INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Truffet v Workers' Compensation Regulator* [2020] ICQ 013
PARTIES:	**STUART DAVID TRUFFET** (applicant) **v** **WORKERS' COMPENSATION REGULATOR** (respondent)
FILE NO:	C/2020/2
PROCEEDING:	Appeal
DELIVERED ON:	22 June 2020
HEARING DATE:	28 April 2020
MEMBER:	Martin J, President
ORDER:	**The application to appeal is struck out.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the applicant lodged an application for compensation with WorkCover for stress-related ill health – where the applicant's claim for compensation was rejected – where the applicant applied for a review of the decision by the respondent – where the respondent confirmed WorkCover's decision – where the applicant unsuccessfully appealed to the Queensland Industrial Relations Commission against the decision of the respondent – where the applicant submits that the Commissioner erred in law by (a) making certain comments at a mention about the matters which would be considered at the hearing, (b) awarding costs against the applicant, and (c) arriving at certain conclusions of fact and law – whether the applicant has demonstrated error of law INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the applicant's application to appeal was filed 16 days out of time – where the applicant explains that the delay was due to the fact that the decision of the Industrial Commissioner being delivered on 20 December 2019 and he was unable to access legal and other assistance for much of the 21 day appeal period – where the applicant states that he was exchanging "without prejudice" correspondence with the respondent up to the time at which he filed his application to appeal – where the applicant argues that the respondent has not identified any prejudice – where the applicant argues that it is in the public interest for the appeal to be heard – whether the applicant should be granted an extension of time to appeal INDUSTRIAL LAW – QUEENSLAND – APPEALS –

APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the applicant applied to appeal on a question of fact – where the applicant submits that it is in the public interest for leave to be granted because (a) the applicant claims to be aware that another employee has been treated in a similar way, and (b) the applicant submits that his reputation has been destroyed by an online newspaper article – whether it is in the public interest that leave should be granted

Industrial Relations Act 2016, ss 557, 565
Industrial Relations (Tribunals) Rules 2011, r 139
Workers' Compensation and Rehabilitation Act 2003

CASES: *A1 Rubber (Aust) Pty Ltd v Chapman (Office of Industrial Relations)* [2019] ICQ 16, cited
Hardy v Simon Blackwood (Workers' Compensation Regulator) [2015] ICQ 27, applied
Workers' Compensation Regulator v Langerak [2020] ICQ 002, applied

APPEARANCES: The applicant appeared in person
S P Gray instructed directly by the Workers' Compensation Regulator

[1] Dr Truffet commenced employment at Esri Australia (Esri) as a Senior Professional Consultant in 2010. By the time his employment came to an end, he was engaged as a Senior Engineer - Application Support providing support to Esri's clients in Geographical Information Systems.

[2] On 27 March 2017, Dr Truffet resigned from his employment. About three weeks later, he lodged a claim with WorkCover Queensland for stress related ill health which he claimed arose in the course of his employment with Esri. Compensation was declined and he appealed to the Queensland Industrial Relations Commission.[1]

[3] Commissioner Knight correctly identified the issues before her in this way:

> "[10] My role in this matter is to determine:
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> (i) Did the exacerbation of Dr Truffet's Asperger's condition (Autism Spectrum Disorder (ASD)) arise out of, or in the course of, his employment? and
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> (ii) If Dr Truffet did suffer an exacerbation of ASD – which arose out of, or in the course of, his employment, was his employment with Esri the major significant contributing factor to the injury?
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> [11] If the answer to (ii) is 'yes', then is the injury not compensable by virtue of it arising out of, or in the course of, reasonable management action taken in a reasonable way by the employer in connection with his employment?"

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1 *Truffet v Workers' Compensation Regulator* [2019] QIRC 201.

[4] After a lengthy hearing, the Commissioner found that a number of the stressors nominated by the applicant had not been substantiated and that there was no causal link between any of the alleged stressors and the exacerbation of the applicant's condition.

