INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Ball v State of Queensland (Department of Justice and Attorney-General, Queensland Corrective Services)* [2019] ICQ 23
PARTIES:	**FREDERICK BALL** (appellant) **v** **STATE OF QUEENSLAND (DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL, QUEENSLAND CORRECTIVE SERVICES)** (respondent)
FILE NO:	C/2018/22
PROCEEDING:	Appeal
DELIVERED ON:	18 December 2019
HEARING DATE:	14 March 2019
MEMBER:	Martin J, President
ORDERS:	**1. The appeal is allowed.** **2. The matter is remitted to the Queensland Industrial Relations Commission to be determined according to law.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – INDUSTRIAL TRIBUNALS – INDUSTRIAL RELATIONS COMMISSION – OTHER MATTERS – ADEQUACY OF REASONS – where the appellant sought an order for reinstatement in the Commission – where the appellant disputed that he was guilty of certain misconduct as alleged by the respondent – where the Commissioner held that the matter turned on witness credibility because of polarising evidence around matters of fact – where the Commissioner held that he preferred the evidence of other witnesses to that of the appellant in areas where there was a conflict in the evidence – where the Commissioner dismissed the appellant's application for reinstatement – where the appellant contends that the Commissioner failed to make relevant findings of fact – where the respondent says that a reader can infer what findings the Commissioner made based on the statement that he preferred the evidence of other witnesses – whether the Commissioner made necessary findings of fact – whether the Commissioner provided adequate reasons – whether the Commissioner erred *Industrial Relations Act* 1999, s 73, s 74, s 77, s 320

CASES:	*Abbott v Blackwood* [2014] ICQ 031, cited
	Ball v State of Queensland (Department of Justice and Attorney General, Queensland Corrective Services) [2018] QIRC 119, related
	Browne v Dunn (1893) 6 R 67, cited
	Camden v McKenzie [2008] 1 Qd R 39, cited
	Cameron v Q-Comp [2011] ICQ 27, cited
	Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280, cited
	DL v R (2018) 356 ALR 197, applied
	Douglass v R (2012) 290 ALR 699, cited
	Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110, cited
	Poulsen v Q-COMP [2012] ICQ 6, followed
	Queensland Independent Education Union of Employees v Local Government Association of Queensland [2015] ICQ 3, cited
	Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited
	Sun Alliance Insurance Ltd v Massoud [1989] VR 8, cited
	Wainohu v New South Wales (2011) 243 CLR 181, cited
APPEARANCES:	S Moody instructed directly by the appellant M Spry instructed by Crown Law for the respondent

[1] This was a case in which the applicant sought an order for reinstatement. The facts alleged were not overly complicated. Yet what should have been an ordinary examination of those facts turned into a juggernaut in which relevance was forgotten and the Commission's time was wasted. It was a hearing in which the parties were consumed by a study of the trees and forgot the wood entirely. Cross-examination which should have concluded in a few hours extended over a few days. All of that led to the Commission being diverted from its function and into error. Error which, for the reasons which follow, requires that the appeal be allowed.

[2] It is with substantial regret that I feel compelled to order that this matter be re-tried because so much time and money has been wasted getting to this point. But, as I will explain, there is no other option.

Background to the application in the Commission

[3] In or around May 2006, Mr Frederick Ball (the appellant) commenced employment with Queensland Corrective Services as a Custodial Correctional Officer (CCO) at Woodford Correctional Centre.

[4] Woodford Correctional Centre is a high security prison located 100 kilometres north of Brisbane. The prison includes various high security areas known as units and blocks, which are staffed by CCOs.

[5] At the time of termination, the appellant was covered by an Award, Certified Agreement and various policies and procedures including a Code of Conduct.

[6] On 5 July 2016 information was provided to the appellant regarding an investigative report prepared by the Department of Justice and Attorney-General Ethical Standards Unit (ESU).

