INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Campbell v State of Queensland (Department of Justice and Attorney-General)* [2019] ICQ 18
PARTIES:	**DANIELLE CAMPBELL** (appellant) **v** **STATE OF QUEENSLAND (DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL)** (respondent)
FILE NO:	C/2018/16
PROCEEDING:	Appeal
DELIVERED ON:	29 November 2019
HEARING DATE:	28 November 2018
MEMBER:	Martin J, President
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – OTHER MATTERS – where the respondent made an application to dismiss the appellant's application for an order to stop bullying in the Queensland Industrial Relations Commission – where the appellant had been absent from her workplace since 31 August 2017 – where it was unclear when (or if) the appellant would return to the workplace – where the Commission found that the appellant had not been bullied in the workplace – where the Commission further found that there was no risk that the appellant would continue to be bullied in the workplace – where the application to dismiss was granted – whether the Commission erred *Industrial Relations Act* 2016, s 272, s 273, s 275, s 541
CASES:	*Bowker & Ors v DP World Melbourne Limited t/a DP World; Maritime Union of Australia, The, Victorian Branch & Ors* [2015] FWC 7312, cited *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, cited *General Steel Industries Inc v Commissioner for Railways (NSW) and Ors* (1964) 112 CLR 125, cited *House v The King* (1936) 55 CLR 499, cited

Mac v Bank of Queensland Ltd (2015) 247 IR 274, cited

Mulligan v Toll Transport Pty Ltd; Mandeep Singh [2018] FWC 5977, cited

Prange v Brisbane City Council [2012] ICQ 2, cited

Purcell v Farah (2016) 261 IR 361, cited

Quaedvlieg & Ors v Boral Resources (Qld) Pty Ltd (2005) 180 QGIG 1209, cited

Quinlan v Rothwell [2002] 1 Qd R 647, cited

Re MEAA; ex parte Hoyts Corporation Pty Ltd (1993) 112 ALR 193, cited

Re Queensland Electricity Commission & Ors; ex parte Electrical Trades Union of Australia (1987) 72 ALR 1, cited

Re SB (2014) 244 IR 127, cited

State of Queensland (Department of Justice and Attorney-General) v Campbell [2018] QIRC 082, related

State of Queensland v Lockhart [2014] ICQ 006, cited

APPEARANCES: M Rawlings instructed by Susan Moriarty & Associates for the appellant
M Spry instructed by Crown Law for the respondent

[1] Danielle Campbell (the appellant) commenced employment with Queensland Corrective Services in or about January 2012. Her most recent role was that of a Correctional Counsellor at the Wolston Correctional Centre.

[2] At the time of the hearing of this appeal, the appellant had been absent from her workplace since 31 August 2017.

[3] On 27 November 2017 the appellant consulted her general practitioner, Dr Andre Nadler, and was issued with a workers' compensation medical certificate. In it Dr Nadler certified that the appellant was suffering from "depression and anxiety" with no capacity to work from 27 October 2017 to 31 August 2018.

[4] On 9 March 2018 the appellant filed an application for an order to stop bullying with the Queensland Industrial Relations Commission, pursuant to Chapter 7 of the *Industrial Relations Act* 2016 (the Act). The appellant relied on a number of alleged incidents of bullying, the last of which was said to have occurred on 12 September 2017.

[5] On 5 June 2018 the respondent filed an application seeking an order pursuant to s 541 of the Act that the appellant's application filed 9 March 2018 be dismissed.

[6] On 29 June 2018 the Commission, acting under s 541 of the IR Act, dismissed the appellant's application.

The statutory provisions

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

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

[8] Section 273 of the Act provides the basis for an application to stop bullying. It provides:

> "Application for a commission order to stop bullying
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> An employee who reasonably believes the employee has been bullied in the workplace may apply to the commission for an order under section 275."

