CARE EMPLOYMENT AND TRAINING SERVICES PTY LTD (ACN 106 294 080) v AUSTRALIAN SKILLS QUALITY AUTHORITY

FEDERAL COURT OF AUSTRALIA

MIDDLETON J

3 April 2012 — Melbourne

[2012] FCA 367

Education and research — Higher education — Whether the respondent authority took into account the matters that needed to be considered under s 33(2) of the National Vocational Education and Training Regulator Act 2011 (Cth) — Whether the respondent authority, in referring to the audit process, failed to accord to the applicant natural justice — (CTH) Administrative Decisions (Judicial Review) Act 1977 ss 476A(1)(c), 501, 501A — (CTH) Judiciary Act 1903 s 39B — (CTH) National Vocational Education and Training Regulator Act 2011 ss 32, 33.

The applicant sought review of a decision made by the respondent authority on 23 March 2012 to reject the applicant's application made on 22 December 2011 to amend the scope of its registration in relation to Vocational Education and Training (VET) courses pursuant to s 33 of the National Vocational Education and Training Regulator Act 2011 (Cth) (the Act). The applicant sought review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) and s 39B of the Judiciary Act 1903 (Cth).

Pursuant to s 34 of the Act, the respondent authority was required to give the applicant reasons for its decision to reject the application within 30 days of the decision but the urgency of the application was such that a new decision would need to be made by the respondent authority by 4 April 2012. In its original application for review, the applicant sought orders, inter alia, directing the respondent authority to make a decision amending the scope of the applicant's registration. The applicant subsequently sought orders in the form of declarations directing the respondent authority to proceed in a particular way and to make a decision by close of business on 4 April 2012. It was common ground that there was no utility in the application to the court unless the respondent authority was able to make a decision on 4 April 2012.

The only material before the court to indicate the basis for the respondent authority's decision to reject the applicant's application was correspondence between the respondent authority and the applicant's solicitor, there being no reasons for the decision at the time the review application was heard before the court.

Held, dismissing the application:

(i) On the material available to the court, it is open to the court to conclude that the respondent authority took into account the matters that needed to be considered under s 33(2) of the Act, and that the effective reason for the respondent authority's final decision adverse to the applicant was that the applicant had failed to comply with the VET Quality Framework: at [18].

(ii) Even assuming that there was some reference to and adoption of the audit process, which was unrelated to the change of scope of registration application, it is quite apparent from the correspondence sent by the respondent authority to the applicant's solicitors that the issue of compliance with the VET Quality Framework was well to the fore of the parties' minds and there was no failure to accord natural justice: at [19], [20].

(iii) Compliance with the VET Quality Framework is among the considerations that the respondent authority must consider when determining whether to grant an application to change the scope of a registration of application made under s 32 of the Act: at [22].

F McKenzie instructed by *Mason Sier Turnbull* for the applicant.

L De Ferrari instructed by the *Australian Government Solicitor* for the respondent.

[1] Middleton J. Application has been made in this proceeding pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the ADJR Act) and s 39B of the Judiciary Act 1903 (Cth) to review the decision of the respondent (the authority), made on 23 March 2012 to reject the applicant's (CARE's) application made on 22 December 2011 to amend the scope of its registration in relation to Vocational Education and Training (VET) courses (the decision). The decision was said to be made in purported exercise of power under s 33 of the National Vocational Education and Training Regulator Act 2011 (Cth) (the Act).

[2] Section 32 of the Act allows for an NVR registered training organisation to apply to change the scope of its registration with respect to all or part of a VET course not already within its scope of registration. The application must be in an approved form and accompanied by any information and documents that the authority requires: s 32(2).

[3] Section 33(2) of the Act provides:

> (2) In deciding whether to grant an application, the National VET Regulator must consider:
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> (a) the applicant's ability to provide the VET course, or part of the VET course, in accordance with the VET Quality Framework; and
>
> (b) the other VET courses, or parts of VET courses, offered by the applicant; and
>
> (c) whether the applicant complies with:
>
> (i) the VET Quality Framework; and
>
> (ii) the other conditions of registration set out in Subdivision B of Division 1 of this Part.

[4] I observe, also, at this stage, that s 34 of the Act provides that if the application made under s 32 is rejected, the reasons for that decision must be given to the applicant in writing within 30 days of the decision. That time, obviously, has not yet elapsed, and there are not any reasons before the court, other than what is on the face of the decision itself, in a letter from the authority to CARE dated 23 March 2012.

