SUPREME COURT OF QUEENSLAND

CITATION:	*Ergon Energy Corporation Limited v Rice-McDonald & Ors* [2009] QSC 213
PARTIES:	**ERGON ENERGY CORPORATION LIMITED** **ABN 50 087 646 062** (applicant) **v** **Dr GLENN RICE-McDONALD** (first respondent) **Dr WILLIAM OLIVER** (second respondent) **Dr JOHN ARMSTRONG** (third respondent) **Q-COMP** (fourth respondent) **GRAHAM ANDERS BATHE** (fifth respondent)
FILE NO/S:	BS 11098/08
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2009
JUDGE:	McMurdo J
ORDER:	**The application for review is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXCLUSION OF PROCEDURAL FAIRNESS – FUNCTION OF A LEGISLATIVE OR POLICY NATURE – where employee applied for workers' compensation for lung cancer alleged to have been contracted during employment – where the General Medical Assessment Tribunal – Thoracic found that the employment was a "significant contributing factor" to the employee's lung cancer – where, in its written decision, the Tribunal "noted" the contrary opinions of two oncologists and "favoured" the opinion of one – where the

Tribunal specifically "disagreed with" certain arguments as it "believed" they were "not relevant" to the case – whether the Tribunal has explained the means by which it has reached its conclusion in a way that demonstrates that it has discharged its statutory function to determine the issue in question

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the Tribunal accepted the evidence of one oncologist but not the other – where this oncologist had referred to medical literature to infer causation – whether this conclusion was so unreasonable that no reasonable decision maker in the position of the Tribunal could have reached it

Acts Interpretation Act 1954 (Qld), s 27B

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 32(1), s 36A, s 510, s 516

WorkCover Queensland Act 1996 (Qld), s 34(1)

Cypressvale Pty Ltd v Retail Shop Lease Tribunal [1996] 2 Qd R 462, applied

Drew v Makita (Australia) Pty Ltd [2009] QCA 66, considered

Masters v McCubbery [1996] 1 VR 635, applied

Seltsam Pty Ltd v McGuiness & Anor (2000) 49 NSWLR 262, applied

Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited

COUNSEL: R J Douglas SC, with S A McLeod for the applicant

No appearance for the first to third respondents

G P Long SC, with C J Murdoch for the fourth respondent

E P Mac Giolla Ri for the fifth respondent

SOLICITORS: Minter Ellison for the applicant

No appearance for the first to third respondents

Q-Comp for the fourth respondent

Hall Payne for the fifth respondent

[1] The applicant seeks to review a decision of the first, second and third respondents, constituting the General Medical Assessment Tribunal – Thoracic, which determined that the respondent, Mr Bathe, had sustained an "injury" within the meaning of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("the 2003 Act") and its predecessors. According to the amended application, there are three grounds for review. However, the first of them, which was that the Tribunal did not apply itself to the relevant question or questions because it did not

consider what was meant by an "injury", was effectively abandoned at the hearing. The principal argument is upon the second ground, which is that the Tribunal failed to provide adequate reasons. Thirdly, it is said that the Tribunal's decision was unreasonable in the *Wednesbury* sense.

[2] Mr Bathe was employed by the applicant from 1973 to January 2008. At all times the applicant was insured under the 2003 Act and its predecessors, which were the *Workers Compensation Act* 1916 (Qld), the *Workers Compensation Act* 1990 (Qld) and the *WorkCover Queensland Act* 1996 (Qld). The insurer was WorkCover Queensland or one of its statutory predecessors.

[3] Mr Bathe has lung cancer. That was diagnosed in September 2007. In February 2008 he applied for workers' compensation under the 2003 Act, upon the basis that his lung cancer was contracted during the course of his employment with the applicant from 1973. WorkCover Queensland rejected that application. Mr Bathe applied to Q-Comp for a review of that decision. Q-Comp set it aside and directed WorkCover Queensland to refer the matter to the Medical Assessment Tribunal and to make a fresh decision when the Tribunal's decision was received.

