MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Romanski v Stone; Black v Stone* [2023] QMC 11
PARTIES:	**MAREK ROMAN ROMANSKI (Applicant)** **v** **MARK DOUGLAS STONE (Respondent)**
PARTIES:	**DENNIS BLACK (Applicant)** **v** **MARK DOUGLAS STONE (Respondent)**
FILE NO/S:	MAG-00188705/21(9) MAG-00188647/21(9)
DIVISION:	Industrial Magistrates Court
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	24 August 2023
DELIVERED AT:	Brisbane
HEARING DATE:	**27/03/2023**
MAGISTRATE:	Pinder
ORDER:	1. The hearing is to be conducted as a *de novo* hearing. 2. The respondent bears the onus of establishing each allegation against the applicants. 3. The respondent provide particulars of the allegation against the applicants. 4. The respondent is to open his case first with the applicant to respond. 5. The first hearing is to determine whether any grounds to take action against the applicant's is established. If any grounds to take action are established, there will then be a further hearing to determine what action is to be taken.

CATCHWORDS: APPLICATION IN A PROCEEDING – *Coal Mining Safety and Health Act 199* - DIRECTIONS REGARDING HEARING OF APPEAL *(de novo)* AND SEPERATE SANCTION HEARING (*de novo)* – ONUS UPON PARTIES – OPENING OF CASE – PROVISION OF PARTICULARS

Dalliston v Taylor & Anor (2015) ICQ 017.

Turnbull v New South Wales Medical Board (1976) 2 NSWLR 281.

De Tournouer v Chief Executive, Department of Environment & Resource Management

Oakley v Chief Executive Administering the Coastal Protection and Management Act.

Ex Parte Australian Sport Club NTP v Dash 47 SRNSW 293.

Phillipson v Commonwealth (1964) 110 CKR 347.

Battle v Bundagen Cooperative Ltd No. 2 (1989) FCA 47.

Battle v Bundagen [2011] NSCA 38

Sakalo v the Medical Board of Western Australia (2002) WASCA 178.

COUNSEL: N. Boyd for Applicant Romanski

C. A. Massy for Applicant Black

M.T. Hickey OAM for Respondent

SOLICITORS: McGinnes & Associates Lawyers for first and second Applicant

Resources Safety & Health Queensland for Respondent

Introduction

[1] The applicant Marek Romanski **(Romanski)** has filed an application in existing proceedings seeking directions for the substantive conduct of the appeal.

[2] In separate, but related proceedings, Dennis Black **(Black)** has similarly applied for directions orders in the same terms.

[3] The respondent to both appeals (and to the application in existing proceedings – directions) is the same respondent Mark Douglas Stone **(Stone)** the CEO pursuant to the *Coal Mining Safety and Health Act 1999* **(the Act)**.

[4] The parties have treated both the Substantive Appeals and these Interlocutory Applications as being heard together, notwithstanding, to date there are no orders providing for that.

[5] For the purposes of these Introductory Applications and these reasons I proceed upon the same basis.

The Substantive Appeal

[6] The substantive appeal is an appeal against the decision of the respondent (Stone) to cancel the appellant's (Romanski & Block) certificate of competency under s 179D of the Act.

[7] The parties all agree that this is the first appeal of its kind since the Act was amended and there are no direct authorities in respect of the conduct of appeals brought pursuant to pt14 of the Act and hence no previously decided matters to assist in the determination of the correct procedural approach to the determination of the appeal.

[8] The respondent by decision dated 11 October 2021 cancelled the certificates of competency of the applicant.

[9] Part 14 of the Act provides for appeals and relevantly s 236A provides for appeals against CEOs decisions.

[10] Section 236A provides a right of appeal to the applicant to an Industrial Magistrates Court in respect of the respondent's decision to cancel the certificates of competency. The parties uncontroversially accept that the entitlement to appeal and the mode of appeal are contained within pt 14 of the Act, subject (unless this division otherwise provides) to the application of the *Industrial Relations (Tribunals)* rules 2011.

Application in Existing Proceeding (Application for Directions Orders)

[11] The application in existing proceedings filed by the applicants seeks relief in accordance with a draft attached order.

[12] Those draft orders were premised on the substantive appeal being listed for a hearing defence on 27 March 2023.

