INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Davis v Workers' Compensation Regulator* [2020] ICQ 011
PARTIES:	**KATIE ANNE DAVIS** (appellant) **v** **WORKERS' COMPENSATION REGULATOR** (respondent)
FILE NO/S:	C/2019/23
PROCEEDING:	Appeal
DELIVERED ON:	18 June 2020
HEARING DATE:	29 January 2020
MEMBER:	Martin J, President
ORDER/S:	**1. Appeal allowed.** **2. The matter is remitted to the Queensland Industrial Relations Commission for rehearing according to law.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – APPEAL – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the appellant provided written submissions at the conclusion of the hearing before the Queensland Industrial Relations Commission – where the appellant also tendered certain diary entries into evidence – where the Deputy President's reasons stated that neither the written submissions nor some diary entries were considered – whether the Deputy President failed to afford procedural fairness to the appellant INDUSTRIAL LAW – QUEENSLAND – APPEAL – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where there was uncontested evidence before the Deputy President – whether the Deputy President failed to consider relevant evidence EVIDENCE – ADMISSIBILITY – HEARSAY – EXCEPTION: DOCUMENTS – GENERAL PRINCIPLES – MATTERS RELATING TO MAKER OF STATEMENT – GENERALLY – where the appellant gave evidence that she made entries in a diary in the course of her employment – where the diary entries were put into evidence – whether the Deputy President erred by holding that the diary entries were not evidence of the truth of the matters recorded therein INDUSTRIAL LAW – QUEENSLAND – APPEAL – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where a witness was called to give evidence – where certain evidence was objected to – where the party calling the

witness stated that it was happy for the challenged evidence not to be relied upon – whether the Deputy President erred by referring to the evidence as unchallenged

INDUSTRIAL LAW – QUEENSLAND – APPEAL – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the appellant seeks an order that the respondent pay her costs of and incidental to the appeal – whether the court has the power under s 563(1) of the *Workers' Compensation and Rehabilitation Act* 2003 to make an order for costs against the respondent

Evidence Act 1977, s 92
Workers' Compensation and Rehabilitation Act 2003

CASES: *Blackwood v Mana* [2014] ICQ 27, cited
Craig v State of South Australia (1995) 184 CLR 163, cited
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389, applied
King v Workers' Compensation Regulator [2019] QIRC 134, cited
Minister for Migration and Border Protection v SZMTA (2019) 264 CLR 421, applied
Yousif v Workers' Compensation Regulator [2017] ICQ 004, cited

APPEARANCES: K M Wilson QC and M Brooks instructed by Morton & Morton for the appellant
S A McLeod QC directly instructed by the Workers' Compensation Regulator

[1] Ms Davis suffered a psychiatric injury during the course of her employment at a nursing home in Maryborough. It was not in dispute that:

- she was a "worker" within the meaning of the *Workers' Compensation and Rehabilitation Act* 2003 (the Act),
- she suffered an injury within the meaning of the Act,
- that injury arose out of, or in the course of, her employment, and
- her employment was the major significant contributing factor to the injury.

[2] The only issue in the hearing was whether her psychiatric injury arose out of, or in the course of, reasonable management action reasonably taken.[1]

[3] In these circumstances, the onus was on Ms Davis[2] to establish the negative proposition, that is, that her injury did not arise out of, or in the course of, reasonable management action.

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1 See *Workers' Compensation and Rehabilitation Act* 2003 s 32(5).
2 *Blackwood v Mana* [2014] ICQ 27 at [23].

[4] At the hearing of the appeal, the appellant abandoned some of the grounds in the application to appeal and her submissions were confined to the following arguments. It was submitted that the Deputy President erred by:

(a) adopting an unduly restrictive application of the so-called principle in *Yousif v Workers' Compensation Regulator*,[3]

(b) failing to afford procedural fairness to the appellant,

(c) failing to have regard to relevant evidence,

(d) relying on facts that were not adduced in evidence,

(e) failing to deal properly with the evidence of certain witnesses, and

(f) his treatment of the failure by the appellant to cross-examine the respondent's witnesses on certain matters and the respondent's failure to call Mr Murnane to give evidence.

[5] Of those six grounds, there are three in which error is patent and I do not need to consider the remaining arguments.

Procedural fairness

[6] In *Dranichnikov v Minister for Immigration and Multicultural Affairs*,[4] Gummow and Callinan JJ (with whom Hayne J agreed) said:

> "[24] To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice."

[7] That expression was followed unanimously in *Minister for Immigration and Border Protection v SZMTA*.[5]

[8] It is, of course, also consistent with the well-known statement of the High Court in *Craig v State of South Australia*,[6] where a unanimous court said that if a tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error.[7]

[9] The appellant provided written submissions for the Deputy President at the conclusion of the hearing. Her submissions were made in response to those of the Regulator. As part of those submissions, she dealt with the credibility and admissibility of certain parts of the evidence and in paragraph [19] of those submissions, the appellant said:

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3 [2017] ICQ 004.
4 (2003) 197 ALR 389.
5 (2019) 264 CLR 421 at 436 per Bell, Gageler and Keane JJ and at 463 per Nettle and Gordon JJ.
6 (1995) 184 CLR 163.
7 (1995) 184 CLR 163 at 179.

