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Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

WorkCover Queensland Act 1996 – s. 509 – appeal against decision of industrial magistrate

Robert William Avis and WorkCover Queensland (No. C54 of 2000)

PRESIDENT HALL — 7 December 2000

DECISION

The appellant was a secondary school teacher employed by Education Queensland over the period 1982 to 12 August 1997. On 12 August 1997 the appellant ceased work because he was ill. He was suffering from a major depressive illness.

The appellant sought compensation under the *WorkCover Queensland Act 1996*. His application was rejected. The appellant pressed for and secured a Statutory Review, but it was to no avail. He then appealed to the Industrial Magistrate's Court. The Industrial Magistrate found that at all material times the appellant did suffer from a major depressive illness, that the illness arose out of his employment by Education Queensland and that the employment was the major significant factor causing the illness. His Worship went on to dismiss the appeal. He dismissed the appeal because he concluded that the illness was removed from the definition of "injury" at s. 34 of the *WorkCover Queensland Act 1996* by s. 34(4)(a) and (d). The appellant now seeks relief from this Court.

It is agreed by counsel that in so far as the Industrial Magistrate's decision is based on s. 34(4)(d) the decision should be set aside. The only issue is whether the Industrial Magistrate was correct to find that s. 34(4)(a) excluded the illness from the definition of "injury".

The Industrial Magistrate found, and the conclusion has not been challenged on the appeal, that:

> "... The dominant cause of the applicant's illness was the applicant's reaction to loss of confidence, his sense of inadequacy and helplessness, and his distress over his perceived ineffectiveness as a teacher principally because of student discipline problems. Again, I am satisfied that the applicant's personality played a critical part in his sense of inadequacy and helplessness and his distress and in his reaction thereto.".

On the evidence the appellant's problems with student discipline arose after the school at which he was employed introduced a new behavioural management plan. It is clear that the appellant was critical both of the plan and its implementation. However, the Industrial Magistrate did not base his finding about s. 34(4)(a) on any resentment by the appellant to the introduction and implementation of the plan. His Worship, whom I should interpolate found that the plan was "reasonable management action taken in a reasonable way", expressly found that:

> "... It is the applicant's case that the student discipline problems which caused his sense of helplessness and inadequacy and his distress over his ineffectiveness as a teacher arose because of the ineffectiveness of the behavioural management plan and its administration. The causative link connecting the cause of the applicant's illness to management action appears to be direct and irrefutable on the applicant's own case. The applicant's case is that the stresses that caused his illness were brought about by the ill discipline of students. The ill discipline of students was facilitated by the behavioural management plan and/or the way in which it was administered.
>
> In my view, to give the provisions of paragraph 34(4)(a) their ordinary meaning and apply them to the circumstances of this case the applicant's illness arose out of and in the course of the adoption and implementation of the behavioural management plan. I have found the adoption and implementation of that plan to be reasonable management action. That being the case the applicant's illness is excluded from the definition of 'injury' by the provisions of paragraph 34(4)(a).".

It was His Worship's use of the "causal link" which has been the subject of the attack on the appeal. The submission is that s. 34(4)(a) will attach only where the management action in itself triggers the psychiatric or psychological disorder. The contention is that in this case the taking and implementation of the management action did not trigger the illness. It is contended that in the wake of the management decision and its implementation a set of circumstances arose in which the appellant could not do his job with a consequential loss of confidence and a feeling of inadequacy, helplessness and ineffectiveness. Reliance is placed on the decision of Davies AJA in *Manly Pacific International Hotel v Doyle* [1999] NSW CA 465 upon a provision on a similar subject matter in the *Workers' Compensation Act 1987* (NSW). I am unable to accept the submission. The New South Wales provision related to circumstances in which an injury was "caused by" reasonable action (of defined type). Section 34(4)(a) of the *WorkCover Queensland Act 1996* is directed at an illness which "arises out of" reasonable management action taken in a reasonable way. I adhere to the view which I expressed in *Lackey v WorkCover Queensland* (2000) 165 QGIG 22 at 22 (admittedly on another limb of s. 34) that the test posited by the words "arising out of" is wider than that posited by the words "caused by" and that the phrase "arising out of' whilst involving some causal or consequential relationship between the employment and the injury, does not require that direct or proximate relationship would be necessary if the phrase used were "caused by". See also *State Government Insurance Commission v Stephens Brothers Pty Ltd* (1984) 154 CLR 552 at 555 and 559, and *Dickinson v The Motor Vehicle Insurance Trust* (1987) 163 CLR 500 at 505. There is in any event the further difficulty that while Davies AJA drew the distinction for which the appellant contends, Fitzgerald JA (with whom Mason P agreed) rejected the distinction.

On the facts there was plainly a sufficient causal nexus to satisfy the test "arising out of". In those circumstances it is unnecessary to deal with the correct application of the test "in the course of" reasonable management action taken in a reasonable way. It is sufficient to observe that *prima facie* His Worship was wrong to substitute "and" for "or".

