



## Civil and Administrative Tribunal New South Wales

**Medium Neutral Citation:** Eshaq v Roads and Maritime Services [2014] NSWCATOD 66

**Hearing Dates:** 27 February and 2nd April 2014

**Decision Date:** 19/06/2014

**Jurisdiction:** Occupational Division

**Before:** Scahill , Senior Member

**Decision:** 1. The Tribunal orders that the decision of the Administrator made on 13 December 2013 to cancel Mr Eshaq's authority be set aside.

**Legislation Cited:** Administrative Decisions Tribunal Act 1997  
Civil and Administrative Tribunal Act 2013  
Crimes (Sentencing Procedure) Act 1999  
The Passenger Transport Act 1990  
Passenger Transport Regulation 2007

**Cases Cited:** Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321  
Barrett v Director General, Department of Transport [2000] NSWADT 183  
Department of Transport and Infrastructure v Murray (GD) [2011] NSWADTAP 16  
Farquharson -v- Director General, Department of Transport [1999] NSWADT 53  
Director General, Transport NSW v AIC (GD) [2011] NSWADTAP 65  
Drake v Minister for Immigration and Ethnic Affairs [1979] AATA 179; (1979) 46 FLR 409.  
Hughes & Vale Pty Ltd v State of New South Wales [1955] HCA 28; (1955) 93 CLR 127  
Lloyd v Director General, Department of Transport [2001] NSWADT 201  
Lo v Director General Department of Transport [2002] NSWADTAP 39  
Maythisathit and Registrar of Motor Vehicles [1996] ACT 165  
Nasour v Director-General, Transport NSW[2011] NSWADT 91  
Re Geoffrey Thompson & Growers Co-op Pty Ltd and Export Development Grants Board (1985) 7 ALN N242  
Re T and Director of Youth & Community Services [1980] 1 NSWLR 392  
Saadieh v Director General, Department of Transport [1999] NSWADT 68  
Sobey v Commercial and Private Agents Board [1979] 22 SASR 70  
Sterjovski v Director-General, Department of Transport [2002] NSWADT 10

**Category:** Principal judgment

**Parties:** Applicant Mohammad Jawad Eshaq  
Respondent Roads and Maritime Services

**Representation:** Coustas Lexington Law (Applicant)  
Smythe Wozniak (Respondent)

**File Number(s):** 1330375

---

## REASONS FOR DECISION

### Introduction

- 1 The matter before the Tribunal is Mr Eshaq's application for review of RMS's decision of 13 December 2013 to cancel his driver authority. Mr Eshaq obtained a stay of the decision on 20 December 2013.
- 2 Mr Eshaq obtained an authority to drive taxi-cabs on 1st August 2011. On 5th May 2013 at the end of his shift he became involved in a physical fight with another driver at the Caltex Service Station on Victoria Road Rydalmere. He pleaded guilty to a charge of affray in Parramatta Local Court on 8 July 2013. No conviction was recorded against him. He entered into a good behaviour bond for a period of 18 months under section 10(1) (b) of the Crimes Act 1999.

- 3 The RMS became aware of the matter through data matching and on 17 October 2013 the RMS wrote to Mr Eshaq asking him to show cause as to why his driver authority should not be cancelled as the RMS could no longer attest that he was a fit and proper person to be authorised to drive a taxi-cab.
- 4 Mr Eshaq's solicitor wrote to the RMS on 29 October 2013 setting out the circumstances of the offence and Mr Eshaq's personal circumstances.
- 5 On 22 November 2013 the RMS wrote to Mr Eshaq notifying him that it had determined to cancel his authority.
- 6 Mr Eshaq sought internal review of the decision and on 13 December 2013 the RMS affirmed its decision to cancel Mr Eshaq's authority.
- 7 On 17 December 2013 Mr Eshaq lodged an Application for Review and a Stay Application in the Administrative Decisions Tribunal.

### **The Passenger Transport Act**

- 8 The Passenger Transport Act 1990 (the PTA) contains provisions governing the purposes of, the mechanisms for granting, and the power of the Administrator to cancel or suspend an authority to drive a taxi-cab. S.33 of the PTA sets out the purpose of the authority, while s.33F gives the Administrator power to cancel or suspend that authority at any time, "having regard to the purpose of the authority".
- 9 The Public Transport Regulations require the holder of an authority to notify the Administrator within 7 days of being charged with an offence.
- 10 **Section 33 (3) of the PTA** sets out

The purpose of an authority under this Division is to attest:

(a) that the authorised person is considered to be of **good repute** and in all other respects **a fit and proper person** to be the driver of a taxi-cab, and

(b) that the authorised person is considered to have sufficient responsibility and aptitude to drive a taxi-cab:

- (i) in accordance with the conditions under which the taxi-cab service concerned is operated, and
- (ii) in accordance with law and custom.

- 11 **Clause 35 of the Passenger Transport Regulation 2007** (PTR) sets out specific conduct requirements of drivers:

#### **Dress and conduct of drivers**

The driver of a public passenger vehicle must:

(a) .....

(b) behave in an orderly manner and with civility and propriety towards any passenger, intending passenger, driver of another public passenger vehicle or authorised officer, and

(c).....

Maximum penalty: 10 penalty units.

