INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Forsyth-Stewart v State of Queensland (Department of Education)* [2022] ICQ 12
PARTIES:	**DAMIEN FORSYTH-STEWART** (appellant) **v** **STATE OF QUEENSLAND (DEPARTMENT OF EDUCATION)** (respondent)
FILE NO/S:	C/2021/27
PROCEEDING:	Appeal
DELIVERED ON:	29 April 2022
HEARING DATE:	21 April 2022
MEMBER:	Davis J, President
ORDER/S:	**1. The appeal is dismissed.** **2. The respondent file and serve upon the appellant by 10 May 2022 any written submissions on the costs of the appeal.** **3. The appellant file and serve upon the respondent by 24 May 2022 any written submissions on the costs of the appeal.** **4. Each party have leave to file and serve by 7 June 2022 any application for leave to make oral submissions as to the costs of the appeal.** **5. In the absence of any application to make oral submissions on the costs of the appeal being filed by 7 June 2022, the question of costs will be decided on any written submissions filed and without further oral hearing.**
CATCHWORDS:	APPEAL AND NEW TRIAL - INTERFERENCE WITH JUDGE'S FINDINGS OF FACT - INTERFERENCE WITH DISCRETION OF THE COURT BELOW - where the appellant is a teacher and a deputy principal - where the appellant made complaints about the principal of the school - where those complaints were dismissed - where the decision-maker advised the appellant of avenues to challenge the decision - where one of those avenues was by way of public service appeal to the Queensland Industrial Relations Commission (QIRC) - where the appellant pursued other avenues - where the appellant then filed a public service

appeal out of time - where the appellant sought an extension of time to regularise the appeal - where the QIRC dismissed the application - whether the QIRC failed to take into account relevant considerations - whether the QIRC's decision was unreasonable - whether the appellant was denied procedural fairness

Industrial Relations Act 2016, s 557, s 564, s 565
Ombudsman Act 2001
Public Service Act 2008, s 194

CASES: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, followed
Attorney-General (NSW) v Quin (1990) 170 CLR 1, cited
Commissioner for the ACT Revenue v Alphaone Pty Ltd (1994) 49 FCR 576, followed
Forsyth-Stewart v State of Queensland (Department of Education) [2021] QIRC 395, related
Fox v Percy (2003) 214 CLR 118, cited
Kioa v West (1985) 159 CLR 550, followed
Lee v Lee (2019) 266 CLR 129, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, cited
Minister for Immigration and Border Protection v SZSSJ (2016) 259 CLR 180, cited
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, considered
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, cited
Orreal v Queensland Community Corrections Board (1995) 81 A Crim R 212, considered
Robinson Helicopter Co Inc v McDermott (2016) 90 ALJR 679, cited
Secretary, Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth) (2013) 209 FCR 215, cited
Shepherd v The Queen (1990) 170 CLR 573, cited
Warren v Coombes (1979) 142 CLR 531, cited

APPEARANCES: Mr Forsyth-Stewart appeared for himself
L Grant instructed by J Dmitrovic, lawyer for the Crown Solicitor for the respondent

[1] This is an appeal against the decision of Deputy President Merrell refusing the appellant's application to extend time within which to lodge an appeal to the Queensland Industrial Relations Commission (QIRC). The current appeal is against an exercise of discretion.

Background

[2] The appellant, Mr Forsyth-Stewart, is a school teacher. Indeed, he is a Deputy Principal serving (at relevant times) at the Gordonvale State School. He, and the Principal of the school were in dispute and Mr Forsyth-Stewart lodged a complaint.

[3] Mr Forsyth-Stewart's complaint was dismissed and he sought internal review which was also unsuccessful.

[4] The Department's Executive Director, Integrity and Employee Relations, Human Resources, Mr McKellar, wrote to Mr Forsyth-Stewart advising of the outcome of his unsuccessful internal review. Importantly to the current appeal, he said:

> "**Avenues of External Review**
>
> Should you be dissatisfied with my decision, because you believe it is unfair and unreasonable, you may be able to refer your concern for External Review. Avenues for External Review may include, but are not limited to:
>
> - a public service appeal against a decision under a directive or a fair treatment decision under section 194(l)(a) or 194(l)(eb) of the *Public Service Act 2008* (must be lodged within 21 days after the day the appellant received notice of the decision appealed against);
> - notification to the Queensland Industrial Relations Commission (QIRC) of an industrial dispute under an industrial instrument; or
> - an application to the QIRC in relation to an alleged contravention of a workplace right under Chapter 8, Part 1 of the *Industrial Relations Act 2016* (IR Act); or
> - an application to the QIRC for a stop bullying order under Chapter 7, Part 4 of the IR Act; or
> - a complaint to the Queensland Ombudsman under the *Ombudsman Act 2001* (must be made within one year after the day the complainant first had notice of the action); or
> - a complaint to the Queensland Human Rights Commission (QHRC) (must be made within one year after the date the alleged discrimination occurred). …"

[5] That letter, which the parties accept constituted the relevant appellable decision, was dated 16 August 2021 and was sent to Mr Forsyth-Stewart's private email address.