[5] The application before the court was for final relief, although the application was only issued a few days ago. The urgency of the matter arises because on the material, and as I am advised by counsel for CARE, a decision by the authority would need to be made no later, I think, than 7 April. Due to the Easter period, the new decision would need to be made by 4 April 2012, which is tomorrow.

[6] The orders sought this morning were different to those eventually sought by CARE. The relief originally sought in the in the originating application was, relevantly:

> 1. An order for the matter to be heard and determined on or before 4 April 2012.
> 2. An order setting aside the decision effective from 23 March 2012.
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> …
>
> 5. An order requiring the respondent to make a decision amending the scope of the applicant's registration in accordance with the applicant's application on or before 7 April 2012.
>
> …

7. Alternatively … an order requiring the respondent to make a decision on the applicant's application for an amendment to the scope of its registration forthwith.

[7] In the course of argument, it became apparent that it would be inappropriate for this court, in the circumstances of this case, to direct a particular decision to be made by the authority. I am not suggesting that in the appropriate case the court does not have power to so direct or guide an authority or decision-maker as part of the supervisory jurisdiction of the court under the ADJR Act. However, the question is whether it is appropriate in the circumstances of this particular case to make such direction.

[8] The court must be mindful of its supervisory role in this respect. It is not the court's role to intrude into the function of a particular body which parliament has entrusted with the role and responsibility of making administrative decisions. In my view — and I think it was accepted by CARE — this is not a case where it would have been appropriate for the court to require the authority to make a decision amending the scope of the CARE's registration in accordance with its application. I was referred to a number of cases where the issue arose as to whether the court could make rulings or direct an authority, but I do not think they are applicable to the circumstances of this case.

[9] CARE, alive to that problem, sought alternative relief in the following terms:

1. An order setting aside the decision of 23 March 2012 to reject the applicant's application made on 22 December 2011 under the National Vocational Education and Training Regulator Act 2011 (Cth) for a change in the applicant's scope of registration (the decision).
2. A declaration that, as and from the time it was made, the decision was unlawful and of no force or effect.
3. A declaration that s 33(2)(c)(i) of the Act does not require ASQA to determine whether or not an applicant complies with the VET Quality Framework before a decision can lawfully be made to change the scope of the applicant's registration.
4. A declaration that in making the decision of 23 March 2012 to reject the applicant's application made on 22 December 2011 for a change in the applicant's scope of registration, the respondent's reliance on the audit report dated 30 November 2011 and provided to the applicant on 15 February 2012 was in breach of natural justice.
5. An order requiring the respondent to make a decision on the applicant's application for an amendment to the scope of its registration, and to take all steps required to give effect to that decision, by close of business on 4 April 2012.
6. The respondent be ordered to pay the applicant's costs.

[10] The orders now sought do have the advantage of not seeking to impose directly upon the authority the decision it has to make according to the direction of this court. The scheme which the orders now sought follow is effectively to set aside the decision of 23 March 2012 and to direct, in the form of a declaration, that the authority proceed in a particular way. Significantly, the orders require the authority to make a decision and to take all steps required to give effect to that decision by the close of business on 4 April 2012. As has been apparent throughout the course of today's hearing on the material before me, unless the

authority can make a decision on 4 April 2012, this application has no use to CARE because of the impact that the failure to make any decision will have upon CARE's business.

[11] I should say that even if I were persuaded that the declaration sought in the reformulated orders should be made, that does not, and could not, necessarily impose upon the authority the requirement to approve CARE's application to change the scope of its registration. The simple reason is that, having regard to s 33(2) of the Act, there are a number of things that the authority must consider, and it cannot be for me to say or circumvent which of those can be counted, or can be given particular weight.

[12] If I am not in a position to do this, then I am clearly not in a position to assume that by the close of business on 4 April 2012 that there will be a decision in favour of CARE. And this really, no matter how it is dressed up, is the gravamen of CARE's complaint, and is central to the relief that CARE must obtain in this court if the whole purpose of the application is to be successful.

[13] Some debate took place before me as to whether (even if I found there were grounds to set aside the authority's decision) I could make the order requiring the authority to make a decision as to CARE's application before the close of business on 4 April 2012. As counsel for CARE submitted, no evidence has been led by the authority to indicate that this could not be done. However, I take the view that I should look at this from a commonsense point of view, in light of what CARE has argued before this court.

[14] One of the grounds of the application for judicial review was that CARE had not been accorded natural justice. CARE's complaint was that an audit process for its compliance with the VET Quality Framework was incomplete and the authority had failed to inform CARE of the gravamen of the complaints raised in that audit which were then relevant to the authority's decision. Assuming that CARE was right about that — namely there was a failure to accord natural justice — it would necessarily follow, if the original decision was set aside on that basis, that the authority, in accordance with the decision of this court, would need to accord natural justice to comply with the law, and make a valid decision if it had to redecide the matter. This could not be achieved in the time frame sought by CARE.