[9] Section 272 of the Act provides:

> "(1) An employee is *bullied in the workplace* if—
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> (a) while the employee is at work, an individual or group of individuals repeatedly behaves unreasonably towards—
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> (i) the employee; or
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> (ii) a group of employees of which the employee is a member; and
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> (b) that behaviour creates a risk to the health and safety of the employee.
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> Note—
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> For the meaning of employee for this chapter, see section 8(2).
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> (2) To remove any doubt, it is declared that subsection (1) does not apply to reasonable management action carried out in a reasonable manner."

[10] Section 275 of the Act relevantly provides:

> "(1) This section applies if—
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> (a) an employee has made an application under section 273; and
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> (b) the commission is satisfied that—

(i) the employee has been bullied in the workplace; and

(ii) there is a risk that the employee will continue to be bullied in the workplace.

(2) The commission may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the employee from being bullied in the workplace."

The grounds of appeal

[11] Of the original six grounds of appeal, only two were pursued:

(a) the Vice President erred at law by failing to assess the application at its highest; and

(b) the Vice President erred at law by interpreting s 275(1)(b)(ii) of the Act to apply only to the time an application is commenced.

[12] Each party proceeded without reference to the applicability of s 541 to this type of application. Whether a "stop bullying" application is an "industrial cause" was not the subject of any submissions on appeal.

First Ground – The Vice President erred at law by failing to assess the application at its highest

[13] This ground raises issues which touch upon the construction of s 541 of the IR Act and how that construction affects the appropriate consideration of the applicant's case.

[14] Industrial legislation in this State has contained a provision in the same, or similar, form since at least the *Industrial Peace Act* 1912.[1] A similar provision was present in federal legislation from 1904 until, it seems, the *Fair Work Act* 2009.

[15] The appellant contends that the Vice President did not consider the appellant's case at its highest and made findings on contentious issues. The appellant submits that the Commission is required to take the applicant's case at its highest in the determination of an application to dismiss pursuant to s 541(b) of the Act because:

(a) such an approach is consistent with the general law and wording of the Act;

(b) the applicant in a proceeding to dismiss an originating application bears the legal and evidentiary onus of the application; and

[1] See Schedule III.

(c) being required to fully prove a case, or call evidence in order to fully prove a proposition at a strike out application, effectively renders a full hearing of the matter nugatory.

[16] The appellant's submissions outline a number of instances where, she alleges, the Vice President did not take her case at its highest. In sum, the appellant's contentions are that the Vice President should not have:

(a) given Dr Nadler's medical certificate no weight;

(b) considered conduct between the parties (a direction to Ms Campbell to attend an Independent Medical Examination (IME)) which occurred after the filing of the originating application, on 9 March 2018, which did not relate to the appellant's contentions;

(c) concluded that the respondent's actions could be traced back to the appellant's failure to authorise Queensland Corrective Services to speak with her treating doctors;

(d) found against the appellant's credit when presented with conflicting versions of whether the respondent was authorised to contact the treating doctors;

(e) characterised the appellant's application as "clutching at straws";

(f) found that the appellant made a complaint about bullying in order to obtain a nine day fortnight and an increase in salary;

(g) found that the appellant's failure to give or call evidence for the application was relevant in the assessment of the respondent's application; and

(h) found that the appellant had attempted to put another service employee's employment in jeopardy.

[17] Some of the observations complained of are simply incidental comments ("clutching at straws") or form part of the corpus of facts in the proceedings. Such observations do not constitute findings or determinations of jurisdictional facts from which an error of law may arise. Similarly, comments concerning the appellant's conduct that purportedly go to credit were not relevant to the ultimate questions of whether the appellant was bullied in the workplace and whether there was a risk that the appellant would continue to be bullied in the workplace.

[18] At the hearing of this appeal the appellant pressed the first point: that the Vice-President erred in making a credibility judgement about Dr Nadler instead of accepting unreservedly that a general practitioner can certify that someone will be incapable of work for ten months. At the outset, it is questionable whether Dr Nadler's certificate was given "no weight" as the appellant contends. The Vice-President did not suggest that the appellant was fit to return to work any sooner than the certificate indicated. In any event, the certificate could not by itself

be evidence of bullying – it could be evidence of the consequences of any bullying found to have occurred.