The application to appeal

[5] The application to appeal was filed 16 days out of time.

[6] By an application and affidavit filed on 14 April 2020, the applicant sought an extension of time within which to appeal and for leave to appeal on questions of fact. That application arose out of the submissions which had already been filed on behalf of the Regulator.

[7] Neither of the documents filed on 14 April 2020 was served on the Regulator before the hearing of the appeal. This was discovered shortly after the appeal hearing concluded and I allowed the parties to file further submissions to deal with those issues.

Extension of time

[8] The applicant advances the following in support of his application for an order extending time:

(a) the decision of the Industrial Commissioner was delivered on 20 December 2019 and that because of the Christmas/New Year period legal and other assistance was inaccessible for much of the 21 days,

(b) he and the Regulator were exchanging "correspondence regarding this dispute in January 2020, some of which was *without prejudice* or otherwise confidential, as late as 29 January 2020", (emphasis in original)

(c) the respondent has not identified any prejudice,

(d) the application to appeal is against an error of law, and

(e) it is in the public interest that the applicant's appeal be heard.

[9] The relevant principles with respect to an extension of time were considered in *A1 Rubber (Aust) Pty Ltd v Chapman (Office of Industrial Relations)*,[2] where the following was said:

> "On an application to extend time, the approach of this Court was described by President Hall in the *Neophytos Foundadjis v Collin Bailey* [2007] ICQ 10 in the following way:
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> > 'This Court has traditionally adhered to the view that s. 346 of the *Industrial Relations Act* 1999 represents a legislative assessment that in the ordinary category of cases, justice will best be served by adhering to a 21 day limitation period, though on occasion the limitation may defeat a perfectly good case and that the discretion to extend time should be exercised only where the applicant for an extension of time

2 [2019] ICQ 16.

> discharges a positive burden of demonstrating that the justice of the case requires the indulgence of a further period.'
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> I note that s 346 of the 1999 Act is reproduced as s 564 in the current Act. In applying those principles, this Court will not grant leave unless it is positively satisfied that it is proper to do so. I will consider the merits of the appeal before finally determining the application for extension. As was said in *Chapman v State of Queensland* [2003] QCA 172:
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> > 'In determining whether it is proper to grant the extension, it is appropriate to consider the merits of the substantive application … An extension of time will not be granted if the court considers the appeal to be plainly hopeless.'
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> In order to be successful, an applicant must ordinarily discharge the burden in three ways: first, the applicant must demonstrate that the justice of the case requires the indulgence sought; secondly, the applicant must demonstrate that the case sought to be appealed has prospects of success; thirdly, there must be an explanation of the delay between the expiry of the time period and the time at which the application was filed. Now, as I said, I will consider the merits of the appeal, but I will deal first with the issue of the explanation of the delay and the extent of the delay."

[10] In order to determine whether the case sought to be appealed has prospects of success, it is necessary first to consider the application for leave to appeal and the grounds sought to be advanced by the applicant.

What are the grounds of appeal?

[11] The application to appeal does not comply with r 139 of the *Industrial Relations (Tribunals) Rules* 2011 because it does not state the "concise grounds of appeal". It is a discursive and rambling document which, among other things, seeks to incorporate an email to the QIRC registry.

[12] A more comprehensible outline of the applicant's grounds of appeal appears in his written submissions. Put briefly, they are:

(a) he was misled by comments made by the Commissioner at a mention about the matters which would be considered at the hearing,

(b) the Commissioner erred in awarding costs against him, and

(c) the Commissioner erred in her conclusions of fact and law in the following respects:

  (i) by concluding that the applicant was not exposed to workplace bullying,

  (ii) by concluding that his interactions with his manager did not contribute to his injury,

  (iii) by concluding that the employer's actions were "reasonable and taken in a reasonable way", and

(iv) by considering each of the applicant's nominated stressors discretely, rather than as part of a "global approach".