[6] One of the avenues for external review identified in the letter was an appeal pursuant to s 194 of the *Public Service Act* 2008 (PS Act). That section provides for an appeal to the QIRC. Section 194, relevantly, is:

"**194 Decisions against which appeals may be made**

(1) An appeal may be made against the following decisions—

(a) a decision to take, or not take, action under a directive; ...

(eb) a decision a public service employee believes is unfair and unreasonable (a ***fair treatment decision***); …"

[7] An appellant must lodge a public service appeal within 21 days of the decision which is being sought to be challenged.[1]

[8] Mr Forsyth-Stewart took the following actions to challenge the decision:

1. He referred the decision to the Ombudsman.

2. He referred the decision to the Human Rights Commission.

3. He purported to request external review by the Public Service Commissioner (Mr Setter). He did that by letter dated 16 August 2021, although Mr Setter recorded that it was not received until 25 August 2021.

[9] On 10 September 2021, Mr Setter responded with a letter in these terms:

> "…I understand from your letter that you seek external review relating to an investigation and administrative decision about a grievance you submitted in relation to unfair and unreasonable treatment by your supervisor. You suggest your human rights have been breached, and you have faced discrimination by the department in finding your supervisors' actions were fair and reasonable management action. You also outline the steps you have followed in attempting to resolve your concerns under the Managing employee complaints Directive 02/17, which was the directive in effect at the time of your original employee grievance dated 24 June 2020.
>
> Under the now superseded directive, I have authority to handle a complaint about the chief executive of an agency. The concerns you raise to me primarily relate to the outcome of the investigation and handling of your grievance at stage 2 of the directive by a delegate of the Director-General, and not about the Director-General specifically. Unfortunately, I am not able to handle your complaint.
>
> As you state you do not believe the outcome and handling of your grievance was fair and reasonable, the appropriate external escalation is to the Queensland Industrial Relations Commission (QIRC) as a fair treatment appeal. I am satisfied, having considered your internal review outcome letter dated 16 August 2021, you have been adequately informed about your appeal options, including that

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1 *Industrial Relations Act* 2016, s 564.

information on how to lodge an appeal is available at www.qirc.qld.gov.au or by contacting the QIRC on phone 1300 592 987."

[10] Mr Forsyth-Stewart filed an appeal under s 194 on 17 September 2021 but he required an extension of time.

[11] The grounds of appeal stated in the notice of appeal were:

"Briefly state the basis of your appeal. You should refer to the Appeals Guide to see whether you have a valid ground for appeal

A summary of my appeal to the QIRC - unfair treatment

- I submitted my complaint on June 24, 2020
- No response provided in July, 2020
- In August, 2020 The initial position of the Department (Dept) was that my complaint had been resolved - they in fact had not commenced the investigative process. Christie Williams-Carey attended the meeting and is a witness to stated position of the Department.
- June-November 2020 months of delay - the responsibility of the Department. Their communicated positions:
  - My complaint had been resolved; Altered to the Dept would investigate
  - The Region could not find anyone to investigate my complaint internally
  - The Dept sought and contracted an external investigator.
  - The Dept failed in their legislative requirements, specifically regular communication with me.
- The Dept altered my allegations without my agreement
- The Dept omitted my allegations without my agreement
- The Dept excluded witnesses with evidence supporting my position from the investigative processes
- The Dep failed to consider evidence supporting my position - All creating a bias
- The Dept failed to consider my supervisor's actions that were/are in contrast to their own departmental policy and procedures.
- The Dept failed to consider my supervisor's actions that were/are in contrast to legislative requirements putting

at risk the safety of children (I refer you to my allegations).

- The Dept failed to consider the misleading testimony of the respondent
- The Dept failed to consider the misleading commentary of their investigator all within the investigative/report process.
- The Dept failed to consider their appointed investigator's lack of capacity to provide a fair process without bias
- The Regional Director failed in his legislative obligations when serving me with a suspension.
- The Dept failed to respond to my appeal of that suspension Imposing an invalid absence upon me.
- The Dept issued me with a Direction to attend an IME under an outdated directive (having failed to respond to my request for review of suspension)
- The Director-General delegated responsibility to sign the outcome of my complaint letter depriving me of an appeal avenue.
- Potentially the Dept has breached my human rights.

