

PARTIES: CORBETT, Jennifer

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: LA 5 of 2014 (21223534)

DELIVERED: 11 August 2015

HEARING DATES: 5 and 29 December 2014

JUDGMENT OF: BARR J

CATCHWORDS:

APPEAL – Workers’ compensation – appeal from Work Health Court – worker unsuccessfully claimed compensation for mental injury – magistrate found that injury was result of reasonable administrative action taken in connection with the worker’s employment and hence not compensable as an “injury” as defined – Work Health Court failed to apply the correct legal test in deciding the issues raised by the employer’s defence of reasonable administrative action – employer had to prove that administrative action relied on was the cause of worker’s injury to the exclusion of any other work related causes – error of law – appeal allowed – decision in favour of worker not inevitable – matter remitted to the Work Health Court for retrial.

Workers Rehabilitation and Compensation Act; Return to Work Act, s 3, s 53, s 116.

Rivard v Northern Territory (1999) 150 FLR 33, applied.

Hart v Comcare (2005) 145 FCR 29; *Swanson v Northern Territory* (2006) 204 FLR 392, not followed.

State Transit Authority of New South Wales v Fritzi Chemler [2007] NSWCA 249; *Attorney General's Department v K* [2010] NSWCCPD 76; *Wiegand v Comcare Australia* [2002] FCA 1464; *Athval Management Pty Ltd v Doherty* [2002] NSWCA 277, followed.

Wilson v Lowery (1993) 4 NTLR 79; *Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd* [2013] NSWCA 46, referred to.

REPRESENTATION:

Counsel:

Appellant:	D McConnel
Respondent:	K Sibley

Solicitors:

Appellant:	Ward Keller
Respondent:	Collier Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Corbett v Northern Territory of Australia [2015] NTSC 45
No. LA 5 of 2014 (21223534)

BETWEEN:

JENNIFER CORBETT
Appellant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 11 August 2015)

- [1] The appellant worker (“the worker”) commenced proceedings in the Work Health Court in Alice Springs claiming that she had suffered injury (a depressive illness) arising out of or in the course of her employment with the respondent employer. The worker’s claim was disputed on a number of grounds by the employer. One of the grounds was that the worker’s injury was a result of reasonable administrative action taken in connection with the worker’s employment.¹

¹ Amended Defence, par 29. See also pars 14.5, 15.2, 17.2, 18.2, 19.2, 20.4, 25, 26.3 and 27.

[2] The reference to ‘reasonable administrative action’ comes from the definition of “injury” in s 3 *Workers Rehabilitation and Compensation Act*² (“the Act”):

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 or her 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.

[3] If an injury (within the first part of the definition) is “as a result of reasonable administrative action taken in connection with the worker's employment”, then it falls outside of the statutory definition of “injury”, and a worker is not then entitled to the compensation otherwise payable in respect of that injury under s 53 of the Act.

[4] The parties agree that the employer (respondent) had the onus of establishing the reasonable administrative action exclusion. The parties conducted their respective cases in the Work Health Court on the basis that

² The *Workers Rehabilitation and Compensation Act* was amended by the *Workers Rehabilitation and Compensation Legislation Amendment Act 2015* (Act No. 9 of 2015), s 4 of which changed the name of the Act to the *Return to Work Act* with effect from 22 May 2015.

the employer had to prove that the worker's injury was "as a result of reasonable administrative action taken in connection with the worker's employment".

- [5] Where the reasonable administrative action exclusion is relied on by an employer, the employer must prove that the relevant reasonable administrative action was the sole cause of the worker's injury. This proposition is established by the decision of the Court of Appeal in *Rivard v Northern Territory*.³ There the Court considered the 'failure to obtain promotion or benefit' exclusion in the definition of "injury". Priestley J (Martin CJ and Thomas J agreeing) interpreted the exclusion as though the word 'only' were added after the word 'result', and added:

... 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 of 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.

In my opinion the Chief Magistrate's findings of fact required a decision in favour of the worker.⁴

- [6] In my view, with respect, the Court's interpretation of the exclusions in *Rivard* is not correct. There is no proper reason to interpret the exclusions as though the word 'only' were inserted after the word 'result' (twice

³ *Rivard v Northern Territory of Australia* (1999) 150 FLR 33.