> "Appendix A summarises the evidence as to the issues the appellant asserts gave rise to the stress she experienced."

[10] Appendix A is a five page document, set out in three columns. The headings of the columns are: "Allegation", "Evidence in support", and "Respondent's evidence". Within the Appendix there are a number of issues referred to such as:

- clinical issues reported to Prescare (her employer) as meeting the appropriate clinical standards,
- evidence of failure to deal with the issues,
- exacerbating factors.

[11] With respect to each of those issues, there are sub-issues. For example, under the heading relating to clinical issues, there is a sub-issue – "Incorrect administration of medication to patients". With respect to that matter there are, in the column headed "Evidence in support", transcript references to the appellant's evidence and the evidence of another witness. There are also references to particular exhibits, one of which was the appellant's diary and the relevant entries are identified. Reference is also made to evidence called for the respondent and transcript references are provided.

[12] In a section of the Deputy President's reasons headed "Analysis of the evidence and submissions", the following appears:

> "[160] Finally, I need to record that I have not considered the contents of Appendix A to the Appellant's submissions because – as the extract at item 19 of paragraph [151] above shows – what is to be made of the transcript references and the exhibits referred to is left to the reader to decide. In that regard, it is not for either the Respondent or me to try to extract the point that the Appellant seeks to make through the documents referred to or how they support the merits of her appeal. That is the Appellant's role."

[13] The purpose and effect of the Appendix is, with respect, obvious. It is to provide to the decision-maker a list of those parts of the transcript which the appellant argues supports a conclusion in her favour. In some parts of the Appendix it also sets out evidence that favoured the respondent. The provision of an appendix of this nature is a common, and sensible, practice in courts and tribunals. It provides a convenient source of the material relied upon. It is, of course, up to the court or tribunal to decide whether the references are relevant, but that is part of the decision-making process. To say, as the Deputy President did, that it is not for him to extract the point the appellant seeks to make is inconsistent with a proper exercise of the jurisdiction. It is a refusal to listen fairly to both sides.

[14] Another example of a similar error is the statement by the Deputy President that he "generally" did not look at the content of a diary entry. That is a reference to entries made in exhibit 1 which is the diary of the appellant. Part of that may be on the basis of an error of law to which I will refer later, but it is also inconsistent with other statements made by the Deputy President where he did refer to the diary notes.

There is a substantial difference between declining to look at evidence and declining to accept evidence.

[15] There was a denial of procedural fairness with respect to both aspects above and each constitute an error of law.

Failure to have regard to relevant evidence

[16] The Commission is not bound by the rules of evidence but it cannot refuse to consider matters which are deemed to be evidence by statute.

[17] The appellant gave evidence that she made entries in a diary in the course of her employment and that diary was admitted into evidence. During the course of her oral evidence, the appellant had occasion to refer to that diary either to refresh her memory or to rely on it for particular details.

[18] As was observed by O'Connor VP in *King v Workers' Compensation Regulator*:[8]

> "[16] Section 531(2)(a) and s531(2)(b) of the IR Act provide for a flexible approach to the receipt of evidence and other material in proceedings. The flexibility afforded to the Commission under s531(2) is best suited when the Commission is, for example, exercising its powers within the Industrial jurisdiction. In that regard, the operation of s531(2) gives the Commission a discretion whether to accept material upon which it may rely in reaching a decision.
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> [17] The discretion afforded to the Commission under s531(3) does not however excuse it from applying the general law. In *Qantas Airlines Limited v Gubbins*, the New South Wales Court of Appeal had to consider s108(1)(b) and s118 of the *Anti-Discrimination Act* 1977. The former provision provided that the Tribunal in question 'shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms'. The latter provision provided for an appeal to the Supreme Court on questions of law. In a joint judgment, Gleeson C.J. and Handley J., described the two provisions as 'the apparently conflicting provisions must, as a matter of construction, be reconciled'. Their Honours held that the conflict could be resolved only by holding that the 'equity and good conscience' provision did not free the tribunal from its duty to apply the rules of law in arriving at its decisions." (citations omitted)

[19] Under the sub-heading "Analysis of the evidence and submissions", the Deputy President said:

> "[157] Secondly, the entries that the Appellant has written in her diary are not evidence of the truth of the matters recorded therein. Each entry is simply to be treated as a record which the Appellant wrote at, or around, the time a particular event or

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8 [2019] QIRC 134.

> conversation occurred, and its existence would normally be supportive of a submission that the direct evidence given by the Appellant should be accepted because it matches the contemporaneous diary entry."

[20] The Deputy President erred when he said that diary entries are not evidence of the truth of the matters recorded therein. Section 92 of the *Evidence Act* 1977 provides:

> "**92 Admissibility of documentary evidence as to facts in issue**
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> (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if—
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> (a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or …"

[21] The requirements of s 92(1)(a) of the *Evidence Act* were met in this hearing, thus, the entries in the diary were admissible as evidence of the fact contained in the diary entry. Section 92(1)(a) does not afford that evidence anything other than admissibility. The evidence can be challenged on other grounds and its reliability, in appropriate circumstances, might be challenged, but the entries still remain evidence of the truth of the matters recorded in them.

