(2) and (2B) of the *AAT Act*.

**43 Tribunal’s decision on review**

…

(2) Subject to this section and to sections 35 and 36D, the Tribunal shall give reasons either orally or in writing for its decision.

…

(2B) Where the Tribunal gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

…

1. The former provision obliges the AAT to give reasons either orally or in writing for its decision, unless either ss 35 or 36D apply. Section 43(2B) then clarifies that, where the AAT gives its reasons for decision in writing, those reasons must include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based. Significantly, that obligation does not oblige the AAT to include findings on non-material questions of fact nor is it obliged to refer to the evidence or other material in respect of any of its findings other than those on material questions of fact.
2. In determining whether the AAT has complied with these obligations, it is relevant to take into account case law which has clarified their nature and scope. First, it is insufficient merely to point to other reasons, findings or references that may have been made by some other decision-maker. As Robertson J observed in *Lawrence Smith v Comcare* [2014] FCA 811 (***Smith***) at [90]:

… Of course it is the Tribunal’s actual reasons which need to be given rather than the reasons which a party thinks the reasons should have been: *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [1], [34], [68] and [217]; see also the reference to the actual path of reasoning in *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; (2013) 303 ALR 64 at [55]. That the reasons may show an error is not a criticism of the reasons themselves.

1. Although Robertson J’s decision was appealed (see *Smith v Comcare* [2015] FCAFC 24), these particular observations were not challenged and I respectfully agree with them.
2. Secondly, in *Applicant* *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 75 ALD 630 (***WAEE***), French, Sackville and Hely JJ stated at [47]:

… it may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality, or because there is a factual premise upon which a contention rests which has been rejected.

The observations of Robertson J in *Smith* and also those of the Full Court in *WAEE* were cited approvingly and applied by Jagot J in *Munswamy v Australian Postal Corporation* [2015] FCA 678 at [55]. I consider that they are equally applicable here.

1. Thirdly, in determining whether there has been compliance with s 43(2) and (2B) of the *AAT Act*, it is well to bear in mind the primary functions underlying the requirement of an administrative tribunal such as the AAT to give reasons for its decisions. Two of the central purposes for which reasons are required to be given are first, to assist the parties to understand the result; and secondly, to enable an aggrieved party to consider whether to take advantage of any right of appeal or review (see *Military Rehabilitation and Compensation Commission v SRGGG* [2005] FCA 342; (2005) 215 ALR 459 at [82] per Madgwick J). See also the relevant observations of Flick J in *Australian Postal Corporation v Hughes* [2009] FCA 1057; (2009) 50 AAR 267 at [12] regarding the importance of a decision-maker’s reasons in having an appeals process operate effectively.
2. Fourthly, helpful guidance as to the nature and scope of the AAT’s obligations to give reasons is to be obtained from the High Court’s decision in *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323, where McHugh, Gummow and Hayne JJ made the following pertinent comments at [67] and [68] regarding the substantially similar obligation of the Refugee Review Tribunal (see s 430 of the *Migration Act 1958* (Cth)) to set out “the reasons for the decision” (footnotes omitted):

Section 430(1) of the Act obliged the Tribunal to prepare a written statement that does four things:

“(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based.”

As was rightly observed in the joint judgment in *Singh*, this section calls for a recording of matters that are matters of fact. In particular, s 430(1)(c) requires the Tribunal to set out the findings of fact which it made. But does it require more? Does it oblige the Tribunal to make findings on any and every matter of fact objectively material to the decision which it was required to make?

Section 430 does not expressly impose such an obligation. In its terms, it requires no more than that the Tribunal *set out* the findings which it *did* make. Neither expressly nor impliedly does this section require the Tribunal to *make*, and then set out, some findings additional to those which it actually made. In *Singh*, significance was attached to the use of the word “material” in s 430(1)(c). It was said that “material” in the expression “material questions of fact” must mean “objectively material”. Even if that were right, it would by no means follow that the Tribunal was bound to set out findings that it did not make. But it is not right to read “material” as providing an objective or external standard of materiality. A requirement to set out findings and reasons focuses upon the subjective thought processes of the decision-maker. All that s 430(1)(c) obliges the Tribunal to do is set out its findings on those questions of fact which *it* considered to be material to the decision which it made and to the reasons *it* had for reaching that decision.