⁴ *Rivard v Northern Territory of Australia* (1999) 150 FLR 33 at [28], [30].

appearing). In my opinion, the decision of the Full Court of the Federal Court in *Hart v Comcare*,⁵ in relation to an almost identical statutory provision to that under consideration, provides the correct interpretation of the exclusions. The Full Court held that, provided the injury (an adjustment disorder in that case) was suffered as a result of the appellant's failure to obtain promotions, the injury was excluded, with the result that the adjustment disorder was not an "injury" as defined. The Full Court declined to read into the words of the exclusion a "modifier ... to restrict the effect of the exclusion to circumstances where there were no other employment related causes".⁶ I agree. I agree also with the reasoning of Martin (BR) CJ in *Swanson v Northern Territory*.⁷ There his Honour held that, although a causal link is required between the administrative or disciplinary action and the injury, such action does not have to be the sole or even predominant cause of the injury.⁸

[7] Notwithstanding the view expressed by me in [6], I am bound as a single judge of this Court to apply the decision in *Rivard*. Although, technically, it is a decision in relation to the second exclusion and not the third, I do not think it can be properly distinguished on that basis.

[8] In the present case, the worker sought to establish entitlement to benefits under the Act as a result of an "injury", and the employer pleaded the

⁵ *Hart v Comcare* (2005) 145 FCR 29.

⁶ (2005) 145 FCR 29 at 33 [22].

⁷ *Swanson v Northern Territory of Australia* (2006) 204 FLR 392.

‘reasonable administrative action’ exclusion. It was therefore important for the Work Health Court to make findings, in the worker’s case, as to whether the alleged injury arose out of or in the course of the worker’s employment; and, for the purposes of the employer’s case, whether alleged administrative action taken in connection with the worker’s employment was reasonable, and whether it was a cause of the worker’s injury to the exclusion of any other work-related cause. The employer had the onus of proving that there was no operative cause of the injury other than the identified reasonable administrative action.

[9] The trial magistrate found that the worker suffered injury, which he described as “depression that was, at least, the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing mental injury”.⁹ His Honour held that the injury was “clearly connected to the worker’s employment” but did not make specific findings at that stage as to any particular work incidents which were causative of the injury. Although the magistrate referred to and quoted extracts from the evidence of three psychiatrists, some identifying causes of the worker’s injury, my reading of the whole of the Decision indicates that the magistrate did not necessarily adopt any of those postulated causes. I set out below the relevant part of the learned magistrate’s Reasons:¹⁰

⁸ (2006) 204 FLR 392 at 417 [100]. By reference to the cases cited on the appeal, listed at 204 FLR 393, it does not appear that Martin CJ was referred to the decision of the Northern Territory Court of Appeal in *Rivard v Northern Territory of Australia* (or to the decision of the Full Court of the Federal Court in *Hart v Comcare*).

⁹ Reasons for Decision par 7.

¹⁰ Reasons for Decision par 5, par 6.

Evidence of injury is provided by the reports of three psychiatrists:

Dr Rodney:

Diagnosed the Worker suffered from Major Depressive Disorder. The major precipitating factor from Ms Corbett's description is the perception of bullying and harassment within the workforce. She denies other factors.

Ms Corbett clearly has a pre-existing illness. She indicated to me that she informed her employer of this when she started. She has a long history of chronic depression and she has remained on antidepressants for a ten year period. I suspect that the long term depression that Ms Corbett had was more of a dysthymia than a major depressive disorder, however it is sometime difficult to determine this historically. One could argue there is some aggravation of a previous condition in her case.

Professor Sandy Macleod:

Ms Corbett suffered a relapse of a major depression following a revelation of concerns regarding her work competency.

She stated that she was shattered to be informed that there were concerns regarding her competency when she felt she had been working reasonably well.

She recalls being dumbfounded by the telephone call requesting the meeting regarding her competency.

Prior to this she had been very mildly relapsing consequent upon issues at work and her perception of being watched and bullied.

Dr Mary Frost:

Diagnostically, Ms Corbett suffered a Major Depressive illness as a result of work related stressors on a background of her having experienced previous episodes of depression but which were in remission at the time of her commencement of work in Borroloola in late 2011.

Dr Frost gave evidence by video link and was cross-examined. She was unable to give an exact date as to when what can be regarded as a normal response to negative life events slipped into illness. Dr Frost stated she was bewildered when told of the Worker's failure to disclose to her various important events in the Worker's history of encounters outside work that could have contributed to her illness. However, Dr Frost maintained a view that there was a work related component to the worker's depression and that work related issues contributed a substantial part.

Dr Frost noted the importance of work to the Worker and having work to fall back on had allowed the Worker to remain relatively healthy.

Professor MacLeod was under no doubt the Worker suffered depression following a revelation of concerns regarding the Worker's competency.

[10] After deciding that the worker's mental injury arose out of or in the course of her employment with the respondent ("clearly connected to the worker's employment"), the magistrate identified and considered a number of "work related events that the worker claims contributed to the worker's injury."¹¹ It is not necessary to refer to all of them. However, in conclusion,¹² his Honour said:

On the evidence I find her depressive illness was in response to the above mentioned actions taken to address issues of competency and performance. I find nothing unreasonable in how those actions were carried out.