[4] In the reference to the Tribunal, the 2003 Act and those three preceding statutes were identified as the relevant legislation. The way in which the injury was alleged to have occurred was described in the reference as:

> "Exposure to carbon tetrachloride and cigarette smoke in the workplace over a period of time between January 1973 and January 2008."

[5] A hearing took place before the Tribunal which was attended by Mr and Mrs Bathe's lawyers. Mr Bathe was interviewed by the Tribunal and his counsel made submissions. The applicant was not represented. The Tribunal had a number of medical reports, X-rays, MRT, CT and ultrasound images and had carried out its own clinical examination of Mr Bathe, as it was entitled to do under s 510 of the 2003 Act.

[6] The Tribunal gave a written decision on 12 September 2008. It recited the history of Mr Bathe's application and the documents which had been provided to it. It said that the matter had been referred to it "in accordance with" each of those four statutes. Under a heading "History" the Tribunal referred to Mr Bathe's "work experience" with the applicant, and to his evidence as to his exposure to the cigarette smoke of other workers, with details of what work he was doing and the approximate hours per working day to which he was so exposed. The Tribunal also noted that he was exposed at work to other substances including carbon tetrachloride, observing that each of these substances, like cigarette smoke, were known carcinogens. The Tribunal also referred to the fact that Mr Bathe's father had died of lung cancer although he had little exposure to cigarettes from his father. It noted that the fact that his father had had lung cancer raised the possibility of a genetic predisposition to the development of that disease.

[7] The Tribunal then set out details from its examination of Mr Bathe and described his current medical condition about which there was, and is, no doubt. Then there followed a section headed "Reasons for decision". Because this passage is the basis for the applicant's present case, it is necessary to set it out in full:

> "REASONS FOR DECISION

The Tribunal considers that Mr Bathe definitely had significant passive cigarette smoke exposure. Passive cigarette smoke exposure is an accepted risk for developing lung cancer. The Tribunal notes Mr Bathe himself has never been an active smoker. The Tribunal also notes a possible genetic predisposition to development of lung cancer when exposed to potential carcinogens by virtue of Mr Bathe's father having lung cancer. The Tribunal also notes exposure to other potential carcinogens in the workplace including carbon tetrachloride, Turco-white solv and transformer oil. The Tribunal cannot discount the possibility of inadvertent ingestion of these materials (carbon tetrachloride, Turco-white solv and transformer oil) during the course of Mr Bathe's employment and hence some co-contribution from those potential carcinogens in addition to the known carcinogens in cigarette smoke.

The Tribunal considers the major carcinogenic exposure was exposure to cigarette smoke in the work environment and considers there may have been other less important carcinogenic exposures to the other substances as described above.

The Tribunal notes the possibility that all of the above exposures may have taken on a greater degree of significance by virtue of a possible genetic predisposition to developing lung cancer by virtue of Graham's father having developed lung cancer.

Taking into account the workplace exposures as a whole, the Tribunal is of the opinion that the criteria set out in all of the relevant Acts have been met with regard to injury.

The Tribunal estimates that the injury of lung cancer developed between 2003 and 2005. This estimation is based on the aggressive nature of the cancer and the estimated number of doubling times the cancer was likely to have undergone by the time of diagnosis.

In making its decision, the Tribunal took into account all submitted information and the testimony offered on the day of assessment. While the Tribunal noted the opinions of both the treating Oncologist, Dr Paul Mainwaring and Occupational Physician, Dr Steven Goode, the Tribunal favoured the opinions of Dr Paul Mainwaring. Specifically, the Tribunal disagreed with Dr Goodes' [sic] arguments relating to the importance of relative risks. The Tribunal believed Dr Goodes' [sic] arguments were not relevant to the circumstances of Mr Bathe's case.

The Tribunal finds that the exposure to Mr Bathe in the course of his employment with Ergon Energy have causally led to the development of metastatic non-small cell lung cancer."

[8] The written decision then set out findings, under each of the four statutes, that Mr Bathe had suffered an injury in the relevant sense under that statute and that the nature of the injury was lung cancer.

