INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*O'Hara v State of Queensland* [2020] ICQ 016
PARTIES:	**O'Hara, Michael John** (appellant) **v** **State of Queensland** (respondent)
CASE NO:	C/2019/27
PROCEEDING:	Appeal
DELIVERED ON:	13 July 2020
HEARING DATE:	6 July 2020
MEMBER:	O'Connor VP
ORDERS:	**1. The appeal is dismissed; and** **2. I will hear the parties on costs.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – APPEAL – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the appellant was employed by the respondent – where the appellant lodged an application for reinstatement with the Commission in excess of 16 years outside the statutory prescribed time limit – where the Commissioner determined not to exercise a discretion to extend time – whether the appellant has demonstrated an appealable error in the decision below INDUSTRIAL LAW – QUEENSLAND – APPEAL – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the respondent has filed an application seeking that the appeal be dismissed – where appellant was given leave to file and serve an amended notice of appeal – whether the amended notice of appeal complies with the statutory requirements – whether the appeal should be dismissed
LEGISLATION:	*Industrial Relations Act 1999* (Qld), ss 72, 73, 74, 331, 335 *Industrial Relations Act 2016* (Qld), ss 339, 541, 557 *Industrial Relations (Tribunal) Rules 2011* (Qld),

r 139, 226

CASES:

Breust v Qantas Airways Limited (1995) 149 QGIG *777*
Burke v Simon Blackwood (Workers' Compensation Regulator) (C/2013/38)
Craig v South Australia (1995) 184 CLR 163
Erhardt v Goodman Fielder Food Services Ltd (2000) 163 QGIG 20
Gambaro v Workers' Compensation Regulator [2017] ICQ 005
House v The King (1936) 55 CLR 499
Minister for Immigration and Multicultural Affairs v Fathia Mohammed Yusuf (2001) 206 CLR 323
O'Hara v State of Queensland (Department of Education) [2019] QIRC 155
Prange v Brisbane City Council [2012] ICQ 2
Robertson v Hollings [2009] QCA 303
State of Queensland v Lockhart [2014] ICQ 006
The Electrical Trades Union of Employees Queensland v President of the Industrial Court of Queensland [2007] 1 Qd R 1

APPEARANCES:

The appellant in person.

Mr S J Hamlyn-Harris, instructed by Crown Law, for the respondent.

Decision

[1] Mr Michael O'Hara was employed as a teacher with the Department of Education on a full-time basis in the Metropolitan South Region between 11 February 2002 and 21 June 2002.

[2] On 7 September 2018 Mr O'Hara filed an application for reinstatement under s 74 of the *Industrial Relations Act 1999*[1] alleging that he had been unfairly dismissed by the applicant. The date of his dismissal was recorded in his application as being 21 June 2002.

[3] The respondent contends that the termination of Mr O'Hara's employment came about by virtue of the effluxion of time consequent upon a temporary period of employment coming to an end.

[4] Section 74(2) of the *IR Act 1999* requires that an application for reinstatement be made within 21 days after the dismissal or a further period the Queensland Industrial Relations Commission allows.

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[1] (*'IR Act 1999'*).

[5] The application was made in excess of 16 years beyond the statutory 21day time limit prescribed by s 74(2)(a) of the *IR Act 1999*.

[6] Pursuant to s 74(2)(b) of the *IR Act 1999*, Mr O'Hara sought from the Commission an extension of time in which to file his application for reinstatement.

[7] On 24 October 2019 the application for an extension of time was refused.[2] In doing so, the Commissioner after considering the factors identified in *Breust v Qantas Airways Limited*[3] and *Erhardt v Goodman Fielder Food Services Ltd*[4] concluded:

> The High Court has held that *"when an applicant seeks an extension of time to commence an action after the time limit has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension"*.
>
> In this matter the Applicant has failed to discharge that onus.
>
> In all of the circumstances of this matter, I do not believe that the Applicant has justified why the Commission's discretion should be exercised to extend the time to pursue his application for reinstatement.
>
> The length of delay of over 16 years is one which is beyond what could be reasonably viewed as acceptable. This delay would be highly prejudicial to the Respondent's interests given the evidentiary challenges associated with defending an application after such a long passage of time. Whilst noting the prejudice to the Applicant in not having the reinstatement application determined, the reasons provided for the delay do not provide a satisfactory basis to justify such a significant extension of time.
>
> For the foregoing reasons I have decided not to exercise my discretion to extend time for the Applicant to pursue the application for reinstatement. The Applicant has not made out a case for an extension of time and, accordingly, I dismiss application TD/2018/84.[5]

[8] It is against that decision that Mr O'Hara now appeals to this Court.