[19] The appellant's written submissions refer to cases considering powers of civil courts to summarily dismiss a matter. The substance of those authorities is summarised in Barwick CJ's judgment in *General Steel Industries Inc v Commissioner for Railways (NSW) and Ors*:[2]

> "There is no need for me to discuss in any detail the various decisions, some of which were given in cases in which the inherent jurisdiction of a court was invoked and others in cases in which counterpart rules to Order 26, r. 18, were the suggested source of authority to deal summarily with the claim in question. It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action – if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal is clearly demonstrated. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'.
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> At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'.
>
> As I have said, some of these expressions occur in cases in which the inherent jurisdiction was invoked and others in cases founded on statutory rules of court but although the material available to the court in either type of case may be different the need for exceptional caution in exercising the power whether it be inherent or under statutory rules is the same."

[20] In oral submissions the appellant also sought to reason by analogy with reference to the summary judgment provisions in the *Uniform Civil procedure Rules* 1999 (UCPR). That scheme was considered in *Deputy Commissioner of Taxation v Salcedo,*[3] wherein McMurdo P held that:

> "[3] Nothing in the UCPR, however, detracts from the well established general principle that issues raised in proceedings will be determined summarily only in the clearest of cases. Gaudron, McHugh, Gummow and Hayne JJ said in *Agar v Hyde*, recently cited with approval by Gleeson CJ, McHugh and Gummow JJ in *Rich v CGU Insurance Ltd*:

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[2] (1964) 112 CLR 125 at 129.

[3] [2005] 2 Qd R 232.

> '… Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.'"

[21] However, in that same case, Williams JA opined that:

> "[16] … it should be noted that P D McMurdo J, with whom McPherson JA agreed (and who constituted the majority in *Gray v Morris*) said at 133:
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> > 'With respect to those who may have expressed a different view, it seems to me that rr. 292 and 293 should be applied by reference to their clear and unambiguous language, without a need for any paraphrase or comparison with a previous rule. But in the application of the plain words of rr 292 and 293, and in particular the consideration of whether there is a need for a trial, a court must keep in mind why the interests of justice usually require the issues to be investigated at a trial.'
>
> [17] That review of the authorities clearly establishes to my mind that there has been a significant change brought about by the implementation of r. 292 and r. 293 of the UCPR. **The test for summary judgment is different, and the court must apply the words found in the rule.** To use other language to define the test (as was contended for in this case by counsel for the appellant relying on the reasoning of Chesterman J in *Gray v Morris*) only diverts the decision-maker from the relevant considerations." (emphasis added)

[22] The difference between r 292 (or r 293) of the UCPR and s 541(b) of the Act is manifest. Rule 293 requires that a plaintiff have "no real prospect of succeeding on all or a part of the plaintiff's claim and there is no need for a trial of the claim or the part of the claim". By contrast, s 541(b)(ii) requires that proceedings be "not necessary or desirable in the public interest". The tests are defined by the language of the instruments in which they appear. Any assistance derived from considering the UCPR rules, or indeed any like test under the general law, is limited at best.

[23] Section 541 of the Act is relevantly indistinguishable from its predecessor – s 331 of the *Industrial Relations Act* 1999. Section 331 relevantly provided:

> "The court or commission may, in an industrial cause—
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> …
>
> (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;"

[24] Consideration given to s 331 in earlier decisions can inform the resolution of this ground of appeal. In *State of Queensland v Lockhart*,[4] Deputy President O'Connor summarised the meaning of "public interest" in relation to the exercise of discretion under s 331 in the following terms:

> "[21] In *O'Sullivan v Farrer*, Mason CJ, Brennan, Dawson and Gaudron JJ considered the expression 'in the public interest'. Their Honours wrote:
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> > '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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> [22] In *GlaxoSmithKline Australia Pty Ltd v Makin*, the Full Bench of Fair Work Australia in considering what constitutes 'the public interest' wrote:
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> > '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 to be made by reference to 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.'
>
> Conclusion

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[4] [2014] ICQ 006.

