DISTRICT COURT OF QUEENSLAND

CITATION:	*Maloney v Workers' Compensation Regulator* [2022] QDC 216
PARTIES:	**TAMARA ELIZABETH MALONEY** (appellant) **v** **WORKERS' COMPENSATION REGULATOR** (respondent)
FILE NO:	16/22
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Cairns
DELIVERED ON:	21 September 2022
DELIVERED AT:	Cairns
HEARING DATE:	19 August 2022
JUDGE:	Morzone KC DCJ
ORDER:	**1. Appeal allowed in part.** **2. The sentence and orders of the Magistrates Court made in Cairns on 17 January 2022 are varied by substituting the following orders in lieu of the sentences of imprisonment for counts 2 and 3:** **(a) For count 2 – A conviction is recorded but the appellant is not further punished.** **(b) For count 3 – A conviction is recorded but the appellant is not further punished.**
CATCHWORDS:	CRIMINAL LAW - appeal pursuant to s 222 Justices Act 1886 – evidence of appellant's intention amount to excusal and absolute defence instead of mitigation – whether prosecution did not exclude a "reasonable excuse" under s 535(1)(c) of the Act – whether sentence manifestly excessive.
LEGISLATION:	*Justices Act* 1886 (Qld) s 222, s 223(1) & 227 *Workers' Compensation and Rehabilitation Act* 2003
CASES:	*Ajax v Bird* [2010] QCA 2 *Latoudis v Casey* (1990) 170 CLR 534 *Lowe v The Queen* (1984) 154 CLR 606

Meisser v R (1994-5) 184 CLR 132
R v Lomass (1981) 5 A Crim R 230
R v McIntosh [1923] St R Qd 278
R v Morse (1979) 23 SASR 98
Scanlon v Queensland Police Service [2011] QDC 236

COUNSEL: MJ Jackson for the Appellant
AL Bain for the Respondent

SOLICITORS: Fisher Dore for the Appellant.
Workers Compensation Regulator Prosecutions Unit

Introduction

[1] On 17 January 2022, the appellant was convicted on her plea of guilty to six dishonesty offences against the *Workers' Compensation and Rehabilitation Act* 2003 ('Act') in the Magistrates Court held in Cairns. She was sentenced for charge 1 to 6 months imprisonment, wholly suspended for an operational period of 12 months, and for the other charges 2 to 6 she was sentenced for each and separately to 3 months imprisonment, wholly suspended for 6 months. It was further ordered that the appellant pay restitution of $15,386.59 and costs of $5191.30. Convictions were recorded.

[2] The appellant now appeals her convictions in relation to counts 1, 4, 5 & 6 on the ground that the learned magistrate erred in not rejecting the appellant's pleas of guilty because on the evidence the absence of "reasonable excuse' is not made out. She also argues that sentences of imprisonment imposed for charges 2 and 3 as being contrary to law where they are only punishable by fine under s 136 of the Act. The respondent concedes that the sentences for charges 2 and 3 are erroneous, but otherwise contests the appeal.

[3] The determinative issues are:

(a) As to counts 1, 4, 5 and 6 - did the prosecution exclude a "reasonable excuse" under s 535(1)(c); if so what are the consequential orders?

(b) As to counts 2 and 3 - what other sentence or order should be made?

[4] I have concluded that there are no grounds to disturb the plea, conviction or sentence in respect of counts 1, 4, 5 and 6. The elements of the offending for those counts are relevantly framed by the offence provisions of ss 533, 534 and 535 of the Act. Only count 1 relied upon the exclusion of "reasonable excuse" for not giving timely notification of employment or calling. Counts 4, 5 and 6, required knowingly giving false or misleading information. In my view the appellant by her plea on the accepted facts rendered as otiose any earlier inconsistent assertions, misplaced psychiatric opinion, and unwavering submissions. For counts 1, 4, 5 and 6, the prosecution did exclude any reasonable excuse for count 1 and any knowledge of falsity in the information relied upon for counts 1, 4, 5 and 6.

[5] However, I accept that the sentences of imprisonment imposed for charges 2 and 3 are contrary to law because such offending is only punishable by fine under s 136 of

the Act. Having regard to the whole of the circumstances and the significant overlap in the charged conduct, I'll substitute a sentence of conviction recorded but no further punishment.