**(Tribunal's bolding)**

### **Response to Show Cause 29 October 2013**

- 12 Mr Eshaq's solicitor Mr Coustas provided a response dated 29 October 2013 to the Show Cause letter from the Respondent dated 17 October 2013. This response set out some matters in addition to those set out in the Police Statement of Facts before Parramatta local Court on 8th July 2013. The additional matters included :

- the victim taking Mr Eshaq's keys,
- 
- the victim insulting Mr Eshaq's wife and mother in Urdu
- 
- the victim punching Mr Eshaq 15 times
- 
- the victim kicking Mr Eshaq 4 or 5 times while he lay on the ground; and
- 
- the victim slamming Mr Eshaq's head into the counter and some shelves.

13 Mr Coustas had appeared at Parramatta Local Court with Mr Eshaq.

The letter noted that Mr Eshaq's victim was bigger than him and that his victim had been charged with more serious offences. Mr Eshaq had pleaded guilty to affray and no conviction was recorded against him.

### **RMS Decision on Show Cause 22 November 2013**

14 RMS wrote to Mr Eshaq on 22nd November advising it had determined to cancel his authority as it could not attest that Mr Eshaq was a fit and proper person on the basis of his criminal "conviction". (Tribunal's quotation marks).

### **Internal Review Application 26 November 2013**

15 Mr Eshaq sought Internal Review on 26th November 2013. He enclosed 6 references from members of the community concerning "the incident".

16 He also relied upon the matters set out in the letter from his solicitor of 29th October 2013 in relation to the Show Cause notice.

### **Internal Review Outcome and Reasons**

17 On 13 December 2013 the Internal Reviewer determined to refuse Mr Eshaq's request on internal review to reverse the decision made to cancel his driver authority. The reasons of the Internal Reviewer were set out as follows.

18 The Administrator had to consider whether Mr Eshaq was of 'good repute' and in all other respects 'a fit and proper person to drive a taxi-cab'. The Administrator considered the 6 references provided by Mr Eshaq and was satisfied he was of 'good repute'.

19 The Administrator noted that the offence had occurred while Mr Eshaq had been driving a taxi-cab and that he had been directed into an 18 month 'good behaviour' bond in July 2013.

20 The Administrator commented that a member of the public made aware of the offence would object to Mr Eshaq being authorised to drive a taxi-cab.

21 The Administrator determined that Mr Eshaq was not a fit and proper person, having considered all the material raised in the internal review, the "conviction" (Tribunal's quotation marks) imposed and the references.

22 The Internal Reviewer considered that Mr Eshaq could not meet the requirements of clause Section 33 of the PTA and clause 35 of the Passenger Transport Regulation 2007 and that his authority must be cancelled. This is the decision subject to review

### **Jurisdiction**

23 The Tribunal's jurisdiction to hear and determine this application for review is found in section 52 of the Passenger Transport Act 1990 and section 63 of the Administrative Decisions Tribunal Act 1997 (ADTA). Mr Eshaq's Application for Review was filed on 17 December 2013.

24 On 1st January 2014 The ADT merged into the NCAT. Clause 7 (3) (b) of Schedule 1 of the Civil and Administrative Tribunal Act 2013 (CATA) provides for unheard proceedings (commenced prior to 1 January 2014 - but not heard) to be considered according to the requirements of the previous legislation - the ADTA.

25 The authorities accept that the Tribunal's review is for the purpose of determining the correct and preferable decision by way of a merits review. See *Sterjovski v Director-General, Department of Transport* [2002] NSWADT 10 at paragraphs 10, 11 and 12.

26 The Tribunal may affirm, vary or set aside the original decision.

27 The hearing is a hearing "de novo" - meaning that the Tribunal may consider the matter from the start including taking into account fresh evidence brought before the Tribunal. The Tribunal is not restricted to the consideration of the material that was before the Respondent, but may have regard to any relevant material before it at the time of the review: *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 46 FLR 409.

28 **Section 73(2) of the ADTA** provides that The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

29 **Section 73(3) of the ADTA** provides that the Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

## **The Process of Hearing**

30 The Tribunal had before it the section 58 documents produced by the Respondent.

These included:

- Mr Eshaq's applications in 2009 and 2011 for a taxi-cab authority;
- Mr Eshaq's driving record;

A copy of the paper file from the proceedings in Parramatta Local Court in July 2013;

6 references;

- The Respondent's Notice to Show Cause;
- Mr Eshaq's solicitor's response to the Notice to Show Cause dated 29 October 2013;
- The Respondent's Notice of Internal Review and Statement of Reasons dated 13 December 2013.

31 Mr Eshaq gave sworn oral evidence and was cross examined.

32 Mr Eshaq's solicitor, Mr Coustas also gave evidence to the Tribunal relating to the proceedings at Parramatta Local Court in July 2013.

## **The events of Sunday 5 May 2013**

33 The section 58 documents contained the fact sheet tendered to the Local Court at Parramatta when Mr Eshaq pleaded guilty to the affray charge. The fact sheet reads as follows:

Both the accused persons in the matter work as taxi drivers hiring vehicles from a taxi base located at the Caltex service station on Victoria Road Rydalmere.

On Sunday fifth of May 2013 at approximately 2:40 am the co-accused Irfan Khakwani returned the taxi he had hired for the night to the service station. The co-accused filled the taxi with gas at one of the pumps of the service station, before turning the cab around and attempting to park the vehicle in one of the parking bays.

At this time the accused Mohammed Eshaq has driven a taxi that he had hired from the location and parked the vehicle lengthways across the parking area. Khakwani flashed the high beams of the taxi he was driving in an attempt to move Eshaq. Eshaq moved the taxi and Khakwani parked the vehicle.

