QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Deanne Maree King v Workers' Compensation Regulator* [2019] QIRC 134
PARTIES:	**Deanne Maree King** (Appellant) v **Workers' Compensation Regulator** (Respondent)
CASE NO:	WC/2018/221
PROCEEDING:	Application in existing proceedings
DELIVERED ON:	12 September 2019
HEARING DATES:	23 August 2019
MEMBERS:	O'Connor VP
HEARD AT:	Brisbane
ORDERS:	**Application refused.**
CATCHWORDS:	WORKERS' COMPENSATION – APPLICATION IN EXISTING PROCEEDINGS – admissibility of evidence – similar fact evidence – where Respondent seeks orders that the Appellant be precluded from calling a witness on the basis that evidence is not relevant and prejudicial – whether Commission is able to make an objective assessment of relevance of the evidence INDUSTRIAL LAW – QUEENSLAND – RULES OF EVIDENCE – Commission is not strictly bound by the rules of evidence – function

and purpose of rules of evidence generally – rules of evidence should only be departed from in the clearest of circumstances and where the interests of justice require it to be done.

LEGISLATION:

Industrial Relations Act 2016 (Qld) s 531

Workers' Compensation and Rehabilitation Act 2003 (Qld) s 32

CASES:

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

DF Lyons Pty Limited v Commonwealth Bank of Australia (1991) 28 FCR 597

Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union (2004) 143 IR 354

Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23

R v The War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228

Qantas Airlines Limited v Gubbins (1992) 28 NSWLR 26

Rodriguez v Telstra Corporation Ltd (2002) 66 ALD 579

Sullivan v Civil Aviation Safety Authority (2014) 141 ALD 540

St Clair v Timtalla Pty Ltd & Anor [2010] QSC 296

Wong v Taitung Australia Pty Ltd (2017) FWCFB 990

APPEARANCES:

Mr M Horvath of Counsel instructed by Compensation Partners Lawyers for the Appellant.

Ms H Blattman of Counsel, instructed directly by the Respondent

Reasons for Decision

[1] The Regulator has filed an application in existing proceedings seeking an order that the Appellant be not permitted to lead evidence from witness Ms Amanda Treloar.

[2] By way of background, Ms Deanne King, the Appellant, lodged an application for compensation with the Coles Group for a work-related injury described in the application for compensation as "stress". The Appellant's application for compensation was considered by Coles as the self-insurer in relation to two stressors. The first involved an industrial dispute between the Appellant and her employer over her rate of pay. The second involved the Appellant's working relationship with Ms Sarah Hawker, the Store Manager which the Appellant alleged amounted to "bullying and harassment". Coles Group investigated both claims and concluded that the actions taken constituted reasonable management action taken in a reasonable way.

[3] The decision of the self-insurer was reviewed by the Regulator and it was determined that the Appellant's claim was excluded by virtue of s 32(5). It is against that decision that the Appellant now appeals to this Commission.

[4] The Appellant was employed in the position of a Night Fill in Charge by the Coles Group and performed her duties at its Rode Road store in Stafford Heights, Brisbane.

[5] The Appellant contends that she was bullied by her supervisor Sarah Hawker in a series of incidents between 8 December 2017 and March 2018. The Appellant's case is underpinned by four specific incidents which are outlined in the statements of facts and contentions filed by the Appellant in the Industrial Registry. In short, they can be described as the Hospital Incident; Bullying and Harassment by Sarah Hawker; the Team Huddle; and a meeting between Sarah Hawker, the Appellant, Erika Lord and Luke Bligh held on 5 January 2018. It is further alleged that there were other incidents between December 2017 and March 2018, including several occasions witnessed by a co-worker, Ms Lynn Mitchell.

[6] Consequent upon the above incidents, it is alleged that the Appellant sustained a psychiatric injury, namely, an adjustment disorder with mixed anxiety and depressed mood.

[7] The Appellant seeks to rely on similar fact evidence in support of their case, namely that Ms Hawker had a history of bullying. In short, the Appellant seeks to lead the evidence from Ms Treloar which reveals that on another occasion, Ms Hawker acted, in

a particular way, in a particular situation, which tendered to prove that Ms Hawker acted in similar way on the occasions in question.

