

Administrative Law and Practice Points

FOR MORE INFORMATION

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This newsletter will discuss new developments in administrative law, major trends or changes in administrative tribunals, recent administrative law cases decided by courts and tribunals and practical advice for staff/members of administrative tribunals and lawyers practising in this area. Please consult with a lawyer for specific legal advice.

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TRIBUNALS HAVE A DUTY TO PROVIDE REASONS

Traditionally, the principles of fairness did not impose a general duty on an administrative tribunal to provide reasons for its decision. However, in the last decade or two, the Courts have shown an increasing willingness to require tribunals to provide reasons for their decisions on the basis of the principles of fairness. In 1999, the Supreme Court of Canada gave a landmark decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 when it recognized that tribunals have a duty to provide written reasons in certain circumstances. The Court stated:

In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required...

Since *Baker*, the Courts have continued to find a duty to provide reasons. In particular, in four very recent cases, the

Divisional Court imposed a duty to provide reasons on four very different tribunals.

In *Stanoulis v. Lykakim Holdings Ltd.*, [2008] O.J. No. 1845 (Div. Ct.), tenants brought an appeal from decisions of the Landlord and Tenant Board finding that there was a landlord and tenant relationship between the parties and granting the landlord's application for a termination of the tenancy. The Court granted the appeal on the basis that the Board failed to provide adequate reasons and remitted the matter back for a new hearing before a differently constituted Board. The Court said the following:

Indeed, we find the reasons of the Member in this case to be inadequate. The requirement for meaningful reasons is part of the tribunal's duty to act fairly and in accordance with the principles of fundamental justice...

...

From the reasons of the Member in this case, it is impossible to determine what legal test was used by the Member in finding that there was a landlord and tenant relationship, which is an issue going to jurisdiction. Further, there is no factual analysis, no findings of credibility and no indication of what evidence was taken into account on any issue before the Member. Her reasons are merely conclusory. Meaningful appellate review is impossible.

In *Shooters Sports Bar Inc. v. Ontario (Alcohol and Gaming Commission)*, [2008] O.J. No. 2112 (Div. Ct.), Shooters brought an appeal from the decision of the Board of the Alcohol and Gaming Commission of

Ontario suspending Shooters' liquor licence for 10 days for permitting drunkenness on its premises. Shooters argued on appeal that the Board's decision should be set aside for a number of reasons including failure to provide adequate reasons and, in particular, failing to make any findings of credibility with respect to any of the witnesses who testified. Commission submitted that the reasons of the Board were adequate.

The Court granted the appeal and set aside the decision of the Board without remitting the matter to the Board for a new hearing. This was done partly on the basis that the Board breached its duty of fairness by failing to provide adequate reasons for its decision. The Court said the following:

A tribunal's duty of fairness includes the obligation to provide reasons for its decision...

It is not sufficient for the Board to summarize the evidence and then baldly state its conclusions. The parties are entitled to know the process by which the Board came to those conclusions. Reasons are required; not merely conclusions...

The suspension of a liquor licence is a matter of some significance for a bar such as Shooters. This has been recognized by the Legislature and the Board, which is why a full hearing is required, with procedural safeguards, before such a sanction can be imposed. In these circumstances, it was incumbent upon the Board to provide reasons to explain its findings.

...

In this case, the Board appeared to simply accept the evidence of Ms Glenn without question. While it was

open to the Board to accept her evidence, it was required to find that evidence to be credible and reliable before doing so and it was required to fairly consider the contrary evidence presented by the defence, including the testimony of Mr. MacDonald. It is impossible to tell from the Board's reasons whether it went through that process. This is particularly problematic given the misstatement of some of the evidence in the earlier portion of the Board's reasons.

Further, the Board completely ignored the argument presented by the defence that because of the delay in providing notice to Shooters, it was unable to defend the charges. It is possible that the Board believed that this argument was not supportable on the facts. If so, it was required to state that in its reasons. It is possible the Board believed that this defence was not viable as a question of law. Likewise, if that was the case, the Board was required to say so. Otherwise, there can be no meaningful right of appeal. It is also possible that the Board simply overlooked the issue, which is also a reviewable error.

...
The reasons of the Board are inadequate and do not meet the standards of procedural fairness and natural justice. This ground, on its own, would be sufficient to set aside the Board's decision.

In *Clifford v. Ontario (Attorney General)*, [2008] O.J. No. 2136 (Div. Ct.), a former spouse brought an application for judicial review from the decision of the Ontario Municipal Employees Retirement System

Appeals Sub-Committee determining that Bernadette Campbell was the common-law spouse of the late Tony Clifford at the time of his death and that she was entitled to his pension death benefits. The Court granted the application for judicial review and set aside the decision of the Tribunal on the basis that it breached its duty of fairness by failing to provide adequate reasons for its decision. The Court said the following:

Ms Campbell disputed some of the evidence listed above. It was open to the Tribunal to prefer her evidence over the evidence of others if it had valid reasons for doing so. However, since the Tribunal made no findings of fact and no findings of credibility, it is not possible to tell if that was the conclusion it reached, or if it simply failed to properly consider the nature of this evidence...