[23] 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.

[24] 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*'." (emphasis added)

[25] Similarly, in *Prange v Brisbane City Council*,[5] Hall P held at [3] 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. In *House v The King* at 504 to 506, Dixon, Evatt and McTiernan JJ explained:
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> > '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.'"

[26] In the earlier case of *Quaedvlieg & Ors v Boral Resources (Qld) Pty Ltd*[6] Hall P, in dealing with an application to strike out for want of prosecution, cited with approval the reasoning of Thomas JA in *Quinlan v Rothwell*[7] as follows:

> "There is now a consciousness of the need for some level of efficiency in the use of the courts as a public resource. That, of course, must not displace the need for

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[5] [2012] ICQ 2.

[6] (2005) 180 QGIG 1209.

[7] [2002] 1 Qd R 647.

> reasonable access to the courts and the provision of justice according to law in each matter, but it highlights the fact that the former laissez faire attitude by courts towards the leisurely conduct of actions at the will of the parties has ended. At the same time the rules of court are not an end in themselves. They do not exist for the discipline of practitioners or clients, or for the protection of courts from inefficient litigants, but rather as a means of ensuring that issues will be defined in an orderly way and that parties have the opportunity of full preparation of their case before the trial commences. The rules also afford defendants the means of bringing to an end actions in which the other party will not abide by the rules."[8]

[27] Insofar as it may confine the exercise of discretion under s 541, the purpose of the Act is stated as follows:

> "3 Main purpose of Act
>
> The main purpose of this Act is to provide for a framework for cooperative industrial relations that—
>
> (a) is fair and balanced; and
>
> (b) supports the delivery of high quality services, economic prosperity and social justice for Queenslanders."

[28] The process for consideration of an application under s 541 does not require that the respondent's case be taken at its highest. The cognate provisions in federal legislation[9] were frequently considered by Full Benches of the federal tribunal, the Federal Court of Australia and the High Court of Australia. The accepted approach was that the applicant bore the onus of making the claim for relief. But the ascertainment in any particular case of where the public interest lay often depended on a balancing of interests, including competing public interests, and was very much a question of fact and degree.[10]

[29] As the power given to the Commission by s 541 can prevent a party from pursuing relief otherwise available under the IR Act it is one which is to be exercised with due circumspection on a proper consideration of relevant materials.[11] A "proper consideration" cannot be made where the case for the respondent is simply taken at its highest. While the onus remains on an applicant, the requirement to consider the "public interest" cannot be satisfied if an artificial inflation of the respondent's case is applied. Indeed, to take a respondent's case at its highest

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[8] At 658, quoted in *Quaedvlieg & Ors v Boral Resources (Qld) Pty Ltd* (2005) 180 QGIG 1209 at 1210.

[9] In particular, s 111(1)(g) of the *Industrial Relations Act* 1988 and s 111(1)(g) of the *Workplace Relations Act* 1996.

[10] *Re Queensland Electricity Commission & Ors; ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1 at 5.

[11] *Re MEAA; ex parte Hoyts Corporation Pty Ltd* (1993) 112 ALR 193 at 194.

would almost always result in the dismissal of an application under this section. On an application of this type, a respondent is not relieved of any requirement to advance a case.

