IN THE HIGH COURT OF AUSTRALIA No. S142 of 2016

SYDNEY REGISTRY

BETWEEN:

COMCARE
Appellant

and

PETA MARTIN
Respondent

RESPONDENT'S SUBMISSIONS

Filed for Respondent
Maurice Blackburn Lawyers
4/25 Petrie Plaza
Canberra City ACT 2601
DX 5642 CANBERRA

Date: 11 July 2016
Tel.: (02) 6120 5000
Fax: (02) 6257 4802
Ref.: Geoff Wilson

PART I: FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the Internet.

PART II: ISSUES

2. Given the Appellant's argument in its written submissions, this appeal would appear to raise at least two questions. The first is as to the correct reading of the decision of the Administrative Appeals Tribunal ("the Tribunal"), which was read differently below on the issue of how the Tribunal treated the evidence relating to the cause of Ms Martin's psychological condition. The second is an issue of principle, not isolated from the first, of statutory construction.

3. The first issue is: what factors did the Tribunal decide had contributed to Ms Martin's psychological condition?

4. The issue of principle is: whether the phrase "*suffered as a result of*" in the "*reasonable administrative action*" exclusion contained in s.5A(1) of the ***Safety, Rehabilitation and Compensation Act 1988*** (Cth) ("the SRC Act"), requires, as a matter of statutory construction, that any of the factors contributing to Ms Martin's psychological condition were a "*necessary consequence*" of Ms Martin's failure to obtain promotion to the position of cross-media reporter?

PART III: SECTION 78B OF THE *JUDICIARY ACT*

5. Ms Martin has considered whether any notice should be given in compliance with s.78B of the ***Judiciary Act 1903*** (Cth). The Respondent does not consider that any such notice is required.

PART IV: THE FACTS

6. The factual summary set out by Comcare at paragraphs [4] to [8] of its submissions is an inadequate outline of the relevant facts.

7. Ms Martin was employed by the Australian Broadcasting Corporation ("ABC") as a reporter at its Renmark (South Australia) station, between January 2010 and March 2012, during which time she was mainly (but not exclusively) supervised by the station manager, Mr Bruce Mellett. In June 2012, Ms Martin lodged a claim for compensation under the SRC Act alleging that she was suffering from a psychological condition (an adjustment disorder) caused by bullying and harassment that she was subjected to during her employment with the ABC, particularly by Mr Mellett. Comcare determined that Ms Martin was not entitled to compensation, and Ms Martin sought a reconsideration. Following its reconsideration, Comcare issued a reviewable decision affirming the determination earlier made, and Ms Martin sought review of that decision by the Tribunal.

8. The Tribunal proceedings concerned only the question of whether compensation of any kind was payable to Ms Martin under s.14 of the SRC Act. The quantum of any particular head of compensation that might be payable (if Ms Martin were successful) was not in issue.

9. Before the Tribunal, Ms Martin contended that she suffered from the effects of a compensable psychological injury which had been contributed to, to a significant degree, by the events which occurred during the course of her employment, involving bullying behaviour by Mr Mellett and others towards her. Comcare accepted that Ms Martin suffered from a psychological "*ailment*" (an adjustment disorder) to which her employment with the ABC had significantly contributed, thereby satisfying *prima facie* the test for compensability of a "*disease*" under s.5B of the SRC Act. Comcare contended that Ms Martin's adjustment disorder was excluded from the definition of "*injury*" under s.5A(1) of the SRC Act, because it was "suffered as a result of reasonable administrative action taken in a reasonable manner in respect of [Ms Martin's] employment". In support of its "*reasonable administrative action*" contention, Comcare alleged that the adjustment disorder suffered by Ms Martin had been "*suffered as a result of her failure to obtain the permanent position of cross-media reporter*", which (it was said) had been reasonable administrative action taken in a reasonable manner.

10. The Tribunal accepted that Ms Martin was suffering a work-related adjustment disorder when she saw ***Dr Kulatunga*** (GP) in July 2011, and was "*probably*" still suffering that adjustment disorder during the period she acted in the role of cross-media reporter, ***before*** any decision was made not to promote her to the permanent position[1]. However, the Tribunal considered that it needed to take into account the entirety of Ms Martin's period of employment in asking whether her adjustment disorder was suffered as "*a result of*" the decision not to promote her to the position of cross-media reporter[2]. The date on which Ms Martin was informed of her failure to obtain the position was 16 March 2012.