[6] I will order accordingly.

Is the evidence of the appellant's intention such that the prosecution did not exclude a "reasonable excuse" under s 535(1)(c) of the Act??

[7] At the commencement of the sentence hearing, the prosecutor sought without objection and upon notice, and obtained leave, to amend the particulars of the complaint. The appellant was then arraigned in bulk in accordance with ss 145(2)-(4) of the *Justices Act* 1886 (Qld), and was convicted on her plea to six offences:

(1) Defraud or attempted to defraud an insurer against 533(1) of the Act;

(2) Worker receiving compensation for injury must notify of return to work or engagement in a calling against s 136 of the Act;

(3) Worker receiving compensation for injury must notify of return to work or engagement in a calling against s 136 of the Act;

(4) Knowingly make a false or misleading statement to an authority, WorkCover or self-insurer against s 534(2) of the Act;

(5) Give authority, WorkCover, self-insurer or registered person a document containing information that is false or misleading in a material particular against s 534(2) of the Act;

(6) Knowingly make a false or misleading statement to an authority, WorkCover or self-insurer against s 534(2) of the Act;.

[8] The appellant's plea of guilty will be vitiated if she so pleaded to a charge that is not made out at law, and this Court has power to receive, hear and determine the appeal in that context.[1]

[9] The appellant points to the submission made by the prosecutor after the arraignment of the defendant, that: "*it's incontrovertible that she did understand her obligations because she went on to fulfil them for several months until the second undisclosed job came to light*". On hearing this, the learned Magistrate was concerned about a contest on a critical issue as distinct from a plea on an agreed statement of facts. The appellant's then solicitor affirmed that the facts "*are agreed*" and that "*references in the medical report really go to moral culpability as opposed to legal responsibility*".

[10] The appellant relies upon the following evidence and submissions below:

(a) Firstly, a contemporaneous file note recording the defendant saying: "*I apologise for the lack of clarity and confusion that this has likely caused. It has never been my intention to gain financially from my employer as a result of the incident which took place*".

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[1] Cf. *Ajax v Bird* [2010] QCA 2, *Meisser v R* (1994-5) 184 CLR 132 at 141, *Meisser v R* (1994-5) 184 CLR 132 at 141

(b) Secondly, Dr O'Hare opined in her psychiatric report that: "*... rigid thinking style and strong moral compass made the plea of guilty a difficult one for her as she genuinely did not intend to mislead Workcover but rather failed to interpret the forms she was required to fill in in an appropriate way…*".

(c) Thirdly, the solicitor's submission that: "*From then on it was made clear to her that the payslips from Big W needed to be remitted every fortnight and that occurred for the rest of the claim period. At that point it would be reasonable to assume that any person would think that maybe other employment would also be relevant, however, my client due to reasons specific to her just simply failed to understand that all of that information was needed by the insurer in order to correctly calculate her entitlements*".

[11] In those circumstances, it is argued that the learned magistrate erred in not rejecting the appellant's pleas of guilty because on the admitted facts the appellant did not in law have the requisite fraudulent knowledge and intent to been guilty of counts 1, 4, 5 and 6.

[12] I disagree. It seems to me that the appellant mischaracterises the nature and scope of the evidence identified, and conflates the relevant elements of the various offending. Unlike conventional fraudulent offending subject of s 408C of the *Criminal Code*, the elements of the offending for counts 1, 4, 5 and 6 are strictly framed by the offence provisions of ss 533, 534 and 535 of the Act as follows:

533 Offences involving fraud

(1) A person must not in any way defraud or attempt to defraud an insurer.

Maximum penalty—500 penalty units or 5 years imprisonment.

534 False or misleading information or documents

(1) This section applies to a statement made or document given—

(a) to the Regulator or WorkCover for the purpose of its functions under this Act; or

(b) to an entity or person as a self-insurer; or

(c) to a registered person for the purpose of an application for compensation or a claim for damages.

(2) A person must not state anything to the Regulator, WorkCover, a self-insurer or a registered person the person knows is false or misleading in a material particular.

Maximum penalty—150 penalty units or 1 year's imprisonment.

535 Particular acts taken to be fraud

(1) This section applies if a person—

(a) lodges an application for compensation with an insurer; and

(b) engages in a calling; and

(c) without reasonable excuse, does not inform the insurer, in the way stated under section 136, of the person's engagement in the calling.