Both accused persons have become involved in a verbal argument at this time, Eshaq saying to Khakwani "why did you put your lights on me?" Khakwani walked away from Eshaq and in through the front door of the service station. Eshaq ran after Khakwani where the verbal has continued in relation to Khakwani flashing his lights. Both accused persons continued the heated verbal argument for a short period of time before Eshaq, punched Khakwani with a closed left fist striking Khakwani on the face. The accused persons have become involved in a wrestle while standing holding each other in a bear style hug.

During this bear style hug Khakwani has punched Eshaq numerous times to the face with closed fists. Eshaq has ceased to fight back after the exchange of these punches. Khakwani has continued to punch Eshaq, striking him in the face and head area. This physical altercation causing fear to the witness for his personal safety.

Police attended and observed Eshaq seated on the floor of the service station, suffering severe facial injuries including swelling to the right eye, and a laceration approximately 10 cm in length running parallel across his neck. Police observed Khakwani standing near the front doors of the service station..... Police requested an ambulance to attend and see to the welfare of Eshaq, which attended and conveyed him to hospital for treatment.

Police were able to view CC TV footage of the incident, and obtain a notebook statement from the witness which was signed in the police notebook.

## **Mr Eshaq's evidence to the Tribunal**

34 In his evidence to the Tribunal Mr Eshaq did not dispute the facts in the fact sheet. He did add matters which were not set out in the Fact Sheet by way of explanation of how the verbal dispute with the other driver had escalated to violence. These were matters set out in his solicitor's response of 29 October 2013 to the Show Cause letter.

35 These additional matters included the other driver

- reaching into Mr Eshaq's car and removing his car keys,
  - saying "now we will see how you will get home."
  - saying in the Urdu language: "Go and call the fucking Police. Fuck your mother. Fuck your wife."
- 36 Mr Eshaq said he responded to this insult by hitting the other driver. However the other driver was larger than Mr Eshaq and he hit Mr Eshaq 15 times, kicked him 4 or 5 times while he was on the ground then grabbed Mr Eshaq's head and slammed it into the shop counter and some shelves.
- 37 Mr Eshaq told the Tribunal that he had never been involved in violence before in his life and not since. He had no previous criminal history and he had been driving cabs 3 ½ years without complaints.
- 38 Mr Eshaq was cross examined by the Respondent's solicitor. He said that he had told his referees the full story of what had occurred. He denied having told the referees what they needed to write despite the fact that all of the referees referred to the "incident" occurring.
- 39 Mr Eshaq said that he agreed with everything that had been in the police facts and that what was written in the fact sheet was correct. He was asked why he had not parked his taxi in a designated parking space and why he had responded to the other driver's flashing of his high beam. He said that the other driver's flashing of the high beam was not an aggressive act. Rather he thought that the taxi driver might be warning him of something. He had not told the police about the other driver taking his keys or kicking him because he didn't think it was necessary and the police had not asked him.
- 40 He said he had previous convictions for prescribed content of alcohol driving offences. He had been stupid and had ceased drinking since these offences. He said he was remorseful for punching the other driver and for the whole situation including running after the other driver into the service station. He said he had been provoked by the other driver swearing about his wife and mother, taking his keys and that he would not have punched him had these not occurred. He said he had told his solicitor about these matters when he had first consulted him and denied making up these issues in order to persuade the Tribunal that he had not been the aggressor.

### **Evidence of Mr Coustas**

- 41 Mr Coustas had represented Mr Eshaq in the affray matter. He had a conference with Mr Eshaq on 30 May 2013 at which time Mr Eshaq had told him about the provocation from his victim, his own pursuit and punching of the victim and his victim's violent response to Mr Eshaq. At that time the affray matter was listed before the courts on 26 June 2013. He had cardiac surgery and had to have the matter adjourned. Because of his illness he had been unable to write to the Police to ask that they amend the fact sheet to include the matters raised by Mr Eshaq which had caused him to become angry and to punch Mr Khakwani as well as the details of the other driver's assault on Mr Eshaq.
- 42 Mr Coustas said he had attended the court on 8 July 2013 and made submissions about these additional facts. He said the Police Prosecutor had not objected to these matters being raised.
- 43 He said that as a result Mr Eshaq had been given a section 10 good behaviour bond. Mr Coustas said he had then prepared the show cause letter sent to the Respondent - again setting out these matters.

### **Findings of fact**

- 44 The Tribunal finds that Mr Eshaq pleaded guilty to the charge of affray in Parramatta Local Court and that no conviction was recorded against him. He entered into a section 10 bond requiring him to be of good behaviour commencing in July 2013 for 18 months. This good behaviour bond will be completed in January 2015.
- 45 The Tribunal accepts that in addition to the matters raised in the fact sheet relating to the affray offence that Mr Coustas made submissions to the Parramatta Local Court on 8 July which were not objected to by the prosecuting police. These included the victim of Mr Eshaq's assault having taken his keys, insulting Mr Eshaq's family in Urdu, punching him, kicking Mr Eshaq while he was on the floor and driving his head into the counter and some shelves. The Tribunal notes that the record of Mr Eshaq's injuries set out in the police facts is consistent with this account.
- 46 The Tribunal accepts Mr Coustas' evidence that Mr Eshaq's victim was charged with more serious offences.
- 47 The Tribunal accepts that he has no prior record of violence and none since. There is no record of complaints made by members of the travelling public.

