Rivard v Northern Territory of Australia [1999] NTCA 28

PARTIES:	RIVARD, Faye Estelle
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 13 of 1998 (9627645)
DELIVERED:	25 March 1999
HEARING DATES:	3 December 1998
JUDGMENT OF:	MARTIN CJ, THOMAS & PRIESTLEY JJ.

REPRESENTATION:

Counsel:

Appellant:	J Tippett with him D Story
Respondent:	D Lisson with him P Timney

Solicitors:

Appellant:	Ward Keller
Respondent:	Solicitor for the NT

Judgment category classification:
Judgment ID Number:
Number of pages: 18

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Rivard v Northern Territory of Australia [1999] NTCA 28
No. AP 13 of 1998 (9627645)

BETWEEN:

FAYE ESTELLE ANNETTE RIVARD
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: MARTIN CJ, THOMAS & PRIESTLEY JJ.

REASONS FOR JUDGMENT

(Delivered 25 March 1999)

[1] MARTIN CJ: I have had the advantage of reading a draft for the reasons for judgment of Priestley J and for the reasons given by him I am of the opinion that the appeal should be allowed and that the orders proposed by his Honour should be the orders of the Court. I have nothing to add.

[2] THOMAS J: I have read the reasons for judgment prepared by Priestley J. I agree with his reasons and with his conclusion.

[3] I would allow the appeal. I agree with the orders proposed by Priestley J.

[4] PRIESTLEY J: The worker in this case, Faye Rivard, claimed against her employer, the Northern Territory of Australia, that she was suffering from a stress-related illness arising out of or in the course of her employment with

the employer, for whom she had worked as a probationary police auxiliary. She claimed payment of weekly benefits from the employer in accordance with the Work Health Act (the Act or the NT Act). By a notice in the form required under the Act the employer disputed liability on three grounds. The first and third of these alleged the worker had suffered neither injury nor incapacity. The second ground was that if the worker did suffer injury "*this arose from reasonable administrative action or a failure on the worker's part to obtain a promotion or benefit*".

[5] The basis for disputing liability in this way was the "*but does not include*" part of the definition of "*injury*" in s 3 of the Act. The section was as follows:

> " 'injury', *in relation to a worker means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his employment and includes -*
>
> *(a) a disease; and*
>
> *(b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease,*
>
> *but does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment*."

[6] Following the denial of liability, the worker applied to the Work Health Court for compensation. Her case was heard by Mr I. Gray, Chief

Magistrate. Before him it was not disputed that the worker had suffered and continued to suffer from a stress-related illness arising from her employment which had incapacitated her since 1 November 1996 and was continuing to do so. Thus of the employer's three earlier grounds of dispute only the second remained, that the worker's injury fell within one or two of the three heads of exclusion from the Act's definition of "*injury*".

[7] A number of facts were common ground at the hearing in the Work Health Court. The worker's employment began on 24 July 1995 as a probationary police auxiliary on terms that after twelve months she would be confirmed as an auxiliary, with an increase in salary, if her performance as a probationary had been satisfactory. In the twelve month probationary period there was no face to face counselling session about the worker's deficiencies. In September 1996 the worker received an increase in salary back dated to July 1996. On 7 October 1996 the worker saw a Police Gazette published on or about that day listing the names of police auxiliaries who had satisfactorily completed twelve months probationary service in July 1996. The worker was the only one of the probationers whose name was not listed. She was advised by the employer shortly afterwards that she had not satisfactorily completed her twelve month period of probation. On 14 October 1996 she was directed to continue on probation for a further period not exceeding six months commencing on 24 July 1997. On 28 October 1996 there was a meeting to discuss her situation in which the employer was represented by two superintendents, a senior sergeant, a sergeant and a

commander and the worker by a representative of the Police Association. Following the meeting the worker was transferred to the Casuarina Police Station for twenty-eight days for assessment. On or about 1 November 1996 the worker ceased work with the employer on the basis of stress related illness.