[30] In considering the public interest, regard must be had to the legislative basis of the principal relief sought and the evidence before the Commission. The history of the anti-bullying provisions under the Act does not provide further guidance as to their object, save that the inspiration for the Queensland anti-bullying scheme was its federal counterpart.[12] The intention behind the cognate provisions under the *Fair Work Act* 2009 (Cth) was to provide workers with "a quick way to stop bullying so they do not suffer further harm or injury."[13]

[31] Insofar as it is alleged that the Vice President made findings in circumstances where the statute did not permit her to do so, one might generously conceive of the appellant's submission as contending that the Vice President acted upon a wrong principle or allowed irrelevant matters to guide her, in the sense of the principles recognised in *House v The King*.[14]

[32] But that submission cannot stand. The value judgment incorporated in s 541(b)(ii) is a broad one. It was open to the Vice President to consider the evidence forming the basis of the s 273 application and it was equally open for her to consider whether the evidence should be accepted without demur. The Vice President's findings in respect of that evidence were not extraneous to the objects of the legislation.

[33] In respect of the particular finding that the appellant was not bullied, the appellant made the case in oral submission that the Vice President had failed to consider the s 273 application at its highest and had therefore erred. For the reasons already given, this submission fails. The discretion afforded to the Vice President is broad and, as above, the Vice President did not act beyond the confines of the legislation in considering whether the appellant could satisfy s 272 of the Act. Indeed, at paragraph [19], the Vice President was not satisfied that the s 273 application established a *prima facie* case:[15]

> "In my view Ms Campbell has not shown any *prima facie* case sufficient to support a bullying application. As mentioned previously had Ms Campbell authorised the Service to make contact with her treating doctors then much of her issues with the Service would have been dealt with at that time. Whilst this aspect of Ms Campbell's claim in B/2018/8 is not required to make a determination of the State of Queensland's application to dismiss B/2018/8, I have dealt with Ms Campbell's allegations of bullying in detail to indicate my view that she does not have a *prima facie* argument of bullying in the workplace against the Service."

[34] No error has been demonstrated that would vitiate the Vice President's exercise of discretion to strike out the appeal. This ground fails.

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[12] Explanatory Notes, *Industrial Relations Bill* 2016 at 3.

[13] Revised Explanatory Memorandum, *Fair Work Amendment Bill* 2013 (Cth) at [88].

[14] (1936) 55 CLR 499.

[15] *State of Queensland (Department of Justice and Attorney-General) v Campbell* [2018] QIRC 082.

Second Ground – The Commission erred at law by interpreting s 275(1)(b)(ii) of the Act to apply only to the time an application is commenced

[35] The appellant contends that the Vice President erred by finding that s 275(1)(b)(ii) of the Act requires an assessment of risk that an employee will continue to be bullied at the time an application is filed or at the time when the Commission considers the application.

[36] The appellant also submitted that the Vice President erred by applying the same test to the assessment of risk under s 272(l)(b) of the Act. But that was not covered in her ground of appeal.

Should the Court entertain this ground of appeal?

[37] The Vice President observed at paragraph [33] that: "Ms Campbell did not address the issues raised by the State of Queensland in respect of ss 272 and 275 of the Act."

[38] The transcript of the Commission hearing reveals that the Vice President sought submissions from the appellant on this matter. Her Honour asked the following:

> "… how do you get over what has been submitted by the Department that it doesn't fit within the bullying section of the Act? … If she's not at work, who's going to bully her?"[16]

[39] There was no response of any substance to that question and the respondent submits that, having elected to make no submissions as to the proper construction of the Act at first instance, the Court should not now entertain this ground of appeal.

[40] This is a pure question of construction and requires no consideration of any evidence. There is no apparent evidence that could have been given which might have prevented this ground from succeeding at first instance. Indeed, the point was raised and pursued with success by the respondent before the Vice President.

[41] I am satisfied that it is expedient and in the interests of justice to deal with this point on appeal, notwithstanding the failure of the appellant to make submissions in respect of it before the Commission.

When is risk assessed for the purposes of the Act?

[42] The appellant says that the question before the court is essentially as follows: when considering s 275(1)(b)(ii) of the Act, is the Commission required to consider risk to an employee at the time the Commission is hearing the application or is the Commission required to consider risk at the time the employee returns to the workplace?

[43] The appellant says that her interpretation of s 275(l)(b)(ii) should be preferred because:

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[16] Hearing T2-29, 30.