[13] There were many other matters about which the applicant complained in his outline and in other documents filed with the Commission. In response to those written submissions, the Regulator contended that leave had not been sought to amend the grounds of appeal (such as they were) nor had leave been sought to rely upon error of fact as a ground of appeal.

Where is leave needed?

[14] In order to determine if, and for what ground, leave is needed, a description of the basis of some of the grounds needs to be undertaken.

Being misled by the Commissioner?

[15] This is a reference to an exchange between the applicant and the Commissioner at a mention conducted on 8 May 2018. It is appropriate to note at this point that the applicant has been diagnosed with Asperger's syndrome, otherwise known as Autism Spectrum Disorder. His condition affects him in various ways, including a vulnerability to sensory overload and what he describes as "meltdowns". Nevertheless, he is of high intelligence and was awarded the degree of Doctor of Philosophy in the School of Information Technology and Electrical Engineering at the University of Queensland. Notwithstanding that, his underlying condition sometimes prevented him from being able to provide concise answers to questions asked of him by the Commissioner. It also appeared to engender misunderstandings or a misapprehension of the proceedings in the Commission and the efforts made by the Commissioner to understand his case.

[16] At the mention the Commissioner sought to identify the issues which the applicant intended to raise at the hearing. There was discussion to the effect that the applicant had to prove that he had an injury that arose out of or in the course of his employment and that the employment was the major significant contributing factor. The applicant referred to being required to sit in a particular place and other matters relating to stress vulnerability. The applicant had provided a list of witnesses he intended to call. There was some discussion about the medical evidence and after the mention had been proceeding for about half an hour the Commissioner noted that the applicant seemed to be very distressed. She adjourned for the purposes of having a private discussion.

[17] The following is then recorded as having occurred after resumption of the mention:

> "COMMISSIONER: Is there a – what value is there for you in calling Ms Jenkins?[3]
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> APPELLANT: She has statements from the employer saying that they were aware of my condition six weeks before the matter arose. My employer may not actually admit to those statements. So she has witnessed accounts – well, actually, Mr King is probably more appropriate. There were statements made by – sorry for keeping my

[3] Ms Jenkins is a Review Officer employed by WorkCover Queensland.

eyes closed. There were statements made by my employer to a third party that were false and misleading to my detriment, but also - - -

COMMISSIONER: What does Ms Jenkins have any – how does she have insight? Are you talking about Ms Jenkins being the third party?

APPELLANT: The third party, yeah, so - - -

COMMISSIONER: But how does that have any impact on your appeal here in the Commission? How does that have any bearing on your appeal here? What value can Ms Jenkins add to that appeal?

APPELLANT: Partly I have to have a quick look at section 32 of the Act and what that was done. Partly it goes down to reasonable management action, and I maintain that the management were providing false and misleading information to third parties. A third party being misled is one of the quickest ways to show that the information was misleading.

COMMISSIONER: Are you suggesting that you want Ms Jenkins as a witness on the basis that she would be able to demonstrate that management took some unreasonable action after – during the WorkCover process?

APPELLANT: Both - - -

COMMISSIONER: Is that - - -

APPELLANT: Both prior to the WorkCover process and after the WorkCover process.

COMMISSIONER: Do you understand that any events that have occurred after the date of your decompensation or the date - - -

APPELLANT: Yes.

COMMISSIONER: - - - your injury arose are not considered by the Commission?

APPELLANT: Yeah.

COMMISSIONER: The practical reason for that being that it's sort of – it's generally assumed that you have the injury. So the injury is there."

[18] The applicant makes a number of submissions about the consequences of this exchange. He said that it affected his ability to assess what was relevant and irrelevant and that had he not been told this he would have investigated "by subpoena and other legal mechanisms" evidence arising after the date of injury. At the hearing of this appeal the applicant was asked what he would have done differently had the Commissioner not said anything about evidence after the date of injury. He said he would have called Ms Jenkins to provide evidence about a conversation he alleges that she had with the management of Esri after the date of his injury. He did not have a statement from Ms Jenkins but said he would rely on

an audio recording of her speaking to him. It appears that the applicant had recorded a telephone conversation he had with her.