[8] In the course of the hearing before the Chief Magistrate detailed evidence was given about the course of the worker's employment, including evidence about her inadequacy for her job. For the worker, it was contended that her inadequacy was irrelevant to the question whether she fell within the exclusions relied upon by the employer. The Chief Magistrate recorded also that it was submitted for the worker that her inadequacy was irrelevant once it became clear that her injury resulted from one or more unreasonable administrative actions. The Chief Magistrate further recorded that it was contended for the worker that the evidence showed fourteen instances of unreasonable administrative action. In connection with this he said:

> *"I am satisfied on the whole of the evidence that the failure to gain confirmation was a humiliation and that it was the ultimate true cause of her mental illness. It is however also the case that there were a number of unsatisfactory administrative actions both before and after the decision which have been the subject of legitimate criticism on the Workers part in this case. Whether those actions were all objectively 'unreasonable' is an issue. Whether they were inherently unreasonable or simply decisions or actions which were unreasonable in the way they were given effect, is also an issue."*

[9] Subsequently he recorded that five of the fourteen alleged instances of unreasonable administrative actions had been conceded by the employer through Commander Fields in the course of the hearing, these being:

> *"(i) that if a probationer was unlikely to successfully complete his or her probationary period then a "face to face' counselling session should take place prior to the end of the period during which the probationer's deficiencies in the work place would be discussed;*
>
> *(ii) that contrary to the procedure that was adopted there should have been a 'face to face' counselling session prior to the publication of the Gazette Notice in order to avoid the humiliation and loss of face that he accepted is likely to arise from a person being left to read of that person's failure in a public document that was required reading for all police officers*;
>
> *(iii) that Mrs Rivard should not have been advised of her failure over the telephone by Dowd;*
>
> *(iv) that the receipt of the increment was able to have been taken as recognition of a successfully completed probationary period;*
>
> *(v) that the humiliation and hurt that he foresaw could easily arise from an employee being left to read of his or her failure in a widely circulated public document could be felt by some employees in a very significant way."*

[10] The Chief Magistrate additionally held that he was satisfied that items 11 and 12 of the fourteen alleged unreasonable administrative actions were made out, these being:

> "*11. Returned Rivard to the Casuarina Station for a 28 day period of assessment without:*

i) having put arrangements in place for supervision upon her arrival;

ii) advising Rivard of the form of assessment would take;

iii) advising Rivard of the standards she was expected to achieve during that period.

12. Placing Rivard at Casuarina on front counter to work alone:

i) shortly after a humiliating meeting;

ii) without supervision when she had been told would be assessed for a 28 day period;

iii) without support in circumstances where she had been advised her skills were inadequate for the task;

iv) in circumstances where senior officers believed or were of the opinion:

a) she was not capable of carrying out the task unsupervised;

b) she lacked confidence to carry out the task;

c) she was in need of assistance to develop confidence to handle matters received from the public;

d) she should not be left alone at the front counter."

The Chief Magistrate then said:

"*Any one or a combination of the actions referred to above would make out the worker's case once it is accepted that her injury results from one or more of them. However the hurdle for the worker here is the second element in the exclusionary part of the section 3 definition of injury. The question is, was the injury the result of a failure by the worker to obtain a promotion or benefit in connection*

with her work? I accept the employer's argument that the answer to that question must be, yes."

[11] The Chief Magistrate then set out a lengthy extract from the submissions that had been made to him in final address on behalf of the employer. Within these submissions, and particularly relevant to the point of this appeal, were the following:

> "*... and as Your Worship has pointed out, the central issue in here, in this matter, is the definition in specifically the second of the three categories, failure to gain a promotion or a benefit. I say that you, on the facts before you, cannot conclude but that her failure to gain a promotion or a benefit resulted in her illness.*
>
> *She can only succeed if you conclude that the process which results in a permanent appointment as auxiliary is not a promotion or a benefit, and you have the unhappy task, without the assistance - that my friend and I have been able to find at least - of authority on that question.*
>
> *However, I say to you that this is the very process, this is the very circumstances that Parliament must have had in mind in drafting that section. If any lay person with any reasonable experience in life, looking at that provision, the definition of 'injury' would know 'Oh, yes, well, we all know that failure to gain promotion' - transfer by the way is one that we haven't mentioned but it is part of that definition - 'or a benefit is indeed, and can indeed, be a very stressful matter, our egos are hurt when we don't get those things. We apply for sergeant along with all the others and only half are selected and we aren't, and it hurts to hear that. This is just the same process. It is the process of promotion."*

And then, a little later:

> "*It is a stressful process, the promotion process, and that process can involve all sorts of elements. Notice is one of them. So we are criticised, legitimately to a point, for allowing notice to go to the worker by way of gazette rather than a much more sensible and sensitive way, sitting down with her and discussing it person to*

person, but it's still part of the promotion process, the notices that are involved.