- The Dept have directed me to attend an IME based on the imposed absence / invalid suspension despite me being declared medically fit to return as of March 1st 2021. I was told I could not provide information to the Dr chosen by the Dept.
- Regarding my return-to-work attempts: The Dept has disadvantaged me by
  - Not providing my GP with information as requested;
  - Depriving me of actions supporting me in the performing of my duties that other employees can utilise, actions that are endorsed by the Dept;
  - Failing to respond to my communicated question: If I was to return to work without medical restrictions, when could I (re)commence;
  - Via their decision regarding my complaint: Establishing that I can be accused of not meeting expectations, prior to those expectations being disseminated, when responsibility for dissemination belongs to another officer;
  - Accepting that my supervisor can affect my access to natural disaster leave entitlements via the creation of

protocol that targets me and may be discriminatory in nature;

- Endorsing my supervisor's decisions and actions that put children at risk plus actions that fail to diminish risk;"

[12] The proforma parts of the notice of appeal invited Mr Forsyth-Stewart to indicate whether he was applying for an extension of time and to explain the reason he could not lodge his appeal within the 21 day time. Mr Forsyth-Stewart said:

> "I misinterpreted the obligations of the Chief executive and instead of a fair treatment appeal submitted a stage 3 external review to the Public Service Commission. I received feedback from Commission Chief Executive Mr Robert Setter on the 13th September[2] and have utilised the time since to rework my documentation from very large to a summary of appropriate sizing.
>
> Evidence has previously been supplied to the Commission but I am happy to provide it again if required."

[13] Directions were made and written submissions were filed. The Deputy President then determined the application for an extension of time on the written submissions. As already observed, the application failed.

The Deputy President's decision

[14] The Deputy President's approach was completely conventional.

[15] The Deputy President firstly identified what he saw to be the relevant facts. He then directed himself that the discretion in s 564(2) of the *Industrial Relations Act* 2016 (IR Act)[3] was unfettered, but that there were cases which had considered how such a discretion might be exercised.

[16] From various authorities to which he directed himself, the Deputy President identified six features which those cases identified as particularly relevant in applications such as the one before him. They were:

1. length of delay;
2. explanation for the delay;
3. prejudice;
4. conduct of the Department;
5. merits of the proposed appeal;
6. considerations of fairness.

[17] In relation to those factors, the Deputy President found:

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2 The day Mr Setter's letter of 10 September 2021 was apparently received by Mr Forsyth-Stewart.

3 The section which bestows a power upon the Queensland Industrial Relations Commission to extend time to appeal.

1. Length of delay

The Deputy President found that Mr Forsyth-Stewart lodged his appeal either 10 or 11 days late and that was, in the Deputy President's assessment "a significant delay".[4]

2. Explanation for the delay

Mr Forsyth-Stewart submitted that there was "miscommunication" about his rights of appeal and that fact, added to his psychiatric/psychological injury, meant he misunderstood his rights of appeal. The Deputy President rejected that argument finding that the letter of 16 August 2021 from Mr McKellar clearly sets out the option of an appeal to the QIRC and Mr Forsyth-Stewart made a deliberate choice not to follow that path. The Deputy President found that Mr Forsyth-Stewart did not adequately explain the delay.[5]

3. Prejudice

The Deputy President held that there was no specific prejudice to the Department by allowing the application. He held that there was prejudice to Mr Forsyth-Stewart in that the possibility of an appeal was lost, but found that the effect of that was ameliorated because Mr Forsyth-Stewart was pursuing other avenues of review.[6]

4. Conduct of the Department

The Deputy President found no conduct of the Department which was adverse.[7]

5. Merits of the appeal

The Deputy President held:

> "[43] Mr Forsyth-Stewart does not provide any sound reason as to why the decision was not fair and reasonable. While he alleges that the investigator was biased, altered and omitted allegations, ignored or failed to properly consider evidence, failed to contact or deliberately excluded witnesses and witness testimony, included the testimony of a witness who was potentially biased and did not understand his complaint, he does not provide any reasonable particulars of these allegations. These allegations are at a very high level of generality."

And later:

> "[47] For these reasons, the merit of Mr Forsyth-Stewart's appeal is a neutral factor as to whether he should be allowed to start his appeal within a longer period."[8]

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4 *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395 at [26].
5 *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395 at [28]-[34].
6 Complaint to the Ombudsman and to the Queensland Human Rights Commission. See *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395 at [35]-[37].
7 *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395 at [28].
8 *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395.

6. Considerations of fairness as between the appellant and other persons in a like position

The Deputy President observed that neither party raised issues of this type.[9]

[18] Having made those findings, the Deputy President:

1. was unpersuaded that it would be fair and equitable to grant the extension;
2. dismissed the application.

