Federal Court of Australia

Sayed v National Disability Insurance Agency (No 4) [2024] FCA 51

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| File number(s): | VID 520 of 2022 |
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| Judgment of: | **O’BRYAN J** |
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| Date of judgment: | 5 February 2024 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for discovery – where categories of discovery sought by applicant impermissibly broad and not directed to issues in proceeding – where limited discovery appropriate to ensure documents relevant to jurisdictional fact are before the Court – limited order for discovery made |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) ss 42A, 44  *Federal Court of Australia Act 1976* (Cth) s 37M  *Judiciary Act 1903* (Cth) s 39B  *National Disability Insurance Scheme Act 2013* (Cth) ss 33, 48, 100, 103  *Federal Court Rules 2011* (Cth) rr 20.11, 20.15  Administrative and Constitutional Law and Human Rights Practice Note (ACLHR-1) |
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| Cases cited: | *Carmody v MacKellar* (1996) 68 FCR 265  *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21; (1979) 24 ALR 307  *Jilani v Wilhelm* (2005) 148 FCR 255  *Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346  *Saint v Holmes (No 1)* [2005] FCA 1057 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 32 |
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| Date of hearing: | 5 February 2024 |
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| Counsel for the Applicant: | The Applicant appeared in-person |
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| Counsel for the First Respondent: | S Thompson |
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| Solicitor for the First Respondent: | HWL Ebsworth Lawyers |

ORDERS

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|  | | VID 520 of 2022 |
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| BETWEEN: | MUHAMMAD ALI SAYED  Applicant | |
| AND: | NATIONAL DISABILITY INSURANCE AGENCY  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | O’BRYAN J |
| DATE OF ORDER: | 5 FEBRUARY 2024 |

THE COURT ORDERS THAT:

1. By 12 February 2024, and in accordance with order 2, the First Respondent give discovery of documents:
   1. within the categories of documents specified in the Annexure to these orders;
   2. of which, after a reasonable search, the First Respondent is aware; and
   3. that are, or have been, in the First Respondent’s control within the meaning of Schedule 1 to the *Federal Court Rules 2011* (Cth).
2. The First Respondent is to give discovery of documents by:
   1. filing a verified list of documents in accordance with rule 20.17 of the *Federal Court Rules 2011* (Cth); and
   2. producing the documents, identified in the verified list of documents, in electronic format (excluding the documents subject to a claim of privilege).
3. The application for discovery constituted by paragraph 2 of the section headed “Interlocutory Orders Sought” in the Applicant’s Amended Notice of Appeal filed on 20 December 2023 be otherwise dismissed.
4. Costs be reserved.

ANNEXURE

Discovery categories

All documents concerning:

* 1. the request made by the Applicant for a review of the statement of participant’s supports on or about 29 June 2022;
  2. the First Respondent’s consideration of that request; and
  3. any review conducted by the First Respondent pursuant to that request in the period 1 June 2022 to 31 July 2022.

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

REASONS FOR JUDGMENT

O’BRYAN J:

## Introduction

1. By orders made on 8 December 2023, I listed this proceeding for hearing on 23 February 2024. I also made orders permitting the applicant, Mr Sayed, to file any further amended notice of appeal by 22 December 2023, and other timetabling orders to prepare the proceeding for hearing.
2. In accordance with those orders Mr Sayed filed a (further) amended notice of appeal on 20 December 2023.
3. Mr Sayed does not have legal representation and is conducting the proceeding himself.
4. By the amended notice of appeal, Mr Sayed appeals a decision of the second respondent, the Administrative Appeals Tribunal (**Tribunal**), pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**). By the same document, Mr Sayed also seeks judicial review of the Tribunal’s decision under s 39B(1A) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).
5. The decision of the Tribunal that is challenged by Mr Sayed in this proceeding is a decision made on 11 August 2022 in which the Tribunal dismissed Mr Sayed’s application for review of a decision of the first respondent, the National Disability Insurance Agency (**NDIA**), on the basis that the Tribunal did not have jurisdiction. The Tribunal concluded that the NDIA had not made a decision under s 100(6) of the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**) and, as a consequence, there was no decision that was reviewable by the Tribunal (as per s 103 of the NDIS Act). The Tribunal dismissed the application pursuant to s 42A(4) of the AAT Act.
6. By the amended notice of appeal, Mr Sayed also seeks orders for discovery. That application is made by paragraph 2 of the section of the document headed “Interlocutory Orders Sought” and is in the following form (errors in original):

