SUPREME COURT OF QUEENSLAND

CITATION:	*Nutley v President of the Industrial Court of Queensland & Anor* [2019] QSC 167
PARTIES:	**DAVID JAY NUTLEY** (applicant) **v** **PRESIDENT OF THE INDUSTRIAL COURT OF QUEENSLAND** (first respondent) **WORKERS' COMPENSATION REGULATOR** (second respondent)
FILE NO:	SC No 1322 of 2019
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	17 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2019
JUDGE:	Bradley J
ORDERS:	**Delivered *ex tempore* on 17 June 2019:** **1. The originating application is dismissed.** **2. The applicant pay the second respondent's costs of the proceeding.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – JUDICIAL REVIEW – where the applicant seeks judicial review of a decision of the President of the Industrial Court of Queensland, in which the President dismissed the applicant's appeal against a decision of the Queensland Industrial Relations Commission – where the applicant contends that the President erred by limiting the scope of the applicant's appeal, or of the matters which could be advanced as grounds of appeal, in accordance with s 557 of the *Industrial Relations Act* 2016 (Qld) – whether there is any inconsistency between s 557 of the *Industrial Relations Act* 2016 (Qld) and s 561 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) that would prevent both provisions applying to the applicant's appeal to the Industrial Court – whether the President of the Industrial Court erred in

his Honour's decision in a manner which gives rise to an error amenable to correction under the *Judicial Review Act* 1991 (Qld)

Industrial Relations Act 2016 (Qld), s 557
Judicial Review Act 1991 (Qld), s 43
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 561

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; [2000] HCA 47, applied
Eastman v The Queen (2000) 203 CLR 1; [2000] HCA 29, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, applied
Harrison v President, Industrial Court [2017] 1 Qd R 515; [2016] QCA 89, cited
Hunt v Blackwood & Anor [2014] ICQ 014, explained
Nutley v Workers' Compensation Regulator [2017] QIRC 091, related
Nutley v Workers' Compensation Regulator [2019] ICQ 002, related

COUNSEL:	R Myers for the applicant C Hartigan for the second respondent
SOLICITORS:	Hall Payne Lawyers for the applicant Crown Law for the second respondent

[1] This is an application for review of a decision of the President of the Industrial Court of Queensland. It was brought under s 43 of the *Judicial Review Act* 1991.

[2] The applicant was employed by Middlemount Coal Pty Ltd, as a truck operator and then as a pit controller. He made a claim for compensation in respect of an adjustment disorder with anxiety and depression, which he alleged was a result of conduct of some of his co-workers towards him. His claim for compensation was refused.

[3] The applicant appealed to the Queensland Industrial Relations Commission (**Commission**). The Commission, constituted by Deputy President Swan, found that the applicant's employment had not been the major contributing factor to his injury. Her Honour also found that, if his employment had been the major contributing factor, then his claim for compensation would have failed because his was not an "injury" for the purposes of a claim by reason of being excluded by s 32(5)(a) of the *Workers' Compensation and Rehabilitation Act* 2003 (***WCR Act***).[1]

[4] The applicant appealed to the Industrial Court. The Industrial Court dismissed the appeal, concluding that no appellable errors had been shown.[2]

[5] On 8 February 2019, the applicant commenced this proceeding seeking declarations and a prerogative order.

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1 *Nutley v Workers' Compensation Regulator* [2017] QIRC 091.
2 *Nutley v Workers' Compensation Regulator* [2019] ICQ 002.

[6] Pursuant to directions made on 25 February 2019, the applicant filed written submissions on 3 June 2019 and the second respondent filed an outline of submissions on 10 June 2019. The matter was heard in the applications list on 17 June 2019, with counsel for the applicant and the second respondent appearing and making short oral submissions, without departing from the arguments presented in writing.

[7] The first respondent abides the order of the court and was excused from further appearances.

[8] The applicant's case proceeded on the basis that, although the Industrial Court is a superior court of record,[3] it is a court of limited jurisdiction so that it may be characterised as amenable to review by prerogative relief, at least to the extent of review for jurisdictional error under Part 5 of the *Judicial Review Act*. [4] The applicant contends there was such an error.