[7] The appellant was required to show cause, pursuant to the *Public Service Act* 2008 (PS Act) why he should not be disciplined in relation to the following allegations said to be capable of substantiation:

> "Allegation 1
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> That between 18 January 2016 and 25 February 2016, you were derelict in the performance of your duties, namely on:
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> (a) the afternoon of 19 January 2016, you were asleep on two occasions whilst seated at the officer's station desk inside N3 Unit;
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> (b) 29 January 2016, during the officers' afternoon meal break, you were asleep in a chair in the walkway around the Tardis, facing the Lexan window of the N3 Unit, when you should have been maintaining prisoner observations;
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> (c) 2 February 2016, you were asleep whilst seated at the officers' station desk inside the N3 Unit; and
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> (d) 24 February 2016, you were asleep on six occasions whilst seated at the officers' station desk and rostered as the P Movement Control officer.
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> Allegation 2
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> That on 29 January 2016, without authority, you inappropriately secured prisoners in their cells.
>
> Allegation 3
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> That between 18 January 2016 and 25 February 2016, you communicated and behaved in an inappropriate manner towards prisoners at WCC, in particular on:
>
> (a) 19 January 2016;
>
> (b) 29 January 2016; and
>
> (c) 8 February 2016."

[8] On 24 October 2016 correspondence was forwarded to the appellant from Ms Kerrith McDermott in which he was informed that all of the allegations were substantiated on the balance of probabilities. He responded to this letter by proposing a less severe penalty.

[9] On 19 January 2017 the appellant's employment was terminated.

Commission proceedings

[10] On 9 February 2017 the appellant lodged an application for reinstatement pursuant to s 74 of the *Industrial Relations Act* 1999 (Qld) (IR Act), claiming unfair dismissal under s 73(1)(a) of the IR Act. Section 73(1)(a) of the IR Act provides that a dismissal is unfair if it is harsh, unjust or unreasonable.

[11] The appellant said that the termination of his employment was harsh, unjust and unreasonable within the meaning of s 77 of the IR Act. Section 77 provides:

> "Matters to be considered in deciding an application
>
> In deciding whether a dismissal was harsh, unjust or unreasonable, the commission must consider—
>
> (a) whether the employee was notified of the reason for dismissal; and
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> (b) whether the dismissal related to—
>
> (i) the operational requirements of the employer's undertaking, establishment or service; or
>
> (ii) the employee's conduct, capacity or performance; and
>
> (c) if the dismissal relates to the employee's conduct, capacity or performance—
>
> (i) whether the employee had been warned about the conduct, capacity or performance; or
>
> (ii) whether the employee was given an opportunity to respond to the allegation about the conduct, capacity or performance; and
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> (d) any other matters the commission considers relevant."

[12] On 14 September 2018, in a decision which extended for 509 paragraphs, the application for reinstatement was rejected by the Commission.

Grounds of appeal

[13] The appellant's amended grounds of appeal are as follows:

> "1. In deciding at [506] that the allegations were 'reasonably open to be substantiated by the decision maker'; that the 'disciplinary process undertaken by the decision maker was at all times compliant with the legislative and policy procedures with Ball being afforded procedural fairness and natural justice at all times' that 'the penalty of the termination of Ball's employment was warranted in circumstances where his conduct constituted significant breaches of procedures, policy and statutory obligations that relate to a CCO undertaking their required duties of work'; and that the decision to terminate the Appellant's employment was not harsh, unjust or unreasonable for the purposes of section 77 of the *Industrial Relation Act* 1999 (Qld), the decision maker:

(a) failed to give any, or any adequate, reasons for his decision;

(b) came to those conclusions without making relevant and necessary findings of fact and law, including findings about whether on the balance of probabilities the Appellant had actually engaged in the relevant conduct in respect of which he was dismissed; and

(c) failed to consider that the Respondent bore the onus of establishing pursuant to section 187 of the *Public Service Act* 2008 (Qld) that, on the balance of probabilities, the Appellant was guilty of the conduct alleged;

(d) on the question of substantive fairness, wrongly confined the scope of the Commission's enquiry to whether the Respondent's findings (that is, the findings which formed the basis for the Respondent's decision to dismiss the Appellant) were 'reasonably open to be substantiated by' the Respondent, and in so doing applied the wrong test and/or failed to identify the proper test as to whether the Appellant's dismissal was harsh, unjust or unreasonable in contravention of section 77 of the *Industrial Relations Act* 1999 (Qld) having regard to the requirements of section 187 of the *Public Service Act* 2008 (Qld);

(e) identified the wrong issues and/or asked the wrong questions;

(f) ignored relevant material and relied on irrelevant material;

(g) wrongly considered the three previous written 'warnings' given by the Respondent to the Appellant, two of which were not valid warnings under the *Public Service Act* 2008 (Cth); and

(h) for the reasons in (a) to (g) above, exceeded the authority or powers given by the statute, and did so in a way that affected the exercise of power and thus amounted to an error of law.