That the agency produce to the applicant within 14 days:

a. an un-redacted copy of any document or business record, referring or pertaining to the applicant held in their control, since 1ˢᵗ march 2022; and

b. a copy of so much of any audit file or records maintained by the respondent concerning the —

i. internal process; and

ii. standard practices; and

iii. agency guidelines; and

iv. staff competency and performance standards of the agency planners and CEO’s delegates responsible for approving statement of participants supports under s 33(2).

c. a copy of so much of any audit file or records maintained by the agency concerning the —

i. internal process; and

ii. standard practices; and

iii. agency guidelines; and

iv. staff competency and performance standards of the agency reviewers and CEO’s delegates responsible for decision making in relation to ‘varying and replacing participant’s plan’ under ss 47 – 48 (division 4, chapter 3) of the NDIS Act.

1. On 22 December 2023, I made orders requiring the NDIA to file and serve a written response to Mr Sayed’s discovery application stating whether the NDIA agrees to provide, or opposes, the discovery sought by Mr Sayed and, in the case of opposition, brief reasons for the opposition. I also made orders for Mr Sayed to file and serve a written reply, and I listed the application for interlocutory hearing on 5 February 2024.
2. On 29 January 2024, the NDIA filed a written response opposing the application. In short, the NDIA submitted that the documents sought by Mr Sayed are not necessary for the determination of the issues in the proceeding. The NDIA also relied on an affidavit of Alexandra Gormon, a solicitor at HWL Ebsworth Lawyers, solicitors for the NDIA, affirmed on 29 January 2024. The affidavit annexed a letter sent by the NDIA to Mr Sayed on 23 January 2024 which advised Mr Sayed of the basis on which the NDIA opposed his application and also identified for Mr Sayed a large number of the NDIA’s guidelines which are publicly available. Also annexed was Mr Sayed’s email reply dated 23 January 2024.
3. On 2 February 2024, Mr Sayed filed a written reply in support of his application.
4. I heard the application for discovery on 5 February 2024. At the conclusion of the hearing, I made orders for discovery in a different form to that originally sought by Mr Sayed. These are my reasons for doing so.

## Applicable principles

1. Rule 20.11 of the *Federal Court Rules 2011* (Cth) stipulates that a party must not apply for an order for discovery unless the making of the order will “facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible”. That rule reflects the overarching purpose of civil practice and procedure as stated in s 37M of the *Federal Court of Australia Act 1976* (Cth), which is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.
2. The two touchstones for discovery are the tests of relevance and proportionality, as framed by r 20.11 and the overarching purpose stated in s 37M. An order for standard discovery under r 20.14 requires the discovery of documents that are “directly relevant” to the issues raised in the proceeding. If non-standard discovery is sought under r 20.15 (as in the current case), the application will usually be assessed according to the same test of relevance. An order for standard or non-standard discovery will not be made unless it is necessary for the just resolution of the proceeding and is proportionate in scope to the issues raised in the proceeding.
3. While there is no bar to discovery in proceedings brought under s 44 of the AAT Act or under s 39B of the Judiciary Act, discovery is less common. That is because the issues for determination in such proceedings must usually be determined on the basis of the materials that were before the person or body whose decision is being appealed or reviewed (in this case, the Tribunal). That circumstance is reflected in para 8.1 of the Court’s Administrative and Constitutional Law and Human Rights Practice Note (ACLHR-1) which states:

Unless a party provides an acceptable justification, no discovery or interrogatories will be ordered in proceedings for administrative law cases …

1. Nevertheless, discovery may be ordered in an administrative law context depending on the issues raised in the proceeding: see *Carmody v MacKellar* (1996) 68 FCR 265 at 280 (Merkel J); *Jilani v Wilhelm* (2005) 148 FCR 255 at [108] (Dowsett, Jacobson and Greenwood JJ); *Saint v Holmes (No 1)* [2005] FCA 1057 at [36] (French J).