Appeals to the Industrial Court of Queensland

[9] The appeal is brought pursuant to s 557 of the *Industrial Relations Act 2016.*[6] Section 557 of the Act provides that a person aggrieved with a decision of the Commission may appeal to the Court only on the ground of *error of law* or *excess or want of jurisdiction*. Section 557 relevantly provides:

> **Appeal from commission**
>
> (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.

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[2] *O'Hara v State of Queensland (Department of Education)* [2019] QIRC 155.
[3] (1995) 149 QGIG 777.
[4] (2000) 163 QGIG 20.
[5] [2019] QIRC 155 [51]-[55] (citations omitted).
[6] ('*IR Act 2016*').

[10] In *The Electrical Trades Union of Employees Queensland v President of the Industrial Court of Queensland*, Chesterman J wrote:

> The need to determine whether there was an error of law which would enliven the Industrial Court's appellate jurisdiction immediately gives rise to the question who should determine the existence of the jurisdictional fact. The question admits only one answer. It must be the Industrial Court which determines whether there has been an error of law in the decision of the Commission and therefore whether it has jurisdiction to entertain an appeal.[7]

[11] An appeal to the Court must also comply with r 139 of the *Industrial Relations (Tribunal) Rules* 2011 which sets out the requirements of a notice of appeal. Rule 139 relevantly provides:

> **139 Application to appeal - Act, s 557 or 562**
>
> (1) This rule applies to an application to appeal -
>
> (a) to the court under section 557 of the Act from a decision of the commission; or
> (b) …
>
> (2) The application to appeal must be filed and state the following -
> …
> (b) whether the appeal is from all or part (and which part) of the decision appealed from;
> (c) concise grounds of the appeal;

[12] At a mention held on 13 December 2019, the appellant was put on notice that his notice of appeal was deficient. A Directions Order was issued on the same date granting the appellant leave to file and serve an amended notice of appeal.

[13] On 15 January 2020 the appellant filed an amended notice of appeal.

[14] The respondent contends that the amended notice of appeal remains deficient. Accordingly, on 24 April 2020, the respondent filed an application to dismiss the appeal.

Application to dismiss

[15] The respondent submits that the amended appeal notice offends s 557 of the *IR Act 2016* on the basis that the appellant does not contend that there is an error of law or jurisdictional error with respect to the Commission's decision.

[16] The respondent submits that the appeal should be dismissed on two grounds:

1. The appeal should be dismissed under Rule 226 of the *Industrial Relations (Tribunal) Rules* 2011; and

2. In the alternative, the respondent seeks an order under section 541(b) of the *IR Act 2016* dismissing the entire appeal.

[17] Rule 226 is in the following terms:

> **Effect of failure to comply with rules**

[7] [2007] 1 Qd R 1, 6.

> (1) A failure to comply with these rules is an irregularity and does not of itself render a proceeding, document, step taken or order made in a proceeding, a nullity.
>
> (2) If there has been a failure to comply with these rules, the court, the commission, a magistrate or the registrar may -
>
> (a) set aside all or part of the proceeding; or
> (b) set aside a step taken or order made in the proceeding; or
> (c) declare a document or step taken to be ineffectual; or
> (d) declare a document or step taken to be effectual; or
> (e) make another order that could be made under these rules; or
> (f) make another order dealing with the proceeding generally as the court, commission, magistrate or registrar considers appropriate.

[18] Section 541 provides the Court with the power, among other things, to dismiss an industrial cause. It relevantly provides:

> **Decisions generally**
>
> The court or commission may, in an industrial cause do any of the following -
> …
>
> (b) dismiss the cause, or refrain from hearing, further hearing, or deciding the cause, if the court or commission considers -
>
> (i) the cause is trivial; or
> (ii) further proceedings by the court or commission are not necessary or desirable in the public interest;

[19] Section 541 of the *IR Act 2016* is virtually indistinguishable from its predecessor s 331 of the *IR Act 1999*. Section 331 was considered in *State of Queensland v Lockhart.*[8] In that case the Court considered an appeal from a decision of the Commission to refuse an extension of time in which to file an unfair dismissal application. Ms Lockhart's application for reinstatement was filed 42 days beyond the statutory 21-day time limit prescribed by s 74(2)(a) of the Act. Ms Lockhart did not identify in the application to appeal or during argument before the Court any error of law or excess or want of jurisdiction by the Commission. In dismissing the appeal, the Court wrote:

> In *O'Sullivan v Farrer*, Mason CJ, Brennan, Dawson and Gaudron JJ considered the expression "in the public interest". Their Honours wrote:
>
> > "Indeed, the expression, 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, **confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable** … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view."
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> In *GlaxoSmithKline Australia Pty Ltd v Makin*, the Full Bench of Fair Work Australia in considering what constitutes "the public interest" wrote:
>
> > Appeals have lain on the ground that it is in the public interest that leave should be granted in the predecessors to the Act for decades. It has not been considered useful or appropriate to define the concept in other than the most general terms and we do not intend to do so. **The expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to**

[8] [2014] ICQ 006.

> **undefined factual matters, confined only by the objects of the legislation in question.**
>
> Although the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters, it seems to us that none of those elements is present in this case.

The respondent has not demonstrated that the Commission erred in the exercise of its discretion to dismiss the application for extension of time and to strike out the application for reinstatement.

As Martin P observed in *Burke v Simon Blackwood (Workers' Compensation Regulator)*, "The burden upon a person seeking to upset the exercise of such a discretion is described in the well-known decision of the High Court in *House v The King*".[9]

[20] In *Prange v Brisbane City Council*,[10] Hall P held that:

> The power to dismiss proceedings pursuant to s. 331 of the Act, on the ground that further proceedings are not necessary or desirable in the public interest, is a discretionary power. The discretion is not vested in this Court. The discretion is vested in the Commission. Only in limited circumstances may this Court intervene.

Grounds of Appeal

[21] The orders sought by the appellant are expressed as follows:

> On the basis of the incontrovertible evidence presented by the applicant against the respondent in the appeal application, it is confidently argued that the applicant has demonstrated that the justice of this case demands an extension of time. Accordingly, the applicant seeks an extension of time.

[22] The grounds of appeal are set out as a narrative contained within what is described as an "Affidavit Statement". Annexed to the statement are some 23 exhibits. What can be discerned from the appellant's statement is as follows:

(a) He was summarily dismissed on 13 June 2002 by Mr Phil Whitehouse, Assistant Director, Human Resources Operations with the Department of Education;

(b) That the respondent "*purposefully and calculatingly, falsely submitted to the QIRC*" that the "*Applicant was not dismissed rather this temporary contract was not renewed beyond its intended end date of 21 June 2002*."

(c) Because of the "*deliberate clandestine action of knowingly withholding crucial evidence that favoured the Applicant when it was know to exist*". In particular, the appellant relies on the submission of Karyn Bell, Principal Employee Relations Advisor, that the Department did not have

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[9] [2014] ICQ 006, [21]-[24] (emphasis added) (citations omitted).
[10] [2012] ICQ 2, [3].

documents in its possession that were relevant to the matters he raised before the Commissioner;

(d) Since the decision of the Commissioner on 24 October 2019 the appellant has obtained further documents (in particular Exhibit X, Parts 1,3,5,8 and 9) not only existed, but were known by the respondent to exist at the QIRC hearing of 18 September 2018; and

(e) The appeal should be allowed, and the decision of the Commission set aside and instead it be ordered that he be granted an extension of time for him to pursue an application for reinstatement.

[23] For completeness let me turn briefly to the grounds of appeal advanced by the appellant.

Ground (a) Mr O'Hara was summarily dismissed on 13 June 2002.

[24] Notwithstanding that the application for reinstatement records 21 June 2002 as the date of termination, the appellant now contends that he was summarily dismissed on 13 June 2002.

[25] To support that claim, the appellant relies on the correspondence of Mr Phil Whitehouse dated 13 June 2002.[11] In that correspondence, Mr Whitehouse raises concerns that the Department had not been advised by the appellant that he had been charged with 139 counts of fraud by the Melbourne Major Crime Squad. In failing to advise the Department that he had been charged with an indictable offence, the appellant was said to be in breach of Regulation 13 of the *Public Service Regulation* 1997.

[26] The appellant contends that the letter terminated his employment effective 13 June 2002. It did not. The letter makes clear that in light of the fraud charges he was requested to work at Gold Coast North District Office until the end of term which concluded on 21 June 2002. Mr Whitehouse advised the appellant that "… *the department rescinds its offer of temporary employment to you for term three of 2002*."

