No/s	Title	Date certified	Cancelling
CA514/99	RACQ Road Service Assistance – Certified Agreement	24/11/99	
CA561/99	Concrete Busters Australia Pty Ltd - Certified Agreement	24/11/99	
CA552/99	Subway Chermside - Certified Agreement	26/11/99	
CA553/99	Subway Enoggera - Certified Agreement	26/11/99	

E. EWALD
Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

WORKCOVER QUEENSLAND ACT 1996

Industrial Relations Act 1999 – s. 341(2) – appeal against decision of industrial magistrate

Gregory Ivey AND WorkCover Queensland (No. C59 of 1999)

PRESIDENT HALL 25 November 1999

DECISION

By an application dated 22 August 1998 and received by WorkCover on 31 August 1998 the appellant made application for compensation under the *WorkCover Queensland Act 1996*. The application was rejected by letter dated 30 October 1998. On 5 November 1998 the appellant executed an application for review. That application was received by WorkCover on 11 November 1998. By a letter dated 25 January 1999 the statutory review unit rejected the application for review. There was an appeal to the Industrial Magistrates Court. On 25 August 1999 the appeal was dismissed. The appeal was dismissed for the very reason that the application for compensation had been rejected. The Industrial Magistrate was not satisfied that the appellant had suffered an "injury" within the meaning of the *WorkCover Queensland Act 1996*. The Industrial Magistrate did not decline to find that the appellant's employment was "the major significant factor causing the injury". Indeed, the respondent has not at any time contended that the appellant's employment was other than the major significant factor causing the injury. The Industrial Magistrate rejected the claim because His Worship was of the view that the injury was a psychiatric or psychological disorder withdrawn from the concept of injury by s. 34(4). It is perhaps useful to interpolate that at all material times s. 34(4) took the form –

> "(4) 'Injury' does not include a personal injury, disease, or aggravation of a disease sustained by a worker if the injury is a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances –
>
> (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
> (b) the worker's expectation or perception of reasonable management action being taken against the worker;
> (c) action by WorkCover or a self-insurer in connection with the worker's application for compensation;
> (d) circumstances in which a reasonable person, in the same employment as the worker, would not have been expected to sustain the injury.".

The appellant was employed by Education Queensland for some thirty years. To dispose of the appeal it is not necessary to rehearse history prior to December 1994. In December 1994 the appellant, then Principal of Gympie Special School, was called to a meeting at the regional office of the Wide Bay Region of the then Education Department. He was informed orally (the advice was confirmed in writing by a letter dated 25 January 1995), that his performance as Principal of the Gympie Special School was to be investigated and evaluated. The appellant was removed from the school whilst the investigation proceeded. He was posted to James Nash High School on unassigned duties for some nine months. Ultimately, in response to requests for a posting nearer to his home, he was given a temporary posting on unassigned duties (but substantially as a supernumerary Deputy Principal) at the Nambour Special School. He remained there for two years.

On 7 March 1996 the Director-General of the Department of Education disciplined the appellant on the grounds of incompetence or inefficiency in the discharge of his duties of office and demoted him from Band 8 Principal to Band 6 Deputy Principal. (An earlier decision to demote him to the rank of teacher had been reversed after the intervention of the Queensland Teachers Union of Employees.) In November 1997 the appellant received notification from the Wide Bay Regional office advising him of a proposed transfer to a school within the Wide Bay Region to commence in January 1998. The appellant resisted the proposed transfer. There is evidence that he had been led to believe that he would not again be placed in the Wide Bay Region. In any event Education Queensland created a position for him as a temporary supernumerary Deputy Principal at a new school, Talara Primary College. The posting was a disaster. Within four weeks the appellant was removed and posted to Mountain Creek State School – a school with three Deputy Principal positions – where he "understudied" one of the two Deputy Principals. His performance was (favourably) evaluated. The District Director appointed the appellant, who had long been concerned about his temporary status, to what he (the District Director) thought was a permanent position as Deputy Principal at Caboolture Special School for term 3, 1998. In fact, although the evidence suggests that the District Director acted with prudence and care to find the appellant a permanent position, the District Director was in error. The position at the Caboolture Special School was a temporary position. The appellant discovered his status at a staff meeting on his first morning at the school. The Caboolture posting was not a success. The position which the appellant filled required him to devote fifty percent of his time to the role of Deputy Principal and fifty percent of his time to the role of a class room teacher. He shared a class (of eight autistic children) with an experienced teacher, selected because of her ability and experience in assisting other teachers, who thereafter devoted 0.5 of her time redeveloping the Caboolture Special School's behaviour management policies and procedures. That teacher, who had commenced by raising concerns about the appellant's performance with the principal, ultimately made an issue of the appellant's competence and his inability to follow instructions. The principal raised the matters of complaint with the appellant. Events moved quickly and shortly thereafter the appellant, on medical advice, exited the school and sought compensation under the *WorkCover Queensland Act 1996*.

For the purposes of this appeal, the appellant accepts the investigation, removal from Gympie Special School and demotion as "reasonable management action taken in a reasonable way" within the meaning of s. 34(4)(a). (In other proceedings the appellant has attacked the investigation and demotion.) What is argued is that though the "core decisions" are protected, in the implementation of the decisions unreasonable subsidiary decisions were made and inappropriate conduct engaged in by the employer. It is then put that when the subsidiary decisions and conduct are taken into account, the process as a whole ceases to be reasonable management action taken in a reasonable way and, in the alternative, that the psychiatric or psychological disorder arose, not out of the decision to investigate, remove and demote but from the unreasonable decisions and inappropriate conduct.