[9] The second respondent did not challenge the right of the applicant to seek orders under s 43 of the *Judicial Review Act*, if the applicant could establish jurisdictional error. Nor did the second respondent contend that the court ought to stay or dismiss the application on the basis that it would be inappropriate for it to continue on the basis that the applicant had any right to appeal to the Court of Appeal in respect of the President's decision.[5]

[10] In the circumstances, it was not necessary to resolve any competing contentions as to the procedure adopted by the applicant in order to decide the outcome of the proceeding.

[11] The following reasons were delivered *ex tempore*.

The applicant's contentions

[12] The applicant seeks various declarations about the decision of the Industrial Court, constituted by the President, given on 14 January 2019 in an appeal from the Commission. The applicant also seeks an order that the appeal be remitted to the Industrial Court "for a hearing on its merits in accordance with law."

[13] On 14 January 2019, the President dismissed an appeal by the applicant from a decision of a Deputy President of the Queensland Industrial Relations Commission. The Deputy President's decision had been made on 16 October 2017.

[14] In the reasons, the President set out the appeal that was before the Industrial Court in these terms:

> "[6] The Application to Appeal contains the seven grounds of appeal. Some of them appear to assert errors of law, others clearly assert errors of fact. On the hearing of the appeal, the appellant reduced the grounds argued to two but they appear to be a combination of some of the grounds listed in the Application to Appeal.

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3 *Industrial Relations Act 2016 (**IR Act**)*, s 407.
4 *Harrison v President, Industrial Court* [2017] 1 Qd R 515, 523-525 [27]-[37], 527-530 [47]-[60].
5 *IR Act,* s 554(1).

> [7] In the appellant's written submissions he appears to rely on two grounds:
>
> (a) "The Commission ought to have concluded that the Appellant's injury arose out of or in the course of the Appellant's employment with employment being the major significant contributing factor to his injury."
>
> (b) "… there was no evidence that any management action caused or contributed to the Appellant's injury in any way."
>
> [8] Under those headings, the appellant has included some other grounds which include allegations of error of fact and a failure to provide adequate reasons for the conclusions reached."

[15] The applicant contends that the President erred, in a matter of significance to the Industrial Court's jurisdiction, by erroneously limiting the scope of the applicant's appeal or of the matters which the applicant could advance as grounds of appeal.

[16] In this respect, the applicant relies, in particular, upon [9] and [10] of the President's reasons:

> "[9] Section 561 (2) of the [*WCR Act*] applies the relevant provisions of the *Industrial Relations Act* 2016 to an appeal of this kind. An aggrieved party may appeal a decision of the Commission on the grounds of error of law or excess, or want, of jurisdiction, but may only appeal on a question of fact where leave has been given. Leave was not sought and so the appellant may not argue any ground which relies upon an alleged error of fact.
>
> [10] The case advanced for the appellant seems to have been based upon a misapprehension about the nature of the appeal. Mr Myers, who appeared for the appellant, submitted that the appeal was an appeal by way of rehearing and, thus, the Court 'is required to look at the evidence that was given below to form a determination whether the finding of the deputy president is capable of being supported.' That is, with respect, incorrect. While s 561(3) of the Act provides that the appeal is by way of rehearing such an appeal is subject to the provisions of the *Industrial Relations Act* 2016 (IR Act). Section 557 of the IR Act sets out the grounds upon which an appeal may be made. It does not allow an appellant to undertake a general review of the case to see if the decision can be supported. It is for the appellant to demonstrate that there has been an error of law or that there has been a finding or determination in excess of jurisdiction or, with leave, an error of fact."

[17] The applicant also relies upon the final sentence in [23] of his Honour's reasons. This paragraph records the President's conclusions on the first of the two reformulated grounds of appeal argued before his Honour. It is appropriate to set out the whole of that paragraph:

> "[23] The foundation for the appellant's case on this series of grounds is that the Deputy President should have accepted other evidence and thus found for the appellant. It was argued that the evidence, for example, of Mr Large was unacceptable because, among other things, he answered some questions in cross-examination with a single word. These were criticised as being monosyllabic responses. In other words, they were the types of responses which are ordinarily given when particular allegations are put as to whether or not a nominated event occurred. There is nothing unusual in that. The argument for the appellant, so far as it alleges that there was no evidence to support a finding or that the Deputy President addressed the wrong question is rejected. Any argument that she [the deputy president] should have preferred some evidence to some other evidence is also rejected at least, on the basis, that to do so would not constitute an error of law."