[15] In any event (and putting the natural justice matter aside, which could, of course, be waived by CARE before the making of the next decision), there are other matters that need to be determined by the authority that are set out in s 33(2). To properly consider those matters would take time, well beyond the time frame set by CARE. So without any further investigation, I would dismiss the application, to the extent that the relief sought seeks to have the decision reagitated by the close of business on 4 April 2012.

[16] However, it is useful, having regard to the arguments that have been raised by counsel, to address some other matters. I do not delay, for the purposes of this decision, in setting out the background and chronology to the events that have taken place between the parties giving rise to the dispute that I need to determine today. However, I do wish to address the letter dated 23 March 2012 which notified CARE of the authority's decision. That letter, addressed to CARE's solicitor, states:

> Dear Mr Skermer,
>
> I refer to your letter of 16 March 2012 (your ref MS: 1102304) regarding your client CARE Employment and Training Services Pty Ltd.

I acknowledge receipt of your letter of 28 February 2012 and advise that the issue you raised in relation to the jurisdiction of ASQA, which you also raised in your letter of 21 February 2012, was addressed in my letter dated 24 February 2012. I see no need to continue correspondence on the jurisdiction of ASQA as this matter has already been dealt with.

I note that your client has yet to provide evidence of rectification which was due by COB 14 March 2012. Please be advised that ASQA will be conducting a site audit to evaluate whether your client has rectified the areas of non-compliance identified in the audit in November 2011, and will assess evidence that your client failed to provide at the time of the audit to verify compliance with the Standards for NVR Registered Training Organisations 2011. The audit will be conducted on Monday 2 April 2012 and Tuesday 3 April 2012 commencing at 9.00 am.

I remind your client, C.A.R.E. Employment and Training Services Pty Ltd, of its obligations, under s 27 of the National Vocational Education and Regulator Act 2011, to cooperate with the National VET Regulator. Specifically, condition 27 — cooperation, states, "An NVR registered training organisation must cooperate with the National VET Regulator, at least to the extent that:

a) it is necessary for the Regulator to perform its functions; or

b) it is necessary to facilitate the Regulator's performance of its functions.

Note: Failure to comply with a condition of registration is a contravention of a civil penalty provision, see section 111*

Please be advised that the Commissioners of ASQA on Friday 23 March 2012 have rejected your client's change of scope application for CPP20211 Certificate II in Security Operations and CPP30411 Certificate III in Security Operations on the ground that C.A.R.E. Employment and Training Services Pty Ltd does not comply with the VET Quality Framework (specifically the Standards for NVR Registered Training Organisations thereof) as per s 33(2)(c)(i) of the National Vocational Education and Training Regulator Act 2011.

The decision to reject an application is a reviewable decision under s 199 of the National Vocational Education and Training Regulator Act 2011. In accordance with s 203(2) your client may apply to the Administrative Appeals Tribunal (AAT) for the review of the decision. Further information on applying to the AAT is available from the AAT website at www.aat.gov.au

Yours sincerely
Jerzy Gill
Regional Manager, Compliance Operations
Australian Skills Quality Authority
…

[17] It is apparent, from the penultimate paragraph in that letter, that the authority did decide that there was a failure to comply with the VET Quality Framework and that was why the decision was made.

[18] I am unable to determine, by reference to the preceding correspondence, and clearly not by reference to any reasons of the authority, the context in which the decision was made. I simply know that the basis for the decision was non-compliance with the VET Quality Framework. I say that because, under s 33(2), the authority must consider a number of matters. That does not mean they are all of equal weight, and it does not mean that one or another of them may not be determinative in the authority reaching its decision. It seems to me that it is open to conclude that the authority took into account the matters that needed to be considered under s 33(2), but the effective reason for its final decision arose because of non-compliance with the VET Quality Framework. This is all I can find on the evidence before me, and bearing in mind that that CARE wants an urgent decision. On that basis, I cannot be in any way satisfied that any improper

purpose or irrelevant consideration was taken into account by the authority or that authority did not act according to law.