[27] It is not immediately apparent the basis for this ground of appeal. It cannot be reasonably said that the Commissioner has mistaken the facts or taken or ignored relevant material. In any respect, there is no error of law simply in making a wrong finding of fact.[12]

[28] Nothing raised by the appellant was material to the question before the Commissioner as to whether she should exercise the discretion to extend time to file the application for reinstatement. If anything, the correspondence supports the State of Queensland's submission that the termination of the appellant's employment came about by virtue of the effluxion of time consequent upon a temporary period of employment coming to an end.

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[11] Amended Application to Appeal dated 15 January 2020 (Exhibit X-Part 1).
[12] *Waterford v Commonwealth* (1987) 163 CLR 54, 77.

Ground (b) Karyn Bell, Principal Employee Relations Advisor, misled the Commission by submitting that the Department did not have documents in its possession that were relevant to the matters raised before the Commissioner.

[29] To support this ground, the appellant refers to an email dated 3 May 2019 to the Industrial Registry.[13] In that email, Ms Bell objects to that part of the Directions Order dated 26 April 2019 requiring the Department to supply to the appellant a list of documents relevant to the matter. Ms Bell wrote:

> Given the magnitude of this delay, the Respondent does not have any documents in its possession that are relevant to the matters raised by the Applicant…
>
> the Respondent is not required by law pursuant to s.339 of the Industrial Relations Act 2016 (Qld) to have, to produce copies of these documents given the significant delay.

[30] Section 339 of the *IR Act 2016* deals with the obligation of an employer to keep time and wages records for six years from the date the work to which the record relates is performed.

[31] This ground is misconceived. It does nothing to establish an error of law by the Commissioner which would displace the exercise of her discretion to refuse an extension of time.

Ground (c) - Since the decision of the Commissioner on 24 October 2019 he has obtained further documents (in particular Exhibit X, Parts 1,3,5,8 and 9) not only existed, but were known by the respondent to exist at the QIRC hearing of 18 September 2018.

[32] This ground is related to ground (b) above. It is submitted by the appellant that correspondence favourable to him was not put before the Commissioner at the hearing on 18 September 2018. The correspondence which appears to have been of most concern to the appellant was identified as Exhibit X, Parts 1,3,5,8 and 9 to his amended notice of appeal.

[33] The first piece of correspondence was the letter of Mr Phil Whitehouse dated 13 June 2002 and dealt with in ground (a). The second is a Briefing Note to the Director-General of the Department. Its purpose was to update the Director-General in relation to the 139 fraud charges brought against the appellant. The balance of the briefing note restates what was contained in the letter by Mr Whitehouse. The next document is a memorandum from the Senior Industrial Officer to the Director of Human Resources of 20 January 2003 concerning a notation placed against the appellant's employment record because of the failure to disclose the charges in accordance with the Public Service Regulation. The final document is a letter of 22 January 2003 from Mr John Ryan, Director of Human Resources to the appellant advising that the Department had acceded to his request that the notation on his employment record be removed.

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[13] Amended Application to Appeal dated 15 January 2020 (Exhibit X-Part 20).

[34] This ground is misconceived. The present appeal is confined to the grounds of error of law and want of jurisdiction.[14] If the appellant wished to appeal on any other basis, he required leave.[15] He did not seek leave.

[35] None of the documentation was relevant to the question to be determined by the Commissioner. Like much of the appellant's submissions, they are focused on the application for reinstatement. The submissions do not demonstrate any error of law.

[36] Finally, the appellant seeks to have the decision of the Commissioner set aside and instead it be ordered that he be granted an extension of time for him to pursue an application for reinstatement. For the reasons which follow, I disagree.

Consideration

[37] As was observed by Martin J in *Burke v Simon Blackwood (Workers' Compensation Regulator)*:

> The burden upon a person seeking to upset the exercise of such a discretion is described in the well-known decision of the High Court in *House v The King*.[16]

[38] In *House v The King*, Dixon, Evatt and McTiernan JJ wrote:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[17]

[39] In *Craig v South Australia,* Brennan, Deane, Toohey, Gaudron and McHugh JJ wrote:

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[18]

[40] In *Minister for Immigration and Multicultural Affairs v Fathia Mohammed Yusuf* after referring to the above passage from *Craig v South Australia*, McHugh, Gummow and Hayne JJ said:

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[14] *Industrial Relations Act* 2016 s 557(1)
[15] *Industrial Relations Act* 2016 s 557(2)
[16] *Burke v Simon Blackwood (Workers' Compensation Regulator) (C/2013/38),* [11] (citations omitted), quoting *House v The King* (1936) 55 CLR 499, 504-5.
[17] (1936) 55 CLR 499, 504–5.
[18] (1995) 184 CLR 163, 179.