2. The Commission erred at law at [450] in concluding that Ms McDermott held the appropriate delegation under the *Public Service Act* (Qld) to dismiss the Appellant on 19 January 2017.

3. The Commission denied the Appellant natural justice and erred at law at [456], [457] and [487] by making negative inferences and/or findings in relation to the evidence of Dr Shea and the Appellant.

4. The Commission erred at law in failing to exclude irrelevant and objectionable material at trial, and/or in relying on that material to make adverse findings about the Appellant's credit and or to make adverse findings on the substantive issues to be decided under section 77 of the *Industrial Relations Act*.

5. The Commission erred at law insofar as it found that witnesses Crichton, Harries, Grey, Beaumont, Bracher, Juffs and Tilly were witnesses of credit, and that the Appellant was not a witness of credit, because in making those

findings the Commission failed to use and/or palpably misused its advantage and/or acted on evidence which was glaringly improbable and/or failed to give any (or any adequate) reasons for its decision.

6. Further or in the alternative to ground 1 above, if the Commission is found to have made a finding of fact that the Appellant was asleep at work as alleged in Allegation 1, then the Commission erred at law because there was no evidence that the Appellant as asleep on any such occasion, and/or it was not reasonably open to the Commission to infer the Appellant was asleep on the primary facts."

[14] The parties' submissions focused on ground 1 and, in particular, on the contentions that the Commissioner failed to provide adequate reasons and erred in applying the wrong test in respect of s 73(1)(a) of the IR Act. I will deal with the matter of the adequacy of reasons first.

Adequacy of reasons

[15] I have, in other decisions, set out the principles relating to the requirement for reasons to be given which are adequate in the circumstances.[1] Decisions of tribunals do not attract the same degree of scrutiny as those of the ordinary civil courts. But the general principles still apply even though they may not be enforced with the same degree of rigour. I will repeat some of them which are particularly relevant in this case:

(a) the content and detail of reasons will vary according to the nature of the jurisdiction which the court or tribunal is exercising and of the particular matter the subject of the decision,[2]

(b) one reason for the obligation to provide adequate reasons is so that an appellate court can discharge its statutory duty on an appeal from the decision and so that the parties can understand the basis for the decision for purposes including the exercise of any right to appeal,[3]

(c) a tribunal member will ordinarily be expected to expose his or her reasoning on points which are critical to the contest between the parties – this applies both to evidence and to argument,[4]

(d) where a party relies on relevant and cogent evidence which is rejected by the tribunal, then the tribunal should provide a reasoned explanation for the rejection of that evidence,[5] and

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[1] For example *Queensland Independent Education Union of Employees v Local Government Association of Queensland* [2015] ICQ 3.

[2] *Wainohu v New South Wales* (2011) 243 CLR 181 at [56].

[3] *Douglass v R* (2012) 290 ALR 699 at [8].

[4] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279.

[5] *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 18.

(e) where parties advance conflicting evidence on a matter significant to the outcome, both sets of evidence should be referred to and reasons provided for the preference of the tribunal of one set of evidence to the other.[6]

[16] Of particular relevance to this case is the observation by Nettle J in *DL v R*[7] where he said:

> " … in providing reasons, the judge is required to make apparent the steps he or she has taken in reaching the conclusion expressed, for reasons are not intelligible if they leave the reader to speculate as to which of a number of possible paths of reasoning the judge may have taken to that conclusion. Failure sufficiently to expose the path of reasoning is therefore an error of law."

[17] With those principles in mind, I turn to the grounds of appeal.

Ground 1

[18] At paragraph [506] of the decision the Commissioner held that "the allegations relevant to the conduct engaged in by Ball (as outlined in Allegations 1, 2 and 3) were reasonably open to be substantiated by the decision maker". The appellant says that, in so holding, the Commissioner appears to have applied the wrong test, which the appellant characterised as "the reasonable grounds test".

[19] It is not necessary to engage in a lengthy examination of the nature of the test which should be applied in a case like this. Whatever the test is, it can only be applied to the facts as found by the Commission.

What findings of fact were made?