(2) If compensation is paid by the insurer under the application to the person or anyone else—

(a) after the start of the engagement in the calling; and

(b) before the insurer is informed in the way stated under section 136 of the engagement in the calling;

the person is taken to have defrauded the insurer of the payments under section 533.

[13] Section 136 relevantly provided that:

136 Worker must notify return to work or engagement in a calling

(1) A worker receiving compensation for an injury must give notice within 10 business days of the worker's—

(a) return to work; or

(b) engagement in a calling.

Maximum penalty—50 penalty units.

(2) The notice must be given to the insurer.

(3) The notice may be a certificate in the approved form of a doctor stating the worker's capacity for work.

[14] For count 1, the critical issue is whether the worker "without reasonable excuse" did not inform the insurer of other callings within the 10 days of the return to work or engagement in a calling as prescribed by s 136. The prosecution retains the onus to exclude a "reasonable excuse" of that nature beyond reasonable doubt. The excuse must be one genuinely held by the worker, which involves an assessment of the worker herself or himself. The excuse must be of a particular character - one relevant to explaining the worker's failure to inform the insurer of other callings within the required time. To be reasonable, the excuse must be assessed according to the standards of ordinary people in the worker's shoes, in his/her circumstances, on reasonable grounds. The focus is on the defendant's excuse, not that of a theoretical reasonable person. The assessment involves consideration of whether the excuse was reasonably held, by the standards of ordinary people having regard to the defendant's particular circumstances, including the information and situation as s/he perceived them.

[15] For counts 4, 5 and 6, the critical issue is whether the worker knowingly gave false or misleading information. The prosecution must prove that the worker had a particular knowledge that the information given was false or misleading. The element of knowledge requires proof of actual knowledge held by the worker. That involves an assessment of the worker herself or himself. A person has the requisite knowledge if s/he is aware that it is false or misleading in the ordinary course of events.

[16] On my reckoning, the evidence identified by the appellant is not probative of any excuse for failing to give timely notice for count 1, or of knowingly giving the false and misleading information for counts 4, 5 or 6. In my view the contemporaneous note of the appellant's self-serving assertion that it was *"never my intention to gain financially*" is not to the point of any element in the offending. Further, I do not accept the appellant's argument that the psychiatrist's opinion created a reasonable possibility that the appellant was not acting dishonestly and that the lack of provision of the other information was as a result of her misunderstanding. Firstly, I do not consider it admissible opinion evidence but mere speculation about an issue of fact ultimately for the court. Secondly, even if permissible, the opinion that the appellant "*genuinely did not intend to mislead Workcover but rather failed to interpret the forms she was required to fill in in an appropriate way*", when read in its proper context, merely went to the impact on the appellant of the appellant grappling with her plea as part of the court process, and was not proffered as conduct in the offending. Thirdly, the evidence was relevant to the remorse and contrition of the appellant by taking responsibility for her offending given her rigid thinking style and strong moral compass. This is consistent with the force of the appellant's solicitor's submissions, which were expressly limited to moral culpability and not proffered as a challenge to the appellant's legal responsibility.

[17] It seems to me that the appellant expressly recanted from any dispute by her plea of guilty with the benefit of advice. The arraignment proceeded in accordance with s145(2)-(4) of the *Justices Act* 1886 (Qld), her plea was not equivocal, and she was properly convicted on her plea to the six offences. Her admissions of the facts in the complaint and statement of facts rendered otiose any earlier inconsistent assertions. Pursuant to s 132C of the *Evidence Act* 1977 (Qld), the learned magistrate was entitled to act on the accepted allegations in the complaint and agreed statement of facts, that were admitted and not challenged.

[18] For count 1, the appellant expressly conceded the absence of "reasonable excuse" as pleaded in the complaint relevant to s 533(1) and ss 535 that:

> "*17. The defendant did not have a reasonable excuse for failing to inform the self-insurer of her engagement in a calling with either employer within 10 business days of 27 March 2020*."