## References

- 48 The Tribunal notes that the references express Mr Eshaq's involvement in violence as being out of character for him. The Tribunal accepts Mr Eshaq's submission that there was some level of provocation to Mr Eshaq by his victim which caused Mr Eshaq to act out of character.

## Failing to Disclose Convictions

- 49 The Tribunal notes that Mr Eshaq did not advise the Administrator of his guilty plea or his entering into a good behaviour bond. Mr Coustas' letter to the Respondent dated 29th October 2013 notes that Mr Eshaq had not realised that he needed to advise the Administrator as he had not been convicted of the matter.

## Complaints and criminal history

- 50 Mr Eshaq's criminal history shows a special range PCA conviction on 16 October 2003, a low range PCA 29 June 2004 and a low range PCA on 13 March 2008. There are no recorded complaints against him by passengers or taxicab authorities.

## The Applicant's submissions

- 51 The Applicant provided written submissions. These submissions addressed the legal principles involved in the concepts of being of good repute, fit and proper and having sufficient responsibility and aptitude to hold a taxi driver authority.

## Good repute

- 52 The Applicant's good character was supported by references from nine referees. The Applicant conceded that limited weight could be given to one of those references provided by Mr Ahmad Reza Wakil dated 12th of December 2013 as it did not disclose an understanding of the affray offence.

## Seriousness of the offence

- 53 The affray offence was in the low range of objective seriousness. The court did not record a criminal conviction and Mr Eshaq had received a section 10 good behaviour bond. This did not usually reflect a matter which the court considered to be objectively serious. The offence did not involve the use of a weapon nor was it committed in company. It was submitted that the injury, emotional harm loss or damage caused by the offence was not substantial. However the Tribunal notes that it did not hear evidence on this.
- 54 The offence had not been part of a planned or organised criminal activity and was not committed for financial gain. The co-offender instigated the conflict by flashing his high beam at the Applicant. The Applicant had ceased to fight back once he was physically assaulted by the co-offender and he was punched numerous times causing him to be taken to hospital for treatment.
- 55 There were a number of mitigating factors which favoured the Applicant. These were that the Applicant does not have any significant record of previous convictions. He had shown immediate remorse for his offending and he had pleaded guilty to the offence at the first available opportunity.
- 56 Even if the Tribunal took the view that the offence reflected badly on the Applicant's character the authorities make it clear that the Applicant can redeem himself. The references indicated that the offence was completely out of character as the Applicant had never been found guilty of any other violent offences in the past. The available evidence indicated that the Applicant is extremely remorseful for his offending. It does not appear the Applicant has been involved in any other matters attracting criminal liability since the events. It appears that the Applicant has told each of the character witnesses about the offence but that this has not changed the opinion of the Applicant's character in the Referees' view.

## Responsibility and Aptitude

- 57 In assessing the responsibility and aptitude of the Applicant the Tribunal needed to assess his likely future conduct. The Applicant submitted that there were minimal prospects of him reoffending. This was on the basis of his lack of previous convictions for violent offences and since. The referees variously described him as a peaceful, loving, kind and sensible man. His remorse and early guilty plea indicated that he was unlikely to reoffend. The good behaviour bond would serve as a constant reminder to the Applicant that he is required to be of good character.
- 58 The Applicant submitted that reasonably minded members of the travelling public who had knowledge of the offence

would not object to being a passenger in the Applicant's vehicle. Such reasonably minded members of the public would construe that the offence was out of character and would take into account the fact that he was not convicted of the offence and appreciate that it was a one-off offence of low objective seriousness.

- 59 Saadie's case set out factors which needed to be considered - see Saadie v Director General, Department of Transport [1999] NSWADT 68. There was no other violence related offences in the Applicant's history. He had been found guilty of three PCA offences between 2003 and 2008. However there had been no further drink-driving offences over the last six years and the Applicant had indicated he had ceased drinking. In any event these matters had not been relied upon by the Respondent as a basis for cancelling Mr Eshaq's driver's authority.
- 60 The Applicant's driving record was unremarkable with five minor traffic matters since 2001.
- 61 The Applicant stressed that he had not been convicted of any offence. In dealing with the Applicant under section 10 of the Crimes (Sentencing Procedure) Act 1999 (CSPA) the Court must have considered the Applicant's character and trivial nature of the offences as considerations relevant to the sentence passed on him.

### **Honesty**

- 62 The Applicant submitted that he was an honest person who had not been dishonest at any time in respect of the affray offence. He had pleaded guilty at the first available opportunity. His criminality was mitigated by the provocation of the "co-offender" and the surrounding circumstances of the offence. There was an inference that these favourable matters were accepted by the Magistrate. His oral evidence had been credible.
- 63 The Applicant also submitted that the Respondent's contention that the Applicant had been dishonest in raising new mitigating facts at the hearing was unfair to the Applicant. The matters had been raised in his solicitor's response to the show cause letter.