[13] Unfortunately, by virtue of the directions orders sought by the applicants and their lateness and the consequences of those proposed directions orders upon the substantive disposition of the appeal, the matter was not and could not proceed to hearing as previously listed, commencing 27 March 2023.

[14] Upon the hearing of the application for directions orders, the applicants position shifted to seek orders in these terms.

1. The hearing is to be conducted as a *de novo* hearing.
2. The Respondent bears the onus of establishing each allegation against the Applicants.
3. The Respondent provide particulars of the allegation against the Applicants.
4. The Respondent is to open their case first, with the Applicants to respond.

5. The first hearing is to determine whether any grounds to take action against the Applicant's is established. If any grounds to take action are established, there will then be a further hearing to determine what action is to be taken.

[15] The respondent took no issue with not having notice of the proposed draft directions orders sought by the applicant.

[16] Indeed, the respondent's position was, that subject to the determination of the manner in which the appeal was to be conducted, further directions orders and a 'trial plan' would be required to advance the appeal to final hearing. The directions orders which the applicants seek have substantial bearing on the hearing of the appeal and its disposition as the applicants contend:

- That the appeal be conducted as a *de novo* hearing.
- That the respondent bears the onus of proof.
- That the respondent should proceed first in the hearing; and
- The hearing should be confined initially to the issue of 'liability' – that is the grounds for cancellation.
- That there will be a separate hearing as to sanction (if any of the grounds for cancellation are established).

[17] The amended proposed directions orders sought by the applicants are opposed by the respondent.

[18] I have been very ably assisted by all counsel and have had the benefit of comprehensive written outline of argument and reply.

Mode of Hearing of Appeal

[19] The effect of the application for directions is to fix the mode of hearing of the appeal with consequential procedural directions orders once that has been determined. The applicants contend that the appeal is to be conducted as a *de novo* hearing. The respondent contends that the court retains a broad discretion in respect of the manner of the conduct of the hearing of the appeal.

[20] The respondent's counsel submits that 'the question court must resolve … is what parliament intended by the phrase "by way of rehearing unaffected by the original decision-makers decision" and how (informed by that intention) the court should direct the appeal to be conducted, when the rules do not make any (or any sufficient) provision for the issue in dispute.'[1]

[21] Indeed, it is the respondent's submission that the court, exercising that broad discretion in relation to procedure, can determine how it considers it will be most

[1] See para 34 – Respondent Outline.

assisted to hear from the parties, in which order it will be most assisted to hear from the parties in opening addresses, and from their witnesses.[2]

[22] The respondent's counsel's outline continues, that the court, determining the appropriate order in which the parties are to proceed ought then, -

- Direct the parties to confer and prepare a trial plan.
- Direct the appellants to inform the respondents of which of their witnesses (if any) are required for cross examination.

Hearing Procedures – Legislative Provisions

[23] The appealed decision is a decision made by the CEO under pt 10A of the Act and is an administrative decision amounting to disciplinary action taken against the holder of a certificate of competency.

[24] Pt. 14 of the Act provides for appeals against decisions made by the CEO.

[25] The applicant is a person with a right of appeal against the CEO's decision to cancel the certificates of competency pursuant to s 236A.

[26] S 240 of the Act provides for the procedures for the hearing of an appeal:

(1) Unless this division otherwise provides, the practice and procedure for the appeal are to be in accordance with the rules of court or, if the rules make no provision or insufficient provision, in accordance with the directions of the court.
(2) An appeal must be by way of rehearing, unaffected by the original decision-maker's decision.
(3) However, for deciding an appeal against a decision of the CEO under *section 267I* to impose a civil penalty on a corporation, information that was not available to the CEO in making the decision must not be taken into account.
(4) In deciding an appeal, an Industrial Magistrates Court—
    (a) is not bound by the rules of evidence; and
    (b) must observe natural justice.
(5) In this section –

"original decision maker" means the Minister, CEO or the board of examiners.

[27] S. 240(2) of the act deals with the hearing procedures and relevantly provides:

- An appeal must be by way of rehearing.
- Unaffected by the original decision-makers decision.

[2] See para (9) – Respondent Outline.