The current appeal

[19] The appeal is mounted under s 557 of the IR Act. It provides:

> "**557 Appeal from commission**
>
> (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.
>
> (3) However, subsections (1) and (2) do not apply to the Minister or another person aggrieved by a determination of the full bench under chapter 4, part 3, division 2.
>
> (4) If a person may appeal a decision of the commission under both subsections (1) and (2), the person may only appeal against the decision with the court's leave on a ground mentioned in subsection (2).
>
> (5) In this section—
>
> ***commission*** means the commission, other than the full bench constituted by the president and 2 or more other members."

[20] The power to grant leave under s 557(2) to argue grounds other than error of law or excess or want of jurisdiction is limited by s 565 to circumstances where it is in the public interest to grant leave. Mr Forsyth-Stewart does not seek leave and bases his appeal only on s 557(1).

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9 *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395 at [48].

The grounds of appeal

[21] Annexed to the application to appeal is a document containing six numbered paragraphs. Paragraphs 1-5 recite various things about the decision under appeal. Paragraph 6 commences, "The Decision was incorrect." What follows are the grounds of appeal.

Failure to take into account relevant considerations

[22] A failure to take relevant considerations into account is a legal error being a decision made beyond jurisdiction.[10] If this ground is established, then Mr Forsyth-Stewart has made out his appeal.

[23] The complaints under this ground are:

> "a. in relation to the explanation for delay and other action by the Appellant:
>
> i. the Decision-maker failed to take relevant considerations into account in making the Decision, including, but not limited, to:
>
> A. despite the assertions of the Decision-maker, the advice from Mr McKellar as to the correct jurisdiction was not '*very clear*';
>
> B. the letter from Mr McKellar to the Appellant provided that External Review by way of a public service appeal pursuant to section 194(1)(a) or 194(1)(eb) of the *Public Service Act 2008* (Qld) must be lodged within 21 days of the decision. However, Mr McKellar did not provide the name of the body to which same External Application was to be lodged and the Appellant mistakenly (but within the time limit) lodged an External Review Application to the Public Services Commission (**PS Commission**) instead of the QIRC;[11]
>
> C. the Decision-maker failed to consider that the decision by Mr McKellar failed to particularise the correct jurisdiction to lodge the External Review Application, or where the Appellant may obtain this information apart from the '*QIRC, QHRC and/or Queensland Ombudsman website/s*' which is inherently vague;
>
> D. further, to be distinguished from the case of *Tucker v State of Queensland (Department of Health)*[12], the Appellant's delay did not result

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10 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
11 Emphasis in original.
12 [2021] QIRC 145.

> solely from a lack of diligence in reading Mr McKellar's notice and taking steps accordingly as the notice, in and of itself was defective as it did not provide the correct, or any, jurisdiction for the Appellant to lodge a public service appeal or fair treatment decision;"

[24] The complaints in paragraphs A, B, C and D allege errors of fact, not a failure to take into account relevant considerations.

[25] At paragraphs [31] and [32] of the Deputy President's judgment, this appears:

> "[31] Secondly in his appeal notice, Mr Forsyth-Stewart contends that he misinterpreted '… the obligations of the Chief executive and instead of a fair treatment appeal submitted a stage 3 external review to the Public Service Commission.' The available external avenues of review of the decision were clearly set out by Mr McKellar in the decision. That included Mr Forsyth-Stewart's right to commence an appeal to the Commission pursuant to s 194 of the PS Act. Indeed, Mr McKellar expressly referred to the 21 day limitation period to commence such an appeal. Mr Forsyth-Stewart does not, in his submissions, explain what he means by the contention that he misinterpreted what he refers to as the '… obligations of the Chief executive'. Mr Forsyth-Stewart does not explain why he sought a review of the decision with the Public Service Commission and did not commence an appeal in the Commission within 21 days of receiving the decision, despite the very clear advice given by Mr McKellar in the decision.
>
> [32] From the above facts and from Mr Forsyth-Stewart's lack of explanation, it is reasonable to infer that Mr Forsyth-Stewart made a deliberate decision to seek an external review of the decision by the Public Service Commission and not to start an appeal to the Commission within 21 days of receiving the decision."

[26] This is the passage the subject of the complaints in paragraphs A, B, C and D.

[27] The point which is taken by Mr Forsyth-Stewart is that the letter of 16 August 2021 specifies the body to whom applications or notifications must be made for all the avenues of review except the public service appeal.

[28] The letter of 16 August 2021 says:

1. "an industrial dispute under an industrial instrument", an allegation of contravention of a workplace right or an application to stop bullying are all to be made to the QIRC;

2. a complaint under the *Ombudsman Act* 2001 is to be made to the Ombudsman;

3. a human rights complaint may be made to the Human Rights Commission.

[29] Nothing in the letter says that a public service appeal is to be made to the QIRC.