### **Respondent's Submissions**

- 64 The Respondent submitted that the Applicant had raised the issue of provocation solely in an attempt to mitigate his actions before the Tribunal. The Applicant had created 2 sets of facts - the Police facts and his own facts in mitigation. This created a picture of dishonesty in the Applicant. The mitigation account came from a single unverified source - the Applicant himself. The Respondent acknowledged that Mr Coustas had given evidence that he had raised these matters in his client's plea in mitigation in the affray matter.
- 65 The Respondent noted that the Tribunal had declined to issue a subpoena to obtain the relevant court documents to confirm Mr Coustas' account that the matters of provocation and extreme violence of the victim had been put in the plea in mitigation to Parramatta Local Court. This had prevented verification of Mr Eshaq's and Mr Coustas' account of the matters having been raised before the Parramatta Local Court. The Respondent submitted that the more recent raising of these issues put into question Mr Eshaq's honesty and that they should not be taken into account in mitigating the issues relating to Mr Eshaq's fitness and propriety or his character in front of the Tribunal.
- 66 The Respondent submitted that a criminal conviction itself does not mean the person is of ill repute. However in the matter of Barrett - see Barrett v Director General, Department of Transport [2000] NSWADT 183 at 31. The Tribunal found that even though charges had been dismissed against Mr Barrett, the fact of the charges on their content still raised issues about Mr Barrett's character. In this matter the facts of the affray and that Mr Eshaq was put on a good behaviour bond did not minimise the gravity of his behaviour.
- 67 The Respondent submitted that Mr Eshaq's good repute as set out in the references need to be counterbalanced against the fact of the offences.

### **References**

- 68 The Respondent also referred to Murray's and the AIC case - see Department of Transport and Infrastructure v Murray (GD) [2011] NSWADTAP 16 and the Director General, Transport NSW v AIC (GD) [2011] NSWADTAP 65. The Respondent submitted that these matters indicated that the testimonials only provided real value when they disclosed a full knowledge in the referee of the conviction and sentence. The references provided by Mr Eshaq all used similar wording referring to the 'incident' and did not refer to the court proceedings or their outcome. The Respondent said that the Tribunal should be wary of the value of the references given the same terminology was used in all of them and that there was scant description in the references by the referees of what actually occurred as result of the court proceedings

### **The effect of the good behaviour bond**

- 69 The Respondent submitted that the fact that the bond was for a period of 18 months and does not expire until 8 January 2015 should trouble the Tribunal. In the matter of *Lloyd v Director General, Department of Transport* [2001] NSWADT 201 at 64-65 Judicial Member Montgomery considered that the Tribunal should be guided by the length of time of the bond in deciding whether sufficient time had elapsed in relation to fitness and propriety of Mr Lloyd. The Respondent submitted that Murray's case meant that "the question of whether the conduct will not recur is a matter which is to be viewed through the eyes of the general community." - see *Department of Transport and Infrastructure v Murray (GD)* [2011] NSWADTAP 65 at 18 The public should no more have the confidence that Mr Eshaq would be of good behaviour than the Magistrate showed in imposing the bond of 18 months. In this respect the evidence before the Tribunal was no different to what was before the Parramatta Local Court.
- 70 In relation to Mr Eshaq's remorse the Respondent submitted that Mr Eshaq had been evasive in dealing with the issue as to whether or not he was remorseful about what he did or what happened to him. When he was taken to the minutiae of the facts he had simply responded that if it was in the police facts "that is what happened." He found it difficult to admit to the Tribunal that he had followed his victim into the service station or that he had been the aggressor. His remorse was remorse concerning what had happened to him.
- 71 The AIC case - see *Director General, Transport NSW v AIC (GD)* [2011] NSWADTAP 65 at 12 meant that the attestation to Mr Eshaq being a fit and proper person must be positive and not simply a failure of the case against him to meet a reasonable doubt. The judgement of a reasonably minded person is an important consideration in deciding whether Mr Eshaq was now fit and proper, displaying the responsibility and aptitude required.
- 72 The Respondent referred the Tribunal to the decision of the Appeal Panel in *Lo v Director General Department of Transport* [2002] NSWADTAP 39. In this matter Mr Lo had been suspended pending his prosecution for assaulting another taxi driver and damaging his taxi while at work. The Tribunal at first instance and the Appeal Panel both affirmed the Respondent's decision to suspend Mr Lo. The Respondent submitted that this was a similar matter which supported the Respondent's decision to cancel Mr Eshaq's authority as it could not attest to him being fit and proper to hold an authority.

## Findings of Fact

- 73 There is a significant dispute about the facts in this case. Mr Eshaq has admitted all matters set out in the Police facts relating to his involvement in the affray with the other driver on 5th May 2013. Where there are additional matters set out in Mr Eshaq's oral evidence of the affray, which are not set out in the Police Facts Sheet, the Tribunal accepts Mr Eshaq's evidence. The Tribunal accepts that Mr Eshaq parked his car blocking parking spots. He was then provoked to pursue and punch the victim by the sequence of the victim's flashing of his lights, verbal insults and the taking of Mr Eshaq's keys.
- 74 The Tribunal notes that there were a number of matters which support the truth of Mr Eshaq's account of the provocative acts.
- The Police facts refer to Mr Eshaq and his victim as the "co-accused" - suggesting joint blameworthiness for the affray.
  - The Magistrate's handwritten notes on the court file record the Afghani insult - although they do not refer to the taking of Mr Eshaq's keys.
  - The provocation matters were raised by Mr Coustas in his response to the show cause letter dated 29 October 2013 suggesting a consistency in the account of provocation
  - Generally speaking Mr Eshaq's evidence concurs with the evidence given by Mr Coustas to the Tribunal of his submissions made to the Local Court on Mr Eshaq's behalf.

## The legal tests

- 75 The Tribunal needs to determine whether Mr Eshaq is of good repute and in all other respects a fit and proper person to be the driver of a taxi-cab, and that he has sufficient responsibility and aptitude to drive a taxi-cab in accordance with the conditions under which the taxi-cab service concerned is operated, and in accordance with law and custom.