11. In the Tribunal, Ms Martin put her case against the causation aspect of the "*reasonable administrative action*" contention on the basis that her failure to get the cross-media reporter position had not resulted in any fresh cause or contribution to her psychological condition (which was already present before the promotion decision in March 2012); in the alternative, if there were any such additional contribution, it came from being told that she was going to have to go back and work with Mr Mellett, whom she held responsible for mistreatment she had suffered under his supervision[3].

12. Ms Martin's evidence to the Tribunal was consistent with the way her case had been opened[4]. It was also consistent with the account given by ***Ms Carol Raabus***, in her statement taken into evidence by the Tribunal[5]. Ms Raabus had been Ms Martin's supervisor during her acting position as cross-media reporter. She was the chairperson of the selection committee which had made the decision not to appoint Ms Martin permanently to that position, and notified Ms Martin that she had been unsuccessful. The statement in paragraph [9] of Comcare's submissions that the Tribunal found that

[1] **AB 25-26**, at paragraphs [39], [42].
[2] **AB 29**, at paragraph [50]; see ***Smith v Comcare*** (2013) 212 FCR 335.
[3] **AB 29**, at paragraph [51].
[4] **AB 30**, at paragraphs [53]-[54].
[5] **AB 29-30**, at paragraph [53].

Ms Martin "*broke down*", after being advised that her application for the cross-media reporter position had been unsuccessful, does not add the important element in the evidence from Ms Raabus, noted by the Tribunal, that the Applicant had seemed "*disappointed*" at not getting the position, but "*appeared to take the news in her stride and indicated she would be happy to participate in a handover with the successful applicant*"[6]. Ms Raabus then said that Ms Martin "*became very upset and emotional*" when the issue of her returning to her substantive role in the Renmark office was raised, saying that she "*had problems with Mr Mellett*" and did not want to return to work with him as her direct line manager[7]. Ms Martin herself agreed with the evidence given by Ms Raabus.

13. The medical evidence supported the account given by Ms Martin concerning the cause of her psychological condition. The psychiatrists qualified by each side, Dr Clarke and Dr Begg, who gave concurrent evidence, agreed that Ms Martin saw the position as a way remove herself from Mr Mellett's supervision, and her "*yen*" for the position was "*so minor that its contribution to her adjustment disorder was immaterial*" [8].

The Tribunal's Findings on Causation

14. On the question of the causal link between the "*reasonable administrative action*" and the psychological condition suffered by Ms Martin, the Tribunal made four significant primary findings of fact:

(a) "I do not agree ... that Ms Martin's claim that the primary reason she applied for the role of cross-media reporter was to remove herself from the supervision of Mr Mellett, is a recent invention designed to avoid the operation of section 5A of the Act" [9];

(b) "There is powerful evidence to corroborate Ms Martin's claim that her belief that she had been mistreated by Mr Mellett pre-dated the decision not to promote her to the position of cross-media reporter"[10];

(c) "I accept Ms Martin's claim that the cross-media reporter position was not her preferred option, and the primary reason she applied for the position was to remove herself from Mr Mellett's direct supervision"[11];

(d) "I agree with the experts that what caused her to 'decompensate' was the realisation that the decision meant she would be returning to Mr Mellett's supervision, and her belief that the alleged bullying would continue"[12].

15. However, having made those findings, the Tribunal then found that it did not matter which of the anticipated consequences of the offending decision was most likely to have troubled Ms Martin. The Tribunal said that even if Ms Martin's dread of

[6] **AB 30**, at paragraph [53].
[7] **AB 30**, at paragraphs [53]-[54].
[8] **AB 30**, at paragraph [56].
[9] **AB 31**, at paragraph [57].
[10] **AB 31**, at paragraph [57].
[11] **AB 31**, at paragraph [58].
[12] **AB 31**, at paragraph [58].

returning to work under Mr Mellett and not her disappointment with lack of career advancement was the reason for her decompensation, *"[i]n her mind the former was a direct and foreseeable consequence of the decision"*[13]. Despite that conclusion, the Tribunal found in favour of Ms Martin on the basis that the selection process for the cross-media reporter position was not "*taken in a reasonable manner*". When Comcare lodged an appeal in the Federal Court against the decision of the Tribunal, Ms Martin filed a Notice of Contention raising the issue of causation.