1. Applying those principles and that guidance here, I reject the applicant’s contention that the AAT failed to discharge its statutory obligations.
2. The AAT correctly recognised that the central issue for determination was whether the expert medical evidence of Dr Parsonage should be preferred to that of Dr Smith. In assessing how the AAT dealt with that issue, its reasons for decision need to be read as a whole. As noted above, the AAT summarised Dr Parsonage’s written and oral evidence which supported his opinion that the applicant continued to suffer from adjustment disorder as at 11 July 2013. The AAT then summarised the competing view expressed by Dr Smith. It may be accepted that those summaries were brief but the applicant did not complain that the summaries in [11] to [13] were inaccurate in any material particular. I am satisfied that the summaries, albeit brief, accurately reflect the competing medical opinions.
3. Ground 1 alleges that the AAT failed to give sufficient reasons because its reasons for decision did not disclose that there was any proper consideration or analysis of the medical evidence of the parties. I disagree. The applicant criticised the AAT’s statement in [16] that the opinions of both Dr Smith and Dr Shaw were that “the effects of the Adjustment Disorder had dissipated by 11 July 2013 and were supplanted by the effects of the applicant’s personality traits and fixed attitudes”, on the basis that while that statement reflected Dr Smith’s opinion, Dr Shaw did not state that the applicant’s personality traits and fixed attitudes supplanted his earlier adjustment disorder. However, any such error on the part of the AAT is an error of fact, not of law. The critical point was that Dr Shaw said in both her reports dated 15 February 2013 and 9 September 2013 that the applicant’s reported symptoms had been resolved and, accordingly, he did not meet the diagnostic criteria for a psychological disorder according to DSM-IV as at the date of the assessment the subject of those reports. The applicant did not contend that his personality traits and fixed attitudes themselves constituted an “injury” or “disease” for the purposes of the *SRC Act*.
4. The AAT explained in the final sentence of [16] of its reasons why it preferred the opinions of Drs Smith and Shaw. It made express reference to three factors, namely the long history of the applicant’s inability to adapt to change, the extension of his anxieties beyond one particular superior manager to include a broader range of managers (including the Area Manager and State Manager, as referred to in [9] of the reasons for decision) and the difficulty of implementing any program of return to work. The applicant did not suggest that these matters were without a proper evidentiary foundation. It was reasonably open to the AAT to make those findings on the basis of the material before it and they provide a sufficient explanation as to why the AAT preferred Dr Smith’s opinion.
5. The applicant sought to make good his complaint that the AAT’s reasons for decision were legally inadequate because the AAT did not in its reasons deal with various matters which, he said, undermined Dr Smith’s evidence. Those matters included the cross-examination of Dr Smith concerning the use he made of Dr Hayward’s notes of various consultations he had with the applicant as his treating general practitioner, particularly during the period February to September 2013. There was no legal obligation on the AAT to address that evidence in its reasons for decision. It is evident from the relevant pages of the AAT transcript that Dr Smith did not dispute what the applicant told Dr Hayward but Dr Smith considered that this information did not justify a diagnosis of adjustment disorder. The AAT was plainly aware of Dr Hayward’s notes, as passing reference was made to them in [14] of the reasons for decision.
6. The applicant also contended that the AAT should have taken into account Dr Smith’s erroneous belief that the DSM-IV contained two cumulative requirements, which he only corrected in cross-examination. In fact the correction occurred during Dr Smith’s oral evidence in chief. In any event, Dr Smith having corrected his earlier evidence, there was no legal obligation on the AAT to say anything about it in its reasons for decision. It was a matter for the AAT to assess the weight it gave to Dr Smith’s evidence.
7. Nor was there any legal obligation upon the AAT to explain in its reasons for decision why it did not adhere to observations which were made by it during the course of the hearing, such as those set out in [34] above. It is not unusual in the course of such a hearing for the Tribunal member to raise preliminary comments and observations as part of the ongoing deliberative process. That does not mean, however, that such remarks are to be characterised as reasons or, indeed, findings of material fact, so as to attract the obligations in s 43(2) and (2B) of the *AAT Act*. Observations or comments of the sort set out in [34] above are frequently modified or even abandoned when the task of producing reasons for the final decision arises, as Flick J observed in *WZAQU v Minister for Immigration and Citizenship* [2013] FCA 327 (***WZAQU***) at [30].
8. As noted above, in support of its appeal, the applicant placed particular emphasis on the apparent inconsistency between certain remarks made by the AAT in the course of the hearing and its decision to prefer Dr Smith’s evidence to Dr Parsonage’s. Considerable caution must be exercised in using a transcript for the purpose advanced by the applicant here. In *WZAQU* at [30] Flick J made the following obiter observations regarding the limited significance of the transcript in construing the reasons for an administrative decision:

Whether or not the transcript of the interview may be taken into account when construing the reasons for the recommendation of the Independent Protection Assessor may be left unresolved. A transcript of proceedings may unquestionably be relied upon to prove that claims were in fact advanced and to prove the nature and ambit of those claims. Reference to the transcript of November 2011 could thus be made to give content to the claims advanced by the Appellant, although the nature of those claims is in any event largely made apparent from paragraphs [40] to [42] of the reasons for decision. But considerable reservation is expressed as to whether reference to the transcript may also be made for the purpose of construing what was intended to be conveyed by paragraph [98]. It has been concluded by the High Court that the transcript of a proceeding forms no part of the “*record*” when seeking certiorari to correct error of law on the face of the record: *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 180-181 per Brennan, Deane, Toohey, Gaudron and McHugh JJ. Whether the same considerations which led to that conclusion are apposite to considering whether a transcript can be relied upon to construe reasons for an administrative decision can also be left unresolved. But that which is common to both is a concern as to whether recourse to a transcript would only encourage parties seeking to impugn or support (or supplement) a statement of reasons by scouring the transcript with a view to minutely discerning differences between the transcript and reasons. To do so may only encourage impermissible reliance upon thoughts or queries raised during the course of a hearing which are only later abandoned at that stage when reasons are being prepared. Even if recourse is made to the transcript in the present proceeding, that transcript provides no assistance - not surprisingly - in construing what was intended to be conveyed by paragraph [98].

1. I respectfully agree with those observations and consider that they have particular application here. In the circumstances here, the reasons given by the AAT for its decision, including its preference for Dr Smith’s evidence over that of Dr Parsonage, must be the central focus in the appeal. As Flick J commented, parties should not be encouraged to pour over the transcript with a view to identifying differences between the transcript and reasons. The reality often is that a member of a tribunal (and, for that matter, a court) may make observations or raise issues for comment during the course of the hearing not in any concluded fashion but rather to test a tentative proposition which may later not crystallise in the decision-maker’s ultimate decision, including in the reasons for that decision.
2. Ground 1 is a thinly veiled attempt to have the Court conduct an impermissible review of the merits of the AAT’s decision to prefer Dr Smith’s evidence to that of Dr Parsonage. Having regard to the central issue in the AAT, namely whether or not the applicant was suffering from an injury or disease as at 11 July 2013, I consider that the AAT’s summary and discussion of the competing medical opinions satisfied the statutory obligations in s 43(2) and (2B). I accept the respondent’s submission that the reference in ground 1 to “**proper** consideration or analysis” is telling because it essentially invites a consideration or analysis with which the applicant would agree.
3. As the Full Court observed in *Tarrant v Australian Securities and Investments Commission* [2015] FCAFC 8; (2015) 317 ALR 328 at [100(g)] (duplicate citations omitted):

…the weighing and evaluation of various pieces of evidence is a matter for the AAT and is generally not susceptible to review in either judicial review proceedings for jurisdictional error (see *Abebe v Commonwealth of Australia* (1999) 197 CLR 510 at [197] per Gummow and Hayne JJ and *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164; [2010] HCA 48 at [33] (*SZJSS*) per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ), or in an ‘appeal’ under s 44 of the AAT Act (see *Brown v Repatriation Commission* [2006] FCA 914 at [7] per Branson J and *Fisse v Secretary, Department of the Treasury* (2008) 172 FCR 513; [2008] FCAFC 188 at [152] per Flick J). As the Full Court (Fox, Deane and Morling JJ) observed in *Collins v Minister for Immigration and Ethnic Affairs* (1981) 58 FLR 407 at 410-411 in the context of an appeal under s 44 of the AAT Act and in response to a claim that a Tribunal decision was against the evidence or the weight of the evidence (emphasis added):