As the injury was the result of reasonable administrative action taken in connection with the Worker's employment, the Worker's claim is dismissed.

¹¹ Reasons for Decision pars 8 - 21.

¹² Reasons for Decision par 21.7.

[11] The magistrate’s conclusion extracted in [10] appears to exclude any operative cause of the worker’s injury other than reasonable administrative action taken in connection with the Worker’s employment.

Arguments on appeal

[12] The worker submits on appeal that the magistrate erred: (1) in failing to identify all contributing causes to the worker’s injury, including those which the worker contends could not be characterized as reasonable administrative action; (2) in reversing the onus of proof in relation to the ‘reasonable administrative action’ exclusion, and (3) in failing to properly consider the worker’s arguments and in turn to provide adequate reasons.

[13] The worker’s principal ground of appeal relates to the magistrate’s consideration of the worker’s case that her injury was caused or contributed to in a material degree by her ‘toxic’ relationship with her co-worker, Nurse Richard Alexander.

[14] It is clear that the worker did not get along with Mr Alexander. The trial magistrate found that the worker “came to very much dislike” Mr Alexander. Their poor relationship may well have been the worker’s fault, or substantially so. It would appear that she lacked (or had insufficient) remote area nursing experience and competence,¹³ was overly ready to take offence, generally difficult to get along with (especially if she perceived any level of

¹³ The worker’s statement of claim even pleaded (par 7) that the worker did not have the skill set required of a Remote Area Nurse. However, the magistrate stated that he was “unable to say whether [the worker] had the required skill set to work as a remote area nurse”. See Reasons par 19.

criticism directed at her), and not a ‘team player’.¹⁴ The magistrate’s reasons included the following summary of the worker’s evidence relating to

Mr Alexander:

She perceived him as interfering with her treatment and management of patients which made her feel uncomfortable. She thought he took too many breaks for cigarettes, texted on his phone or chatted during meetings, didn’t always take the next patient in line. She felt this increased her workload. ...¹⁵

The worker stated she lacked confidence and took the N4 position with some misgivings. Nurse Alexander had more remote area experience than she did. It was a job where team work was required. She was highly critical of him to others. She resented him observing her work, suggesting to her how to do things and taking over in an emergency. ... He was, in her mind, too confident. He reminded her of her recently deceased mother with whom she did not have a good relationship.¹⁶

[15] The above extract says as much about the worker herself as it does about the worker’s view of Mr Alexander.

[16] The worker’s case in relation to Mr Alexander was pleaded in par 21 of the statement of claim. The worker alleged that she felt “alienated and under great scrutiny with the worker’s immediate supervisor and other co-employees becoming extremely critical of the worker’s performance culminating in the employer’s report into the proficiency of the worker concluding that the worker was not at a level expected of a RAN.”¹⁷ The particulars included that Mr Alexander informed his immediate supervisor of

¹⁴ These characteristics are evidenced in the detailed file note extracted and set out in [26] below.

¹⁵ Reasons par 8.

¹⁶ Reasons par 9.

¹⁷ “RAN” refers to a Remote Area Nurse.

the worker's lack of skills and remote competency, and that Mr Alexander conducted himself and treated the worker in an off-hand and dismissive manner.

[17] In par 23 of the statement of claim, the worker alleged that she informed her immediate supervisor of difficulties the worker perceived with a co-worker. The co-worker was Mr Alexander. The employer admitted that the worker made complaints about the co-worker's conduct.

[18] In par 25 of the statement of claim, the worker alleged that by January 2012 she was struggling with carrying out her duties because of "ongoing feelings of alienation and ostracism as a consequence of the conduct of a co-worker, her immediate supervisor and management staff giving rise to her experiencing elevated levels of anxiety in performing her duties." The employer denied those allegations, but in the alternative said that if the worker suffered an injury (which the employer denied), the injury arose as a result of reasonable administrative action taken in connection with the worker's employment.¹⁸ The worker's reply to that pleading by the employer is set out below:

In answer to paragraph 25 of the Amended Defence, the Worker joins issue with the defence of reasonable administrative action and says that even if the injury was caused by reasonable administrative action taken by the Employer in connection with the Worker's employment it was also caused by:

¹⁸ The employer referred to and repeated the allegations par 8.1 to par 23 of its Defence – see footnote 1 above.