The applicant's first ground

[9] The first ground was that the Tribunal failed to consider the required questions, which was whether there was an injury under each of the statutes, because they differed from one another as to the required connection between an injury and the workplace. However, at the hearing, counsel for the applicant conceded that this ground must fail, for the reasons advanced on behalf of Q-Comp. Counsel for Q-Comp referred to s 36A of the 2003 Act which applies where a person is diagnosed after the commencement of that section (2 November 2005[1]) as having a latent onset injury (which the applicant concedes is the case here). According to s 36A, the question of whether there was an "injury" in the required sense is to be decided under the statute which was in force when the injury was "sustained". The applicant accepts that in Mr Bathe's case, his lung cancer was sustained when it was identifiable which, according to the Tribunal's decision, was between 2003 and 2005. Thus the applicant now accepts that the Tribunal had to decide whether this was an injury under the 2003 Act (which commenced on 1 July 2003) and also under the *WorkCover Queensland Act* 1996 (Qld) (for the first half of 2003). But each statute, by s 32(1) and s 34(1) respectively, defined an "injury" in effectively the same terms. The Tribunal therefore had to decide whether Mr Bathe's employment was a "significant contributing factor" to his lung cancer.

[10] What remains of the first ground is really within the second and principal ground in the applicant's case, which is a failure to give adequate reasons. The applicant submits that the reasons show that the Tribunal did not address what counsel described as the "fabric" of the question for its determination.

Second ground

[11] By s 516 of the 2003 Act, the Tribunal was obliged to give a written decision, with reasons for that decision, to the insurer and the worker or his representative. The applicant was not thereby entitled to a copy of the decision. It is accepted that the applicant has standing to apply for review of the decision because of the potential for Mr Bathe's claim to affect the level of its premiums. But the applicant's complaint about the absence of reasons is not made in the more common context of a participant in judicial or quasi-judicial proceedings who wants to know why it has been unsuccessful. Rather the complaint is that the absence of reasons proves that the Tribunal did not exercise its statutory function.

[12] Section 27B of the *Acts Interpretation Act* 1954 (Qld) provides that where an Act requires a Tribunal to give written reasons for a decision, those reasons must set out the findings on material questions of fact and refer to the evidence or other material on which these findings were based. As I understand the argument for the applicants, there is no complaint that the evidence or other material was not set out. In my view that requirement was clearly satisfied. Rather the complaint is that the Tribunal simply gave its conclusion without explaining the path by which that was reached.

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1 *Workers' Compensation and Rehabilitation and Other Acts Amendment Act* 2005 (Qld).

[13] The applicant cited the judgment of Muir JA (with whom Holmes JA and Daubney J agreed) in *Drew v Makita (Australia) Pty Ltd*[2] and in particular this passage:

> "[58] The rationale for the requirement that courts give reasons for their decisions provides some guidance as to the extent of the reasons required. The requirement has been explained, variously, as necessary: to avoid leaving the losing party with 'a justifiable sense of grievance' through not knowing or understanding why that party lost; to facilitate or not frustrate a right of appeal; as an attribute or incident of the judicial process; to afford natural justice or procedural fairness; to provide 'the foundation for the acceptability of the decision by the parties and the public' and to further 'judicial accountability'."

However, the applicants accepted that at least many of those considerations do not apply to a tribunal such as this, which does not conduct its hearing or provide its decision in public and which is entitled to apply its own professional expertise in reaching its decision.

[14] As to the difference between what is required from a tribunal such as this and from a court, counsel for the applicant properly referred to *Cypressvale Pty Ltd v Retail Shop Lease Tribunal*,[3] where McPherson and Davies JJA said:

> "However, before turning to the particular matters decided by the Tribunal, it is necessary to add that virtually all of the decisions which have been referred to here involved appeals from courts exercising judicial power in the full sense, and not administrative or quasi-judicial bodies or tribunals. The second and third of the three purposes identified by McHugh J in *Soulemezis*,[4] which are to maintain judicial accountability and to furnish precedents for the future, obviously have little or much less force in the case of a tribunal whose members and functions are not strictly judicial. The calibre, legal training and experience of members of the judiciary raise expectations that reasons they give for their decisions will attain a high level of sophistication. The same would not always be true of decisions of persons whose primary qualification for decision-making consists of specialist knowledge or experience rather than ability to produce reasons conforming to accepted judicial tradition. Reasons that would not be considered adequate if given by a judge may nevertheless suffice for some other decision-makers not chosen for their task because of their resemblance to the judiciary. In the end, the question whether reasons are "adequate" falls to be considered in the context afforded by the nature of the question which has to be decided and other factors, including the functions, talents and attributes of the tribunal members or the individual in whom the duty of deciding questions of that kind has been vested. Considerations of the cost to litigants and

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2 [2009] QCA 66 at [58], citations omitted.

3 [1996] 2 Qd R 462 at 484-5.

4 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279.

> the general public in requiring reasons to be given is another factor which must be weighed …"

[15] In my view, the judgments of the Victorian Court of Appeal in *Masters v McCubbery*,[5] which was also cited by counsel for the applicant, are of particular assistance in the present statutory context. The tribunal there was a medical panel under the *Accident Compensation Act* 1985 (Vic). Winneke P described the extent of that tribunal's obligation to give reasons as follows:

> "A medical panel is not required to do more than provide sufficient reasons to enable it to be seen by the court and the parties that it has arrived at its decision in accordance with its statutory functions …
>
> As I have already pointed out they are required to do no more than to provide a succinct statement of why they came to the conclusions which they did sufficient to enable to the parties and the court to see that they have addressed their mind to relevant matters and have not acted unreasonably: see *Iveagh (Earl of) v Minister of Housing and Local Government* [1964] 1 QB 395 at 410."[6]

Callaway JA said that the reasons had to be given in sufficient detail:

> "…to show the court and the worker that the question referred to the panel has been properly considered according to law and that the opinion furnished is founded on an appropriate application of the members' medical knowledge and experience."[7]

[16] Counsel for the applicant at one point appeared to submit that the content of the reasons required for this decision were somewhat greater, on the basis that it constituted some precedent. The suggestion was that this decision will have an impact upon other cases in which claims will be made for compensation for lung cancer or other conditions said to have been caused by passive smoking in the workplace. I accept that the Tribunal's decision is considered to be particularly important by the applicant. I do not accept that it should constitute some indication to another tribunal to decide a similar claim in the same way. In each case the question will be one of fact, and the outcome will be affected, as it was apparently here, by the particular evidence and the Tribunal's own professional assessment of the condition and circumstances of the claimant.

[17] The Tribunal's reasons are certainly less extensive than would be found in the reasons for a judgment. But as just discussed, of itself that is not critical. The reasons reveal that the Tribunal found the opinion of Dr Mainwaring persuasive and the opinion of Dr Goode unpersuasive. Their respective opinions are not described in the Tribunal's decision, as they would be in a judgment. But that does not matter if it can be seen that the Tribunal has applied itself to the statutory task and has not reached a result that was unreasonable in the *Wednesbury* sense.

[18] Dr Goode's conclusion was expressed as follows:

> "There's currently insufficiently strong epidemiological evidence to state that the claimant's passive exposure to second hand tobacco

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5 [1996] 1 VR 635.
6 [1996] 1 VR 635 at 650, 651.
7 [1996] 1 VR 635 at 661.

> smoke was definitely a significant contributing causative factor in the genesis of his lung cancer. Further, there's a lack of evidence to support the contention that the claimant's exposure to carbon tetrachloride and/or to tetrachloroethylene, or his general work in the electrical industry, have been significant contributing factors in the genesis of his lung cancer either. On the available evidence, I am also unable to state that the claimant's exposure to involuntary tobacco smoke and/or asbestos as a child/adolescent at home has been a significant contributing factor."

He did not exclude the possibility that passive smoking at work, or more generally his work environment, was a significant contributing factor. But in his view, it could not be concluded that these factors were causative unless:

> "the epidemiological RR in similarly exposed groups in the literature *consistently and reliably* <u>*exceeds* 2.0</u> (i.e. SMR > 200, odds ratio > 2.0. Therefore, to support causality, there must be *strong and consistent* epidemiological evidence (not just an association) across different studies and authors."