10

The Decision of a Single Judge of the Federal Court

16. A single judge of the Federal Court (Griffiths J) allowed Comcare's appeal and dismissed the Notice of Contention. The matter was remitted to the Tribunal for determination of the question of whether the "*administrative action*" was "*taken in a reasonable manner*". On the question of causation raised by the Notice of Contention, Griffiths J found that the alleged bullying and harassment, and Ms Martin's reaction at being told the outcome of the promotion decision and the dread she felt at the prospect of returning to work under Mr Mellett, were regarded by the Tribunal as
20 inextricably linked, as was reflected in the express finding that, in Ms Martin's mind, the dread of that prospect "*was a direct and foreseeable consequence*" of the promotion decision[14]. Ms Martin then appealed to the Full Court.

The Full Court Decision

17. A majority of the Full Court ordered that the appeal be allowed, and the decision of the primary judge be set aside, and the matter be remitted to the Tribunal. Murphy J (with whom Siopis J agreed) identified three why the Tribunal decision should be set
30 aside:

(a) the Tribunal's decision was inconsistent with its factual findings;

(b) it misconstrued s.5A(1); and

(c) it did not take a proper approach to causation.

It is clear that these three reasons are mutually interactive.

40 18. **The Tribunal's Decision Was Inconsistent With Its Factual Findings**: Murphy J first recounted the factual findings made by the Tribunal[15]. Most importantly, his Honour said[16], the Tribunal found that what caused Ms Martin to "*decompensate*" was the realisation that the decision meant she would be returning to her substantive position under the direct supervision of Mr Mellett, and her belief that the claimed bullying would continue. His Honour noted that this conclusion was congruent with the Tribunal's factual findings on the lay and medical evidence relevant to causation, but "*at odds*" with the conclusion at [62] of the Tribunal's reasons[17].

---

[13] **AB 31-32**, at paragraph [61].
[14] **AB 94**, at paragraph [109].
[15] **AB 137**, at paragraph [111].
[16] **AB 139**, at paragraph [112].
[17] **AB 139**, at paragraph [113].

19. **The Tribunal Misconstrued s.5A(1)**: Murphy J did not accept Comcare's contention that, as a matter of construction of s.5A(1), a consequence of an employee's failure to obtain a promotion is necessarily bound up with the decision not to promote the person[18]. His Honour then considered the decision in ***Hart***, upon which Comcare relied, and concluded (correctly, it is submitted) that whether events concerned with a promotion application are necessarily bound up with a promotion decision, and a failure to obtain the promotion, will depend upon factual issues[19]. In this case, the Tribunal's findings on the lay and medical evidence strongly indicated that it concluded that Ms Martin's adjustment disorder was ***not*** inextricably bound up with the decision to promote her[20].

20. **The Tribunal Took an Erroneous Approach to Causation**: Murphy J recited a number of the Tribunal's statements[21], and then concluded that the Tribunal had wrongly construed the expression "*suffered as a result of*" as permitting it to treat as causative an event which was no more than "*chronologically precedent*" to the event which was, on the lay and expert evidence accepted by the Tribunal, the cause of the adjustment disorder. Murphy J considered that the question of whether Ms Martin suffered the adjustment disorder "*as a result of*" the failure to promote her was not a matter to be determined by using metaphysical concepts of cause and effect and instead required a common sense approach to the facts as it had found them[22]. Murphy J also considered that it was wrong for the Tribunal to approach the issue of causation on the assumption that Ms Martin being returned to her substantive position was an inevitable consequence of the failure to promote her, because it was likely that there was an intervening administrative action. In summary, Murphy J concluded that the Tribunal's error of construction and its erroneous approach to causation led it to subvert its earlier factual findings as to the cause of Ms Martin's adjustment disorder[23]. It did not apply common sense to the facts, as found by it, that the cause of Ms Martin's condition was not the failure to promote her. Accordingly, the primary judge erred in upholding the Tribunal's decision on this issue.

PART V: APPLICABLE LEGISLATION

21. The Respondent considers that the Appellant's statement of the currently applicable statutory provisions should include s.5B of the SRC Act, and the definition of "*ailment*" in s.4.

PART VI: STATEMENT OF ARGUMENT

The Contribution to Ms Martin's Psychological Condition

[18] **AB 139**, at paragraph [114].
[19] **AB 140**, at paragraph [117].
[20] **AB 140**, at paragraph [118]-[119].
[21] **AB 140**, at paragraph [120].
[22] **AB 142**, at paragraph [121].
[23] **AB 143**, at paragraph [125].

