INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Royce v State of Queensland (Department of Justice and Attorney-General)* [2019] ICQ 19
PARTIES:	**STEPHEN ROYCE** (appellant) **v** **STATE OF QUEENSLAND (DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL)** (respondent)
FILE NO:	C/2018/27
PROCEEDING:	Appeal
DELIVERED ON:	29 November 2019
HEARING DATE:	20 March 2019
MEMBER:	Martin J, President
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – INTERFERENCE WITH FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – where the application to appeal reargues matters which were agitated in the Queensland Industrial Relations Commission – where the appellant did not seek leave to raise errors of fact – whether the grounds of appeal assert errors of law or errors of fact – whether the grounds of appeal can be pursued INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the appellant contends that he was given directions by the Deputy President when he was cross examining witnesses in the Commission – where the appellant further contends that the Deputy President suggested to the appellant that he abandon his application in the Commission – where the appellant contends that the Deputy President's conduct as characterised demonstrates actual or apprehended bias – whether the Deputy President made any statements in the Commission proceedings that demonstrate actual or apprehended bias *Dispute Resolution Centres Act* 1990, s 35 *Industrial Relations Act* 2016, s 557

CASES: *King & Ors v ASIC* [2018] QCA 352, applied

Royce v State of Queensland (Department of Justice and Attorney-General) [2018] QIRC 143, related

Together Queensland, Industrial Union of Employees v Executive Director, Public Sector Employees Industrial Relations, Public Service Commission [2015] ICQ 023, cited

APPEARANCES: Appellant in person
M Spry instructed by G R Cooper, Crown Solicitor for the respondent

[1] Stephen Royce was employed by the respondent at its Dispute Resolution Branch on the Gold Coast. His employment was terminated and his application in the Commission for reinstatement was dismissed.

[2] The hearing in the Commission extended over 11 days and covered a wide area of relevant and irrelevant matters. Mr Royce's appeal reflects that mix of relevance and irrelevance.

[3] For the reasons which follow, his application to appeal is dismissed.

Background to the application for reinstatement

[4] The essential facts underlying Mr Royce's application for reinstatement were summarised by Bloomfield DP in the following way:

> "[3] On 26 November 2014 the Respondent's Ethical Standards Unit (ESU) received information relating to Question on Notice 863 (QON) by Dr Alex Douglas, MP, Member for Gaven. On 25 June 2015 the ESU also received information about a Right to Information application by Hannay Lawyers in respect to the same QON. On both occasions the information was provided by Ms Lindsay Smith, Executive Manager, Dispute Resolution Branch, who was Mr Royce's line manager. Ms Smith raised both matters with the ESU on the basis that the contents of the QON were of a similar nature to that which was the subject of Mr Royce's conduct in April and May 2014, for which he was reprimanded (see below).
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> [4] On 27 July 2015 the ESU received further information (also from Ms Smith) that Mr Royce had allegedly involved himself in mediating a matter in which the agreed settlement sum of $350,000 had exceeded the pecuniary limit ($75,000) prescribed by DRB policy.
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> [5] Whilst reviewing the material provided to it, the ESU examined Mr Royce's departmental emails and work computer storage. During this process the ESU identified material which indicated that Mr Royce may have:

- been in an intimate relationship with his work colleague, Ms Kylie Mills, Justice Mediation Intake Officer;
- prepared questionable correspondence to Dr Alex Douglas (MP), Mr Cameron Dick (MP)* and Hannay Lawyers; and
- stored excessive personal files on his departmental computer, including some that were inappropriate.

(* Note: this matter was not pursued by the ESU after it was established that Ms Smith had spoken to Mr Royce about the matter at around the time it happened.)

[6] Subsequently, Mr Royce was directed to participate in an interview with ESU Investigators in relation a number of allegations. This took place on 19 November 2015 and the Investigation Report (the Report) was finalised by the ESU Investigators on 24 December 2015.

[7] On 4 March 2016, after considering the contents of the Report, Ms Lang suspended Mr Royce from duty on full pay pursuant to s 189(1) of the *Public Service Act* 2008 (the PSA)."

[5] A show cause letter followed. Mr Royce responded and another show cause letter was issued to which he also responded.[1] On 18 October 2016 Ms Lang (an acting Deputy Director-General) wrote to Mr Royce setting out in detail why she rejected his submissions and terminated his employment.