A number of authorities was cited by counsel for the appellant in support of the propositions that the making of a decision against the evidence or the weight of the evidence and the making of an unreasonable decision are errors of law. We find it unnecessary to examine these authorities for the reason that, in our opinion, there is no factual basis to found those propositions. We would, however, comment that the concepts of a decision being against the evidence and of being against the weight of the evidence belong to appeals from courts of law and have particular application to jury verdicts. Even in that context, they did not involve questions of law. *They certainly have no place when the appeal, or review, is of proceedings of an administrative tribunal which is not bound by the rules of evidence, subject to their obligation to observe the requirements of natural justice, can inform itself as it chooses* (see, s 33(1)(c) of the Administrative Appeals Tribunal Act 1975.) An appellant who attacks a conclusion of the Tribunal because of deficiency of proof said to amount to error of law must show, if he is to succeed, that there was no material before the Tribunal upon which the conclusion could properly be based…

1. Nor do I accept that the AAT’s reasoning is illogical (ground 3) or its decision to prefer Dr Smith’s evidence to that of Dr Parsonage to be unreasonable in the legal sense of that term (ground 4). As Crennan and Bell JJ held in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 (***SZMDS***)at [131]:

… the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

1. Although these observations were directed to the head of the judicial review relating to illogicality, they are also relevant where an error of law based on illogical reasoning is raised in a s 44 *AAT Act* appeal, as here. The AAT was faced with competing expert medical opinions on the central issue. Both Dr Parsonage and Dr Smith were cross-examined and the AAT was afforded an opportunity to assess the cogency of both their opinions. The AAT also had before it written evidence from, amongst others, Dr Shaw and Mr Campbell. Which of the competing evidence was to be preferred was a matter for the AAT in the exercise of its fact-finding function. There is no illogicality in the AAT preferring the evidence of Dr Smith and Dr Shaw, which was to the effect that the applicant’s previous adjustment disorder had ceased by 11 July 2013.
2. Similar considerations apply in rejecting the applicant’s complaint of unreasonableness. *Li* is the leading current High Court authority on that ground of review, at least in a judicial review context. For the applicant to establish that the AAT’s decision to prefer the medical opinion of Dr Smith over that of Dr Parsonage is unreasonable in the legal sense of that term, it is insufficient to demonstrate that another decision-maker may have come to a different conclusion. Rather, in the circumstances here, the applicant needed to demonstrate that the AAT’s preference was arbitrary, capricious or devoid of common sense (*Li* at [28] per French CJ) or that it lacked “an evident and intelligible justification” (*Li* at [76] per Hayne, Kiefel and Bell JJ). The AAT’s preference for the views of Dr Smith (and Dr Shaw) over that of Dr Parsonage may be one upon which reasonable minds could differ but it is not irrational or unreasonable to prefer one opinion over another (see *SZMDS* at [78] per Heydon J and at [121]-[131] per Crennan and Bell JJ). As French CJ observed in *Li* at [30] (citations omitted):

The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker. Gleeson CJ and McHugh J made the point in *Eshetu* that the characterisation of somebody's reasoning as illogical or unreasonable, as an emphatic way of expressing disagreement with it, “may have no particular legal consequence.”

1. Different considerations arise where an administrative decision-maker has given reasons for a decision and there is a claim of unreasonableness. As the Full Court observed in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 308 ALR 280 (***Singh***) at [47]:

This question highlights the distinctions made between reasonableness review which concentrates on the outcome of the exercise of power, and reasonableness review which concentrates on an examination of the reasoning process by which the decision-maker arrived at the exercise of power. Although it is not necessary for the purposes of this appeal to resolve the question whether those should be seen as two different kinds of review and what might flow from that, we are inclined to the opinion that, where there are reasons for the exercise of a power, it is those reasons to which a supervising court should look in order to understand why the power was exercised as it was. The “intelligible justification” must lie within the reasons the decision-maker gave for the exercise of the power – at least, when a discretionary power is involved. That is because it is the decision-maker in whom parliament has reposed the choice, and it is the explanation given by the decision-maker for why the choice was made as it was which should inform review by a supervising court. It is not, as in *House v R* (1936) 55 CLR 499, on an appeal from an exercise of a judicial discretion, for the court to re-exercise the discretion. If a supervising court goes outside the reasons given by a decision-maker for another justification for the exercise of power, that court might then be seen to be placing itself in the position of the repository of the power and therefore acting impermissibly. Where there are reasons, either the reasons given by the decision-maker demonstrate a justification or they do not. It would, we think, be a rare case where the reasons demonstrate a justification but the ultimate exercise of the power would be seen to be legally unreasonable.