...you will come to the conclusion that confirmation, or permanent appointment after a period of probation is a promotion or a benefit within the meaning of the Act and as intended by Parliament.

All of those matter, the probation, the evaluation, the notification, the counselling etcetera, are, in fact, all part of the promotion or benefit-conferring process, and it's - any injury resulting from that process is not compensative."

[12] The Chief Magistrate said that he accepted and agreed in toto with the submissions he had set out. His adoption of the last sentence I have set out is very relevant to the point argued in this appeal. On the basis of his acceptance of the submissions, he said:

"I am satisfied in this case that the administrative actions which I have found to be unreasonable were not the cause of the injury other than they (sic) by virtue of the part they played in the promotion process, as an integral part of that process."

[13] Then, in his next paragraph the Chief Magistrate's reasoning and expression show how completely he adopted the submissions he had set out, and the last sentence I have above reproduced from them. The paragraph was as follows:

"I am satisfied that each of the actions which caused Mrs Rivard to develop her stress related injury formed part of a process of promotion in the sense that each action, or non-action, was an element in a chain of events which were all connected with the question of whether she should or should not be confirmed as a probationary auxiliary. I am satisfied that the injury did not result from any particular administrative action, or combination of actions, which was (or were) <u>not integrally connected</u> with the process of promotion, or the process of obtaining a benefit. (underlining by the Chief Magistrate)

> *Accepting Mr Lisson's argument as to the correct approach to take to the meaning of the words 'promotion' and 'benefit', I am satisfied that her illness (injury) was a result of a failure to obtain a promotion or benefit. I am satisfied that were it not for the failure to be confirmed after twelve months probation she would not have suffered the injury."*

[14] A separate submission for the worker was that the three heads of exclusion should be read conjunctively and reasonableness should be imported into the second exclusion. This submission was not accepted by the Chief Magistrate. On the basis of his acceptance of the employer's construction argument, and his findings of fact, the Chief Magistrate dismissed the worker's claim. She appealed to this court. The appeal was heard by Bailey J who dismissed it.

[15] Before Bailey J the conjunctive construction of the exclusions from the definition of "*injury*" was again argued and was again not accepted. A further submission was that upon the proper construction of the second of the three exclusions from the definition of "*injury*", it was necessary to assess whether the injury was a result of the simple fact of a worker failing to obtain a promotion or benefit, (resulting in no compensation) or as a result of something else (in which case she was entitled to compensation). On this construction, consideration of the cause and effect for the purpose of seeing whether the second exclusion applied or not, would be confined to examining the consequences of the worker's failure to obtain a promotion or benefit. This submission contradicted the "*promotion*" process construction contended for by the employer and accepted by the Chief Magistrate.

[16] Bailey J did not accept the worker's submission. In his view a failure to obtain a promotion or benefit should not be viewed in isolation, because such failures were usually the culmination of a chain of events and might involve subsequent events and consequences inextricably linked to the failure. He cited *Parker v Comcare*, an Administrative Appeals Tribunal decision, as an example of a case where optional post-selection counselling was taken to be part of the failure to obtain a promotion. He then referred to parts of the passages from the Chief Magistrate's reasons which I have set out above and continued that their substance was

> *"that while the learned Chief Magistrate accepted that unreasonable administrative actions had occurred and made some contribution to the appellant/worker's injury, the effective cause of that injury was a failure to obtain a promotion or benefit, namely confirmation of her appointment."*

[17] In Bailey J's view the Chief Magistrate's finding that the worker's injury was the result of failure to obtain a promotion or benefit was an inference reasonably open to him from the primary facts and thus not a matter within the Supreme Court's appellate jurisdiction. On this basis he dismissed the appeal.

[18] The worker then appealed to this court from Bailey J's decision. In the appeal it was again argued for the worker that the three exclusions from the definition of "*injury*" should, in effect, be read conjunctively. I am doubtful whether the exclusions can be read precisely in the way submitted for the worker; but it may be that a somewhat different version of the submission

could have some force, and I will return to that version subsequently. For the present, I observe that the three exclusions seem to me to be intended to deal with three separate situations. This does not mean however that in considering the meaning of each exclusion the terms of the others should not be taken into account. This consideration will come into play in considering what was the main submission for the worker on the appeal.