Finally, and of fundamental concern, it is possible, indeed probable, that the Tribunal misapplied the onus of proof...However, in the absence of any reasons beyond this one sentence, it is simply not possible to determine whether this is the case.

The requirement of providing reasons for a decision is part of the Tribunal's obligation to comply with principles of natural justice and procedural fairness...

It is not sufficient for the Tribunal to simply summarize the positions of the parties and baldly state its conclusions...

For a tribunal such as this one, on issues of the importance involved here, the failure to provide meaningful reasons supporting its decision is itself a breach of the principles of natural justice that will warrant quashing the tribunal's decision...This is particularly the case in light of the conflicts in the evidence and the apparent failure of the Tribunal to place the onus on the correct party.

...In the absence of reasons setting out what the Tribunal's decision-making process was, the Tribunal's decision cannot be said to be "justified" or "transparent" or "intelligible". It is incumbent on the Tribunal, particularly in a case of this nature, to articulate its reasons so that the parties will know the basis upon which the case was decided and the reviewing court can determine whether the decision is a "reasonable" one. The reasons in this case do not enable that process to be carried out. Accordingly, the decision is not a "reasonable one" and is also not in accordance with principles of natural justice and procedural fairness.

In *Cotton v. College of Nurses of Ontario*, [2008] O.J. No. 2172 (Div. Ct.), a nurse brought an application for judicial review from the order of the Board of Inquiry of the College of Nurses of Ontario requiring Ms. Cotton to submit to a medical examination to assess her capacity to practise as a nurse. In this case, after Ms. Cotton received notification from the College Registrar that it was conducting a health inquiry into the allegation that Ms.

Cotton might be suffering from an addiction to narcotics, Ms. Cotton denied the allegation and forwarded, among other documentation, two medical reports, one from her family doctor and one from a family physician specializing in addiction medicine, concluding that Ms. Cotton was not incapacitated. Ultimately, the Executive Committee appointed a Board of Inquiry. Subsequently, the Board of Inquiry issued an order requiring Ms. Cotton to attend an examination with Dr. Judson without providing reasons for its decision.

Ms. Cotton argued that the refusal of the Board of Inquiry to give reasons for its decision was a denial of natural justice such that their order must be quashed. Agreeing with Ms. Cotton, the Court granted the application for judicial review and set aside the order of the Board of Inquiry. The Court said the following:

...We recognize that there may be functions of the Board that are investigative and which are not determinative of the rights of any party. However, an order requiring a person to undergo an invasive medical examination, subject to the penalty of suspension or revocation of licence for refusing to comply, is a determination of rights, even though it may be ordered for an investigative purpose. It is in this context that the duty to observe rules of procedural fairness, including the duty to provide reasons, arises.

...

Ms. Cotton submits the Board did not have reasonable and probable grounds to believe that she was incapacitated. The College submits the Board had reasonable and

probable grounds to so find. We have no way of knowing if the Board considered the evidence led by Ms. Cotton on that issue. If considered, we have no way of knowing if the Board rejected that evidence. If rejected, we have no way of knowing why. The lack of reasons is fatal to the College's position on this judicial review...

PRACTICAL TIPS:

In order to avoid the possibility of tribunal decisions being set aside by the Courts on the basis of inadequate or no reasons, the following are some practical tips:

- Whenever a tribunal makes a decision, it should try to give a reason or reasons for its decision, unless this is impractical or impossible.
- The governing statute of the tribunal should be reviewed to determine whether there are any requirements relating to the content of the reasons.
- In order to enhance the likelihood that the content of a tribunal's reasons will be considered adequate by a Court on an appeal or application for judicial review, the following are suggestions on what should be included in the reasons:
 1. Summary of the evidence of the witnesses – It is not necessary that the tribunal summarize all of the evidence of the witnesses but it should summarize all of the important evidence. This includes indicating the significance or weight that the tribunal gives to the evidence which has been considered by them.
 2. Findings of fact – When there are disputes or contradictions between the witnesses over the relevant facts, the tribunal should make specific findings of fact. This includes indicating what evidence has been accepted and what evidence has been rejected and explaining why.
 3. Findings of credibility – When witnesses give evidence at a hearing, the tribunal should make findings of credibility. In making a finding of credibility, a tribunal must explain clearly the reasons why it found a particular witness or all or part of the witness's testimony to be credible or not credible including referring to the evidence which supports that finding.
 4. Arguments made by parties – A tribunal should ensure that it responds to the arguments made by the parties. This is especially important when it intends to reject an argument that has been made.
 5. Reasons for decision – A tribunal must explain its thought process or decision-making process so that the reader can understand the reason(s) why it made a particular decision.