22. The Tribunal had found that Ms Martin was probably suffering from a work-related adjustment disorder prior to being informed of the promotion decision. The four findings of fact set out in paragraph [14] of these submissions comprise the central Tribunal findings relevant to the consideration of whether Ms Martin's failure to obtain the permanent cross-media reporter position had contributed to, or aggravated, Ms Martin's probable pre-existing psychological condition. On those findings, the cause of Ms Martin's decompensation was "*the realisation that the decision meant she would be returning to Mr Mellett's supervision, and her belief that the alleged bullying would continue*", rather than disappointment at having failed to obtain the position of cross-media reporter, whatever her anticipated benefits from that promotion might have been.

The Conclusions by the Tribunal in [60]-[62][24] Assumed "Direct and Foreseeable" Consequences From the Failure to Obtain the Promotion In the Absence of Evidence

23. Contrary to the implicit assertion made by Comcare in in the way it framed the issues at paragraph [2] of its submissions, there was no specific evidence, nor any factual finding made by the Tribunal purporting to be based on any such evidence, that a return to being supervised by Mr Mellett was "*a necessary consequence*" of Ms Martin's failure to obtain the position of cross-media reporter.

24. The reaction of Ms Martin to being told of the outcome of the selection process by Ms Raabus makes it clear that she did not break down until Ms Raabus informed her that she would be returning to supervision by Mr Mellett[25]. The Tribunal did not make any finding of fact that Ms Martin had realised that would be a necessary consequence of the selection decision at any time before she was so informed by Ms Raabus.

25. Ms Raabus was then informed by Ms Martin that Ms Martin had problems with Mr Mellett and did not wish to return to his supervision. There was no finding of fact by the Tribunal that there was something intrinsic to the process of Ms Martin vacating the acting position she had occupied that made a return to supervision by Mr Mellett immediately self-executing. Neither did the Tribunal make any factual finding that any presumptive return by Ms Martin to supervision by Mr Mellett was incapable of being overridden by another executive decision addressing the merits of whether she should be returned to her former position, at least while her problems with Mr Mellett were investigated.

26. The Tribunal stated that "*a number of consequences flowed from Ms Martin's failure to obtain the promotion*", including that "*Ms Martin would be required to return to her substantive position and work under the direct supervision of Mr Mellett*". There was, in fact, an absence of any evidence that the ABC had no option but to (a) return Ms Martin to her former position, with (b) Mr Mellett as her direct supervisor. Ms Martin subsequently made a number of significant allegations of bullying and harassment by Mr Mellett, which are canvassed in the Tribunal's reasons for decision. In those circumstances, it would be wrong to conclude in the absence of evidence that the ABC had no power to prevent a fearful young woman from being returned to a

[24] **AB 31-32**, at paragraphs [60]-[62].
[25] **AB 29-30**, at paragraph [53].

position where she claimed she was likely to be bullied by an older and more powerful male supervisor, whether or not the allegations of bullying were eventually proven to the satisfaction of the ABC.

27. In short, the Tribunal wrongly conflated the decision not to promote Ms Martin with the decision to send her back to the position she formerly held, as if one were an inevitable consequence of the other. It is incorrect to describe that as a "finding of fact" as to causation. It was simply an erroneous conclusion which was inconsistent with the primary finding of fact about the cause of Ms Martin's decompensation.

28. Comcare submits that the question of whether any other administrative action was required (or could have been taken) before Ms Martin was sent back to the supervision of Mr Mellett, was never argued before the Tribunal[26]. The basis for that assertion is the statement made by Murphy J at paragraph [122] of the Full Court's judgment, and not the primary materials before the Tribunal[27]. In fact, it is not correct to say that the availability of intermediate administrative action between the promotion decision and the subsequent move back to the supervision of Mr Mellett was never the subject of submission to the Tribunal. In the course of final submissions, counsel for Ms Martin specifically raised the point that alternative intermediate action could have been taken by the ABC to find another solution for Ms Martin apart from returning her to the supervision of Ms Martin, once Ms Martin had told Ms Raabus that she had problems with Mr Mellett and did not want to return to work with him[28]. That submission was made as part of the argument that the promotion decision was a separate and distinct event from Ms Martin being informed that she would be going back to work with Mr Mellett, and each had different effects on Ms Martin. If the alternative intermediate action had been taken, it was submitted, the probability was that Ms Martin would not have suffered her breakdown.