[8] The Appellant's Statement of Facts and Contentions state that Ms Treloar applied for leave from the Rode Road store over the Christmas period. Ms Treloar had been scheduled to be rostered on during this period. Ms Treloar contacted Ms Hawker to advise that she would not be available as she would be on leave. Consequently, Ms Hawker change the roster by substituting other staff to fill Ms Treloar's absence. It is asserted that Ms Hawker did not roster Ms Treloar for further shifts from that time on. After Christmas, Ms Hawker allegedly told Ms Treloar that other staff had missed out on time with their families over Christmas because of her. Ms Hawker's comments and her tone upset Ms Treloar and a complaint was made to Wesfarmers alleging that Ms Hawker was in breach of the employers bullying policy. It is contended that the employer investigated the incident which resulted in Ms Hawker being transferred to another store partly as a result of that incident and because of a pattern of behaviour by Ms Hawker towards subordinate staff. The Regulator denies the allegations.

[9] The Regulator submits that Ms Treloar's evidence is inadmissible as similar fact evidence, irrespective of whether it is true, it is not relevant and not probative of the allegations of Ms Hawker's behaviour towards the Appellant.

[10] The Regulator refers to the observations of Gummow J in refusing to admit similar fact evidence in *DF Lyons Pty Limited v Commonwealth Bank of Australia*:

> 33. But the first question to be asked when it is sought to draw any particular case within this universe of discourse is to ask when "facts" are to be treated as "similar". This is so whether or not it is then said that there are striking similarities between those facts or an underlying unity between them. The issues that are involved were analysed nearly sixty years ago by Professor Julius Stone in his article "The Rule of Exclusion of Similar Fact Evidence: England", supra. It was this article to which Evatt J. paid close regard in his judgment in *Martin v Osborne*, supra. The learned author pointed out that the determination of similarities is essentially a process of classification, and that any particular inquiry must be preceded by an ascertainment of the significant features of the class under which a given fact is to be subsumed. He perceived two meanings of the term "similarity". First, in the wider sense and the popular sense, a fact is similar to another whenever the two possess a common characteristic; but that common characteristic may be insufficient to render the first fact relevant in the legal sense as proof of the other. Secondly, in the narrower sense, a fact is similar to another only when the common characteristic is the significant one for the purpose of the inquiry at hand.
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> 34. If facts similar, in the wider understanding, to the fact in issue are irrelevant in the legal sense, they are inadmissible for that reason and there is no occasion to deal with the restrictions imposed by the "similar fact" doctrine. As will become apparent, in my view the present is such a case. Facts similar, in the narrow meaning, to the fact in issue will be relevant thereto in the legal sense; it is only when this kind of relevance has been found that the question arises as to whether such similar facts,

> though relevant, are not admissible, because of the operation of the exclusionary rule or discretion restricting the admissibility of "similar fact" evidence. See also Mr Justice Hoffmann's article, "Similar Facts After Boardman", (1975) 91 LQR 193 at 204ff; Zuckerman, supra at 226; Robertson, Review (1990) 106 LQR 510 at 514. It may be observed, in this connection, that in Mood Music Publishing Co. Ltd v De Wolfe Ltd, supra at 127, the Master of Rolls stated the first step as being the determination of whether the evidence in question was logically probative or relevant in determining the question in issue; if so, it would be admitted "provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice of it".
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> 37. … each case has to be considered with close regard to its particular circumstances. In the present case, Mr Green had dealings with various customers of the Bank at Taree concerning foreign exchange loans and that they took place in the period in which he was dealing with Mr Lyons. In that sense, there was an underlying unity in Mr Green's activities, but as one might expect, the dealings with customers varied with the particular circumstances as they arose. The nature of the causes of action propounded by the applicants means that specific representations must be established. That is why both in the oral evidence of Mr Lyons, both in chief and in cross-examination, great attention was paid in eliciting what was or was not said in precise terms on particular occasions. As a matter of ordinary experience of human behaviour, the evidence which the applicants seek to lead would not tend to prove the making of the representations upon which the applicants rely.[1]

[11] As a matter of general principle, if the similar fact evidence is logically probative, that is, relevant to proving a matter in issue, provided that it is not unfair or oppressive and the other side has had notice, it will be admissible.