Consideration of the applicant's contentions

[18] Appeals are creatures of statute and the statute ordinarily defines the conditions and limits of the exercise of the power.[6] The nature of an appeal must ultimately depend upon the terms of the statute conferring the right of appeal.[7]

[19] The statutes in question here, as identified in the President's reasons, are the *WCR Act*, in particular ss 560A, 561 and 562 in chapter 13, part 3, and the *Industrial Relations Act* 2016 (***IR Act***), in particular ss 557 and 558 in chapter 11, part 6.

[20] There is no dispute that the appeal heard by his Honour was one brought to the Industrial Court by the applicant as a party aggrieved by the Commission's decision and was expressly brought pursuant to s 561 of the *WCR Act*. That section provides:

> "**561 Appeal to industrial court**
>
> (1) A party aggrieved by the industrial magistrate's or the industrial commission's decision may appeal to the industrial court.
>
> (2) The *Industrial Relations Act 2016* applies to the appeal.
>
> (3) The appeal is by way of rehearing on the evidence and proceedings before the industrial magistrate or the industrial commission, unless the court orders additional evidence be heard.
>
> (4) The court's decision is final."

[21] Section 557(1) and (2) of the *IR Act* identify the grounds upon which an appeal by an aggrieved person may be made from a decision of the Commission.

> "**557 Appeal from commission**

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6 *Eastman v The Queen* (2000) 203 CLR 1 at 11 [14] (Gleeson CJ).

7 *Re Coldham; Ex parte Brideson (No. 2)* (1990) 170 CLR 267 at 273-274.

> (1) The Minister or another person aggrieved by a decision of the commission may appeal against the decision to the court on the ground of—
>
> (a) error of law; or
>
> (b) excess, or want, of jurisdiction.
>
> (2) Also, the Minister or another person aggrieved by a decision of the commission may appeal against the decision to the court, with the court's leave, on a ground other than—
>
> (a) error of law; or
>
> (b) excess, or want, of jurisdiction."

[22] It follows that an appeal is available under s 557(1) as of right on the ground of error of law or excess or want of jurisdiction. Under s 557(2), an appeal may be brought on a ground other than those grounds with the court's leave.

[23] The applicant's case for judicial review is founded on the proposition that there is an inconsistency between s 561(3) of the *WCR Act* and ss 557(1) and (2) of the *IR Act*. If there is such an inconsistency, the applicant contends that the *WCR Act* provisions, being more specific to the particular appeal, ought to have applied and excluded the operation of the *IR Act* provisions to the extent of the inconsistency; so that, the applicant contends, his Honour was mistaken as to his jurisdiction in applying s 557(2) of the *IR Act* to exclude the applicant's challenge to the Deputy President's findings of fact.

[24] In *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, the High Court considered the position with respect to appeals to the Australian Industrial Relations Commission. Commencing on page 203, the majority judgment made the following observations:

> "[11] … The statute in question may confer limited or large powers on an appellate body; it may confer powers that are unique to the tribunal concerned or powers that are common to other appellate bodies. There is, thus, no definitive classification of appeals, merely descriptive phrases by which an appeal to one body may sometimes be conveniently distinguished from an appeal to another.
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> [12] It is common and often convenient to describe an appeal to a court or tribunal whose function is simply to determine whether the decision in question was right or wrong on the evidence and the law as it stood when that decision was given as an appeal in the strict sense. An appeal to this Court under s 73 of the Constitution is an appeal of that kind. In the case of an appeal in the strict sense, an appellate court or tribunal cannot receive further evidence and its powers are limited to setting aside the decision under appeal and, if it be appropriate, to substituting the decision that should have been made at first instance.
>
> [13] If an appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should