The application to appeal

[6] Section 557 of the *Industrial Relations Act* 2016 (the Act) sets out the basis upon which a person may seek to appeal from a decision of the Commission. So far as is relevant, that section provides:

"(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."

[7] The application to appeal does not comply with either the Act or the *Industrial Relations (Tribunals) Rules* 2011. Leave was not sought to appeal on grounds other than error of law or

[1] These are summarised in [8]-[15] of [2018] QIRC 143.

excess, or want, of jurisdiction. Notwithstanding that, much of the argument of the appellant concerns issues of fact.

[8] One of the findings of the Deputy President which is not the subject of any "ground" of appeal or, indeed, complaint, concerns the finding about Mr Royce's credibility. In order to understand the approach taken by the Deputy President in his reasoning it is necessary to set out a brief part of his reasons:

> "[20] In the normal course of events I would, when writing a decision such as this, record the competing evidence about the issues in contention before making findings of fact about such matters. However, Mr Royce raised so many issues (many of them totally irrelevant or spurious) in support of his contention that his termination was both unfair and for invalid reasons, it is simply not practicable, nor appropriate, to chase every rabbit down every warren he took me to. Instead, I propose to concentrate on those matters which have led me to conclude that Mr Royce's termination was not harsh, unjust or unreasonable.
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> [21] In doing so, **it is necessary for me to record that I found Mr Royce to be a very, very, unreliable witness who studiously avoided giving plain answers to plain questions whenever the thought a plain answer might damage his case. Further, many of his responses were, in my considered view, simply untruthful**. (See, for example, his 19 responses to Dr Spry's questions (at Transcript 2-82 to 2-86 and 3-16 to 3-18) about claiming sick leave between Friday 23 August and Friday 6 September 2013 (inclusive) to travel to Thailand with Ms Mills). As such, wherever there is a conflict in his evidence compared to that of another witness, and there are too many to cite, I prefer the evidence of the other witness." (emphasis added)

[9] In the paragraphs following those set out above, the Deputy President outlined his reasons for arriving at that strongly expressed view. Those findings are of considerable importance in the assessment of the other matters to which the Deputy President directed his mind when considering the case being presented by Mr Royce.

[10] So far as the grounds of appeal are capable of being understood I will address them in the same order as they appear in the written submissions.

Ground 1 – apprehension of bias or bias

[11] As was said in *Together Queensland, Industrial Union of Employees v Executive Director, Public Sector Employees Industrial Relations, Public Service Commission*:[2]

> "[7] The relevant test for disqualification on the ground of bias was enunciated in *Ebner v Official Trustee in Bankruptcy* where Gleeson CJ, McHugh, Gummow and Hayne JJ said:

[2] [2015] ICQ 023.

> '… a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.'.

[8] That principle is applicable to members of tribunals such as the Queensland Industrial Relations Commission. See, for example, *ResMed Limited v Australian Manufacturing Workers' Union*. But, in saying that, it should be acknowledged 'that the application of the principle to decision-makers other than judges must necessarily recognise and accommodate differences between court proceedings and other kinds of decision-making.'

[9] The rule against bias, actual or apprehended, is directed to prejudgment incapable of being altered by evidence or argument. It is not directed to predisposition capable of being swayed by evidence or argument. In *Minister for Immigration and Multicultural Affairs v Jia Legeng* Gleeson CJ and Gummow J said:

> 'Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision maker's mind is blank; it is whether it is open to persuasion. …
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> Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.'

[10] It is well accepted that *Ebner* provides that there is a test which involves at least two steps:

> 'The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. … Only then can the reasonableness of the asserted apprehension of bias be assessed.'

[11] In *Jia Legeng* Hayne J set out a similar analysis relevant to the issue of prejudgment. He said:

> 'Saying that a decision-maker has prejudged or will prejudge an issue, or even saying that there is a real likelihood that a reasonable observer might reach that conclusion, is to make a statement which has several distinct elements at its roots.

> First, there is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. Secondly, there is the contention that the decision-maker will apply that opinion to that matter in issue. Thirdly, there is the contention that the decision-maker will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. Most importantly, there is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case.'