## Tribunal decision

1. It is uncontroversial that Mr Sayed joined the National Disability Insurance Scheme (**NDIS**) on about 30 March 2022. On about 7 June 2022, Mr Sayed received his first participant’s plan. However, Mr Sayed was unhappy with the delegate’s decision to approve the statement of participant supports under s 33(2) of the NDIS Act. During a teleconference meeting on 29 June 2022, the applicant made a review request by telephone. The nature of the review requested and conducted is in dispute. The NDIA contends that the review was conducted under s 48 of the NDIS Act (as in force at that time) whereas Mr Sayed contends that he requested a review under s 100 of the NDIS Act.
2. On 7 July 2022, Mr Sayed filed an application for review in the Tribunal.
3. On 29 July 2022, Mr Sayed received a second participant’s plan including a second statement of participant supports. In a letter accompanying the second plan, the delegate stated that a review of his first participant’s plan had been undertaken pursuant to s 48 of the NDIS Act.
4. On 11 August 2022, the Tribunal dismissed Mr Sayed’s application for review, concluding that it did not have jurisdiction to review Mr Sayed’s statement of participant supports. In its reasons published on 18 August 2022, the Tribunal found (at [10]) that Mr Sayed had not lodged a reviewable decision made pursuant to s 100(6) of the NDIS Act with the Tribunal at the time he purported to make his application, as required by s 103 of the NDIS Act, to ground the Tribunal’s jurisdiction to review such a decision. The Tribunal found:

11. The evidence elicited before the Tribunal confirmed that the Applicant requested the Agency to review the SOPS, which resulted in a review being conducted pursuant to section 48 of the NDIS Act. The Applicant and his support co-ordinator participated in that process. This process resulted in the formation of the Applicant’s current SOPS dated 29 July 2022.

12. The review of the SOPS dated 8 June 2022 was not conducted pursuant to section 100(6) of the NDIS Act. Furthermore, there has been no review of the SOPS dated 29 July 2022 pursuant to section 100(6) of the NDIS Act. As such, the Tribunal does not have jurisdiction to review the application pursuant to section 103 of the NDIS Act.

## Grounds of appeal and review

1. An appeal from a decision of the Tribunal under s 44 of the AAT Act is confined to questions of law. Similarly, an application for judicial review under s 39B of the Judiciary Act is also based on legal or jurisdictional error. However, where the decision-maker’s jurisdiction is conditional upon the existence of particular facts (commonly referred to as jurisdictional facts), and a question is raised concerning the existence of the jurisdictional facts, the Court is required to determine that question as a matter of fact: *Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 at [116] (Edelman J).
2. Despite the confined scope of the issue determined by the Tribunal, Mr Sayed’s amended notice of appeal alleges that the appeal raises 20 questions of law and 6 grounds of review. It is unnecessary to reproduce the alleged questions of law and grounds of review in full. For present purposes, it is sufficient to observe that they fall into the three principal categories:
3. The first category comprises allegations concerning natural justice, variously that the Tribunal’s decision was vitiated by bias (actual and apprehended) or a failure to afford procedural fairness in the conduct of the hearing.
4. The second category comprises allegations that the Tribunal erred in law, particularly that the Tribunal misdirected itself with respect to s 103 of the NDIS Act, or failed to apply the principle in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21; (1979) 24 ALR 307.
5. The third category is an allegation that the Tribunal erred in fact by failing to conclude that the review conducted by the NDIA was a review under s 100 of the NDIS Act and therefore amenable to review by the Tribunal.
6. Encompassed by categories two and three are allegations that the Tribunal failed to consider that the NDIA had been requested to undertake a review under s 100 of the NDIS Act, but had not undertaken that review.

## Consideration of categories of discovery sought

#### Category (a)

1. Category (a) sought by Mr Sayed is for “an un-redacted copy of any document or business record, referring or pertaining to the applicant held in [the NDIA’s] control, since 1st [M]arch 2022”.
2. In its letter to Mr Sayed dated 23 January 2024, the NDIA stated that it considered that category (a) was too broad and invited Mr Sayed to identify more specific sub-categories of documents that he sought, and to explain the relevance of the documents. Mr Sayed’s written response did not engage with that invitation.
3. As submitted by the NDIA, this category is impermissibly broad, seeking “any document or business record referring or pertaining” to Mr Sayed. It is not directed to any of the issues properly raised in the proceeding and will require discovery of a wide range of irrelevant documents. I therefore refuse to order discovery of that category.
4. Nevertheless, I consider that discovery should be given in a more limited scope. Mr Sayed’s amended notice of appeal puts in issue the question whether the Tribunal was correct to conclude that the review undertaken by the NDIA of Mr Sayed’s participant’s plan was a review under ss 48 or 100 of the NDIS Act. That question is one of jurisdictional fact and, accordingly, a factual question that must be determined by the Court. In his submissions to the Court at the hearing, Mr Sayed emphasised that that question was central to his application. While documents relating to that question were in evidence before the Tribunal, in my view it is appropriate to make an order for discovery to ensure that all documents bearing on that question are before the Court. For that reason, I have made an order for discovery of all documents concerning:
5. the request made by Mr Sayed for a review of the statement of participant’s supports on or about 29 June 2022;
6. the NDIA’s consideration of that request; and
7. any review conducted by the NDIA pursuant to that request in the period 1 June 2022 to 31 July 2022.