[19] For count 4, the appellant admitted the requisite knowledge as pleaded in the complaint relevant to s 543(1) and ss 544(2) that:

> *"5. The defendant knew that the information she stated to the self-insurer on 2 March 2020 was false or misleading in a material particular as she knew [she] was employed by and had been working shifts for Ausfuel Services Pty Ltd."*

[20] For count 5, the appellant again admitted the requisite knowledge as pleaded in the complaint relevant to s 543(1) and ss 544(2) that:

> *"9. The defendant knew that the information provided in the application form on 13 April 2020 was false and misleading in a material particular as she knew she was employed by and had been working shifts for Ausfuel."*

[21] And similarly for count 6, the appellant admitted the requisite knowledge as pleaded in the complaint relevant to s 543(1) and ss 544(2) that:

> *"10. The defendant knew that the information she stated to the self-insurer was false or misleading in a material particular as she was employed by both Woolworths Pty Ltd (Big W) and Ausfuel Services Pty Ltd."*

[22] Against the background of the detailed pleading in the Complaint, the Statement of Facts provided an agreed summary of the basal facts relevant to counts 1, 4, 5 and 6 as follows:

1. On 26 January 2020, the defendant was working in a Liquorland shop in Woree which was the subject of a theft. She suffered an exacerbation of her pre-existing psychological illness (the work-related injury).

2. On 14 February 2020, the defendant lodged an application for workers' compensation with Coles Group Ltd, the relevant self-insurer. On that application, she signed a declaration agreeing to advise the self-insurer of particular matters, including undertaking any employment during her claim.

3. The defendant had been employed by Ausfuel Services Pty Ltd from around 18 March 2019. She took approximately one month away from that job as a casual console operator after the work-related injury. The defendant returned to work on about 17 February 2020 and continued until 11 October 2020, working between 29 and 54.75 hours per fortnight with around 45 hours per fortnight being the most common. She earnt a total of $20,895.03 during that period.

4. The defendant was also employed by Woolworths Group Limited to work in retail at Big W from 20 January 2020 and started work there in the week commencing 23 March 2020. She continued to work there for the entirety of the period of the fraud and into 2021. During the relevant period, the defendant worked between 4 and 25.25 hours per week, with about 10 to 15 hours weekly being the most common. She earnt a total of $5,793.79 during that period.

5. The defendant told Mr Martin Willoughby, an employee of the self-insurer, that she had no other employment outside of Coles on 2 March 2020 which was false or misleading as she had recommenced work with Ausfuel on about 17 February 2020. [Charge 4]

6. The self-insurer accepted the defendant's claim on 27 March 2020. The defendant failed to notify the insurer of her two engagements in a calling with Big W and Ausfuel within 10 business days (being 14 April 2020) as she was required. [Charges 2 and 3]

7. On 13 April 2020, the defendant signed a second application for compensation because the previous application had been on the incorrect form. She indicated on the second application that she had no other employment and agreed to notify the self-insurer if that changed. [Charge 5]

8. Around 16 April 2020, the self-insurer received information that the defendant was working at Big W. Ms Suzana Kitanovic, an employee of the self-insurer, phoned the defendant on 20 April 2020 and asked whether the defendant had recently obtained employment elsewhere. The defendant said no. When Ms Kitanovic asked whether she had recently started working at Big W, the defendant then said that she had started working there three weeks ago as a casual, had only done five shifts, and had not been back since the first week because she was having COVID-19 symptoms. [Charge 6]

9. Ms Kitanovic told the defendant that she would need to disclose her income from her other employer to the self-insurer weekly to avoid overpayments. The defendant began providing her payslips from the Big W job following this conversation.

10. The defendant did not disclose her Ausfuel job at this point or until about 24 September 2020, about five months after the discussion with Ms Kitanovic about the Big W job.

11. As a result of the defendant's dishonesty, the self-insurer paid $16,078.16, being the amount paid out in compensation and medical expenses during the period of the fraud. The defendant has repaid $691.57 of this amount to the self-insurer, leaving $15,386.59 in restitution outstanding.

[23] On my review, for counts 1, 4, 5 and 6, the prosecution did exclude any reasonable excuse for count 1, and showed the requisite knowledge of falsity in the information relied upon for counts 1, 4, 5 and 6. Whilst the learned magistrate ultimately characterised the appellant's conduct as a "careless aberration" and distinguishing a comparable case involving a "purposeful fraud", such remarks must be considered in the context of the elements of the offending for counts 1, 4, 5 and 6 are relevantly framed by the offence provisions of ss 533, 534 and 535 of the Act. It seems to me that His Honour was merely acknowledging the limited scope of purpose and intent available under the statutory regime. That is, the defendant's excuse fell short of being a reasonable in respect of count 1, and her state of mind did not displace the requisite knowledge admitted for counts 4, 5 and 6.