[28] The applicants contend that there is long-standing authority and a well settled doctrine that an appeal brought in a court, of an administrative decision is conducted as a *de novo* hearing.[3] The applicant relies on the decision of Justice Martin in *Dalliston v Taylor & Anor* (2015) ICQ 017. That decision considered an appeal also brought pursuant to pt 14 of the Act, what the applicants contend is a decision directly on point in respect of the construction of the hearing procedures in regard to a cognate appeal provision under the Act.

[29] In *Dalliston v Taylor & Anor* the Industrial Court considered an appeal pursuant to s 246 of the Act. That was an appeal against a decision of the Chief Inspector of Coal Mines overturning a direction by Mr Dalliston, the appellant, as an industry safety and health representative appointed under pt 8 div 2.

[30] Relevantly:

[31] s 246 provides:

> (1) The procedure for an appeal is to be in accordance with the rules of court or, if the rules make no provision or insufficient provision, in accordance with directions of the Industrial Court.
>
> (2) An appeal is by way of rehearing, unaffected by the Chief Inspector's review decision or a directive given.

[32] A comparison of s 246 to the provision, the subject of this application for directions, reveals the only difference is that to s 240 – **Hearing procedures** commences with the words

[33] 'Unless this division otherwise provides, the practice…'

[34] S 246 is therefore clearly a cognate appeal provision contained within the same part of the Act.

[35] S 240 – **Hearing procedures**, however, includes relevantly at s 240(4):

In deciding an appeal, an Industrial Magistrates Court –

> *(*a) *is not bound by the rules of evidence; and*
> *(b) must observe natural justice.*

[36] The respondent's outline of argument, seeking to resist the directions orders sought by the applicant, place no reliance on the inclusion of s 240(4) in the hearing procedures provision – the subject of this appeal and this directions application, to distinguish the disposition in *Dalliston v Taylor & Anor* (considering s 246 of the Act) as against the hearing procedures provision for this appeal (s 240).

[37] Justice Martin in *Dalliston v Taylor & Anor* considers the nature of the appeal – pursuant to s 246 of the Act commencing at paragraph 8 of the decision.

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[3] *Turnbull v New South Wales Medical Board* (1976) 2 NSWLR 281.

[38] In considering the question his Honour found as follows:

> "[11] The language used in s 246 is inconsistent. For an "appeal by way of rehearing" to be successful it ordinarily requires that the original decision-maker be shown to have erred in law or fact. But this section says that the appeal is to be "unaffected by the chief inspector's review decision" which would seem to be inconsistent with the ordinary understanding of an appeal by way of rehearing.
>
> [12] This clumsiness of expression is to be found in other statutes. A similar provision was considered in *De Tournouer v Chief Executive, Department of Environment & Resource Management*[3] where Fraser JA said that the expression meant that the appeal tribunal could "exercise afresh the statutory power"[4]. In other words, section 246 uses a form of words which is more clearly understood as an appeal *de novo*. An appeal *de novo* involves a rehearing of the evidence by the appellate court. It is analogous to a new trial."

[39] The respondent's outline seeks to distinguish the decision in *Dalliston v Taylor & Anor* upon the basis that:

- The parties had agreed that his Honour should proceed as if the matter was, in effect, a trial by which the directive would be reviewed and that his Honour need not have regard to the decision of the first respondent.
- That is, the respondent contends that his Honour's comments about the effect of the words of s 246 were merely *obiter*.
- Insofar as his Honour deals with the notion of onus, nothing from his Honour's reasons suggests that the decision-maker was required to call its witnesses first.

[40] The respondent's outline refers, amongst other authorities, to the decision in *Oakley v Chief Executive Administering the Coastal Protection and Management Act,*[4] a decision of Rackemann DCJ in the Planning and Environment Court in respect of the meaning of the word 'rehearing.'

[41] As the applicants' outline of argument correctly contends however, and is acknowledged in the respondent's outline in relation to the legislative provision under consideration there, the addition of the phrase 'unaffected by the Chief Executive's decision' to the word 'rehearing' was "to be consistent with a hearing *de novo* but was not conclusive."

[42] The decision of Justice Martin in *Dalliston v Taylor & Anor*, considering as it does an almost identical and certainly cognate appeal provision within the same part also within pt 14 of the act, is persuasive.

[43] In respect of s 246 his Honour most relevantly says:

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[4] 1995 (2015) QPELR 157.