(a) it is consistent with the purpose of Chapter 7 of the Act;

(b) the wording of s 275 of the Act and the ordinary meaning of "risk" is consistent with an assessment of risk in the future;

(c) the Act expressly restricts the assessment of risk of bullying to the workplace such that, if at the time of the application the employee is not attending the workplace, the Commission is required to consider the risk of bullying when the employee returns to the workplace; and

(d) otherwise the Commission is precluded from making an order for any employee who is absent from the workplace. If Parliament intended to exclude a class of employees, otherwise covered by the Act, they would have explicitly excluded these employees in the wording of the Act. Such employees include those on leave, or who are stood-down or suspended pending an investigation, on secondment or whose absence is administered by WorkCover due to an injury caused by unreasonable management action.

[44] In reply, the respondent submits that the use of the phrase "will continue to be bullied in the workplace" means that the alleged bullying behaviour is ongoing in the workplace and, absent an order from the Commission to prevent it, there is a risk that it will continue in the workplace. Section 274 of the Act is said to support this construction. As to the timing, s 274 says that:

> "The commission must start to deal with an application under section 273 within 14 days after the application is made."

[45] The respondent further submits that s 275(l)(b)(ii) does not require that the Commission be satisfied that there may be a risk at some point in the future. Rather, the Commission must be satisfied that "there is a risk" at the time the Commission makes its decision that the bullying will continue in the workplace.

At what time is the risk calculated?

[46] The notion of risk connotes exposure to the chance of injury or loss – it contemplates the possibility of a future occurrence. That said, "risk must also be real and not simply conceptual."[17]

[47] When considering risk to an absent employee at the time the Commission is hearing a s 273 application the Commission can, in appropriate circumstances, consider what will occur when the employee returns to the workplace. The distinction relied on by the appellant is artificial.

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[17] *Re SB* (2014) 244 IR 127 at [45]; applied in *Mac v Bank of Queensland Ltd* (2015) 247 IR 274 and *Purcell v Farah* (2016) 261 IR 361; See also *Bowker & Ors v DP World Melbourne Limited t/a DP World; Maritime Union of Australia, The, Victorian Branch & Ors* [2015] FWC 7312 at [19]; *Mulligan v Toll Transport Pty Ltd; Mandeep Singh* [2018] FWC 5977 at [17].

[48] If an employee who has been bullied is temporarily absent from their workplace it may be reasonable to find a risk that, on their imminent return, bullying will continue. Evidence may be tendered to this effect. Nothing in the wording of s 273 of the Act necessarily precludes the Commission from making such a finding if the existence of risk is considered from the time at which the application is made or considered.

[49] However, the appellant presents an altogether different case. Hers is one where the last alleged incident of bullying occurred some six months before the appellant filed her application, and some nine months before the respondent's application to dismiss was heard. Even if she had remained in the workplace, it would have been contentious whether there was any risk of bullying continuing as at either of these dates.

[50] As it transpired, she was absent from the workplace from 31 August 2017. In the circumstances, there was no evidence of exposure to the chance of continued bullying in the workplace at the time of making her application, or the consideration of the respondent's application.

[51] Further, it was unclear when (or if) the appellant would return to the workplace at all. The medical certificate only said that the appellant was incapacitated for work from the 27th of October 2017 to the 31st of August 2018, not when she would return. In this regard, any risk to the appellant was entirely speculative. There was no evidence, or promise of evidence, which tended to show that she would be at risk at an unknown time in unknown circumstances. It was open to the Vice President to accept that the absence of exposure to any chance of bullying in the workplace would continue into the foreseeable future.

Was there a finding that the appellant was not bullied?

[52] The question of whether there had been any bullying need not be determined for the purposes of the grounds of appeal which were pursued. But, as it was raised in argument, I will deal with it briefly.