[12] Finally, the words of Mason J in *Re JRL; ex parte CJL* must be borne in mind:

> 'It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established': (*Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, at pp 553-554; *Watson* (1976) 136 CLR 248, at p 262; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.' (citations omitted)

[12] With that in mind, I will consider what appear to be the three areas of complaint:

(a) the manner in which the Deputy President dealt with some parts of the hearing, in particular, the examination and cross examination of witnesses,

(b) the "warning" given to Mr Royce by the Deputy President at the end of the third day of the hearing, and

(c) meetings held between Ms Lang and another departmental officer during the consideration by those officers of Mr Royce's position.

[13] The part of the transcript relied upon by Mr Royce for the first area of complaint reveals nothing more than the ordinary conduct of a case in which parties have to come to grips with documents and, sometimes, in a short period of time. Other complaints were about the directions given by the Deputy President to Mr Royce when he was cross examining witnesses but they were simply actions designed to move the hearing along in a responsible manner.

[14] The second section of this ground concerns a statement made by the Deputy President at the end of the third day of the hearing. Mr Royce says that the Deputy President suggested that he abandon his application as he could not see how Mr Royce could find his way out of the hole he was in. This, Mr Royce says, demonstrates bias. It is always important to read what anyone says in context. And when the Deputy President's remarks are read in context no indication of bias can be seen. The Deputy President commenced by speaking directly to Mr Royce about the case so far as it had been presented at the end of the third day of the hearing. He spoke to Mr Royce about the structure of the case to that point and said:

> " … I'll stress to you that I haven't formed any view, in a sense of a conclusive view, about the merits of your arguments at the moment. … But on the material that's been presented thus far, if I might draw on another analogy which I'm often fond of doing, you are in a very deep swimming hole and there is a shortage of ladders and it's going to be difficult to you to find your way out of the hole that you're in, simply because of the evidence that's come forward and the responses that you've given in relation to the evidence.
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> … It might be that you're able to do that and you're able to get yourself out of the hole and have shown me, as I said before, that you've got yourself out of trouble and you've found your way out of the forest and you've convinced me that your argument's better than that which has been run against you."[3]

[15] The Deputy President then goes on to raise the issue of costs as a matter which Mr Royce should also take into account. He then asks Mr Royce to consider the matter overnight. The matters raised by the Deputy President did not demonstrate that he might not bring an impartial mind to the resolution of the question. He was merely indicating that, on the material that he had heard so far, the applicant's case appeared to be difficult. A reading of the entire passage demonstrates that, while he may have formed a tentative view on the basis of what he had heard at that time, he specifically acknowledged that Mr Royce might be able to change his mind.

[16] The third point is not with respect to the Deputy President but with respect to some of the departmental officers involved in the termination process. This is not a matter which reflects upon the Deputy President.

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[3] Hearing T3-129.

Ground 2 – delay in giving judgment

[17] There was a considerable delay between the conclusion of the hearing on 14 August 2017 and the giving of the final decision – about 470 days. But, delay by itself, does not constitute a ground of appeal.[4] While extensive delays may raise concerns about an accurate recollection of the proceedings or about the demeanour of witnesses, there needs to be an error in the decision-making process in order that a ground of appeal may arise.

[18] The Deputy President gave detailed reasons for the conclusions which he had reached and, for example, with respect to the issue of Mr Royce's credibility, he referred to matters which did not rely upon an impression received during the hearing but were based upon an examination of the various conflicts between evidence he did accept and the evidence given by Mr Royce. No error has been demonstrated.

Ground 3 - perjury by a key witness

[19] This ground relates to evidence given by one of the witnesses for the respondent. Mr Royce goes into some detail in an attempt to demonstrate that untruthful evidence was given. But this is a question of fact. In order to arrive at a conclusion which would satisfy the appellant, the Deputy President would have had to make findings of fact consistent with the appellant's case. That he did not do so could constitute an error of fact but no leave was sought to raise that and, had leave been sought, I would have refused it on the basis that the appellant's case before the Deputy President would have failed whatever evidence was given by the witness who was said to have perjured herself. No error of law has been demonstrated.

Ground 4 – statutory protections not applied to the appellant

[20] Mr Royce appears to rely upon s 35(1) of the *Dispute Resolution Centres Act* 1990. It provides:

> "(1) No matter or thing done or omitted to be done by—
>
> (a) a mediator; or
>
> (b) a director or a member of the staff of a dispute resolution centre;
>
> if the matter or thing is done in good faith for the purpose of executing this Act, subjects any of them to any action, liability, claim or demand."