[19] The worker's main submission was that the Chief Magistrate had wrongly construed the words of the exclusion "*failure by the worker to obtain a promotion ... or benefit*", that his ultimate finding of fact was arrived at by use of the wrong construction, and that Bailey J erred in turn in not holding that the Chief Magistrate had erred in law in his construction of the conclusion. Putting it shortly, the worker contended that the "*promotion process*" construction of the exclusion was wrong in law.

[20] In the course of argument in this court, the court was referred to a number of decisions on provisions in the Safety Rehabilitation and Compensation Act 1988 (Cth) and one on the Workers Rehabilitation and Compensation Act 1986 (SA) dealing with work related stress injury. The provision considered in the South Australian Case, *Workcover Corporation v Summers* (1995) 65 SASR 243, which is set out at 244, although in a general way similar to the exclusion part of the definition of "*injury*" in the NT Act, is significantly different in its structure and some of its wording, to the extent that I do not think decisions on its proper construction are of any help in deciding the particular construction question in the present case.

[21] The provision in the Commonwealth Act is considerably closer to that in the NT Act in its terms. The latest decision to which the court was referred was *Trewin v Comcare* (1998) 27 AAR 423. At 425 Heery J set out the definition of "*injury*" in s 4 of the Commonwealth Act. It began by defining "*injury*" in a slightly different way from the definition in question in the present case, but ended similarly with words of exclusion, as follows:

> *"but does not include any such disease, injury or aggravation suffered by an employee as a result of disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.*"

The Commonwealth Act thus has two exclusions and these are in substantially identical terms to two of the three NT Act exclusions. The presence of the third exclusion in the NT Act in my opinion has a significant bearing upon the construction of the presently relevant exclusion.

[22] In *Trewin* the Administrative Appeals Tribunal found that the worker's condition was the result of a failure to obtain a transfer or benefit in connection with her employment, so that her injury was not compensable. In his reasons for dismissing the appeal, Heery J noted that the Tribunal had dealt with the case on the footing that the worker's condition was the result of all the earlier uncertainty and stress over her failure to obtain permanency, these stressors all being related to her employment. He said "*all the employment related factors in the case were treated by the Tribunal as being caused by the failure by the applicant to obtain permanency*" (at 428). He then said that the Tribunal's conclusion was plainly open on the

evidence. In saying this he was adopting a "*promotion process*" construction similar to that accepted by the Chief Magistrate and Bailey J in the present case.

[23] Before adopting this construction Heery J had given some consideration to an earlier decision of Drummond J, *Comcare v Mooi* (1996) 69 FCR 439, in which Drummond J had indicated a possibly contrary view, which however had not been essential to the decision in that case, and with which Heery J indicated disagreement. Although Heery J decided the appeal on the basis of the "*promotion process*" construction, it is not clear from his reasons that that particular construction was contested before him.

[24] In *Comcare v Parker*, (2 August 1996, Butterworths Unreported Judgments No 960678) Finn J set aside a decision of the Administrative Appeals Tribunal awarding compensation to the worker for a stress injury, because of the inadequacy of the Tribunal's reasons. The case was remitted to the Tribunal for further hearing. The appeal before Finn J appears to have been conducted on the footing that the "*promotion process*" construction was appropriate. There was discussion whether particular incidents in the worker's employment could properly be said to be part of the promotion process: the alternatives considered were whether the incidents were "*totally separate to*" the promotion process or "*a connected part of the promotion procedure*". Finn J refrained from coming to firm conclusions on these or other matters argued before him, in the end basing his decision solely on the inadequacy of the Tribunal's reasons.

[25] When the case went back to the Tribunal, (*Parker v Comcare*, unreported, No A96/349, AAT No 11298, 11 October 1996) it was again decided in favour of the worker, on the ground that the worker's injury resulted not only from incidents within the promotion process but, the Tribunal said, also from

> "*the parallel existence of factors arising during the counselling session which, in our view, went beyond promotional counselling. In short, we find that there were multiple concurrent causes of Mrs Parker's injuries and not a single linear cause*". (par 63)

Summarising its approach, the Tribunal said, (par 65), that the matters arising at the worker's counselling session "*went well beyond the proper boundary of post interview counselling and played the major role*" in the worker's injury and did "*not fall within the exclusion in the definition of 'injury'*".