[19] I make some further comments in relation to the issue of natural justice. I will assume, for the purposes of this proceeding, that in making the decision on the s 32 application, natural justice must be accorded to CARE. The question, as in most of these cases, is whether the requirement of natural justice has been met. I will not rehearse all the correspondence between the parties regarding the audit process and the change of scope of registration application. However, I will again assume, in CARE's favour, that there may well have been some adoption of, and reference to the audit process by the authority, which was unrelated to the change of scope of registration application. However, it is quite apparent from the correspondence — correspondence, I should add, with a legal practitioner acting for CARE — that the issue of the VET Quality Framework was well to the fore of the parties' minds. I simply do not accept, on the material before me, that there is any misunderstanding by CARE of the nature of their non-compliance with the VET Quality Framework, even assuming, in their favour, that it may have arisen in a different context to the scope of registration application made under s 32 of the Act.

[20] I should emphasise I do not make a positive finding that the audit arose in a different context to the s 32 application, I merely assume it in the favour of CARE for the purposes of making this decision. Therefore, I am not satisfied that there has been a failure to accord natural justice in the circumstances of this particular case, on the basis on which CARE raised the issue before me.

[21] From the declarations that are now sought by CARE, an issue arises as to whether the Act requires the authority to determine whether or not an applicant complies with the VET Quality Framework before a decision can lawfully be made to change the scope of that applicant's registration to provide a VET course. In my view, the Act sets out clearly that the authority must consider whether the applicant complies with the VET Quality Framework. This will involve the authority taking whatever steps it regards as appropriate to consider whether the applicant complies.

[22] If the applicant does not comply with the VET Quality Framework, it does not necessarily preclude the grant of a change of scope of registration application made under s 32 of the Act. None the less, compliance is a matter which the authority must consider. I do not enter the debate as to whether the criteria set out in s 33(2) are exclusive or not; that is not a matter that requires determination in this proceeding.

[23] The other question that arises is the authority's reliance on the audit order report dated 30 November 2011, but that is only relevant as to whether there is a breach of natural justice. I have already indicated that I think there is no breach of natural justice as formulated by CARE in this case, because I take the view that CARE knew the nature of the matters that were relevant to the consideration of whether it complied with the VET Quality Framework and the reliance on them by the authority.

[24] Another matter arose in the course of argument as to the concept of unreasonableness as understood in the *Wednesbury* sense. It may well be now that unreasonableness also incorporates, having regard to recent decisions of the High Court of Australia, the concept of irrationality. However, the way in which

unreasonableness is put really indicates the problem that CARE has in this proceeding. The written submissions of CARE, under he heading of "Unreasonableness", are as follows:

> For the above reasons, and in particular, in light of the delay, and in view of the fact that the impact of the decision was to shut down the applicant's operations 2 weeks hence, the decision was so unreasonable that no reasonable decision maker could have made it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680; [1948] 1 KB 223

[25] In my view, this is not the way in which an analysis should be made of unreasonableness. This analysis does not deal with the requirements of the Act. There is nothing unreasonable about requiring the authority to consider each of the matters in s 33(2). Looking at the authority's decision, against which the attack is made for unreasonableness, the fact of the timing, in my view, does not detract from what the authority must consider in accordance with the statutory command, clearly set out in s 33(2).

[26] One final matter to mention is that there is provision to be made for the review of the decision by the Administrative Appeals Tribunal (the AAT). If not for the timing problem confronting CARE, in my view this case would be an appropriate one to have been heard by the AAT, particularly as it deals with matters of judgment and requires weighing up the criteria set out in s 33(2). This court could not weigh up all those matters in its constitutional capacity of only being a "reviewer"; the advantage of the AAT would be that it would review the decision on the merits and, of course, the natural justice point would not need to be reagitated as the AAT would be able to comfortably hear all the evidence and the submissions and come to a decision.

[27] I understand the way in which CARE now says that the remedy of the AAT is not available, because of the time it would take to hear the matter. This potential remedy, nevertheless, is there as a legal avenue that CARE could, in the appropriate case, take. I do however indicate that, if everything else was in favour of CARE, I would not exercise my discretion not to intervene.

[28] For those reasons, I propose to dismiss the application.

[29] The authority seeks its costs. Normally costs follow the event unless there are circumstances where the court, in its wide discretion, determines otherwise. It is undoubtedly true that, on the matters raised by CARE, I have found against it. Regarding the arguments raised by CARE as to costs, I do not think that the authority has acted improperly and, do not decide on that basis that no order should be made for costs in CARE's favour. However, this matter necessarily had to come before the court with some haste. I have been assisted by the authority and its legal representatives in putting before the court its position. I think, in the circumstances where that assistance has been needed by the court and given, and when the court is dealing with statutory provisions which are relatively complex, it is appropriate to make no order as to costs. Therefore, I will make no order as to costs.

Orders

(1) The application be dismissed.

AMY DOUGLAS-BAKER
BARRISTER