[30] The observation by the Deputy President that the letter is "clear" is essentially an inference which he drew that Mr Forsyth-Stewart:

1. knew from the face of the letter that he could commence a public service appeal; and
2. chose not to do so.[13]

[31] These inferences were drawn from the following primary facts:

1. The letter stated that a "public service appeal" must be lodged within 21 days.
2. Mr Forsyth-Stewart did not lodge an appeal.
3. Mr Forsyth-Stewart sought "external review" of the decision, not a public service appeal.

[32] Were the appeal to be one by way of rehearing so that issues of fact may be reviewed, then the question for me would be whether the inferences ought to have been drawn by the Deputy President.[14] As the Deputy President did not hear witnesses, he enjoys no advantage over me in determining what inferences ought to be drawn.[15] The appeal is limited to matters of law The question of whether the evidence was capable of supporting the inferences is a matter of law.[16]

[33] The letter sent by Mr Forsyth-Stewart to Mr Setter was not in evidence before the Deputy President. It was tendered on the appeal by Mr Forsyth-Stewart with the consent of the Department.

[34] Also tendered by consent were two directives: Directive 02/17 "Managing Employee Complaints" and Directive 03/17 "Appeals". Directive 03/17 need not be the subject of analysis. That directive concerns various aspects of public service appeals.

[35] Mr Forsyth-Stewart's letter to Mr Setter says this:

> "…My name is Damien Forsyth-Stewart and I wish to submit a complaint regarding the administrative decision by the Director-General of Education, Mr Tony Cook.
>
> I believe I have been treated unfairly and unreasonably by my supervisor, the principal of Gordonvale State School, Mr Lloyd Perkins. I believe my human rights have been breached and I have been discriminated against by my employer the Department of Education…."

And later in the letter:

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13 *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395.

14 *Warren v Coombes* (1979) 142 CLR 531 at 551, *Fox v Percy* (2003) 214 CLR 118 at [25].

15 *Lee v Lee* (2019) 266 CLR 129 at [55], *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at [43].

16 This is the point of cases such as *Shepherd v The Queen* (1990) 170 CLR 573 at 592 and whether an inference is "open".

"…I have provided ***1. Previously submitted Formal complaint and supporting evidence*** and ***2. Stage 2 Internal Review*** to support my complaint found in ***3. Stage 3 External Review*** entitled 'External Review'.

Based on the Managing Employee Complaints Directive, I am entitled to submit an External Review when dissatisfied with an Internal Review decision. That decision was provided 17th August 2021. That decision supported the Stage 1 findings. The delay (duration from submission to decision) remains the responsibility of my employer."

[36] There is no reference in the letter to Mr Setter of Mr Forsyth-Stewart making a "public service appeal". The letter instead speaks of a "Stage 3 External Review".

[37] Directive 02/17 contains this:

"**Stage 3 - External review**

7.5.15 If the employee who made the original complaint is dissatisfied with a decision made following internal review, the employee may seek an external review. Depending on the issues raised in the complaint, the avenues for external review may include:

- A public service appeal against a decision under a directive or a fair treatment decision, under sections 194(1)(a) or 194(1)(eb) of the *Public Service Act 2008*; or
- Notification to the QIRC of an industrial dispute under an industrial instrument, or
- An application to the QIRC in relation to an alleged contravention of a workplace right under Chapter 8, Part 1 of the *Industrial Relations Act 2016*; or
- An application to the QIRC for a stop bullying order under Chapter 7, Part 4 of the *Industrial Relations Act 2016*; or
- A complaint to the QIRC in relation to alleged sexual harassment, racial vilification or religious vilification under Chapter 7, Part 1 of the *Anti-Discrimination Act 1991*; or
- A complaint to the Queensland Ombudsman under the *Ombudsman Act 2001*.
    - Note that under section 23 of the *Ombudsman Act 2001*, the Ombudsman has a wide discretion to refuse to investigate a complaint, for example, if the complainant has a right of appeal or review they have not used or where the complainant has

> used and exhausted another type of review or appeal.
>
> However, the issues raised in a particular complaint may mean that the complaint is not eligible for external review under the above legislation.
>
> Employees seeking more information about their public service appeal rights and the procedures to be followed when lodging a public service appeal should refer to the QIRC Appeals Guide.
>
> **7.6 Complaints made to the commission chief executive about the chief executive of an agency**
>
> 7.6.1 An employee may make a complaint to the commission chief executive about the chief executive of an agency. A complaint must be made in writing and must state the action the employee believes would resolve the complaint. …"

[38] It can be seen that paragraph 7.5.15 of Directive 02/17 was the source of the information which Mr McKellar included in his letter of 16 August 2021 to Mr Forsyth-Stewart.

[39] Mr Forsyth-Stewart has not, it seems, followed paragraph 7.5.15 of the Directive, but has followed 7.6.1. He has probably misunderstood 7.6 as that only relates to complaints about the chief executive.

