LEVEL TWENTY SEVEN CHAMBERS

Whitely v Stone & Anor [2021] QSC 31

Judicial Review No Replacement for QLD Industrial Magistrates Court

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Facts of the Case & Decision

In an application for judicial review, the applicant sought to challenge a decision, under s 197D of the *Coal Mining Safety and Health Act* 1999 (Qld), to cancel his open cut examiner's certificate of competency. The certificate had been cancelled on the basis that the applicant had breached safety and health obligations, in contravention of s 39(2)(b) of the Act and s 107 of the *Coal Mining Safety and Health Regulation* 2017.

That action had been taken against the background of a fatal accident at the Middlemount Coal Mine in 2019, at which the applicant had been the nightshift examiner.

The Supreme Court of Queensland dismissed an application for judicial review on the basis that the applicant should pursue an appeal in the Industrial Magistrates Court. The applicant held an open cut examiner's certificate of competency required under s 7 of *Coal Mining Safety and Health Act* 1999 (Qld). This certificate was subsequently cancelled by the respondent on the basis the applicant contravened safety and health obligations using s 39(2)(b)[1] and reg 107 of the *Coal Mining Safety and Health Regulations* 2017.

Arguments & Reasoning

The applicant relied on *Kirk v Industrial Court of New South Wales* to suggest the respondent's decision was void because no particular act or omission was identified, rather only statutory obligations were recited.[2] The applicant asked the Court to declare the respondent's decision ineffective,

The respondent argued the application should be summarily dismissed under ss 12, 13 or 48 of the *Judicial Review Act* 1991 (Qld), because the Act made adequate provision for the decision to be reviewed elsewhere (namely the Industrial Magistrates Court). The applicant resisted that course on the basis if he was forced to appeal the decision in the Industrial Magistrates Court his right to silence in a criminal prosecution arising from the same events would be prejudiced.

The Court considered that, even if it found in favour of the applicant, the respondent would likely use other means to cancel the applicant's certificate of competency. Thus, it would not be the end of the matter. Although the applicant relied upon *Nelson v Q-Comp* [2004] QSC 167, the Court rejected the applicant's submission that questions of public interest arose in the case.[3] Ultimately, the Court determined the Industrial Magistrates Court was the appropriate forum for the resolution of the applicant's complaint.

Justice Dalton had regard to the general rule stated by Thomas J in *Stubberfield v Webster* [1996] 2 Qd R 211, in which it was said that judicial review should not be seen as a substitute for the appellate process in the civil courts.

Implications - Judicial Review No Replacement for Ordinary Process

This case confirms the general rule under *Stubberfield v Webster* that judicial review should not be considered a replacement for ordinary judicial process, especially where alternative avenues for review of administrative decisions have been provided elsewhere, by statute.

For the mining industry, this decision provides the first judicial consideration of the relatively new power of suspension or cancellation of certificates of competency, under the *Coal Mining Safety and Health Act* 1999. It provides important guidance for those advising certificate holders, especially where suspension or cancellation is threatened or occurs.

[1] *Coal Mining Safety and Health Act 1999 (Qld) s 7.*
[2] Kirk v Industrial Court of New South Wales (2010) 239 CLR 531.
[3] *Nelson v Q-Comp [2004] QSC 167.*

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