#### Categories (b) and (c)

1. Categories (b) and (c) “any audit file or records maintained by [the NDIA]” concerning the internal process, standard practices, agency guidelines and staff competency and performance standards of the NDIA reviewers and the CEO’s delegates responsible for:
2. approving statements of participant’s supports under s 33(2) of the NDIS Act; and
3. decision making in relation to varying and replacing participant’s plans under ss 47 to 48 of the NDIS Act.
4. Mr Sayed submitted that, at the hearing of the proceeding, he will contend that the NDIA has a practice of conducting reviews under s 48 of the NDIS Act rather than under s 100. Mr Sayed contends that this practice is systematic and intentional so that participants are unable to apply to the Tribunal for a review of the NDIA’s decisions concerning participant’s plans. Mr Sayed submitted that he requires discovery of categories (b) and (c) in order to prove the existence of that practice.
5. In my view, the documents covered by categories (b) and (c) are not relevant to any issue that must be determined by the Court in this proceeding. Whatever practices the NDIA may or may not implement on a systematic basis with respect to the review of participant’s plans under the NDIS Act does not affect the questions that arise in this proceeding. The questions that must be determined in this proceeding concern Mr Sayed’s participant’s plan and his request that it be reviewed. The Court must determine whether the Tribunal was correct to conclude that no decision was made by the NDIA under s 100 in respect of Mr Sayed’s participant’s plan, and that the Tribunal did not have jurisdiction to review the NDIA’s decision. In my view, the NDIA’s internal processes and standard practices with respect to decisions under ss 33(2) and 48 of the NDIS Act will not assist in the resolution of what decisions were made in Mr Sayed’s case. The documents may explain why the NDIA elected to exercise power under s 48 rather than under s 100. But the question of why the NDIA elected to exercise power under s 48 rather than under s 100 is not a question that requires determination by the Court.
6. Underlying Mr Sayed’s application for discovery of these categories of documents appears to be a concern that the NDIA is actively seeking to frustrate his rights of review of the statement of participant supports in his participant’s plan. Mr Sayed is seeking that the Court investigate the NDIA’s conduct in that regard. Whether or not there is any substance in Mr Sayed’s concern, the present proceeding does not, and cannot, raise that question for determination. This proceeding concerns the correctness of the Tribunal’s decision of 11 August 2022, not the conduct of the NDIA more broadly. It should be noted for completeness, though, that s 100(2) confers on a participant a right to seek a review of a decision made under s 33(2) to approve the statement of participant supports in the participant’s plan. The right to have that review conducted is a statutory right that is enforceable in the Court. However, that is not the subject of the present proceeding.
7. I therefore dismiss Mr Sayed’s discovery application in respect of categories (b) and (c).

## Conclusion

1. For the reasons given above, at the hearing I ordered the NDIA to give discovery of documents in categories that are relevant to a central question raised in this proceeding: whether the Tribunal was correct to find that the review undertaken by the NDIA of Mr Sayed’s participant’s plan was a review under s 48 of the NDIS Act and not a review under s 100 (with the result that the Tribunal did not have jurisdiction to conduct the review).
2. With respect to costs, Mr Sayed was largely unsuccessful in his application, in that the discovery I ordered were not categories that were specifically sought by Mr Sayed. Further, it is unclear whether discovery will produce any documents that were not before the Tribunal when it made its decision. For those reasons, I made an order reserving the costs of Mr Sayed’s discovery application. It will be appropriate to revisit the question of costs when final judgment is given.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O’Bryan. |

Associate:

Dated: 5 February 2024