> *"In other words, s 246 uses a form of words which is more clearly understood as an appeal* de novo*. An appeal* de novo *involves a rehearing of the evidence by the appellant court. It is analogous to a new trial."*[5]

[44] S 240(2) of the Act providing:

> *"An appeal must be by way of rehearing, unaffected by the original decision-maker's decision,"* is I find an appeal conducted as a *de novo* hearing.

[45] **I conclude and find that the appeals are to be conducted as a hearing *de novo.***

An Appeal Conducted as a *de novo* Hearing – the Onus of Proof

[46] The applicants seek directions to the effect that the respondent bears the onus of establishing each allegation as against the appellant. This proposition is resisted by the respondent, upon effectively the same basis, that even if this court concludes that the hearing of the appeal is to be conducted as a *de novo* hearing, the court still retains a broad discretion in respect of procedure to make directions for practice and procedure of the appeal and that in the context of the procedures prescribed in pt 10A of the Act.

[47] The applicant relies on a number of authorities that the applicant contends support the propositions that:

- An appeal from an executive authority to a court involves the court exercising original jurisdiction rather than appellant.[6]
- The effect of this is that a respondent to such an appeal bears the onus of proof.[7]
- The effect of this is that all issues must be retried, the party succeeding below enjoys no advantage and must win the case a second time.[8]

[48] The respondent presses the submission that the authorities the applicant relies on do not rise to the height of the propositions contended for.

[49] Comfort for the correctness of the propositions contended for by the applicant is derived again from Justice Martin's decision in *Dalliston v Taylor & Anor.*

[50] Having concluded that in respect a cognate appeal provision that the appeal be conducted as a *de novo* hearing his Honour found in respect of onus in these terms:

> "[14] The next consideration concerns onus. Although this is, in effect, a hearing de novo, the orders sought by Mr Dalliston include setting aside the review decision. In other words, Mr Dalliston is seeking to establish that his decision was correct and should be reinstated. But, the exercise I must embark on requires that I stand in the shoes of the Chief Inspector and exercise the power afresh. In doing that, the

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[5] *Dalliston v Taylor & Anor* (2015) ICQ 017.
[6] *Ex Parte Australian Sport Club NTP v Dash* 47 SRNSW 293.
[7] *Phillipson v Commonwealth* (1964) 110 CKR 347.
[8] Ibid (3).

question for this Court is determined by the provisions of the Act relating to acceptable levels of risk. Thus, it is not a question of comparing what was in place but, rather, whether the replacement vehicles satisfy the Act so far as risk is concerned."

[51] This similarly is support for the construction propounded by the applicant that as this is an appeal to be conducted as a *de novo* hearing, the respondent bears the onus of proof to establish the allegations against the applicant.

Order of Proceedings

[52] The applicants seek directions that the respondent open their case first with the applicants to respond.

[53] As the respondents continue to assert, s 240 provides the court with a broad and unfettered discretion as to the conduct of the hearing, a hearing conducted as a *de novo* hearing 'in accordance with the directions of the court.' The applicant having persuaded the court that:

- The appeal is an appeal conducted as a *de novo* hearing.
- That the respondent bears the onus of proof.

[54] Then it is appropriate in all the circumstances that the respondent should open its case first with the applicants to respond.

The Sanction Phase -

[55] The applicant seeks that upon the hearing of the appeal the court first determines what the applicant refers to as 'liability' but is properly best described as the proof of the grounds for suspension or cancellation and then conducts a separate hearing as to sanction.

[56] The applicant relies on two authorities in support of that proposition, namely *Battle v Bundagen Cooperative Ltd No. 2* (1989) FCA 47 and *Sakalo v the Medical Board of Western Australia (2002)* WASCA 178.

[57] The applicant contends that this is not a bifurcation of the proceedings but rather an orthodox approach in accordance with conformity with the regime of the Act and which affords the applicants natural justice.

[58] The submission is premised on what the applicants assert are a number of permutations of 'liability' which will be determined in the appeal. Effectively, the appeal will determine whether or not as prescribed by s 197A of the Act there are grounds for suspension or cancelation of certificates of competency.

[59] There is no broad range of penalty or sanction the court effectively standing in the shoes of the decision-maker could make.

[60] The decision maker could, only if satisfied that the grounds are proved either:

- Suspend the certificate of competency.

- Cancel the certificate of competency.