## Fit and Proper

- 76 The meaning of fit and proper person in the context of issuing a driver authority was considered by Deputy President Hennessy of the NSW ADT Appeal Panel in the matter of Department of Transport and Infrastructure v Murray [2011] NSWADTAP 16 at 20.

"When deciding whether a person is a 'fit and proper person', the question of whether the community would have confidence that any improper conduct will not re-occur is relevant: Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321; 94 ALR 11. Otherwise, the determination of fitness and propriety is a question of fact for the decision maker to determine objectively on the basis of the all evidence. That question is not to be determined through the eyes of a reasonable member of the travelling public. Nor is it correct, as was suggested in Farquharson, to take account of the likely perceptions of the travelling public as one of the relevant factors in deciding whether an Applicant is a fit and proper person."

- 77 In drawing this conclusion, the Appeal Panel had analysed and confined the interpretation of an earlier line of administrative review cases. These included Farquharson and Registrar of Motor Vehicles [1996] ACTAAT 165. These cases had broadly decided that the opinion of the travelling public was relevant to determining whether an Applicant for or holder of a driver authority was a fit and proper person.
- 78 The Appeal Panel in Murray preferred the approach of the High Court to the phrase "fit and proper person" as set out in Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321; 94 ALR 11; 64 ALJR 462; 21 ALD 1. Toohey and Gaudron JJ stated (at 380) that:

The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.

In the same case, Mason CJ stated at [63] that:

The question whether a person is fit and proper is one of value judgment. In that process the seriousness or otherwise of particular conduct is a matter for evaluation by the decision maker. So too is the weight, if any, to be given to matters favouring the person whose fitness and propriety are under consideration.

- 79 In the matter of Hughes & Vale the High Court commented that there are 3 components to fitness and propriety - "honesty, knowledge and ability." Hughes & Vale Pty Ltd v State of New South Wales [1955] HCA 28; (1955) 93 CLR 127 at para 9.
- 80 In Sobey v Commercial and Private Agents Board [1979] 22 SASR 70 Walters J said of the term "fit and proper":

"In my opinion what is meant by that expression is that the Applicant must show not only that he is possessed of a requisite knowledge of the duties and responsibilities evolving upon him as the holder of a particular licence ... but also that he is possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public ... as a person to be entrusted with the sort of work which the licence entails."

- 81 This Tribunal's synthesis of these requirements in this matter is that an Applicant's fitness and propriety must be determined in the light of the role the Applicant is to undertake as a taxi driver. The Tribunal must consider the evidence before it about the Applicant's honesty, knowledge and ability as it relates to the specific role of taxi driving. It is a determination to be made by the decision maker taking into account and weighing up matters both contrary to and in favour of the Applicant.

## Good repute, aptitude and responsibility

- 82 The Appeal Panel's decision in Department of Transport and Infrastructure v Murray [2011] NSWADTAP 16 (8 April 2011) was subject of comment by the President of the Tribunal, Judge K P O'Connor, in the case of Nasour v Director-General, Transport NSW [2011] NSWADT 91 at 34:

"A judgement as to the perception of reasonably-minded members of the travelling public remains, in my view, a relevant consideration for an administrator, when considering the 'repute' of a driver, or the driver's 'aptitude and responsibility'."

- 83 From this the Tribunal understands that an administrator, and hence a substitute decision maker must make a judgement as to the perception of reasonably-minded members of the travelling public as a relevant consideration when considering the 'repute' of a driver, or the driver's 'aptitude and responsibility'.

84 In Saadie v Director General, Department of Transport [1999] NSWADT 68 at 17, Deputy President Hennessy said:

85 ... there are a number of factors that need to be taken into account in determining a person's suitability and fitness to obtain a taxi authority. These factors include:

- the nature, seriousness and frequency of any criminal offences for which the Applicant has been arrested or convicted;
- the nature, seriousness and frequency of any complaints made against the Applicant;
- the Applicant's driving record;
- the Applicant's reputation in the community; and
- the likelihood that the Applicant will re-offend, be the subject of further complaints or commit further traffic offences

86 In assessing the last factor, the following considerations are relevant:

- the length of time since the offences were committed and the circumstances in which they were committed;
- whether the Applicant admits responsibility for the offences or complaints and shows genuine remorse;
- the efforts the Applicant has made to rehabilitate himself or herself during that time;
- any change in the Applicant's circumstances such as increased support from friends, family or professional service providers.

## Findings

87 Adopting the considerations set out in Saadie's case the Tribunal makes the following findings.

(1) Nature and seriousness and frequency of criminal offences

Mr Eshaq initiated an affray with another authorised taxi driver in May 2013. He was not charged with assault. He was not convicted of the affray. He received a good behaviour bond. The behaviour is serious and specifically contrary to the Passenger Transport Regulations 2007 which require that a driver behaves with civility towards other drivers. It appears that the Local Court has regarded the matter as at the lower end of objective seriousness given the good behaviour bond and that no conviction was recorded.

(2) The Tribunal distinguishes the gravity of Mr Eshaq's behaviour from that of Mr Lo in *Lo v Director General Department of Transport* [2002] NSWADTAP 39. The Appeal Panel regarded the fact that the assault had taken place in the regulated environment of the NSW taxi industry as being of importance. In that case however, the assault was of considerably greater severity than that under discussion here, and included property damage to the victim's cab, with resultant loss of income.