Causation in the Statutory Context of Sub-Section 5A(1)

29. **General Propositions**: It is trite that the SRC Act, in common with other workers compensation Acts, is (in general) beneficial legislation. It is clear that generally beneficial legislation may still be subject to specific statutory exceptions to its generally beneficial objectives. Hence, there is no dispute that the construction of s.5A must begin (as always) with an examination of the text of the section itself. The section must be read in a fashion which does justice to the express words of the exclusion. However, that does not justify extending the exclusion to a point where it ceases to be harmonious with the overall purpose of the SRC Act, and becomes unduly destructive of it[29]. An interpretation of an exclusion in its context that would best achieve the purpose or object of the Act should be preferred to one which does not[30].

30. **The Text of Section 5A**: The structure of the exclusion in s.5A(1) is built on the simplest form of causal connection, i.e. Condition A is "*suffered as a result of*" Action B. No further qualification is built into the text. In that respect, it is different to

[26] Appellant's Submissions, at 14, paragraph [53].
[27] **AB 142.**
[28] AAT Transcript, 13 June 2014, at p.45, lines 10-45.
[29] See the discussion by Gray J in ***Commonwealth Bank v Reeve*** (2012) 199 FCR 463, at 472, [23]-[24].
[30] Section 15AA of the ***Acts Interpretation Act 1901*** (Cth).

the test of causation in, for example, the definition of "motor accident" under the ***Motor Accidents Compensation Act 1999 (NSW)*** considered in ***Allianz v GSF***[31], where the phrase "*as a result of*" is qualified by a number of other factors governing the factual circumstances in which the motor accident must take place before causation can be established.

31. The only other provision of the SRC Act which directly affects the scope and operation of s.5A is s.5B. That section applies where the claimed work-related condition is an "*ailment*", which term includes Ms Martin's psychological condition. Section 5B requires that, in order to qualify as a compensable "*disease*", a work-related "*ailment*" must be contributed to, "*to a significant degree*", by the employee's employment[32]. Historically, there have been differences of opinion in the Tribunal about whether that test applies to the operation of the "*reasonable administrative action*" exclusion, even in a case where the relevant "*ailment*" has only one identified cause. But whatever view is taken of its application to the contribution made by something alleged to be "*reasonable administrative action*", s.5B cannot override a conclusion compelled by the primary factual findings that the relevant "*ailment*" was **not** "*a result of*" a particular "*administrative action*", but of an event consequent to it in time. Section 5B simply sets a threshold, below which a causal contribution will not give rise to any entitlement to compensation. If s.5B had any relevance in the present case, it would work against the conclusion for which Comcare advocates, because the psychiatric evidence (with which the Tribunal agreed[33]) is that the decision not to promote Ms Martin to the permanent position of cross-media reporter made an "*immaterial*" contribution to the cause of her psychological condition.

32. Comcare places considerable weight on the fact that the exclusion in s.5A(1) refers to "***a*** *result of*" as opposed to "***the*** *result of*" the relevant administrative action. There is, of course, no dispute that that is a correct reading of the legislation. Further, as ***Hart*** establishes, it is sufficient that if one cause, out of several that contribute to the requisite degree to the suffering of the condition, can be properly classified as "*reasonable administrative action taken in a reasonable manner*" in respect of the employee's employment, then the exclusion will apply.

33. Be that as it may, the difference between "*a*" cause and "*the*" cause makes no practical difference to the outcome in the present case. The failure to get the promotion had no independent causative contribution to make to Ms Martin's condition, other than through what the Tribunal found as a matter of fact was the immediate cause of her condition, namely her realisation that she was going to be sent back to work with Mr Mellett. If the correct approach to causation in this context is not to treat the failure to obtain the promotion as causative of Ms Martin's condition, merely because it was a "*chronologically precedent*" event, then it will follow that Ms Martin's condition was not "*a*" result of the failure to obtain the promotion.

34. **The Extrinsic Materials**: Assuming this is an appropriate case to have resort to the statutory materials under s.15AB of the ***Acts Interpretation Act 1901*** (Cth), then contrary to the contention of Comcare, those materials do not provide clear guidance

---

[31] ***Allianz Australia Insurance Ltd v GSF Australia Pty Ltd and Anor*** (2005) 221 CLR 568.