> have been made at first instance, the appeal is usually and conveniently described as an appeal by way of rehearing. Although further evidence may be admitted on an appeal of that kind, the appeal is usually conducted by reference to the evidence given at first instance and is to be contrasted with an appeal by way of hearing de novo. In the case of a hearing de novo, the matter is heard afresh and a decision is given on the evidence presented at that hearing.
>
> [14] Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker. That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error. However, the conferral of a right of appeal by way of a hearing de novo is construed as a proceeding in which the appellate body is required to exercise its powers whether or not there was error at first instance."[8]

[25] As the above extract indicates, in the usual terminology adopted in respect of appeals, the description of an appeal as "by way of rehearing" is a description of the manner in which the appeal is to proceed both as to the evidence it is to consider and as to whether or not the court or tribunal considering the appeal accords a particular status to the correctness of the decision below.[9] The description says nothing about the grounds upon which the appeal may be brought.

[26] It follows that it is possible for both the relevant provisions in ss 561(2) and (3) of the *WCR Act* and those in ss 557(1) and (2) of the *IR Act* to operate consistently with each other, because the description of an appeal as "by way of rehearing"[10] is not inconsistent with the application of the *IR Act* to the appeal,[11] and the specification of the available grounds of appeal as of right and by leave.[12] The *WCR Act* provisions prescribe the nature of the appeal in terms of the material that is to be considered by the Industrial Court and the manner in which the Industrial Court is to approach the decision below. The *IR Act* provisions specify the grounds of appeal that are available to an appellant undertaking such an appeal – both as of right and with leave.

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8 The footnoted citations have been omitted. There is the further complication that, where an appellate body admits new evidence, what is involved is an exercise of original rather than strictly appellate jurisdiction: *Eastman v The Queen* (2000) 203 CLR 1 at 11 [14].

9 Section 567(1) of the *IR Act* confirms that an appeal to the Industrial Court is "by way of re-hearing on the record." By s 567(2), the "industrial tribunal may hear evidence afresh or additional evidence" if it "considers it appropriate to effectively dispose of the appeal." The Industrial Court is an "industrial tribunal". On the applicant's case, this would be an internal inconsistency in the *IR Act* itself.

10 In s 561(3) of the *WCR Act*.

11 In s 561(2) of the *WCR Act*.

12 In s 557(1) and (2) of the *IR Act*.

[27] For his different view, the applicant drew some comfort from decisions of the Industrial Court in a series of earlier cases commencing with *Hunt v Blackwood & Anor* [2014] ICQ 014 at [3], [4] and [5], where his Honour criticised as "incompetent" the bringing of an appeal against the Commission's decision in respect of a workers' compensation matter under s 321 of the (now repealed) *Industrial Relations Act* 1999. The basis of the President's criticism appears to have been that an appeal could be brought under s 561 of the *WCR Act*. Early in his Honour's reasons, the following is stated:

> "[3] The appellant purported to appeal under s 321[13] of the *Industrial Relations Act* 1999. This was incompetent. An appeal against the Commission's decision can be brought under s 561 of the *Workers' Compensation and Rehabilitation Act* 2003 ("the WCRA").
>
> [4] The notice of appeal was inadequate. Premised, as it was, on a misunderstanding of the appellate process it listed the grounds of appeal as:
>
> "(a) Error of law; and
>
> (b) Excess and/or want of jurisdiction"
>
> Those grounds demonstrate a further misunderstanding of the process. I do not need to deal further with this, or the other problems in the notice of appeal, as the respondents did not object to the appellant correcting these fundamental errors and proceeding in accordance with the WCRA."

[28] The *Industrial Relations Act* 1999 has since been repealed.[14] The former s 341 of the repealed Act provided for an appeal to the Industrial Court from a decision of the Commission only on the ground of error of law or excess, or want, of jurisdiction. The repealed Act had no provision for an appeal on other grounds with the leave of the court, as may now be found in s 557(2) of the *IR Act*.

[29] The mere recitation of "error of law" and "excess and/or want of jurisdiction" in a notice of appeal may be accurately described as inadequate. It fails to inform the court and the respondent(s) of the real basis of challenge to the decision of the tribunal below.

[30] Later in the reasons in *Hunt*, the President explained that "the appellant's case on appeal had to be teased out during the hearing."[15] His Honour continued:

> "[8] It is completely unsatisfactory that this Court should find itself in the position of having to hunt through the material to determine the grounds of appeal. Nevertheless, that is the result when an appellant fails at the outset to commence proceedings properly."