The appeal is dismissed. The respondent is to have the cost of and incidental to the appeal, taxed by the Industrial Registrar the same way that costs would be taxed if this were a Supreme Court matter.

Dated this seventh day of December, 2000.

D.R. HALL, President.

Released: 7 December 2000

Appearances:–
Mr A.A. Horneman-Wren instructed by Macrossans Lawyers for the appellant.
Ms J.A. Ryrie instructed by WorkCover Queensland, the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(1) – appeal against decision of industrial commission

Seair Trading Co Pty Ltd and Erica Lewin, Denise Thompson and Robyn Evans (No C57 of 2000)

PRESIDENT HALL — 7 December 2000

DECISION

Applications under s. 278 of the *Industrial Relations Act 1999* were filed by each of Ms Erica Ann Lewin, Ms Denise Thompson and Ms Robyn Marie Evans for recovery of unpaid wages. The matters were listed for preliminary hearing in the commission on 17 July 2000. On that day the lay advocate for the respondent Seair Trading Co Pty Ltd raised a threshold issue as to whether the commission was able to deal with the matters. It was asserted that applications had been filed under s. 399 of the Act for the same matters. In those circumstances, s. 278(11) of the Act was said to prevent the various applicants from making the s. 278 applications to the commission. The lay advocate went on to seek an order that the applications before the commission be "struck out", which application I treat as an application to invoke the power of the commission under s. 331(b).

The threshold issue was listed for 10 August 2000. On that day it emerged that the application to invoke s. 331(b) was entirely without substance. There were no proceedings under s. 399 of the Act. In those circumstances the commission rightly refused to dismiss or to refrain from hearing the applications under s. 278 which had been made by Erica Ann Lewin, Denise Thompson and Robyn Marie Evans. The commission also awarded costs against the now appellant. On the appeal, it is the appellant's contention that there was no power to award costs. It is contended that the only applications before the commission were the applications under s. 278, and that s. 335 does not authorise the award of costs in favour of an applicant save in the presently irrelevant case of a reinstatement application.

I quite accept that the applications made under s. 278 were applications for the purposes of s. 335. However, there is nothing in the Act to indicate that the generic term "application", compare *Golden Video Pty Ltd v Chief Executive, Department of Employment, Training & Industrial Relations* (2000) 164 QGIG 298, does not include an interlocutory application whether initiated by use of Form 2 in the *Industrial Court Rules 1997*, initiated orally after the giving of written notice that the application would be made, or initiated orally without notice. On the contrary, s. 326(h) expressly contemplates that cost orders may be made in relation to interlocutory proceedings. I reject the appellant's submission that s. 326 contemplates the award of such costs only where the costs are awarded prior to the hearing of the interlocutory proceedings. The phrase "taken before the hearing of the cause" refers to the interlocutory proceedings not to the decision to award costs taken therein. The commission plainly had the power to make the order which it did.

There was a suggestion in the appellant's written submissions, as I understand it abandoned to the hearing, that the appellant's application to the commission was made neither vexatiously nor without reasonable cause. It is not necessary to revisit the matters discussed in *MIM Holdings Limited v Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland* (No C37 of 2000). The application made to the commission by the now appellant had no factual basis. It is not proper to make unnecessary findings about credibility and in any event I have no materials before me which would enable findings about credibility to be made. However, on the benign view that the error arose out of misunderstanding and lack of prudence, on an objective test the application was made vexatiously and without reasonable cause.

I dismiss the appeal.

The respondent seeks the costs of the appeal. The respondent is entitled to those costs. The appeal could only have succeeded if the decisions in *Golden Video Pty Ltd v Chief Executive, Department of Employment, Training and Industrial Relations* (2000) 164 QGIG 298 and *MIM Holdings Limited v Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland* (No C37 of 2000) were overruled. That matter was not canvassed by the appellant.

The respondents are to have their costs of and incidental to the appeal, assessed by the Industrial Registrar as costs would be assessed if this had been a Supreme Court matter.

Dated this seventh day of December, 2000.

D.R. HALL, President.

Released: 8 December 2000

Appearances:–
Mr P.F. Allen of counsel for the appellant.
Mr S. Reidy of Reidy & Tonkin Solicitors for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

WorkCover Queensland Act 1996 – s. 509 – appeal against decision of industrial magistrate

Tracy Ann Johntone and WorkCover Queensland (No. C55 of 2000)

PRESIDENT HALL — 7 December 2000

DECISION

By a decision published 20 November 2000 I allowed the appeal in this matter. I reserved the question of costs. Having considered the written submissions of Mr Lippett of counsel and Mr Major of counsel I am satisfied that the *Appeal Costs Fund Act 1973* has no application. I have considered the submission that the costs of the earlier proceedings in the Industrial Magistrates Court and of the appeal should be costs in the cause. The difficulty is that there is no assurance that the matter remitted to the Industrial Magistrates Court will ever be heard. The maximum amount which the appellant might

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