[32] See, for example, ***Power v Comcare*** [2015] FCA 1502, at [73]-[95]. The contribution has been held to relate specifically to causation, not the severity of the condition: see ***Mellor v Australian Postal Corporation*** [2009] FCA 504, at [36].

[33] **AB 30-31**, at paragraphs [56], [58].

that the test of causation in the s.5A(1) exclusion must be read "*broadly*" in order to achieve the legislative object behind the enactment of s.5A in its present form[34].

35. It may be accepted as a general proposition that the intent of the 2007 amendments[35], which inserted s.5A, was to provide greater latitude for management action which might be poorly received by the employee at whose "*employment*" it was directed, than had been regarded as possible under the earlier concept of "*disciplinary action*"[36]. Nonetheless, the SRC Act still preserves a right to compensation for employees suffering a "*mental injury*" or "*mental ailment*" in work-related circumstances[37]. There are no explicit guidelines in the SRC Act setting out where the line is to be drawn between reasonable protection of management action, on the one hand, and proper compensation of employees suffering work-related psychiatric conditions in the workplace, on the other hand. In ***Reeve***, the Full Court found one limitation on a broad construction of the exclusion in s.5A(1) to be the distinction between decisions made "*in respect of the employee's employment*" (which attracted the exclusion), and those made for "*operational*" purposes (which did not attract the exclusion). Further, in ***Hart***, another Full Court (construing the former "*reasonable disciplinary action*" exclusion) found that the phrase "*as a result of*" had the effect of excluding an "*ailment*" from being treated as an "*injury*" attracting compensation, if only one cause out of a number of relevant work-related causes fell within the scope of the exclusion[38].

36. There is nothing else in the text of s.5A, or in the extrinsic materials, to suggest that the exclusion should be given a broader application than that which has been applied since the decisions in ***Hart*** and ***Reeve***, so as to restrict further the beneficial effect of the SRC Act.

37. That is particularly so when it comes to the determination of causation. If the causal reach of the exclusion is construed more broadly, such that there are no implicit limits on the extent to which simple logical or mechanical relationships of cause and effect can be traced through time like physical links in a chain, it would be possible to argue, as pointed out by Gray J[39] in ***Reeve***, that "*an injury to an employee in falling down stairs at his or her workplace was the result of administrative action in directing that employee to work at that workplace*". In ***Reeve***, the risk of such an odd result was limited to some extent by the distinction between action directed at the "*employment*" and action directed at "*operational*" matters. Nonetheless, the observation made by Gray J would have been equally appropriate if the employee in his Honour's example had been working in a higher duty position elsewhere prior to the fall down the stairs, and the requirement to return to work at the workplace where the fall occurred had been a "*direct and foreseeable*" consequence of a failure to obtain permanent promotion to the higher duties position. In that case, it could also be argued that the "*operational*" description did not apply, and that the injured employee was caught by the exclusion, however divorced from management action that result might be.

---

[34] ***Commonwealth Bank v Reeve***, ibid., at 472, [25].
[35] ***Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007***, No. 54 of 2007.
[36] ***Commonwealth Bank v Reeve***, ibid., at 486, [73]; ***Martin v Comcare*** [2015] FCAFC 169, at [103].
[37] See s.5A(1)(b)-(c), s.5B(1)(a), and the definition of "*ailment*" in s.4.
[38] ***Hart v Comcare*** (2005) 145 FCR 29, at 33.
[39] ***Commonwealth Bank v Reeve***, ibid., at 472, [24].

38. A simple temporal variation on the facts in the present case also exemplifies the point made by Gray J. Suppose that Ms Martin had not decompensated when she did, and had returned to her substantive position under Mr Mellett. Suppose that she then decompensated a month later, which she attributed to living with the daily fear of a resumption of bullying, and her sense of hopelessness at being unable to escape from it. On the argument being advanced by Comcare, her psychological condition would still have been suffered "*as a result of*" her failure to obtain the promotion a month earlier, even if the psychological evidence showed that her ongoing corrosive fear of renewed bullying had been a much more significant independent cause of her decompensation (to the extent where the contribution made by the promotion decision was "*immaterial*"). No matter how distant in time from the decompensation, the necessary precondition to that decompensation set by the failure to obtain the promotion would remain present. As in the example raised by Gray J, no policy objective of the SRC Act is advanced by such a mechanical view of causation applicable to the exclusion.