[19] The applicant misunderstood the remark made by the Commissioner. Much of the conversation which had been taking place before the particular remark was made was concerned with the manner in which the matter would be conducted. It appears from that exchange that the applicant had not previously considered the application of s 32 of the *Workers' Compensation and Rehabilitation Act* 2003 (the Act) and that he was reading it for the first time during the mention. It was in the light of that that the Commissioner asked what value there was to him in calling Ms Jenkins. Earlier in the proceeding, the applicant had referred to what he understood to be a provision in the Act which allowed him to bring before the Commission "other laws …against the actions of my employer". He said that there was an "other laws provision where I can pursue the employer under other torts". This may explain his reference (when referring to the evidence he might lead from Ms Jenkins) to "statements made by my employer to a third party that were false and misleading to my detriment". Later he said it was relevant to reasonable management action. The point being made by the Commissioner was with respect to evidence relating to the cause of his injury which had been the subject of the earlier discussions among the parties during the mention. The intention of the Commissioner was clear. She was attempting to determine what was said by the applicant to be the stressors which led to his "injury". While the applicant may have interpreted the comment in the way he suggests, the remark by the Commissioner was, in the circumstances of the discussion taking place, entirely appropriate.

[20] In any event, the issue of whether evidence from Ms Jenkins could be led was raised again and discussed on the first day of the hearing. The purpose advanced by the applicant for calling her appears not to have related to the specific issue of whether an injury was suffered but whether the applicant could pursue some other form of relief. The applicant said:

> "Under this Act, if I prove that the employer is at fault, I am allowed to seek damages under other legislation and other statutory torts which include slander and libel. And, therefore, if I'm entitled to seek damages within this forum via slander and libel, the spreading of false and misleading information to third parties is highly relevant to a form of damages which I am entitled to claim through this proceeding."

[21] His attempt to have Ms Jenkins give evidence demonstrates that the applicant was not dissuaded from attempting to call her by anything said at the mention. He had an ulterior, and misguided, motive.

[22] No error of law has been demonstrated.

The costs order

[23] The applicant says that he was not provided with a reasonable opportunity to make submissions with respect to costs, and that there was a failure to articulate the legal basis upon which such an order could be made. The costs consequences of his appeal to the Commission were made clear to him at various times in writing and orally. At the mention on 8 May 2018, the applicant said that he had been told by

counsel for the Regulator that they would seek their costs if he lost the appeal. The applicant expressed certain views about discretions as to the awarding of costs and then made submissions which demonstrate that he misunderstood the litigation process.

[24] In the written submissions provided by the Regulator after the hearing, an order for costs was sought. The applicant had an opportunity at that stage to make whatever submissions he wished about costs. He sought an order that the Regulator pay his costs and made no further submissions.

[25] In those circumstances, the Commissioner was entitled to make the order she did. It was consistent with the general rule that "costs follow the event" and the Commissioner had not been presented with any argument to the contrary.

Errors of fact and law

[26] The applicant says that there are four other errors:

(a) there should have been a finding that exposure to workplace bullying was a stressor,

(b) there should have been a finding that interactions with his manager constituted a stressor,

(c) there should have been a finding that the employer's actions were not reasonable and not taken in a reasonable way, and

(d) a global approach should have been taken to the assessment of the stressors.