[20] Under the heading "Findings", the Commissioner says:

> "[506] On consideration of the evidence, material and submissions before the proceedings pursuant to the requisite standard of proof the Commission finds that:
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> - the allegations relevant to the conduct engaged in by Ball (as outlined in Allegations 1, 2 and 3) were reasonably open to be substantiated by the decision maker;
> - the disciplinary process undertaken by the decision maker was at all times compliant with the legislative and policy procedures with Ball being afforded procedural fairness and natural justice at all times;
> - the penalty of the termination of Ball's employment was warranted in circumstances where his conduct constituted significant breaches of procedures, policy, and statutory obligations that relate to a CCO undertaking their required duties of work; and

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[6] *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [66].

[7] (2018) 356 ALR 197 at [131].

- the decision to terminate Ball's employment effective from 19 January 2017 was not harsh, unjust or unreasonable."

[21] The findings made in paragraph [506] do not, without more, resolve the question as to what test was applied by the Commissioner.

[22] According to the respondent, a series of further findings appear in the paragraphs preceding the conclusions at paragraph [506]. The respondent says that these paragraphs indicate that the Commissioner found that the appellant was notified of the reason for his dismissal and he was given an opportunity to respond to the allegations about his conduct. The sequence referred to by the respondent is as follows:

> "[413] The evidence confirmed that Ball had been the subject of an investigation in relation to alleged conduct in the workplace resulting in a report being prepared by the ESU (dated 23 May 2016) which in effect concluded that Allegations 1, 2 and 5 were capable of being substantiated with there being insufficient evidence to substantiate two other allegations.
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> [414] Ball was required to show cause pursuant to the PS Act as to why he should not be the subject of disciplinary action in respect of the allegations said to be capable of substantiation. The correspondence (dated 5 July 2016) under the signature of McDermott provided to Ball full details of each of the allegations to which he was required to respond as well as the particulars relevant to each of the allegations. Additionally the correspondence confirmed that Ball's employment would remain suspended on his normal remuneration.
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> …
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> [420] Upon examination, it is evident that the show cause letter (dated 5 July 2016) properly identified:
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> - the allegations levelled against Ball;
> - particulars relating to each incident; and
> - the relevant sections of the PS Act and the Code of Conduct under which the show cause process was being conducted.
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> …
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> [422] The evidence reflects that Ball was given an extension of time in which to respond to the allegations contained in the show cause letter and subsequently provided two responses dated 31 August 2016 (received on 9 August 2016) and 13 September 2016.
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> [423] In the responses Ball raised no issue regarding the standing of McDermott in relation to her delegation to progress the show cause process. Ball denied all of the allegations that had been made against him, addressing in significant detail each individual allegation and in

some cases quoting from the transcript of interviews where complainants had been interviewed by the ESU Investigator.

…

[425] The 39 page document contained reasoning as to why Ball's responses had been rejected and confirmed that in respect of each of the allegations they had been in effect substantiated and that pursuant to s 188 of the PS Act that the decision maker was giving serious consideration to terminating Ball's employment. Forming part of that consideration would be the following:

- the seriousness of the offence;
- the overall work record, including previous disciplinary actions (if any);
- the explanation given by Ball;
- any extenuating circumstances which may have had a bearing on Ball's actions;
- the impact the offence has on Ball's ability to perform the duties of his position; and
- the impact the offence has on public and client confidence in the Department.

…

[431] The disciplinary process itself, **on the face, would seem** to have met the requirements of the relevant legislation, in that it provided Ball the opportunity to respond to the allegations levelled against him, having had the opportunity to access all the material upon which the decision maker had relied in concluding the issue of the show cause letter had been warranted. Where there had been requests for extensions of time to respond the Respondent had granted such extensions fairly and in a timely manner.

[432] There can be little question that the disciplinary process afforded Ball procedural fairness by the adoption of proper procedures in the decision making process and **it is unlikely that a finding could be made** to challenge successfully the integrity of the disciplinary process.

…

[450] The Commission whilst noting the argument advanced by the applicant is satisfied that pursuant to the Department's Human Resources Management Delegation Manual, McDermott by way of right held the delegation to undertake the disciplinary process including the decision to terminate Ball's employment, in her capacity as Deputy Commissioner." (emphasis added)

[23] The language adopted in paragraphs [431] and [432] is not the language of a finding of fact. The language used connotes uncertainty, rather than the determination of a question of a fact.

[24] The respondent says that the language used may be inelegant, but that it expresses the findings of the Commission. It also urges the proposition, which is correct, that these paragraphs must be read in context and that, if that is done, the findings may be discerned.