39. If the analysis in the previous paragraphs is correct, two conclusions follow. First, there are implicit, if not brightly delineated, limits on the extent to which the Parliament intended the "*reasonable administrative action*" exclusion to deprive psychologically injured employees of compensation under the SRC Act. The reasonableness of the "*administrative action*" taken, and the manner in which the action was taken, present two such limits. The distinction between "*operational*" decisions, and those directed at the employees "*employment*", is another such limit. The need for harmony with the overall objectives of the SRC Act may imply additional limits on the reach of the exclusion in particular cases, such as here, where an injured employee has a pre-existing psychological condition suffered as a result of perceived bullying, and the issue is whether (as a matter of fact) particular "*administrative action*" worsened that condition to the point of decompensation. Second, given the first conclusion, it is inevitable that every decision concerning the application of the exclusion will involve an assessment of the evidence relating to causation, within the rather fuzzy boundaries of the legislative context, leading to a decision about whether the particular factual matrix being examined should result in the Commonwealth (or licensee) assuming legal responsibility to pay compensation for the relevant injury.

Causation in Workers Compensation Cases Generally

40. It is well-established that causation in workers compensation cases is to be treated in the same way as causation in tort matters[40], at least in the absence of statutory language expressing a different intention[41]. It is also well-established that in personal injury matters, the test of legal causation does not involve the same kind of analysis as cause and effect relationships understood by physicists or philosophers, because the inquiry is directed at ascertaining or apportioning legal responsibility, rather than explaining the operation of the physical or metaphysical world. Accordingly, "*in cases concerning liability for personal injury it has been emphasized repeatedly that*

[40] ***Migge v Wormald Bros Industries Ltd*** [1972] 2 NSWLR 29, per Mason JA at 44 (the reasons of Mason JA were specifically approved by the High Court in allowing the subsequent appeal: [1973] 47 ALJR 236.

[41] A different (but not necessarily inconsistent) two-step process for assessing causation in tort matters involving public liability and medical negligence can now be found in the ***Civil Liability Act 2002*** (NSW) and its analogues in other States and Territories.

***questions of causation are to be resolved by the application to the facts of the case of common sense**, rather than scientific or logical theories of causation*"[42] (emphasis added).

41. On the analysis of the legislation in the preceding paragraphs, there is nothing in the text of s.5A, or the SRC Act in general, to suggest that this body of law is not relevant to issues of causation arising under s.5A (including under the exclusion), even when subject to the threshold contained in s.5B. In the absence of any express provision excluding the case law referred to above, it is respectfully submitted that it should be applied. The reason is that the exclusion in s.5A(1) is simply a classic example of a legislative provision directed at ascertaining or apportioning legal responsibility, not simply explaining the physical world. There is no basis for applying different principles for establishing the legal responsibility to pay compensation under s.5A(1) than in any other personal injury case where the responsibility to compensate an injured person is being considered.

42. In applying common sense to the facts of a case when considering causation, including under s.5A, the object of the exercise is not to conduct a "*scientific or logical*" inquiry. A scientific inquiry would be purely concerned with the physical connection between cause and effect. It may be built up on a series of essential pre-conditions for each link in a chain, without any obvious limit placed by the remoteness of the end of the chain from its beginning. However, as Deane J said succinctly in ***March***, "*the mere fact that something constitutes an essential condition (in the 'but for' sense) of an occurrence does not mean that, for the purposes of ascribing responsibility or fault, it is properly to be seen as a 'cause' of that occurrence as a matter of either ordinary language or common sense*"[43]. Although Deane J was referring to a case in negligence, no different principle applies in the present case.

43. In the present case, Murphy J was correct in concluding that the Tribunal erred in treating as causative an event which was no more than "*chronologically precedent*" to the event which was the actual cause of the adjustment disorder, on the evidence accepted by the Tribunal. It defies any common sense analysis to find that the failure to obtain the promotion was even "*a*" cause of Ms Martin's psychological condition, when the Tribunal made specific factual findings that –

(a) Ms Martin had probably suffered from a work-related adjustment disorder from July 2011 and during the period she subsequently acted in the role of cross-media reporter, before the promotion decision was made;

(b) the cross-media reporter position was not Ms Martin's preferred option, and the primary reason she applied to that position was to remove herself from Mr Mellett's direct supervision;

(e) the immediate cause of her decompensation after being informed of her failure to obtain the permanent position of cross-media reporter was the realisation

---

[42] ***Migge v Wormald Bros Industries Ltd***, *supra*, at 44; ***Kirkpatrick v Commonwealth*** (1985) 9 FCR 36, at 40; ***O'Neill v Commonwealth Banking Corporation*** (1987) 75 ALR 154, at 155-6, upheld by the Full Court in ***Commonwealth Banking Corporation v O'Neill*** (1988) 9 AAR 170; ***March v E & H Stramare Pty Ltd*** (1991) 171 CLR 507, at 509 (per Mason CJ).