[19] The nature and utility of epidemiological evidence was discussed by Spigelman CJ in *Seltsam Pty Ltd v McGuiness & Anor*.[8] As Spigelman CJ there explained, epidemiological evidence identifies associations between specific forms of exposure and the risk of disease in groups of individuals and most epidemiological studies identify the strength of such an association by a measure called relative risk or RR. This is the ratio of the incidence of disease in exposed individuals compared to the incidence in unexposed individuals.[9] When the relative risk is at least 2.0, the risk in exposed individuals is twice as great as in unexposed individuals, from which it might be concluded that, considering the group of exposed individuals as a class, the relevant circumstance is responsible for just as many cases of the disease as all other causes. As Spigelman CJ explained, some American courts use this measure of relative risk established to infer causation in an individual case where the relative risk is greater than 2.0, on the basis that this implies a more than 50 per cent likelihood that an exposed individual's disease was caused by the relevant circumstance.[10] His Honour noted that whilst some American cases apply the RR of 2.0 as a rigid mathematical formula, others indicate a more flexible approach which, for example, would allow for a finding of causation where the RR was less than 2.0 but having regard to other evidence.[11]

[20] This is the explanation for Dr Goode's reference to the need, as he saw it, for the epidemiological RR "in similarly exposed groups in the literature" to "consistently and reliably" exceed 2.0. He discussed literature containing epidemiological evidence, firstly for those exposed to "passive involuntary tobacco smoke". He said the highest RR in this respect, according to his research, was 1.3. As to carbon tetrachloride, he said that the evidence was that this was only possibly carcinogenic to humans. For tetrachloroethylene, there was some evidence of an association with some types of cancer but not specifically with lung cancer. He concluded that:

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8 (2000) 49 NSWLR 262 at 271-285.

9 (2000) 49 NSWLR 262 at 272.

10 (2000) 49 NSWLR 262 at 280-1, setting out an extract from the Federal Judicial Centre's *Reference Manual on Scientific Evidence* at 168-9.

11 (2000) 49 NSWLR 262 at 283-4.

> "Therefore, passive tobacco smoke alone is known to be carcinogenic to humans, and the other factors – carbon tetrachloride, tetrachloroethylene and work in the electrical industry – are not. However, there's insufficiently strong epidemiological evidence to suggest that the claimant's workplace exposure to involuntary tobacco smoke is actually causative of his lung cancer in a compensation/legal sense."

[21] Dr Mainwaring wrote in February 2008 that:

> "Occupation exposure to dangerous chemicals such as cigarette smoking, carbon tetrachloride are well recognised to be associated with the risk of developing lung cancer, in particular the epidemiological evidence for the correlation between cigarette smoking and the development of lung cancer is irrefutable."

In a subsequent report (June 2008) Dr Mainwaring wrote:

> "1. It is my opinion that passive exposure to cigarette smoke and environmental carcinogens is significantly more important to the development of lung cancer than any family history e.g. see the article by Veglial Epidemiology 2007 November; 18(6); 769 to 75.
>
> 2. Epidemiological evidence exposure to passive smoking and the development of lung cancer strongly links. With regards to carbon tetrachloride exposure there is accumulating strong genetic evidence that patients with a wrong genetic makeup may be at much higher risk of developing lung cancer when exposed to such carcinogens.
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> 3. Strong epidemiological evidence such as that published by Alberg et al chest 2007 September 132 (3 supplement); 29S to 55S demonstrates … The predominant cause of lung cancer is exposure to tobacco smoke, with active smoking causing most cases but passive smoking also contributing to the lung cancer burden… This is the cause for Mr Bathe.
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> 4. Mr Bathe['s] coincident exposure to tetrachloroethylene may also be considered a coincident risk factor for developing lung cancer as reported by Paulu et al Environmental Health Perspectives 1999 April; 107(4): 265 to 271.
>
> 5. Multiple studies have demonstrated that coincident exposure to multiple carcinogens increases the risk of developing lung cancer.
>
> 6. …
>
> 7. The report by Dr Goode relies heavily on trying to quantify these risks in order to modify the impact of relative risk. As I have highlighted above there are other important

> differences in the genetic makeup of individuals that may make them much more susceptible to developing malignancy within the context of environmental exposure to carcinogens and this data has not been examined formally in any scientific studies presented to date in a prospective manner. The accumulating retrospective data heavily points towards individuals' susceptibility increasing the risk of developing lung cancer when exposed to environmental carcinogens such as passive cigarette smoke and carbon tetrachloride."