[12] As was observed by Martin J in *St Clair v Timtalla Pty Ltd & Anor*[2], with respect to the admissibility of similar fact evidence, the modern cases support the view that the essential criterion for admissibility is relevance.[3]

[13] The Regulator seeks to exclude the evidence on the basis that it is not relevant and inherently prejudicial.

[14] The Regulator submits that the Commission should direct that the Appellant not to call evidence from Ms Treloar or at least not in the terms set out in the outline of evidence. The evidence, it is argued, does not bear directly upon any matters in issue. Permitting Ms Treloar to give evidence would, it was contended, potentially raise further issues of credit and prolong the trial. The submission of the Regulator overstates the matter. Ms Treloar's evidence is relatively short in compass relating to a specific incident of alleged bullying in late 2017 and early 2018. The evidence, as best can be determined

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[1] (1991) 28 FCR 597 [33]-[34], [37].
[2] [2010] QSC 296 [34].
[3] *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23; *H W Thompson Building Pty Ltd v Allen Property Services Pty Ltd* (1983) 48 ALR 667; *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534.

from the short outline, is unlikely to be lengthy, nor create significant issues of credit or prolong the trial. It is not possible on the material before me and in the absence of hearing the other evidence to be adduced by the Appellant to make an objective assessment of the relevance or otherwise of Ms Treloar's proposed evidence.

[15] Irrespective of the Regulator's objections, the Appellant submits that under section 531(2) and (3) of the *Industrial Relation Act* 2016 the Commission is not strictly bound by the rules of evidence; and secondly, that the Commission may inform itself in any way it considers appropriate in the exercise of its jurisdiction. The Commission is to be guided by equity, good conscience and the substantial merits of the case having regard to the interests of the persons immediately concerned and the community as a whole.

[16] Section 531(2)(a) and s531(2)(b) of the IR Act provide for a flexible approach to the receipt of evidence and other material in proceedings. The flexibility afforded to the Commission under s531(2) is best suited when the Commission is, for example, exercising its powers within the Industrial jurisdiction. In that regard, the operation of s 531(2) gives the Commission a discretion whether to accept material upon which it may rely in reaching a decision.

[17] The discretion afforded to the Commission under s531(3) does not however excuse it from applying the general law.[4] In *Qantas Airlines Limited v Gubbins*,[5] the New South Wales Court of Appeal had to consider s108(1)(b) and s118 of the *Anti-Discrimination Act* 1977. The former provision provided that the Tribunal in question "shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms". The latter provision provided for an appeal to the Supreme Court on questions of law. In a joint judgment, Gleeson C.J. and Handley J., described the two provisions as "the apparently conflicting provisions must, as a matter of construction, be reconciled".[6] Their Honours held that the conflict could be resolved only by holding that the "equity and good conscience" provision did not free the tribunal from its duty to apply the rules of law in arriving at its decisions.

[18] Whilst the rules of evidence do not apply in the Commission in the strictest sense, as the authorities suggest, it does not necessarily follow that they are irrelevant.

[19] The exercise of the Commission's freedom from the rules of evidence should be subject to the cautionary observation of Evatt J in *R v The War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* where his Honour observed:

> … Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, "bound by any rules of evidence." Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the

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[4] *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26, 29 applied in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611
[5] (1992) 28 NSWLR 26.
[6] Ibid, 29.

> attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice." The position of an appellant has been specially protected by the Legislature, and he should not be placed in a position where he is effectually prevented from conducting his appeal.[7]

[20] In *Australian Broadcasting Tribunal v Bond,* Deane J said:

> If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably. It requires that regard be paid to material considerations and that immaterial or irrelevant considerations be ignored. It excludes the right to act on preconceived prejudice or suspicion ... When the process of decision-making need not be and is not disclosed, there will be a discernible breach of such a duty if a decision of fact is unsupported by probative material. When the process of decision-making is disclosed, there will be a discernible breach of duty if findings off act upon which a decision is based are unsupported by probative material and if inferences off act upon which such a decision is based cannot reasonably be drawn from such findings off act. Breach of a duty to act judicially constitutes an error of law which will vitiate the decision.[8]