[40] In my view, it was well open to the Deputy President to infer that Mr Forsyth-Stewart did not intend to mount a "public service appeal". The Deputy President was further entitled to infer that Mr Forsyth-Stewart was not mistaken that a "public service appeal" was a proceeding to be directed to Mr Setter. Mr Forsyth-Stewart deliberately launched a complaint under clause 7.6 of the directive.

[41] Mr Forsyth-Stewart's letter to Mr Setter and the Directive referred to in that letter, support the Deputy President's conclusion that Mr Forsyth-Stewart elected not to mount a public service appeal. He elected to take other action, namely a complaint to Mr Setter. When that was rejected, he determined to pursue a public service appeal.

[42] It follows that, in my view, the complaints in paragraphs A, B, C and D and paragraph 6(a)(i) of the application to appeal have no merit.

The decision of the Deputy President was unreasonable

[43] The complaints under this ground are:

> "ii. the Decision-maker acted unreasonably in the decision-making process, including, but not limited, to:
>
> A. it was not open at law for the Decision-maker to infer, and there was no evidence to suggest, that as the Appellant lodged an External Review with the PS

Commission and not the QIRC, that the Appellant did so deliberately. This inference is plainly wrong especially as the Appellant submitted that the application was lodged to the PS Commission in error;

B. further, that no explanation was given by the Appellant as to why the Appellant lodged an appeal incorrectly with the PS Commission conversely supports an inference that the Appellant was acting under a genuine belief the PS Commission was the correct jurisdiction to seek External Review of Mr McKellar's decision, and adds to the unreasonableness of the inference by the Decision-maker;

C. the Decision-maker failed to inquire about the size of the application for external review made to the PS Commission, or failed to request any further documents from the Appellant;

D. the Appellant submitted 36 allegations to the Department, and the Decision-maker was aware of this, however the Decision-maker only reviewed 22 allegations and as a result failed to inquire or investigate the remaining allegations, or make a decision based on all of the information available;

E. the Decision-maker failed to inquire about the Appellant's mental health, or request any additional information regarding the Appellant's mental impairment or mental health;

F. there was an obvious gap in the material that the Decision-maker reviewed regarding the Appellant's mental health impairment and the documents submitted by the Appellant to the PS Commission, and all of the allegations of the Appellant's complaint and as a result the Delegate ought to have exercised their discretion to enquire about the Appellant's mental health, impairment, and requested a copy of the documents submitted to the PS Commission;"

[44] In order for legal error to be established under this ground, the decision must be "unreasonable" in the sense understood in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[17] A decision will be reviewable as unreasonable where no reasonable decision-maker could have made the decision.[18] In *Minister for Immigration and Citizenship v Li*,[19] the High Court observed that while unreasonableness will be found where no reasonable decision-maker could have made the decision, there may be circumstances where a decision is rendered

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17 [1948] 1 KB 223.

18 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230. And see generally *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

19 (2013) 249 CLR 332.

unreasonable notwithstanding that test could not be fulfilled.[20] There seems to be no such circumstances here.

[45] In this ground of appeal, Mr Forsyth-Stewart points to four factors which he says amounts to unreasonableness.

[46] Complaint A ought to be rejected. I have already found that there was evidence upon which the relevant inferences could be drawn.

[47] Deputy President Merrell held that there was a decision made not to pursue a public service appeal but instead pursued the complaint to the Public Service Commission. That was the inference he drew and it is one that is open on the evidence, so Complaint B fails.

[48] Complaints C, D and E all allege the Deputy President failed to make inquiries. He was not obliged to do so. The Deputy President was obliged to ensure that Mr Forsyth-Stewart was aware of the relevant issues and the nature and content of any adverse material to be relied upon.[21] There is no suggestion that Mr Forsyth-Stewart was not aware of those things. There is no substance in Complaints C, D and E.

[49] Complaint F alleges that the Delegate (a reference to Mr McKellar) ought to have sought further material from Mr Forsyth-Stewart before making the decision which Mr McKellar made. That is hardly, if at all, relevant to a *Wednesbury* unreasonableness submission directed at the Deputy President's decision. Complaint F raises nothing which renders the decision unreasonable.

Failure to afford procedural fairness: prejudice

[50] The grounds here allege:

> "b. In relation to prejudice
>
> i. the Decision-maker failed to afford procedural fairness to the Appellant and the fact the Appellant sought alternate avenues of External Review should not adversely affect and/ or preclude the Appellant's right to seek an appropriate outcome at the QIRC;
>
> ii. if the Decision was likely to turn on the fact the Appellant had sought alternate avenues for appeal, the Decision-maker had a duty to request a further response from the Appellant as to the prejudice that he would suffer as a result of the refusal to allow an extension of time;
>
> iii. further, the QIRC is the appropriate, and best jurisdiction for the Appellant to seek an outcome as the Appellant is

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20 At [30], [68] and [74].