> 'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute.
>
> In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.[19]

[41] In my view, the amended notice of appeal is, with respect, incompetent and non-compliant with the legislative requirements. The notice is neither concise nor does it offer clarity. The notice is filled with irrelevant information, it is repetitive, and it fails to identify whether the appeal is from all or part (and which part) of the decision appealed from. Moreover, the notice does not identify the law or facts supporting the grounds of appeal nor does it direct the Court to any error of law or excess or want of jurisdiction by the Commission.

[42] The appellant has failed to articulate, in any meaningful way, any grounds why the discretion should be upset nor have any grounds been raised to enliven the Court's appellate jurisdiction.

[43] It must also be said that the delay of more than 16 years is extraordinary. The appellant has offered no satisfactory explanation for the delay. The explanation provided was expressed by the appellant as issues with respect to *legal advice* and *incapacity*.

[44] The Commissioner gave the following reasons for not accepting his explanation for the delay in respect of legal advice:

> The Applicant submitted that he did not pursue an application for reinstatement on the basis of advice he had received from a solicitor, Mr Stephen Lather, on 24 June 2002. The Applicant submits that "*it was Mr Lather's professional opinion that to make an unfair dismissal at that time would be doomed to failure due to the fact that Queensland Education would argue that the Applicant had a chronic mental illness and because of that formally diagnosed illness QIRC would have no choice but to refuse his application for re-instatement.*"
>
> The only evidence provided to confirm that the legal advice had been sought or provided by Mr Lather was the Applicant's affidavit and oral evidence. Mr Lather was not called to give evidence. If it is accepted that legal advice of this nature had been provided, the issue arises of representative error.
>
> In the matter of *Maller v Suncorp Metway QIDC Pty Ltd*, Deputy President Bloomfield concluded that the behaviour of an Applicant cannot be ignored when an agent is involved.
>
> In *Rich v Chubb Protective Services,* President Hall (as he then was) continues:

[19] (2001) 206 CLR 323, 351 [82].

> "It is a substantial step, in an extension of time application, to move from arguing that an adviser's error carries less weight than personal fault to arguing that the fault of an adviser is an excuse, compare *Turner v Best & Less Australian Pty Ltd* (1995) 150 QGIG 1129 at 1131 per Hall C.CI [sic]. As between applicant and respondent, an applicant cannot dissociate himself from his agent in that way, see *Grumble v Killingsworth* [1970] VT 161 at 176 per McInerney J. I think that the passage from *Rex & Co v Ghosh* [1971] 2QB 597 at 601 may properly be invoked to justify granting an extension of time when delay is short and where the error is in the nature of a slip. Here the delay, 470 days, is considerable. This is not a case of error. This is a case of a considered forensic judgement now regretted."

Clearly in this matter the delay is not short – over 16 years in total – and the error is not in the nature of a slip. On the Applicant's evidence, he accepted the legal advice that his prospects of success would be limited if he filed an application prior to having medical clearance.[20]

[45] The appellant further claimed that the delay in making the application for reinstatement was due to his mental health. In that regard, the Commissioner concluded:

> A report from by Dr Lester Walton in relation to a separate legal proceeding and provided as exhibit C to the Applicant's application states:
>
> > This man remains thoroughly cognitively intact and he is more than able to adequately follow legal proceedings. He has a clear appreciation of the nature of his charges, the implication of pleading not guilty and the likely disposition of convicted. He is certainly able to articulate the nature of the defence he wishes to pursue and he is not compromised in terms of providing instructions, in the sense that he is more than adept at communicating his ideas to others.
>
> Dr Walton's comments suggest that the Applicant was capable of understanding legal matters and able to provide clear instructions accordingly.
>
> The Applicant's submissions that he was medically unfit to work as a schoolteacher until 9 April 2019 may be correct, however it does not follow that his medical condition prevented him from filing a reinstatement application.
>
> The Applicant's history of pursuing other legal applications in 2003, 2004, 2006, 2014, 2015 suggest that, despite his medical condition, the Applicant was capable of filing an application for reinstatement at a point in time much earlier than 2018. Of note is the Applicant's application for unfair dismissal filed in Victoria in 2003, indicating that not only was he capable of pursuing such an application but he was experienced in doing so some 15 years prior to filing his application in this Commission.
>
> The Applicant's evidence that he sought legal advice immediately after his employment ceased also suggests that the Applicant's illness did not render him incapable of understanding or pursuing his application within the 21-day time limit.
>
> Whilst the mental illness undoubtedly had an impact on the Applicant's life over many years, it is not accepted that they prevented him from filing this application within the statutory time period, and certainly prior to 2018.[21]