(3) It does not appear that Mr Eshaq has any other criminal violence history. Mr Eshaq does have three criminal offences relating to driving with the prescribed content of alcohol. These are serious criminal offences. It appears that the last of these occurred in February 2008.

## Complaints history

88 There do not appear to be any customer complaints against Mr Eshaq.

## Driving record

89 The Tribunal has noted the three serious matters of driving with a prescribed content of alcohol - the last of which was in 2008.

90 Mr Eshaq also has five traffic infringements the most recent of which was in August 2001.

## **Reputation in the community**

- 91 Mr Eshaq provided references to the Local Court and then a further set of references to the Respondent in November 2013 as part of his application for internal review.
- 92 There are 5 references in November 2013 from five other taxi drivers who are also family friends. Rejab Alii Bonyadi said that he had "never been in any argument or brawl before". Mohammed Yunus Rahimi had previously provided a reference to the Local Court. He had known Mr Eshaq for 13 years and sees him every day. He comments that "he is not that kind of person." Mansoor Hussein says he has not heard of Mr Eshaq being involved in this kind of incident and reports Mr Eshaq's regret. Hussain Ali Shafaie has known him for 14 years and comments that he has never been involved in this kind of incident. Sayed Baseer Moosawee comments he "never heard he involved in any kind of incident" and notes his regret. Dr Mohammed Qureshi, Mr Eshaq's treating general practitioner notes his remorse and considers that it is a one off incident and will not happen again.
- 93 The references are largely similarly worded referring to "the incident". They express Mr Eshaq's behaviour as being out of character and uniformly indicate that he is a kind and community oriented person. The Tribunal is satisfied despite the common wording that the references provided the genuine impressions of each of the referees. Some of the referees have provided a reference on both occasions. The Tribunal is satisfied that they disclose a sufficient understanding of the jeopardies that Mr Eshaq faced first in his appearance before the Local Court and secondly in his application to the Respondent to retain his driver's authority.
- 94 It is noted that Mr Rejab Alii Bonyardi uses the words "argument or brawl" disclosing his understanding of an affray. The Tribunal considers that the four taxi driver referees would have awareness of the requirement set out in the regulations for a taxi driver to behave with civility towards another taxi driver and that the references have been provided in this context.
- 95 The Tribunal considers that the references disclose sufficient information and understanding of the matters Mr Eshaq faced both in appearing before the Local Court in relation to the affray charges and acting to retain his driver authority.

## **Likelihood of reoffending**

- 96 Mr Eshaq's offence occurred in May 2013 - only one year ago. It occurred while he was in the profession of taxicab driving - the profession in which he wishes to remain.
- 97 Mr Eshaq raised the issues of provocation and the extreme response of his victim before the Local Court at the same time as he pleaded guilty to the offence of affray. He told the Tribunal that he accepted responsibility for the offence and that what is in the police facts was correct. In this respect the Tribunal accepts that Mr Eshaq has accepted responsibility for the offence of affray.
- 98 In his evidence before the Tribunal Mr Eshaq displayed distress. The Tribunal interpreted this as demonstrating some remorse for the offence. The Tribunal notes that the references presented by Mr Eshaq do indicate an understanding by the referees of his remorse for the offence and express the view that it is a one off occurrence.
- 99 There was nothing put to the Tribunal by Mr Eshaq about efforts at rehabilitation. He does appear to have the support of members of the community and other taxi drivers.
- 100 The Tribunal has considered the findings of the Tribunal in the matter of Lloyd concerning the risk of reoffending during the unexpired portion of a good behaviour bond. Judicial Member Montgomery found that he should be guided by the time imposed by the Courts in terms of the good behaviour bond and that it would be imprudent to allow Mr Lloyd to hold the authority sought prior to the expiration of the bond. This Tribunal distinguishes Mr Eshaq's situation from that of Mr Lloyd who had been convicted of serious dishonesty offences over a long period of time. Mr Eshaq's offence appears to have been a single momentary offence.
- 101 In the Tribunal's view, a member of the public, knowing what Mr Eshaq has done, knowing the circumstances leading up to and surrounding the affray, including the provocation which the Tribunal accepts occurred, and aware of the support he has from family friends and other taxi drivers would consider the likelihood of him reoffending to be low.
- 102 Taking into account these considerations the Tribunal considers there is a low likelihood that he will reoffend.
- 103 Mr Eshaq's failure to notify the Administrator of being charged with the offence, as required by the Regulation, is a serious matter, and a breach of the Regulation. I am not however satisfied that in the circumstances it alone justifies cancelling his authorities, or renders him no longer fit and proper.

## **Responsibility and Aptitude**

104 As set out above, Nasour's case requires the Tribunal to take into account the perception of reasonably-minded members of the travelling public as a relevant consideration when considering the 'repute' of a driver, or the driver's 'aptitude and responsibility'. The references from non-taxi driver members of the travelling public appear to support Mr Eshaq in this regard.

## **Fit and Proper**

105 The Tribunal considers that it can attest to Mr Eshaq being a fit and proper person to hold his authority.

## **Application for costs**

106 The Applicant sought the award of costs of the second day of hearing. On the first day the Respondent questioned the Applicant's credit in raising issues of provocation by his victim, the co-accused. The Respondent put to the Applicant that he had raised the provocation to improve his case before the Tribunal. When the Applicant objected to this the Respondent requested that the Tribunal issue a summons for further material from the Local Court to test this.