[61] The broad discretion in relation to hearing procedure conferred by s 240 applies to the disposition of the appeal both insofar as the grounds for suspension or cancelation and the sanction (if the grounds are proved) to be imposed.

[62] The hearing of the appeal is to be conducted as a hearing *de novo*. The court, standing in the shoes of the decision-maker, is required to exercise the same discretion in respect of the proposed action as prescribed by part 10A of the Act.

[63] The procedures set out in part 10A of the Act, in fact, contemplate a two-stage process.

- Section 197B notice of proposed action – requires the CEO to give notice of the proposed action including grounds and permitting a written response.

- Section 197D provides that the CEO, after considering any written submission, and after deciding that the ground exists to take proposed action, can decide either to suspend or cancel the certificate.

[64] The applicants rely on a decision of the New South Wales Court of Appeal as to the orthodox approach to proceedings of this nature.

[65] In *Battle v Bundagen Cooperative Ltd No 2*[9] the court in considering a Federal Court decision of Justice Spender said:

> *"I agree with Campbell J that there is no rule of law mandating a two-stage process in all circumstances. In cases like Hall and Forge, where there are both a substantial number of different findings on guilt that could be made, and also a considerable range of consequential penalties that could be imposed, it is generally the case that natural justice does require first a determination of what findings are made on guilt, and second an opportunity to be heard concerning the range of possible penalties. Otherwise, it is not possible for submissions concerning penalty to be appropriately focussed. However, in my opinion, if for example there were only two possibilities on guilt, that is, either guilty or not guilty on one charge, then it could be that submissions concerning penalty could be appropriately focussed in a single-stage hearing. And where, as in this case, there are only two possible results on "penalty" that is, expulsion or non-expulsion, again it may be that submissions concerning penalty could be sufficiently focussed in a single-stage hearing.*
>
> *In my opinion, it would generally be preferable under rule 47 to have a separate submission on penalty after a determination as to guilt is made; but I do not think this is mandatory in every case. Where it is not necessary for me to make a finding in this case on the question of natural justice, I would prefer not to do so.[19] (emphasis added)"*

[66] Whilst the authority, as the court observes, does not provide that there "*was no rule of law to the effect that it is not possible for there to be a single hearing which addresses both questions of guilt and on a contingent basis, questions of penalty,"*

[9] *Battle v Bundagen* [2011] NSCA 38

The circumstances of the hearing of this appeal and the scheme of the Act at pt 10A which provides a two-stage process in relation to "proposed action" is consistent with the approach the court considered preferable in *Battle v Bundagen.*

[67] The hearing of the substantive appeal should proceed on the basis that a hearing *de novo* as to whether grounds for suspension or cancellation are proved occurs first.

[68] If those grounds are proved, a second, obviously much shorter hearing, can be conducted as to the appropriate sanction affording the applicant's natural justice but equally the respondent's the opportunity of being heard, and indeed if necessary presenting evidence, in respect of any submission concerning the sanction to be imposed.

Respondent – Provisions of Particulars

[69] The applicants seek directions orders that the respondent provide particulars of the allegations as against the applicants.

[70] The legislative scheme provides for the respondent (as decision-maker) to provide effectively particulars in the notice of proposed action pursuant to s 197(b) of the Act. The applicants seek, in responding to this appeal -

- A hearing set to be conducted as a *de novo* hearing.
- That the respondent bears the onus of proof to establish the allegations (grounds for suspension or cancelation).

[71] This is consistent with the respondent holding an obligation to particularise the allegations against the applicants.

Disposition

[72] I make the following directions orders in respect of the appeal:

1. The hearing is to be conducted as a *de novo* hearing.
2. The respondent bears the onus of establishing each allegation against the applicants.
3. The respondent provide particulars of the allegation against the applicants.
4. The respondent is to open his case first with the applicant to respond.
5. The first hearing is to determine whether any grounds to take action against the applicant's is established. If any grounds to take action are established, there will then be a further hearing to determine what action is to be taken.

Trial Plan

[73] The respondents properly and appropriately raise the issue of the court requiring the parties to confer to prepare a trial plan with all the benefits that that entails including narrowing the issues for determination and facilitating the effective and efficient disposition of the hearer of the appeal.

[74] I therefore direct the parties to confer and the prepare a trial plan to be submitted to the court.