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[20] *O'Hara v State of Queensland (Department of Education)* [2019] QIRC 155, [17]-[21].
[21] Ibid [25]-[30] (citations omitted).

[46] In *McDonald v Tinbilly Travellers Pty Ltd* Hall P wrote:

> The appeal is about whether the Commission erred in law. Whilst there may be cases in which the chasm between the facts and the decision is so large that this Court will be entitled to infer that there has been an (unidentifiable) error of law, and whilst there will be cases in which this Court will interfere with a factual conclusion on the ground that the process was flawed, a clear distinction has always been maintained between an error of fact and an error of law. In particular, whilst s. 348 authorises an appellant to roam over the record of proceedings in the Commission to locate and/or demonstrate error of law, the appeal is not by way of a second chance trial, and is not an avenue for testing whether evidence supportive of a particular finding should have been accepted in whole or in part rather than other evidence which led to other conclusions. In ordinary circumstances, a factual conclusion by the Commission will be respected, save where there is not any evidence to support the conclusion.[22]

[47] The Commissioner's view for rejecting the explanation for the delay was entirely open to her on the facts. The Commissioner correctly accepted that the appellant would be prejudiced if his application for an extension of time was rejected in that he would not be able to pursue a remedy of reinstatement. However, the Commissioner also concluded, again correctly, that the State of Queensland would be prejudiced if forced to defend a dismissal at a trial held more than 16 years after the dismissal occurred. There was nothing in the evidence to suggest that a favourable exercise of discretion could be based on the State of Queensland's conduct.

Conclusion

[48] In my view, to permit this appeal to progress would be pointless. To do so would waste the Commission's time as well as waste the time and resources of the State of Queensland.

[49] The application to appeal does not comply with r 139 of the *Industrial Relations (Tribunals) Rules* 2011 because it does not state the "concise grounds of appeal".

[50] As observed by Martin J in *Gambaro v Workers' Compensation Regulator*[23] the failure to comply with those requirements under r 139 *Industrial Relations (Tribunals) Rules* 2011may be dealt with under r 226:

> The purpose of the rules is to provide for the just and expeditious disposition of proceedings. It is contrary to this purpose for a party to file protracted or ambiguous notices of appeal, or to supplement a notice with large amounts of material that will not assist the court in the determination of the matter. The consequence of the appellant's noncompliance with the rules is that the court may set aside or strike out part or all of the notice of appeal.

[51] Whilst it is recognised that the appellant is unrepresented, this does not excuse his noncompliance. As was said by Keane JA (with whom Fraser JA and Cullinane J agreed) in *Robertson v Hollings*:

> [L]itigation is not a learning experience. The courts do not permit litigants, even unrepresented litigants, to prosecute claims which cannot proceed fairly to the other parties. It is no doubt

[22] (2006) 183 QGIG 841.
[23] [2017] ICQ 005, [13].

> unfortunate for Mrs Robertson that she does not have the benefit of competent legal advice and representation; but her misfortune in this regard does not license her to proceed unconstrained by the rules according to which adversarial litigation is conducted.[24]

[52] The appellant has not demonstrated that the Commission erred in the exercise of its discretion to dismiss the application for extension of time and to strike out the application for reinstatement.

[53] The appellant has not raised any grounds why the discretion should be upset nor have any grounds been raised to enliven the Court's appellate jurisdiction.

[54] Accordingly, I am of the opinion that it would not be in the public interest for this appeal to continue and, in exercise of my discretion pursuant to s 541 of the Act, I dismiss the appeal. Equally, for the reasons advanced above, it is open to the Court to exercise its discretion under r 226 to dismiss the appeal.

Costs

[55] I will hear the parties on the question of costs.

Orders

[56] I make the following orders:

1. **The appeal is dismissed; and**
2. **I will hear the parties on costs.**

[24] [2009] QCA 303, [11].