[26] Even if it were correct to say that there is authority on the Commonwealth Act's promotion exclusion firmly in favour of the "*promotion process*" construction (and that seems to me in any event to be a doubtful proposition), such a construction would seem to me to be more tenable than a similar construction of the same exclusion in the NT Act. This is because of the absence from the Commonwealth Act's exclusion provision of the third exclusion in the NT Act. It seems clear that administrative action taken in connection with the worker's employment, the third exclusion in the NT Act, could overlap with administrative action in the promotion process in the wide application given to it by the Chief Magistrate and Bailey J in the

present case. This position is avoided if what seems to me to be a quite straightforward reading is made of the NT Act's exclusions, namely that the first applies to mental stress injury resulting from disciplinary action, the second applies to such injury resulting, as it says, from failure by the worker to obtain promotion or benefit, and the third to such injury resulting from reasonable administrative action connected with the worker's employment, this last exclusion being well adapted to include events in the promotion process and other administrative events connected with the employment, but not mental stress injury resulting from the failure itself by the worker to obtain promotion or benefit.

[27] That this is the most straightforward reading of the second of the three exclusions seems to me to be apparent if an effort is made to state the "*promotion process*" construction in terms as close as possible to the words of the second exclusion itself. The result must be something like

> "does not include an injury … suffered by a worker as a result of … failure (including events before and after and connected with that failure) to obtain a promotion … or benefit."

[28] In my view, when the second exclusion is read bearing in mind the third, the events referred to in brackets fall much more easily into the third exclusion than the second. Adoption of the construction I favour does not involve the addition of any words to the second exclusion (or the third), except perhaps the word "*only*" after "*result*" in the second exclusion.

[29] In summary, in my view the foregoing approach gives a clear operation to each of the three exclusions, in each case by means of an unforced and obvious meaning. The meaning of the second exclusion is that if a worker suffers mental stress injury as a result of the non obtaining of a promotion or benefit, then the injury is not compensable; because of the presence of the third exclusion, in considering whether the injury resulted from failure to obtain promotion or benefit, the tribunal or court would not take into account either matters leading up to the employer's decision not to promote or benefit the worker or actions of the employer consequent upon the employer's decision not to promote or benefit the worker. Whether the last mentioned matters and actions had the effect of excluding a worker from compensation would depend upon their assessment by the Tribunal under the third exclusion.

[30] In applying this construction to the present case, I mention first that I think Bailey J was right in summarising the approach of the Chief Magistrate as involving acceptance that unreasonable administrative actions had occurred and made some contribution to the worker's injury; but next, upon my view of the proper construction of the second exclusion, it cannot follow from the Chief Magistrate's findings of fact that the effective cause of the worker's injury was failure to obtain promotion or benefit. In my opinion the finding that some events outside any of the three exclusions made some contribution to the worker's injury excludes in law the conclusion that the injury was "*a result of … failure by the worker to obtain a promotion … or benefit …*". On

the Chief Magistrate's findings the injury was the result both of the worker's failure to obtain a promotion or benefit and of other materially contributing factors.

[31] In my opinion the Chief Magistrate's findings of fact required a decision in favour of the worker. Further, in my respectful opinion, Bailey J erred in law in not coming to that conclusion.

[32] I would add that if my interpretation of the exclusion part of the definition of "*injury*" is wrong, and the "*promotion process*" construction should be adopted, then a version of the conjunctive construction submission for the worker would need to be considered. If the second exclusion is to be read as encompassing events before and after the worker's failure to obtain promotion or benefit, those events would necessarily include events in the nature of administrative action; in view of the insistence in the first and third exclusions upon reasonable disciplinary action in the one case and reasonable administrative action in the other, I would be of opinion that the second exclusion in referring to (on this hypothesis) the "*promotion process*" must have been contemplating a proper or regular promotion process, not one involving, as here, unreasonable administrative actions.

[33] On this approach also, on the findings of fact made by the Chief Magistrate, he could not, as a matter of law, have found that there had been a proper or regular promotion process within the (presently assumed) meaning of the

second exclusion, and on this approach also, Bailey J, with respect, himself erred in law in not finding that the Chief Magistrate had erred in law.

[34] On either view the worker's appeal should, in my opinion, be upheld, and it should be ordered that (i) the orders of Bailey J be set aside, (ii) the decision of the Chief Magistrate be set aside, (iii) the worker's claim be returned to the Work Health Court for her compensation to be quantified and (iv) that the employer bear the worker's costs of the proceedings before the Chief Magistrate, before Bailey J, and in this court.