[25] In *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[8] the Full Court of the Federal Court made the following observations in respect of the language adopted by a tribunal when expressing its reasons:

> "This translates to a practical as well as principled restraint. The Court will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal's thoughts: *Lennell v Repatriation Commission* (1982) 4 ALN N 54 (Northrop and Sheppard JJ); *Freeman v Defence Force Retirement and Death Benefits Authority* (1985) 5 AAR 156 at 164 (Sheppard J); *Repatriation Commission v Bushell* (1991) 13 AAR 176 at 183 (Morling and Neaves JJ). The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error: *Politis v Commissioner of Taxation (Cth)* (1988) 16 ALD 707 at 708 (Lockhart J)."

[26] Even if it were accepted that paragraphs [431] and [432] contain findings of fact, those paragraphs do not tell a reader how the Commissioner applied any particular test.

Were there findings that misconduct took place?

[27] The focus of the decision was on comparing the evidence of opposing witnesses. At paragraph [458] the Commissioner held that:

> "In the determination of this application the issue of witness credibility is paramount for reasons relating to the polarising evidence before the proceedings around matters of fact."

[28] Findings in respect of witness credibility were then made in the following terms:

> "[462] The body of this decision contains all the relevant evidence regarding the complainant's allegations and the denials of Ball which makes it unnecessary to again record the precise detail, save to say the most credible witness evidence will be preferred to that of those who were less credible.
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> …
>
> [477] In assessing the demeanour of the three witnesses pursuant to the same criteria utilised in respect of Ball's evidence it would be my view they presented as superior witnesses of credit when measured against Ball

[8] (1993) 43 FCR 280 at 287.

> and more likely than not their evidence was evidence upon which the Commission could reasonably rely.
>
> …
>
> [501] Having assessed the evidence of each of the witnesses in the proceedings, taking into account both the written and oral aspects of such evidence, I find that of the substantive witnesses it was only Ball whose credibility was of question and in such circumstances the Commission would overwhelmingly prefer the evidence of the other witnesses to that of Ball in areas where there was a conflict in the evidence."

[29] The respondent says that a reader can infer what findings the Commissioner made based on his earlier statement that he preferred the evidence of the respondent's witnesses where there was a conflict with the appellant's evidence. In order to identify the Commissioner's findings, it is said, one must therefore apply the Commissioner's decision on credibility to the evidence recited in the decision.

[30] The respondent contends that, in respect of the witness Mr Harries, the Commissioner records that he had "maintained his evidence that Ball has been asleep on the job."[9] Similarly, the Commissioner says of the witness Mr Crichton that "he maintained that he was telling the truth and in the case of the sleeping allegations refused to accept that Ball was not asleep."[10] The respondent says that one should infer from these statements that the Commissioner found that the appellant had been asleep, which supports Allegations 1(a), (b) and (c).

[31] In response, the appellant says that the approach advocated by the respondent is flawed because it does not assist in elucidating any primary facts. In support of this contention, the appellant's submissions are replete with references to what he says are contradictions in the evidence of the respondent's witnesses.

[32] The caution to be exercised by this court when scrutinising the reasons of the Commission was considered in *Abbott v Blackwood*.[11] In that case, the decision of Hall P in *Cameron v Q-Comp*[12] was referred to with approval. I repeat here the relevant passage*:*

> "[18] Of course, when considering whether or not a Tribunal has either overlooked some relevant evidence or misconstrued the issue to be determined, an appeal court must not be quick to apply a critical magnifying glass. I agree, with respect, with what Hall P said in *Cameron v Q-Comp*:

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[9] [2018] QIRC 119 at [472].

[10] [2018] QIRC 119 at [474].

[11] [2014] ICQ 031.

[12] [2011] ICQ 27.

> '[3] It is, however, important for an appeal court to refrain from undue ebullience in seeking-out error in decisions written under the pressure of other work and after lengthy trials. I adhere to the view expressed by this Court in *Cunningham and Others (Flower and Hart) v William Hamilton Hart*, *viz*:
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> > '… However, I accept that the Court should not be overly enthusiastic to seek out error. Cases abound in which the need for caution and restraint have been emphasised. It is convenient to commence with the observations of Meagher JA in *Beale v Government Insurance Office of NSW*:
> >
> > > 'It does not automatically follow that because the reasons for decision are inadequate then an appealable error has occurred. Examination of nearly any statement of reasons with a fine-tooth comb would throw up some inadequacies. Indeed, an appeal court will reserve any intervention to those situations in which it is left with no choice: where no reasons have been given in circumstances where a statement of reasons is so inadequate as to constitute a miscarriage of justice. In other words, the statement of reasons must be looked at as a whole and the material inadequacies identified and considered.'"