21 *Commissioner for the ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, *Secretary, Department of Sustainability, and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth)* (2013) 209 FCR 215 at [107] and *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180.

> a public service employee within the meaning of that term according to Schedule 1 and section 9(1) of the *Public Service Act 2008* (Qld) and the Appellant would suffer significant prejudice if the appeal was refused, including, but not limited, to:
>
> A. the Appellant's case may not be heard in any jurisdiction;
>
> B. the Appellant submitted 36 allegations to the Department, and the Decision-maker was aware of this. However, the Decision-maker only reviewed only 22 allegations, which, as detailed above was unreasonable. The Appellant's prejudice is clear that if the application is refused, the Decision would have been made on incomplete infom1ation and/ or on part of the information available;"

[51] This no doubt concerns the findings by the Deputy President at paragraph [37] of the reasons:[22]

> "[37] However, I note that Mr Forsyth-Stewart has also submitted that he has sought external reviews of the decision with the Ombudsman and the Queensland Human Rights Commission. My opinion is that these facts are against allowing Mr Forsyth-Stewart to start his appeal within a longer period. Mr Forsyth-Stewart has sought those reviews within the relevant limitation periods. That is to say, Mr Forsyth-Stewart will still have an external review avenue of the decision if I do not allow him to start his appeal within a longer period."

[52] The Deputy President was required to afford procedural fairness to Mr Forsyth-Stewart. What is in issue is the content of that obligation.

[53] A decision-maker will normally be under an obligation to ensure that a person who may be affected by a decision must be given "an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon [the question]".[23]

[54] A decision-maker need not specifically identify, before the decision is made, issues which are obviously ones which may be taken into account. That situation can be distinguished from cases such as *Orreal v Queensland Community Corrections Board*.[24] There, material of which an appellant for parole had no knowledge raised issues well beyond the usual scope of such an application. The decision-maker took those matters into account without Mr Orreal having the opportunity to address them. The challenge to the refusal of parole was upheld.

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22 *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395.

23 *Kioa v West* (1985) 159 CLR 550 at 628; see also *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180.

24 (1995) 81 A Crim R 212.

[55] This is not such a case. Prejudice, being the loss of the right to pursue a public service appeal, was an obvious matter for consideration. Mr Forsyth-Stewart was on notice that prejudice was an issue and that the Department's position was that any prejudice to Mr Forsyth-Stewart was ameliorated by the fact that he was pursuing other avenues. In the Department's written submissions to the Deputy President, this was said:

> "*The prejudice to the parties should the extension be allowed or not allowed*
>
> 12. It is important to note the delay itself is considered to give rise to a general presumption of prejudice to a respondent. The Respondent contends it would suffer general prejudice should the Commission decide to exercise its discretion to hear the Appeal out of time.
>
> 13. Should the Commission decide not to exercise its discretion to hear the Appeal out of time, the prejudice to the Appellant may be limited and mitigated based on the other avenues the Appellant is pursuing via an external review, namely through the Queensland Ombudsman and the Queensland Human Rights Commission, which the Appellant advises on appeal. Furthermore, there is apparently other avenues of action the Appellant has taken as per the Submissions of the Appellant."

[56] The issue of prejudice having been squarely raised, Mr Forsyth-Stewart could have sought to file further submissions in answer to that particular point. There has been no breach of the rules of procedural fairness.

[57] Ground b.iii[25] raises a different issue. That is not so much an allegation of a denial of procedural fairness, but either a factual complaint or an unreasonableness argument. Mr Forsyth-Stewart submits that if the extension of time is not granted, he may suffer prejudice because his case might not be heard in any jurisdiction.

[58] The Deputy President did not hold that there was no prejudice to Mr Forsyth-Stewart. What he found in paragraph [37] of the reasons[26] was, in effect, that in balancing discretionary issues, he took into account the availability of other avenues of review. That is what the Deputy President meant when he said that "these facts [the other avenues of review] are against allowing Mr Forsyth-Stewart to start within a longer period".

[59] The Deputy President has not made a factual mistake and, in my view, taking the availability of other avenues into account in the way that he did was not an error and did not render the decision unreasonable.

Conduct of the Department

[60] In his grounds of appeal, Mr Forsyth-Stewart says:

> "i. as detailed above, the Decision-maker did not review all of the Appellant's allegations, as outlined in the McKellar decision,

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25 Subparagraphs A and B.

26 Set out at paragraph [51] of these reasons.

> being an error in and of itself as the Decision-maker failed to consider relevant considerations and material in the matter. The scope of the investigation by the Department was unilaterally reduced, without the prior knowledge or consent of the Appellant. Accordingly, the Respondent's conduct should be questioned and provide support to the approval of this application, as it caused a disadvantage to the Appellant as the Decision was not made on all of the available information;"

[61] This addresses paragraph [38] of the Deputy President's reasons:[27]

> "[38] There is no conduct on the part of the Department that supports the view that it would be fair and equitable to allow Mr Forsyth-Stewart to start his appeal on 17 September 2021."