107 The Tribunal declined to issue the summons. The Tribunal already had before it a copy of the Local Court's file including the Police facts, the record of the bond and the Magistrate's handwritten notes. The Tribunal was not certain that a transcript of the guilty plea would be available from the Local Court. The Tribunal understood that the Applicant's solicitor Mr Coustas had represented him in the Local Court. As Mr Coustas had been an Officer of the Court in the matter, the Tribunal considered it was appropriate to hear Mr Coustas' evidence of what had occurred at the Local Court proceedings. He gave evidence of his instructions and the matters of provocation he raised in mitigation before the Local Court.

108 Section 73(2) of the ADTA provides that The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice. Further Section 73(3) of the ADTA provides that the Tribunal is to act with as little formality as the circumstances of the case permit...without regard to technicalities or legal forms. The Tribunal considered that Mr Coustas' evidence could assist the Tribunal to understand whether the provocation matters had been raised in the Local Court - without requiring the cost and delay of issuing a summons.

109 The Respondent sought an adjournment to obtain instructions in relation to the evidence of the Applicant's solicitor Mr Coustas concerning the Local Court proceedings. On resumption the Respondent did not seek to cross examine Mr Coustas.

110 The Applicant submitted that he had not been placed on notice by the Respondent that the Respondent would raise the Applicant's credit concerning this matter at hearing. This had caused an extra day's costs for the Applicant.

111 The Applicant referred the Tribunal to the matter of Re Geoffrey Thompson - Re Geoffrey Thompson & Growers Co-op Pty Ltd and Export Development Grants Board (1985) 7 ALN N242. In that matter at [24] the Board had raised a new ground to support its decision at hearing and the "tribunal" in that matter determined that notice should have been given of this to the Applicant well in advance of the hearing.

112 The Tribunal's power in relation to costs was set out in Section 88 of the Administrative Decisions Tribunal Act 1997 as amended.

### **Section 88**

(1) Each party to proceedings before the Tribunal is to bear the party's own costs in the proceedings, except as provided by this section.

(1A) Subject to the rules of the Tribunal and any other Act or law, the Tribunal may award costs in relation to proceedings before it, but only if it is satisfied that it is fair to do so having regard to the following:

(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings by conduct such as:

- (i) failing to comply with an order or direction of the Tribunal without reasonable excuse, or
- (ii) failing to comply with this Act, the regulations, the rules of the Tribunal or any relevant provision of the enactment under which the Tribunal has jurisdiction

- in relation to the proceedings, or
- (iii) asking for an adjournment as a result of a failure referred to in subparagraph (i) or (ii), or
  - (iv) causing an adjournment, or
  - (v) attempting to deceive another party or the Tribunal, or
  - (vi) vexatiously conducting the proceedings,
- (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
  - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
  - (d) the nature and complexity of the proceedings,
  - (e) any other matter that the Tribunal considers relevant.
- 113 The Applicant's arguments were that the Respondent's conduct in raising the Applicant's credit at hearing in relation to his evidence of provocation had unnecessarily disadvantaged the Applicant, prolonged unreasonably the time taken to complete the proceedings and had not given notice of the intention to raise it as natural justice would require.
- 114 The Respondent submitted that the issue of the Applicant's credit came out when questioned about the coincidence in the wording of references which used the word "incident" consistently. Further the Applicant's answers in relation to matters raised in the Police brief and raised in his solicitor's show cause response of 29 October 2013 had emerged in live proceedings - they needed to be pressed.
- 115 The Tribunal notes on one hand the fact that the Tribunal's review is a hearing "de novo" and that this does not confine the matters raised at hearing to those set out in the Respondent's decision under review. This does not relieve a party however of giving notice of the intention to raise a matter not previously canvassed. The Tribunal notes that the Applicant had relied on the provocation matters in his response to the show cause letter dated 29th October 2013. The Respondent's Memo of 14 November 2013 considering the show cause response acknowledges the claims of insult to Mr Eshaq's mother and wife.
- 116 Further the Statement of Reasons for the subsequent decision to cancel Mr Eshaq's authority notes "the explanation tendered is insufficient to mitigate the seriousness of the offence". No issue is raised here alleging recent invention of the provocation matters.
- 117 In his application for internal review dated 26 November 2013- Mr Eshaq again relies upon the contents of his solicitor's letter of 29 October 2013 which set out the provocation matters. The Internal Review outcome of 13 December 2013 states that the Internal Reviewer has taken into consideration all the information raised in the internal review correspondence. Again no issue is taken with Mr Eshaq's honesty in raising the provocation matters.
- 118 At the same time, the Tribunal notes that the nature of this Application is that the Applicant contests the Respondent's decision that it cannot attest to the Applicant being a fit and proper person. The Applicant's honesty and credit is a live issue in this respect and questions were put to him in cross examination which properly raised these issues.
- 119 The costs provisions provide for each party to pay their own costs. The Tribunal may only award costs when it is fair to do so for reasons a) to e). The reasons set out in a) to e) focus on "improper" conduct - using the words unreasonable, unnecessarily disadvantage, deceive and vexatious. In the circumstances the Tribunal determines that the Respondent's conduct has not been "improper" in any of the ways described. The Tribunal declines to award costs as sought by the Applicant.

## Decision

- 120 In my view the correct and preferable decision was not to cancel Mr Eshaq's authority. Accordingly, the order of the Tribunal is that the decision of the Administrator made on 13 December 2013 to cancel Mr Eshaq's authority be set aside.

judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.