[21] Kiefel J (as her Honour then was) in the context of an appeal by an applicant from decisions of the Administrative Appeals Tribunal concerning his entitlement to workers' compensation wrote:

> The Tribunal is not bound by the rules of evidence (s 33 *Administrative Appeals Tribunal Act* 1975 (Cth)) and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force: *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492, referring to *Consolidated Edison Co v National Labour Relations Board* (1938) 305 US 197, 229; *The King v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256. The drawing of an inference without evidence is an error of law: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355-356; *Repatriation Commission v Maley* (1991) 24 ALD 43 (Full Court). Similarly such error is shown when the Tribunal bases its conclusion on its own view of a matter which requires evidence.[9]

[22] In *Sullivan v Civil Aviation Safety Authority*, Flick and Perry JJ wrote in the context of the relevant provisions covering the admissibility of evidence in the AAT:

> The procedural flexibility afforded to an administrative tribunal freed from the rules of evidence does not absolve it from the obligation to make findings of fact based upon material which is logically probative in which the rules of evidence provide a guide.[10]

[23] The Full Bench of the Australian Industrial Relations Court wrote in *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union*

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[7] (1933) 50 CLR 228, 256.
[8] (1990) 170 CLR 321, 367.
[9] (2002) 66 ALD 579, 585-6 [25].
[10] (2014) 141 ALD 540.

> While the Commission is not bound by the rules of evidence that does not mean that those rules are irrelevant. As the then President of the Industrial Relations Commission of Western Australia said in respect of a similar provisions in the then *Industrial Relations Act* 1979 (WA):
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> > However, this is not a licence to ignore the rules. The rules of evidence provide a method of enquiry formulated to elicit truth and to prevent error. They cannot be set aside in favour of a course of inquiry which necessarily advantages one party and necessarily disadvantages the opposing party (*R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 Evatt J. at 256 (dissenting)). The common law requirement that the Commission must not in its reception of evidence deny natural justice to any of the parties acts as a powerful control over a tribunal which is not bound by the rules of evidence.
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> A similar observation was made by the Industrial Commission of New South Wales in *PDS Rural Products Ltd v Corthorn*:
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> > First, it is correct to say, as the commissioner did, that he was not bound to observe the rules of law governing the admissibility of evidence (s 83). It should be borne in mind that those rules are founded in experience, logic, and above all, common sense. Not to be bound by the rules of evidence does not mean that the acceptance of evidence is thereby unrestrained. What s 83 does do in appropriate cases is to relieve the Commission of the need to observe the technicalities of the law of evidence. Common sense, as well as the rules of evidence, dictates that only evidence relevant to an issue which requires determination in order to decide the case should be received. This means that issues must be correctly identified and defined. This did not happen in this case.[11]

[24] More recently in *Wong v Taitung Australia Pty Ltd*[12] Catanzariti VP, Gooley DP and Wilson C agreed with the observations in *Hail Creek Coal Pty Ltd* expressing the view that "… the rules of evidence provide general guidance as to the manner in which the Commission chooses to inform itself."

[25] The overriding obligation of the Commission remains a duty to act judicially and to afford the parties procedural fairness. Consistent with that obligation is a recognition that in the conduct of proceedings before the Commission, the rules of evidence are, as observed by Evatt J in *Bott* "… a method of inquiry best calculated to prevent error and elicit truth." In my view, the rules of evidence should only be departed from in the clearest of circumstances and where the interests of justice require it to be done.

[26] It is hard to imagine a situation in the context of the Commission exercising its jurisdiction under the *Workers' Compensation and Rehabilitation Act* 2003 where it would be necessary or appropriate to depart from the general application of the rules of evidence.

Conclusion

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[11] (2004) 143 IR 354 [48]-[50].
[12] (2017) FWCFB 990.

[27] Having considered the material before me, I have formed the view that the correct approach to adopt in the present circumstances is to permit Ms Treloar to give her evidence and that the relevance and weight to be afforded to that evidence be left to the ultimate trier of fact to determine after having the benefit of hearing the totality of the evidence.

Order

1. **Application refused.**