[24] For these reasons, in my respectful view, the learned magistrate did not err in not rejecting the appellant's pleas of guilty, and proceeded according to law. I do not discern any grounds to disturb the plea, conviction or sentence in respect of counts 1, 4, 5 and 6.

As to counts 2 and 3 - what other sentence or order should be made?

[25] This court ought not interfere with a sentence unless it is manifestly excessive, that is, "beyond the acceptable scope of judicial discretion" or "so outside the appropriate range as to demonstrate inconsistency and unfairness".[2]

[26] I accept that the sentences of imprisonment imposed for charges 2 and 3 are contrary to law because such offending is only punishable by fine under s 136 of the Act, and therefore manifestly excessive.

[27] Having reached that conclusion, it is incumbent on this court to re-exercise the sentencing discretion. The only purpose for which a sentence may be imposed by virtue of s 9(1) of the *Penalties and Sentences Act* 1992 (Qld) is to punish an offender to an extent or in a way that is just in all of the circumstances, facilitate avenues of rehabilitation, deter the offender and others from committing a similar offence, make it clear that the community denounces the conduct in the offending and to protect the community. The relevant factors to which the court must have regard are in the subsequent subsections of section 9 of the *Penalties and Sentences Act* 1992 (Qld).

[28] It is trite to say that the appropriate sentence will depend on the particular circumstances of the offending and the degree of culpability of the offender. The nature of the penalty, in the form of a fine, provides little by way of rehabilitation, particularly in circumstances where its payment is likely to be unattainable and, therefore, there would be little motivation to do so. The gravity of this offending can also be gleaned by the relative minimum and maximum penalties, with due regard to the factors of general and, as appropriate, personal deterrence. For this offending, it is relevant that imprisonment should only be imposed as a last resort and a sentence that allows the appellant to stay in the community is preferable.

[29] Having regard to the whole circumstances and the significant overlap in the charged conduct, I'll substitute a sentence of conviction recorded but no further punishment.

Costs

[30] The appellant applies for costs of the appeal. On the other hand, the respondent contends that each party ought bear their own costs.

[31] Section 226 of the *Justices Act* 1886 (Qld) provides that a judge may make such order as to the parties' costs incurred in the bringing of an appeal under s 222 as the judge thinks just. The discretion must be exercised judicially,[3] to compensate a successful party, and not by way of punishment of the unsuccessful party.[4] I note that the circumstances do not qualify for any orders under the *Appeal Costs Fund Act* 1973 (Qld).

[32] The appellant was only party successful in the appeal in respect of counts 2 and 3, which was properly conceded by the respondent, and could have been corrected by reopening the sentence below.

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2 *R v Morse* (1979) 23 SASR 98; *R v Lomass* (1981) 5 A Crim R 230; *R v McIntosh* [1923] St R Qd 278; *Lowe v The Queen* (1984) 154 CLR 606.
3 *Latoudis v Casey* (1990) 170 CLR 534.
4 *Scanlon v Queensland Police Service* [2011] QDC 236.

[33] The appellant was otherwise unsuccessful in the appeal. The merits of the appeal were relatively weak and failed despite able argument. The conduct of the parties to the proceeding before and during the primary proceeding was generally appropriate, as were the nature and extent of the documents. The appellant has forced the respondent to endure further appellate proceedings attended by costs, delay and inconvenience. In the circumstances of this case, it would be inequitable for the respondent to bear the financial burden of the recourse to this court.

[34] In the circumstances, I will not order the respondent to pay the appellant's costs of the appeal.

Order

[35] For these reasons, I make the following orders:

1. Appeal allowed in part.

2. The sentence and orders of the Magistrates Court made in Cairns on 17 January 2022 are varied by substituting the following orders in lieu of the sentences of imprisonment for counts 2 and 3:

   (a) For count 2 – A conviction is recorded but the appellant is not further punished.

   (b) For count 3 – A conviction is recorded but the appellant is not further punished.

Judge DP Morzone KC