[22] It appears that that error may have led the Deputy President to disregard the diary entries. He said:

> "[158] Thirdly, because the content of individual diary entries was generally used as a prompt to the Appellant, such that she might recall additional detail about a particular event or incident, or for her to demonstrate that evidence she had given was accurate - because it reflected what was written in her diary - I have generally not looked at the content of a diary entry. As I said immediately above, a diary entry is not "evidence" by, and of, itself." (emphasis in original)

[23] It was open to the Deputy President to consider the reliability of a diary entry but it is an error to disregard such an entry on the basis that it "is not 'evidence' by, and of, itself". A diary entry is evidence if s 92 of the *Evidence Act* is satisfied.

[24] The appellant also argues that some evidence appears not to have been considered by the Deputy President. I accept that there is no evidence of close consideration having been given to the evidence of Ms Cocking and Ms Pearce, but the subject of that evidence was touched upon by the Deputy President.

[25] The appellant particularly relies upon an alleged failure to consider the evidence of Ms Liebke. Ms Liebke was called as an expert. She was a registered nurse with considerable experience. She was asked to comment on the development of pressure sores and wound management. Ms Liebke was entitled to provide her expert

opinion on that subject. The manner in which she was asked to give evidence, though, was confusing.

[26] Her expertise was not properly established before she gave evidence and it became obvious during her examination that she was being asked questions which did not call for the provision of expert opinion, at least expert opinion which she was qualified to give. It was put for the applicant before the Deputy President that she was being called to answer questions such as "As a registered nurse, would it cause you concern if this was happening with the patients under your care and control[?]"

[27] Whether Ms Liebke might have been concerned or "stressed" by a given set of circumstances was irrelevant. She was entitled to give evidence, based upon her experience, of what might be the appropriate response by management to certain circumstances. But her hypothetical state of mind was neither relevant nor expert opinion. The Deputy President was right to exclude from his consideration those parts of Ms Liebke's evidence which related to what reaction she might have had to a particular set of facts.

[28] Some of the evidence given by the appellant concerning the issue of staffing. This evidence was uncontested. That was due to the fact that the person to whom she had made complaints, Mr Murnane, had died at some time before the hearing. The Deputy President dealt with the situation caused by the death of Mr Murnane and observed that he had been urged to accept the appellant's uncontested evidence about her concerns relating to patient safety and similar issues. There was discussion about whether, had Mr Murnane provided the respondent with a statement, it could have been produced but the issue of greater importance on this aspect is the statement by the Deputy President:

> "[171] In any event, I am left to decide this Appeal based upon the evidence before me, which has to be assessed on its merits – not just accepted because the Appellant's 'evidence' was allegedly not contradicted – in light of the provisions of s 32 of the Act."

[29] It appears that the reference to s 32 is to that section in the Act. I cannot, with respect, understand what the Deputy President intended by that remark. Section 32 is the section which defines injury. It says nothing about evidence. As a general proposition, where evidence has been given which is uncontradicted and which is inherently reasonable, probable and conclusive of the matter, then the court or tribunal will be bound to accept it. It is correct, though, that a tribunal is not bound to accept evidence simply because it is uncontradicted.

Reliance on facts not in evidence

[30] On the last day of the hearing, Ms Anderson, a registered nurse who had formerly been employed at the same nursing home as the appellant, was called to give evidence. In the course of giving that evidence, she was asked questions about problems with another registered nurse and, among other things, said that he was supervised in a number of respects. That evidence was objected to and counsel for the Regulator said: "… I'm happy for that evidence not to be relied upon."

[31] Notwithstanding that concession, the Deputy President specifically referred to the evidence which had been objected to and upon which reliance was not to be placed. At paragraph [214] of his reasons, the Deputy President referred to the evidence as being unchallenged. The reference to unchallenged evidence suggests that it played some part in the reasoning of the Deputy President. In the circumstances of the objection and the withdrawal, that was an error.

Conclusion

[32] The appellant sought an order that this court conclude that her injury was not excluded under s 32(5) of the Act. There is insufficient uncontested and clearly reliable evidence to allow that to occur.

[33] The matter will be remitted to the Queensland Industrial Relations Commission for rehearing according to law.

[34] The appellant seeks an order that the respondent pay her costs of, and incidental to, this appeal. Section 563(1) of the Act provides:

> "(1) On an appeal, the industrial court may order a party to pay costs incurred by another party only if satisfied the party made the application vexatiously or without reasonable cause."

[35] That section can be contrasted with s 558(3) which gives the power to the Industrial Relations Commission to make an order about the costs of the hearing at its discretion:

> "(3) Costs of the hearing are in the appeal body's discretion, except to the extent provided under a regulation."

[36] Section 563(1) only allows for an order for costs to be made against the party that made the application. The court does not have the power to make an order for costs against the respondent on an appeal of this nature.