1. Decisions such as *Li, SZMDS* and *Singh* all emphasise the need for judicial self-restraint in applying heads of judicial review concerning illogicality and unreasonableness. Such restraint is related to the legitimacy of judicial review and the need to ensure that it is confined to its proper province. Similar constraints arise in the context of a s 44 *AAT Act* appeal where an applicant raises errors of law based on illogicality or unreasonableness. The following observations of the Full Court in *Haritos v Commissioner of Taxation* [2015] FCAFC 92; (2015) 322 ALR 254 at [194] are apposite:

We restate that the subject matter of an appeal under s 44 is a question or questions of law. We also restate that the appeal is not by way of rehearing; it is the exercise of original jurisdiction. Neither is it sufficient that the appeal merely involves a question of law. The correct approach, in our opinion, is to ask directly the question whether the appeal is on a question of law, without being diverted by whether or not the appeal raises a mixed question of fact and law. As the High Court said in *Owens*, the purpose of limiting an appeal to a question of law is to ensure that the merits of the case are dealt with not by the Federal Court but by the tribunal. This distribution of function is critical to the correct operation of the administrative review process. See also *O'Brien* at CLR 430; ALR 125 where Gibbs CJ, Wilson and Dawson JJ said that on an appeal under s 44 the appellate body should not usurp the fact-finding function of the tribunal. But such fact-finding is an entirely different exercise from the evaluation of the fact-finding process of the tribunal (as fact-finder) to decide upon its legality.

1. The AAT’s preference for Dr Smith’s opinion over that of Dr Parsonage is neither illogical nor unreasonable. The AAT provided an adequate explanation for that preference. It is also to be noted that Dr Smith’s opinion was supported not only by Dr Shaw but also by Mr Campbell (although the AAT proceeded on the basis that Dr Parsonage and Mr Campbell both held an opposing view, that is incorrect – however, that error of fact is immaterial). On the material before it, it was reasonably open to the AAT to make the findings which it did concerning the competing medical opinions.

## Conclusion

1. For these reasons, the appeal must be dismissed. The parties were agreed that, subject to one matter which I shall mention shortly, there is no reason why the costs should not follow the event.
2. The relevant qualification relates to the belated filing of Part C of the Appeal Book. On 16 June 2015, the applicant was ordered to file and serve Part C by 7 August 2015. It failed to do so. The respondent sent several emails on 14 August 2015, 24 August 2015 and 1 September 2015 to the applicant’s solicitor inquiring about the delay. It received no reply to any of its inquiries as to why Part C had not been filed and served. On 2 September 2015, the respondent’s solicitor emailed my associate and informed her that the applicant was in breach of the Court’s order and that it had received no response. On Monday, 14 September 2015, i.e. the day before the hearing was scheduled to commence, my associate emailed the applicant’s solicitor inquiring about the delay. She received a telephone call in response from the legal assistant to the applicant’s solicitor who advised that Part C had been posted to the respondent and the Court the previous week. The Court’s Registry had no record of receiving Part C until it arrived at approximately 9:20 am on Tuesday, 15 September 2015, i.e. less than one hour before the hearing was scheduled to commence.
3. At the commencement of the hearing, Mr Gilbert apologised for the late delivery of the documentation. I explained to him that its late receipt had severely handicapped the efficient conduct of the proceeding in circumstances where the respondent had only received a copy of Part C on 11 September 2015 and the Court itself was given no meaningful opportunity to review the material (which included all of the relevant medical evidence and transcripts), before the hearing commenced. I indicated that I was minded to consider making a costs order against the applicant’s solicitor under s 37N(4) of the *Federal Court of Australia Act 1976* (Cth).
4. The applicant’s solicitor subsequently filed a brief affidavit which adequately explained that the delay was caused by some unexpected personal health issues, the details of which need not be set out here. Accordingly, no special costs order is warranted.

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| I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths. |

Associate:

Dated: 2 October 2015