The first of the alternative submissions seems to me to have been expressly rejected by the Magistrate. His worship said:–

> ". . . I am satisfied that the investigation that commenced in 1995 and the subsequent management action taken by the employer was not an unreasonable way by the employer in the particular circumstances.".

I entirely agree. There was certainly mismanagement along the way. Given the history of the appellant's relationships with people in the Wide Bay Region and representations made to him, it was quite inappropriate to indicate to him that he was to be sent back to that region. The decision to send the appellant to Talara Primary College was ill-thought out. Talara Primary College was an opening school. Given the appellant's difficulties in dealing with stress, which must have been known to the officers of Education Queensland, it was entirely inappropriate to place him in such a position. The difficulties were exacerbated by the very high expectations which the Principal had of him. The transfer to Caboolture Special School was well intentioned, made on careful consideration but, in the event, a by then fragile appellant was (wholly unexpectedly) subject to a crushing disappointment. But "mismanagement" is an appropriate word only if one has regard to the appellant's susceptibility to psychiatric or psychological disorder (which ought by November 1997 to have been known to the officers of Education Queensland). By s. 34(5)(b) in deciding in a particular case whether the management action was reasonable or whether the management action was taken in a reasonable way, regard must not be had to a particular worker's susceptibility to a psychiatric or psychological disorder.

A particular complaint is made about delay. The evidence does not establish that the appellant was allowed to linger for too long at Nambour on a temporary posting. The evidence is consistent with the view that Education Queensland was doing what it could to find a position as Deputy Principal for the appellant at a school near to his home. However, not-withstanding the submission that time was swallowed in a determined attempt to grant natural justice to the appellant, the conclusion is inevitable that the investigation and taking of the decision to demote were dilatory. Unfortunately, investigation and litigation very often does take longer than it should. Parties do not react in the way in which the appellant has. Given that the appellant was being remunerated as a Band 8 Principal and was not given unduly onerous tasks, I have come (with some hesitation) to the conclusion that what occurred would be assessed as reasonable action taken in a reasonable way "for a worker of ordinary susceptibility to psychiatric or psychological disorder", compare s. 34(5)(a).

I do not accept the appellant's submission that the burden of proof fell upon the respondent. On a fair reading of s. 34 it does not impose a general liability to which s. 34(4) "provide[s] for some special grounds of excuse, justification or exculpation depending upon new or additional facts". Section 34 states "the complete factual situation which much be found to exist before anyone obtains a right – – under the provision". Compare *Vines v. Djordjevitch* (1955) 91 CLR 512 at 519. The onus is born by the appellant. That is fatal to the alternative argument. Two medial witnesses, Dr Bell and Ms Bendall, gave evidence that the nature of the condition suffered by the appellant, and the causes thereof, were accumulative and could not be teased out. Ms Briscoe, a clinical psychologist who was not available for cross-examination, concluded:–

> "Although it is evident that issues of mismanagement have caused undue stress for Mr Ivy, it has been predominantly his personality style and his inability to cope when assessed as incompetent by others that has had a significant impact on his psychological condition. The fact he has consistently chosen to ignore advice and guidance results in Mr Ivy being exposed to ongoing criticism that further deflates his self esteem and hence his ability to cope.".

The inference that the appellant's disability is attributable to decisions or conduct falling beyond the cocoon of s. 34(4) is simply not open. I rather apprehend from the passage:–

> "In my view, Mr Ivy's inability to accept his personal and professional deficiency and his inability to adjust to the changed work place environment and employer decisions subsequent to 1994 created the setting that contributed to his present inability to perform his duties on a full-time basis"

that the Industrial Magistrate took the same view.

The appeal is dismissed. I order that the appellant pay the respondent's costs of and incidental to the appeal, taxed as costs are taxed in the Supreme Court.

Dated this twenty-fifth day of November, 1999.

D.R. HALL, President.

Appearances:–
Mr A. Horneman-Wren instructed by Macrossans Solicitors for the appellant.
Mr S. Sapsford instructed by WorkCover Queensland for the respondent.

Released: 25 November 1999

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 331(b) – dismissing a cause

Department of Natural Resources AND Gregory Lawrence Willis (No. B1445 of 1999)

VICE PRESIDENT LINNANE 19 November 1999

Dispute as to whether an agreement had been reached at compulsory conciliation conference – intention of the parties to be bound by terms agreed at conciliation – alteration to Deed of Settlement to reflect agreement – cause not necessary or desirable in the public interest

DECISION

This application by the Department of Natural Resources (the "Department") seeks to have matter B974 of 1999 dismissed pursuant to s. 331(b) of the *Industrial Relations Act 1999* on the ground that further proceedings by the Commission is not necessary or desirable in the public interest. Matter B974 of 1999 is an application by Gregory Lawrence Willis seeking reinstatement to his former position of Facilitator (Property Management Planning) with the Department.

Matter B974 of 1999 was the subject of a s. 75 Conference before the Commission on 12th August, 1999. The Department submits that at the conclusion of that Conference Mr Willis agreed to accept the Department's offer to resolve the matter. The Department subsequently forwarded Mr Willis a document setting out the terms that had been agreed to on 12th August, 1999 asking Mr Willis to execute the document and return it. Mr Willis did not execute the document and has since sought to have matter B974 of 1999 listed for hearing.