[21] Mr Royce did not, either during the show cause process or in his application for reinstatement, seek to rely upon the protections set out above. In any event, the protection only applies to things done in good faith for the purpose of executing the statute. Mr Royce does, for example, not show how the unchallenged finding of dishonesty in deliberately omitting $294,000 from the relevant database or the failure to disclose his conflict of interest arising from his sexual relationship with another employee[5] could allow him to claim the benefit of the protection in s 35.

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[4] *King & Ors v ASIC* [2018] QCA 352 at [45].

[5] [2018] QIRC 143 at [54].

Ground 5 – use of privileged/confidential documents admitted into evidence

[22] The fact that a document may have been admitted in error does not, of itself, constitute an appealable error unless the evidence so admitted leads to a finding or other decision. Mr Royce did not demonstrate how the allegedly inadmissible documents led to an appealable error.

[23] In any event, Mr Royce did not seek to demonstrate by argument – as opposed to mere assertion – that these documents were subject to either s 36 (Privilege) or s 37 (Secrecy) of the *Dispute Resolution Centres Act.*

Ground 6 – new issues raised

[24] Mr Royce lists a number of matters in his outline of submissions which he said he had no "real opportunity to consider". He does not demonstrate either in his written submissions or his oral submissions how any of these matters can constitute an error of law on the part of the Deputy President. He notes, for example, that "Car parking at the Courthouse" was a new issue. No argument was advanced as to why the admission of any evidence about that issue constituted an error of law. Other matters had been disclosed to Mr Royce and some were tendered without objection. No error of law has been demonstrated.

Ground 7 – uncontested evidence ignored

[25] This ground appears to engage another assertion of bias by the Deputy President by not accepting the evidence of one of Mr Royce's witnesses. The Deputy President did not ignore Dr Douglas's evidence, he referred to it at [37] and following of his reasons. The mere fact that he did not accept that evidence does not demonstrate bias.

[26] Mr Royce asserts that Ms Smith lied to the investigators. This is nothing more than an assertion of an error of fact for which leave was not sought to appeal.

[27] There is also a series of assertions about withholding information from the original decision maker. Once again, this is nothing more than an assertion of an error of fact for which leave was not sought to appeal.

Ground 8 – similar issues treated differently

[28] This appears to be an assertion that similar conduct was treated differently by the respondent. In particular, reference is made to Ms Mills who was the subject of the finding by the Deputy President referred to above. Whether or not there was differential treatment is a matter for argument at the primary hearing and is an issue of fact for which leave is needed to appeal. In any event, as was pointed out by the respondent: Mr Royce was in a leadership role and Ms Mills was at a lower classification, he failed to disclose a sexual relationship, he used sick leave to take a holiday, and he lied to his direct supervisor about his reasons for absence from work. Thus, there was a substantial difference in his conduct as opposed to that of Ms Mills. Once again, no error of law has been demonstrated.

Ground 9 – case law not followed

[29] A failure to follow binding precedent would constitute an error of law. But, the argument raised under this heading by Mr Royce merely agitates again his assertions of bias and, in particular, refers again to bias on the part of persons other than the Deputy President. These matters have already been dealt with and no error of law is disclosed.

Ground 10 – flawed investigation leading to dismissal

[30] The submissions made in support of this ground assert error on the part of investigators but not the Deputy President. No error of law or otherwise is advanced by the appellant under this heading.

Ground 11 – decision maker having regular meetings with complainant while investigation underway

[31] This is another in the series of complaints made about the conduct of Ms Lang. No error on the part of the Deputy President is asserted. It is nothing more than a revisiting of evidence considered by the Deputy President. There is no assertion that any error of law attaches to any findings made by the Deputy President with respect to this issue.

Ground 12 - departmental pressure to terminate

[32] No identifiable error of law is asserted under this heading. Mr Royce makes a number of assertions about meetings with the then Chief Magistrate, whistle blowing, suspension from the Queensland Civil and Administrative Tribunal and the like. But none of them are directed towards establishing any error of law at all.

Conclusions

[33] The application to appeal consists, for the main part, of an attempt to revisit and reargue matters which were agitated in the Commission. No application for leave to raise errors of fact was made and, even if it had, no grounds to support such an application are apparent on any of the material provided by the applicant. No errors of law have been demonstrated.

[34] The application to appeal is dismissed.