[53] The Vice President laid out the question before her as follows:

> "[35] Ms Campbell's application in B/2018/8 is not an application concerning a dispute where general provisions of the Act may apply. Ms Campbell's application is a specific application and the Commission has been given specific power to deal with such applications. The role of the Commission in s 275 of the Act is to make orders provided the two aspects of s 275(1) of the Act have been met i.e. that Ms Campbell has made an application under s 273 of the Act **and** the Commission is satisfied that Ms Campbell has been bullied in the workplace **and** there is a risk that Ms Campbell will continue to be bullied in the workplace." (emphasis in original)

[54] The Vice President held:

> "[36] Whilst it is accepted that Ms Campbell has made an application under s 273 of the Act there is no evidence whatsoever that Ms Campbell is at risk of a continuation of any bullying in the workplace. **Whilst I have formed the**

> **view that the allegations of bullying raised in B/2018/8 do not have much substance** and that the actions of Service management would appear to meet the reasonable management action carried out in a reasonable manner test in s 272(2) of the Act, **I do not rely in my determination on this aspect of s 275 of the Act.**" (emphasis added)

[55] The appellant says that the effect of paragraph [36] is that the Vice President intimated that she would not rely on determinations in respect of s 272 for the determination of the application as a whole.

[56] For its part, the respondent says that the focus of the case was on s 275 of the Act. It submits that the Vice President was invited to assume that s 272 was satisfied, and simply turn to the question of risk under s 275. The Vice President notes as much in her decision.

[57] However, at the hearing before the Vice President, the respondent did not concede that there had been any bullying at all. It was submitted that the conduct alleged by the appellant did not constitute bullying because it failed to meet the definition under the Act.

[58] The Vice President described the respondent's submissions in the following terms:

> "The State of Queensland (Department of Justice and Attorney-General) seeks to have Ms Campbell's application for an order to stop bullying (B/2018/8) dismissed on the basis that the Commission is restricted to making the orders established by the legislation. Dr Spry contends that s 272 requires that an employee be bullied in the workplace whilst the employee is at work. Ms Campbell is not at work and therefore she is not 'in the workplace' and has not been 'in the workplace' since 31 August 2017 i.e. for almost a ten month period."

[59] The Vice President's conclusions on this point are as follows:

> "[37] The submission by Dr Spry concerning the effect of s 272 of the Act has substantial merit. Ms Campbell has not been in the Service's workplace since 31 August 2017. There is no risk to her health and safety at this time or at the time she filed her application in B/2018/8. Thus, **the requirement found in s 272(1)(b) of the Act has not been met."**
>
> [38] As for s 275 of the Act, before any order to stop bulling can be made by the Commission, the Commission must be satisfied that Ms Campbell 'has been bullied in the workplace' and that there is a 'risk' that Ms Campbell 'will continue to be bullied in the workplace'. There was no risk of Ms Campbell being bullied in the workplace when she filed her application in B/2018/8 on 9 March 2018 as she was in receipt of a medical certificate that stated that she had no capacity for any work until, at the earliest, 31 August 2018. Similarly there is no risk of Ms Campbell being bullied in the workplace at the current time because she continues to be absent from the workplace under the medical certificate issued by Dr Nadler on 27 November 2017.

> "[39] [I] exercise my discretion and dismiss B/2018/8 under s 541(b) of the Act. In circumstances where **Ms Campbell has not met the requirement of s 272** and where s 275 could not be utilised to grant her the relief that she seeks, I do find that application B/2018/8 should be dismissed and that further hearing of the application and/or deciding the application is not necessary or desirable in the public interest. Ms Campbell cannot succeed in her application in B/2018/8." (emphasis added)

[60] Thus, the Vice President found that the appellant had not been bullied for the purposes of s 272 of the Act. It may be that the Vice President considered the question of "risk" in s 275 independently of whether the appellant had been bullied. But the difficulty for the appellant is that, even had she been successful in establishing that the Vice President erred in respect of s 275(1)(b)(ii), a separate, undisturbed finding that the appellant was not bullied means that her application under s 273 would have failed in any event.

Conclusion

[61] The appeal is dismissed.