[43] ***March v E & H Stramare Pty Ltd***, supra, at 523.

that she would be returning to the supervision of Mr Mellett and her belief that the alleged bullying would continue; and

(d) the agreed evidence of the psychiatrists qualified by each party (which the Tribunal appears to have accepted) was that the contribution made by the failure to obtain the promotion was so minor as to be "immaterial".

Reasonable Foreseeability As a Test of Causation

44. Comcare points to the fact that the Tribunal found that it was irrelevant whether her dread of returning to work under Mr Mellett, rather than her disappointment with lack of career advancement caused her decompensation, because "*in* [Ms Martin's] *mind, the former was a direct and foreseeable consequence of the decision*". Comcare goes on to argue that the Tribunal was entitled to reach the conclusion, by reference to Ms Martin's state of mind, that her psychological injury was "*as a result of*" the non-promotion decision[44]. That submission obscures the fact that Ms Martin's reaction to the prospect of being sent back to work with Mr Mellett followed being advised of that consequence by Ms Raabus. There is no evidence, as noted earlier, that this was an inevitable consequence of failing to get the promotion. It was simply the only option she was presented with at the time.

45. In short, foreseeability played no part in it. Even if Ms Martin had actually foreseen (before her conversation with Ms Raabus) that it was possible, or even likely, that a failure to obtain the promotion might be followed by her return to the supervision of Mr Mellett, it does not follow that that is sufficient to establish that the promotion decision was a causal factor, given the factual finding by the Tribunal as to the cause of Ms Martin's decompensation. In particular, the promotion decision does not become causal simply because the Tribunal asserts that Ms Martin foresaw that consequence, any more than any causal connection is established because a person believes it to be so. The latter is a notorious logical fallacy, and the former is of the same character. The question is not whether Ms Martin foresaw a possible outcome of the promotion decision, but whether disappointment with the promotion decision itself contributed to her condition, or did not. That is a purely factual determination, which the Tribunal resolved against Comcare.

Remittal of the Issue of Causation to the Tribunal

46. Although Murphy J concluded that "*the evidence is clear*", and "*the matter comes close to a case where there may only be one answer*", his Honour considered that the best course was to remit the matter to the Tribunal for rehearing according to law on the question of causation[45]. The Court so ordered. Ms Martin did not seek leave from this Court to challenge that order. The term of the Senior Member of the Tribunal who heard the matter originally has since ended, and the matter would need to be reheard by a freshly constituted Tribunal. In those circumstances, Comcare would have an opportunity to explore any additional issues of fact that might be thought relevant to the issue of causation.

---

[44] Appellant's submissions, p.13, at paragraph [57].
[45] **AB ??**, at paragraph [128].

47. If this Court accepts that the Tribunal erred in its consideration of the causation issue, and is also of the view that it is possible that on rehearing the Tribunal (properly instructed on the question of causation) might reach materially different conclusions on aspects of the evidence, then the course proposed by the Full Court remains appropriate. However, if this Court were to conclude that, properly instructed on the law applicable to causation in the context of s.5A(1), the Tribunal could only reach one conclusion on the evidence that it accepted, i.e. that Ms Martin's psychological condition was not suffered "*as a result of*" her failure to gain promotion to the position of cross-media reporter, then there would be no utility in remitting the issue of causation to the Tribunal. Such a conclusion would also make it unnecessary to remit the matter for further consideration of whether the promotion decision was "*taken in a reasonable manner*".

PART VII: ESTIMATED HOURS

48. It is estimated that 2 hours will be required for the presentation of the Respondent's oral argument.

Dated: 11 July 2016

LARRY KING SC **LEO GREY**

Counsel for the Respondent
Tel: (02) 9231-0077
Fax: (02) 9235-1492
Email: king@williamdeanechambers.com.au

....