[62] Mr Forsyth-Stewart in this ground of appeal, complains about the way the Department conducted the investigation which led to Mr McKellar's decision. That is not what is being referred to by the Deputy President. The Deputy President is referring to conduct which might be relevant to the application to extend time.

[63] Sometimes, the conduct of one party will be relevant in balancing whether an extension of time should be given. For example, if the Department had misled Mr Forsyth-Stewart as to the time limits applicable for the making of a public service appeal, the QIRC may be loath to then hold Mr Forsyth-Stewart to the time limit.

[64] There is nothing like that here and there is no error demonstrated by paragraph [38] of the Deputy President's reasons.

Merits of the appeal

[65] In his grounds of appeal, Mr Forsyth-Stewart says this:

> "i. while the merits of the substantive appeal are considered as a guiding principle as to whether or not to allow the extension of time, the case of *Johnson v Discovery Bay Developments Pty Ltd*[28] provides that the merits or lack thereof of the substantive application must be clear cut and will usually flow from formation of a view that there is an obstacle that no amount of evidence can overcome;
>
> ii. as the appeal was in relation to an extension of time, and not a substantive appeal of the matter, the Decision-maker did not have all of the relevant information before him to make a determination of the Appellant's lack of prospects of success, especially to the point that, as above, '*no amount of evidence can overcome*'. As a result, the Decision-maker erred in taking into account an irrelevant consideration in making the Decision."

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27 *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395.
28 (1996) 151 QGIG 1010.

[66] This ground concerns the findings made by the Deputy President at paragraphs [43]-[47] of the decision.[29]

[67] There, the Deputy President says:

> "[43] Mr Forsyth-Stewart does not provide any sound reason as to why the decision was not fair and reasonable. While he alleges that the investigator was biased, altered and omitted allegations, ignored or failed to properly consider evidence, failed to contact or deliberately excluded witnesses and witness testimony, included the testimony of a witness who was potentially biased and did not understand his complaint, he does not provide any reasonable particulars of these allegations. These allegations are at a very high level of generality.
>
> [44] The fact that the investigator found that none of the 22 allegations were proven, does not and cannot reasonably mean, without some specific allegation or claim, that the investigator was actually biased against Mr Forsyth-Stewart or that the investigation faltered, as seems to be contended by Mr Forsyth-Stewart.
>
> [45] In terms of the merits of his case on appeal, Mr Forsyth-Stewart makes submissions about another decision that has been made, namely, a direction that he attend an independent medical examination. However, as best as I can make out, that direction was not the subject of the decision against which he seeks to appeal. Similarly, Mr Forsyth-Stewart seems to make submissions about a later decision (that is later to the date of his stage 1 complaint) to suspend him. Again, it seems to me that suspension decision was not the subject of the decision against which he seeks to appeal.
>
> [46] In my view, Mr Forsyth-Stewart simply does not like the decision and, without particularising why the decision was not fair and reasonable, wants to re-run his stage 1 complaint.
>
> [47] For these reasons, the merit of Mr Forsyth-Stewart's appeal is a neutral factor as to whether he should be allowed to start his appeal within a longer period"

[68] The Deputy President observed[30] that Mr Forsyth-Stewart was aware that the prospects or otherwise of success of the appeal against Mr McKellar's decision was a relevant consideration to the application to extend time. There is no appeal against that finding. The Deputy President then dealt with the material which had been placed before him in order to assess the merits of the appeal.

[69] It was not for the Deputy President to inquire as to what other material was available. His function was to decide the case on the basis of the evidence put before him by the parties. He did that. No error is shown.

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29 *Forsyth-Stewart v State of Queensland (Department of Education)* [2021] QIRC 395.

30 At [39].

Conclusions

[70] None of the grounds of appeal raised by Mr Forsyth-Stewart have merit. The appeal ought to be dismissed.

[71] The Department applies for costs. The parties agreed that directions ought to be given for the exchange of written submissions on costs and that, subject to both parties' rights to apply for leave to make oral submissions, costs should be determined on the papers.

Orders

[72] It is ordered:

1. The appeal is dismissed.
2. The respondent file and serve upon the appellant by 10 May 2022 any written submissions on the costs of the appeal.
3. The appellant file and serve upon the respondent by 24 May 2022 any written submissions on the costs of the appeal.
4. Each party have leave to file and serve by 7 June 2022 any application for leave to make oral submissions as to the costs of the appeal.
5. In the absence of any application to make oral submissions on the costs of the appeal being filed by 7 June 2022, the question of costs will be decided on any written submissions filed and without further oral hearing.