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13 This appears to be a typographical error in the reported reasons, which should instead refer to s 341 of the *Industrial Relations Act* 1999.

14 *IR Act,* s 991.

15 At [7].

[31] The applicant may have taken the President's criticism in *Hunt* of the inadequate identification of the grounds of appeal as a criticism of the appeal being confined to grounds of that kind.

[32] At [5] of the reasons in *Hunt v Blackwood*, his Honour identified that:

> "[5] Section 561(3) defines the scope of the proceedings, which are to be "by way of rehearing on the evidence and proceedings before the … industrial commission, unless the Court orders further evidence be heard." … Such a re-hearing on the record is to be determined in the manner set out by the High Court in *Fox v Percy*."

[33] This was a reference to s 348 of the repealed Act. [16]

[34] In *Fox v Percy*,[17] the Court was considering an appeal from a trial judge, sitting without a jury, who had made a finding of fact based on the credibility of a witness. The majority of the court, Gleeson CJ, Gummow and Kirby JJ, held that such a finding may only be set aside on appeal where incontrovertible facts or uncontested testimony demonstrate that the judge's conclusions are in error or where the decision at the trial was glaringly improbable or contrary to compelling inferences. In that context, their Honours explained:

> "[22] The nature of the "rehearing" provided in these and like provisions has been described in many cases. To some extent, its character is indicated by the provisions of the sub-sections quoted. The "rehearing" does not involve a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits. No such fresh evidence was admitted in the present appeal.
>
> [23] The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to "give the judgment which, in its opinion, ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case, which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval,

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16 The former s 348 provided that appeals to the Industrial Court were "by way of re-hearing on the record", with provision for the court to "hear evidence afresh, or hear additional evidence, if the [court] considers it appropriate to effectively dispose of the appeal." Section 567 of the *IR Act* is in the same terms.

17 (2003) 214 CLR 118.

> to reflect upon that evidence and to draw conclusions from it, viewed as a whole."

[35] The applicant's contentions proceed upon the assumption that the description of an appeal as being "by way of re-hearing" necessarily permits a broad and unrestricted range of grounds of appeal and is, therefore, inconsistent with the provisions in ss 557(1) and (2) of the IR Act, which give effect to a right of appeal on the ground of an error of law or excess or want of jurisdiction and an ability to appeal on other grounds only with the leave of the Industrial Court. In this the applicant is simply wrong. The requirement that an aggrieved person obtain leave to raise broader grounds of appeal does not affect the manner of the appeal by way of rehearing.[18]

[36] The second respondent identified that, since the commencement of the *IR Act*, in more recent decisions the Industrial Court, constituted by the President, has held that the grounds of appeal available in appeals under s 561 of the *WCR Act* are subject to the provisions in ss 557(1) and (2) of the IR Act.[19]

Conclusion

[37] For the reasons noted above, I do not find that there is an inconsistency between s 561 of the *WCR Act* and s 557 of the *IR Act* that would prevent both applying to the applicant's appeal heard by the Industrial Court. Therefore, I do not find that a case has been made that the President erred in his Honour's decision in respect of that appeal in a manner amenable to correction by relief in the nature of a prerogative writ under s 47 of the *Judicial Review Act*.

[38] The second respondent seeks its costs of the proceeding. The applicant could say nothing against such an order.

[39] The orders will be:

1. The originating application is dismissed.
2. The applicant pay the second respondent's costs of the proceeding.

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[18] An appeal to the Court of Appeal under chapter 18 of the *Uniform Civil Procedure Rules 1999* is an appeal by way of rehearing: r 765(1). An appeal against conviction requires leave if it involves a question of fact alone or a mixed question of law and fact; and an appeal against sentence requires leave: *Criminal Code,* s 668D(1), (2).

[19] *Carlton v Blackwood* [2017] ICQ 001 at [25]; *Gambaro v Workers' Compensation Regulator* [2017] ICQ 005 at [3], [27]; *Kiesouw v Workers' Compensation Regulator* [2017] ICQ 006 at [7].