[33] Bearing in mind what is said in *Abbott v Blackwood*, there are nevertheless difficulties raised by the evidence before the Commission which cause real concern about the adequacy of the approach described by the respondent.

[34] As an example, the particulars of Allegation 1(d) in the respondent's show cause notice outlined that the witness Mr Gray had observed the appellant asleep on six occasions during his shift on 24 February 2016. However, under cross-examination that same witness denied that he made an allegation that he saw the appellant asleep at all. The Commissioner noted that Mr Gray "acknowledged he was unsure whether Ball had been asleep whilst on duty [Transcript p. 14-65] but he was inattentive [Transcript p. 14-66]."[13]

[35] Accordingly, if the Commissioner accepted that the allegation as particularised in the show cause notice was correct, then he had to reject the conflicting evidence evinced in cross-examination. Yet, nowhere in the decision does the Commissioner resolve this conflict or explain how the allegation was nevertheless "reasonably open to be substantiated by the decision-maker".

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[13] [2018] QIRC 119 at [187].

[36] Similarly, Allegation 2, particular 9 was that a prisoner had said to the appellant "you trapped my fucking fingers in the door" and that, in response, the appellant was observed by Mr Crichton to shrug his shoulders. In the ESU record of interview Mr Crichton said that "luckily, it must have only just been his fingertips that [the prisoner] was whinging about. … If his fingers had been any further in, that door would have sheared his bloody fingers off". In cross-examination before the Commission, Mr Crichton agreed that the particular prisoner had made the allegation falsely and said that he knew it to be "BS".[14]

[37] The Commissioner noted that Mr Crichton had "… in the course of lengthy cross-examination accepted that parts of his evidence-in-chief had been wrong including … the allegation about a prisoner's fingers having been jammed in the door by Ball".[15]

[38] Simply preferring the evidence of witnesses other than the appellant did not resolve inconsistencies in the evidence given at different times by the same witness.

[39] Further, not all of the allegations turned on the appellant's credit as a witness. Allegation 3 concerned conduct some of which the appellant conceded had occurred. His conduct was said to contravene the requirement in the Code of Conduct for the Queensland Public Service that employees treat co-workers, clients and members of the public with courtesy and respect.

[40] In submissions before the Commission, the appellant agreed that he had sworn at a prisoner in circumstances alleged to constitute misconduct. The allegation was set out in Allegation 3(c). Nevertheless, he submitted that what was said did not amount to misconduct because of the culture and practice of swearing at the Woodford Correctional Centre. Witnesses other than the appellant had provided evidence in support of such a culture.

[41] In respect of Allegation 3(b), the appellant admitted that he had opened cell doors one at a time (allegedly constituting misconduct) but contended that there was no policy dictating how cell doors were to be unlocked. Evidence from witnesses other than the appellant, including Ms Juffs for the respondent, supported this contention.

[42] If the Commissioner considered that the appellant's submissions in respect of Allegation 3 did not warrant detailed consideration, then that is not expressed in the decision.

[43] The Commissioner's stated preference for witness evidence other than that of the appellant does not address the circumstances where the success of the appellant's submissions rested on evidence other than his own.

[44] In *Camden v McKenzie*[16] Keane JA considered the reasons that a judge must provide when there is an evidentiary conflict resting on witness credibility:

> "[34] Usually, the rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence

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[14] [2018] QIRC 119 at [236].

[15] [2018] QIRC 119 at [474].

[16] [2008] 1 Qd R 39.

independent of the parties which is apt to cast light on the probabilities of the situation. In *Goodrich Aerospace Pty Ltd v. Arsic*, Ipp J.A., with whom Mason P. and Tobias J.A. agreed, explained:

> 'It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the end of the evidence simply by the judge saying: 'I believe Mr X but not Mr Y and judgment follows accordingly'. That is not the way in which our legal system operates …
>
> Often important issues of credibility involve sub-issues. Often, objective facts, or facts that are probable, are capable of having significant bearing on the sub-issues. In cases of this kind, it is incumbent upon trial judges to resolve the sub-issues and to explain, by reference to the relevant facts, the conclusions to which they have come. This having been done, they should then turn to the ultimate facts in issue and explain how their decisions on the sub-issues have assisted them in forming a conclusion on the ultimate issue. It is only when adequate reasons of this kind are given that an unsuccessful party will be able to understand why the judge has believed his or her successful opponent.'"