[22] The Tribunal accepted the opinion of Dr Mainwaring that a possible genetic predisposition to developing lung cancer, having regard to Mr Bathe's father having developed lung cancer, increased the likelihood that exposure to cigarette smoke and "other less important carcinogenic exposure" was causative. So the fact that the relative risk from passive smoking was less than 2.0 did not mean that the evidence, taken as a whole, did not establish a causal connection. In saying that the Tribunal "believed Dr Goode's arguments were not relevant to the circumstances of Mr Bathe's case", the Tribunal was referring to the other evidence in his case which had to be considered in addition to the measures of relative risks.

[23] In my view the Tribunal's process of reasoning plainly appears, once its decision is read with the evidence of Dr Goode and Dr Mainwaring. That reasoning is consistent with relevant legal principle. In *Seltsam Pty Ltd v McGuiness*, Spigelman CJ summarised Australian law relevant to the use of epidemiological studies in this passage which, again, I respectfully adopt:

> "The courts must determine the existence of a causal relationship on the balance of probabilities. However, as is the case with all circumstantial evidence, an inference as to the probabilities may be drawn from a number of pieces of particular evidence, each piece of which does not itself rise above the level of possibility. Epidemiological studies and expert opinions based on such studies are able to form "strands in a cable" of a circumstantial case. …The predominant position in Australian case law is that a balance of probabilities test requires a court to reach a level of actual persuasion. This process does not involve a mechanical application of probabilities …
>
> In Australian law, the test of actual persuasion does not require epidemiological studies to reach the level of a relative risk of 2.0, even where that is the only evidence available to a court. Nevertheless the closer the ratio approaches 2.0, the greater the significance that can be attached to the studies for the purposes of drawing an inference of causation in an individual case. The "strands in the cable" must be capable of bearing the weight of the ultimate inference."[12]

[24] The present question is not whether the Tribunal's conclusion was correct. It is whether the Tribunal has explained the means by which it has reached its conclusion, in a way which demonstrates that it has discharged its statutory function

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12 (2000) 49 NSWLR 262 at 278, 284-5.

by answering the question which was for its determination. In my view the reasons, although brief, were sufficient. Indeed, having regard to the evidence and the clear terms of the respective medical opinions, it is difficult to see that significantly longer reasons would have been appropriate.

The third ground

[25] The argument here is that no reasonable decision maker, in the position of the Tribunal, could have reached this conclusion. The argument cannot be accepted. Plainly there was evidence – that of Dr Mainwaring – to support the conclusion. In effect the applicant would have to say that no reasonable medical tribunal could have agreed with him. Dr Mainwaring referred to medical literature, which was not the subject of debate before me. It is far from established that Dr Mainwaring had no sufficient basis in the literature for his opinion that a number of circumstances, when considered together, led to an inference of causation. The applicant did not attempt to demonstrate that the opinion of Dr Mainwaring was so patently flawed on its face that any tribunal should have rejected it. That would have been an ambitious argument given the specialist nature of this Tribunal. Ultimately the applicant's complaint seems to be that Dr Mainwaring could not have made a qualitative judgment without the support of epidemiological evidence showing a RR of 2.0 or more. That is really to seek a merits review of the Tribunal's decision.

Conclusion

[26] It follows that none of the grounds have been established. I should note here that upon its principal argument, the alleged inadequacy of reasons, the applicant did not seek an order that the Tribunal provide reasons, but rather an order that the whole case go to a differently constituted tribunal to be considered afresh. I would not have been persuaded to order that had I held that the reasons were insufficient. The application for review will be dismissed. I will hear the parties as to costs.