[27] Of those listed, the only ground which might be regarded as asserting an error of law relates to the "global approach" contention. As to the other grounds I repeat what I said in *Workers' Compensation Regulator v Langerak*:[4]

> "[29] Provided that there is some factual basis for a finding, there can be no error of law on the "no evidence" ground. Here, the appellant appears to accept that there was evidence to support the Commissioner's findings, but contends that the Commissioner erred in the weight he gave to the evidence supporting those findings.
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> [30] The respondent says that in order to demonstrate an error of law, it is ordinarily insufficient for an appellant to argue that there was not "sufficient probative evidence" for a particular conclusion.
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> [31] The respondent refers to *Carlton v Blackwood*, where the following is said:
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> > "… in this appeal, the appellant only argues that there was not 'sufficient probative evidence'. If that is the case, then that will not be an error of law because the task for the appellant is to show an absence of evidence. Provided that there is some factual basis for the

4 [2020] ICQ 2.

> Commissioner's finding, there can be no error of law on the 'no evidence' ground. If the Commissioner made a finding for which there was no evidence, that will be an appellable error if it is relevant to the case conducted before the Commissioner."
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> [32] Further, the misattribution of weight to certain evidence is an error of fact, not an error of law.
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> …
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> [39] The Commissioner explained his preference for certain evidence. He then reached a conclusion that was open on the evidence. No error is demonstrated by proposing alternative conclusions that could have been reached on the evidence had the Commissioner attributed weight in a different way." (citations omitted)

[28] With respect to the grounds relating to workplace bullying and interactions with his manager, there was evidence to support the findings made and no error of law is disclosed.

[29] With respect to the ground concerning reasonableness of his employer's actions, the applicant's claim was dismissed on the basis that he had not sustained a compensable injury. Therefore, the reasonableness of the employer's action was irrelevant.

[30] With respect to the ground relating to a "global approach", that is based on a misunderstanding of the appropriate approach to be taken to a case like this. The correct approach was outlined in *Hardy v Simon Blackwood (Workers' Compensation Regulator)*:[5]

> "[15] The appellant argues that, given the number of stressors identified by her as major stressors, it was appropriate for the Deputy President to "consider the impact of the stressors on a global basis". That is, with respect, not an accurate description of the procedure described by Hall P in *Delaney v Q-Comp*. An approach of that nature may be valid where there are findings of the kind discussed by Hall P in *Delaney*. As Hall P made clear, such an evaluation will be appropriate where there are "repetitive blemishes joined by subject matter, time and personality in a discordant workplace". Such an approach is not justified simply by the fact that an appellant nominates a large number of stressors." (citations omitted)

[31] The approach taken by the Commissioner was correct in the circumstances and no error has been disclosed.

Should leave be granted to appeal on errors of fact?

[32] Leave is required pursuant to s 557 of the *Industrial Relations Act* 2016 (the IR Act). Section 565 of the IR Act provides:

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5 [2015] ICQ 27.

> "If an application for leave to appeal is made under section 554, 557 or 560, the Court of Appeal, court or full bench –
>
> (a) must give leave if it is satisfied it is in the public interest to do so; and
>
> (b) may not give leave other than under paragraph (a)."

[33] The applicant submits that it is in the public interest because:

(a) he claims to be aware that another employee has been treated in a similar way, and

(b) his reputation has been destroyed because of an article in the Brisbane Times website.

[34] Whether there has been any such conduct as alleged against another person does not bear upon the determination of this matter. Even if the applicant had been successful, it would not have served as any form of precedent. If another employee has a valid claim and satisfies the provisions of the Act, then it would be accepted whatever the result of this case.

[35] One of the consequences of bringing an application is that it is made in public and is subject to comment and reporting by the media. The fact that proceedings have been reported does not provide a basis for saying that it is in the public interest that leave should be granted.

[36] The applicant has not demonstrated that leave should be granted.

Should the extension of time be granted?

[37] The applicant has not demonstrated that there are any prospects of success on this appeal. The extension of time is refused. Had an extension of time been granted, I would have dismissed the appeal on the basis that leave to appeal on error of fact was not available and no error of law had been demonstrated.

Order

[38] The application to appeal is struck out.