[45] The approach to reasons adopted by the Commissioner does not satisfy the requirements set out in *Camden v McKenzie* and, thus, are inadequate. Having expressed a preference for certain witness evidence, the Commissioner did not take the next necessary step of making findings of fact on the basis of that evidence.

[46] The parties cannot infer findings from the decision because the Commissioner did not explicitly identify what the conflicts in the evidence were between the appellant and other witnesses. Instead, the parties must parse the lengthy recitation of evidence in order to identify where a conflict occurred and hence where a finding of fact can be inferred.

[47] The manner in which the Commissioner has dealt with the conflicts of evidence leaves the reader to speculate as to which of a number of possible paths of reasoning he may have taken to that conclusion and, so, is an error of law.[17]

[48] In the absence of any findings which may confidently be identified there is no basis for proceeding to consider whether the correct test was applied.

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[17] See *DL v R* (2018) 356 ALR 197 at [131].

Ground 2

[49] The appellant submits that the Commissioner erred in concluding that Ms McDermott had the appropriate delegated authority under the PS Act at the time of her decisions affecting his employment.

[50] That she might not have had the appropriate authority was not put to her in cross-examination. The appellant says that this did not have to be put to her in cross-examination because the respondent bore the onus of establishing her delegated authority. Accordingly, it is said that the appropriate time to raise the matter was in closing submissions.

[51] It must be borne in mind that the question of Ms McDermott's authority was neither put in issue nor her evidence objected to until after all of the evidence was presented.

[52] Ms McDermott gave unchallenged evidence in relation to her delegation. Accordingly, the Commissioner found that she held the delegation to undertake the disciplinary process, including the decision to terminate the appellant's employment. There might be some uncertainty as to the date of the delegation but that was for the applicant to explore.

[53] If the appellant wanted to challenge Ms McDermott on the question of delegation then that should have been done during cross-examination.[18]

[54] There was evidence before the Commissioner upon which he could base his finding. No error has been demonstrated.

Ground 3

[55] The appellant contends that it was a denial of natural justice for the Commissioner to make a finding against his credit in circumstances where such a finding was not the subject of cross-examination by the respondent. The finding complained of concerns an interaction between the appellant and a general practitioner who had provided treatment to the appellant. At paragraph [457] the Commissioner said:

> "Later in the proceedings Ball and Dr Shea gave further evidence regarding the exchange on 30 June 2017 which was in all likelihood a less than honest recount of what had occurred on the day."

[56] The passage complained of is arguably not a finding at all. This is an example, though, of the pettiness of approach which led to the hearing time blowing out.

[57] In any event, the Commissioner formed his own opinion about what was said based upon his impression of the witnesses. It was open for him to do so.

[58] The Commissioner's ultimate finding in respect of the appellant's credit is made at paragraph [501] and that finding was expressly informed by all of the witness evidence in the proceedings, the preponderance of which was not objected to. Subject to exceptions that do

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[18] *Browne v Dunn* (1893) 6 R 67.

not arise here, findings about credit by a judicial officer who has seen and heard the witnesses are, in general, to be respected.[19]

[59] No error has been demonstrated.

Ground 4

[60] The appellant says that he objected to the admission of certain evidence which was later referred to in the Commission decision. Some of that evidence is said to be hearsay or opinion evidence. Some of the evidence was also said to be disputed, and according to the appellant, ought not to have been considered by the Commissioner since it was unrelated to the reasons for the appellant's dismissal.

[61] First, the IR Act provides that the Commission is not bound by the rules of evidence.[20] A Commissioner is not prohibited from considering hearsay or opinion evidence.

[62] Secondly, the position advanced by the appellant was that he had a positive work record. Having put the matter of his work record in issue, it was open for the Commissioner to consider evidence that militated against the appellant's position.

[63] No error has been demonstrated.

Ground 5

[64] This ground relies, in part, on the failure to give adequate reasons and, therefore, is dealt with above.

Ground 6

[65] This ground is dealt with by the consideration of ground 1 above.

Conclusions

[66] The appeal is allowed.

[67] The absence of findings means that this matter cannot be resolved on appeal and will be remitted to the Commission.

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[19] *Poulsen v Q-COMP* [2012] ICQ 6 at [5].

[20] IR Act s 320(2).