- a. Her perceptions of unfair favourable treatment of RAN Richard Alexander by the Health Centre Manager;
- b. Her perceptions that the Health Centre Manager was singling her out for criticism and unduly scrutinising her work;
- c. Her perceptions that because of the favouritism shown towards RAN Alexander, the Worker had to work harder than RAN Alexander;
- d. Her perceptions that RAN Alexander was rude and disrespectful towards staff and patients at the Clinic;
- e. Her perceptions that the Health Centre Manager was motivated to single her out for criticism because of the adverse comments the Worker had made to the investigation referred to in paragraph 13 of the Statement of Claim and Defence; and/or
- f. Her perceptions of poor treatment of patients of the clinic;
- g. The actions documented in paragraphs 13 – 20 and 26 of the Statement of Claim which did not constitute reasonable administrative action taken in connection with the Worker's employment for the reasons stated herein;

such that the defence of reasonable administrative action is not available.

[19] The worker's reply extracted in [18] was important because it pleaded causes for the worker's mental injury other than causes which might be characterized as reasonable administrative action taken in connection with the worker's employment. As explained in [8], if any one such other cause were accepted by the Court, the worker was entitled to succeed because the employer would not have been able to prove reasonable administrative action to the exclusion of any other work-related causes.

[20] The worker’s reply extracted in [18] was important for another reason. The reference to the worker’s perceptions¹⁹ required the magistrate to consider whether the worker harboured such work-related perceptions, and not whether the perceptions were justified or reasonable.²⁰ His Honour was required to consider not only what happened to the worker, in terms of events in the workplace, but how the worker perceived those events. He then had to consider and decide whether such perceptions caused the worker’s mental injury. The authorities establish that, if a worker perceives conduct on the part of others in the workplace as creating an offensive or hostile working environment, and as a result of that perception suffers a mental injury, causation under workers compensation law is made out.²¹ There is an ‘eggshell psyche’ principle in the law of workers compensation, analogous to the ‘eggshell skull’ principle at common law.²² However, there is one significant qualification: the relevant perception held by the worker must be a perception about an incident which actually happened or an actual state of affairs.²³

[21] The legal issues in relation to the worker’s problematic relationship with Mr Alexander were addressed in closing submissions before the learned

¹⁹ See also par 23 statement of claim (perception of difficulties with co-worker), and par 23 statement of claim (feelings of alienation and ostracism as a consequence of the conduct of a co-worker).

²⁰ *Wiegand v Comcare Australia* [2002] FCA 1464 at [31], per von Doussa J; *Attorney General’s Department v K* [2010] NSWCCPD 76 at [54].

²¹ See, for example, *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249 at [51] - [54] per Spigelman CJ, Basten JA and Bryson AJA agreeing; per Basten J at [67] - [69]; *Attorney General’s Department v K* [2010] NSWCCPD 76 at [42] - [54].

²² *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249 at [40], per Spigelman CJ.

²³ *Wiegand v Comcare Australia* [2002] FCA 1464 at [24], per von Doussa J, who referred to it as the “reality test”.

magistrate by Mr McConnell of counsel for the worker. The matters argued on appeal were clearly identified at that stage.²⁴

[22] On appeal, Mr McConnell referred to parts of the trial magistrate's Reasons which, he contends, indicate that his Honour accepted that the worker had genuinely misconstrued Mr Alexander's behaviour towards her.

Notwithstanding a finding that the worker's evidence in court disclosed

"nothing that could be characterised as harassment or bullying by

Alexander",²⁵ the following part is relied on as indicating the magistrate's

acceptance of the worker's subjective perception in relation to

Mr Alexander:

Just as the worker had misconstrued Alexander's behaviour as harassment and bullying the worker has misconstrued Riggs' behaviour as unfavourable treatment, being singled out for criticism or unduly scrutinising her work.

Even accepting that the worker was inclined to perceive Alexander's and Riggs' actions as unfavourable towards herself [there is no basis on which she could form the belief that Riggs "made her life hell"].²⁶

[23] However, although the magistrate appears to have accepted the worker's subjective perceptions in relation to Mr Alexander, other parts of his Honour's Reasons suggest that he considered that there was no basis in fact for the worker's perceptions and/or that such perceptions were not causative

²⁴ Workers Closing Submissions, Appeal Book vol 1, p.16 onwards, pars 46 - 50; 144 - 146; 254 - 257.

²⁵ Reasons for Decision par 10.4.

²⁶ Reasons for Decision par 12.3 and par 12.4. Underline emphasis has been added.

of the worker's injury. So, for example, his Honour made the following statement:²⁷

Dr Frost reported on the work-related difficulties comprising perceived bullying and harassment and lack of managerial support.

Dr Rodney reports Ms Corbett felt she came into conflict with a couple of staff members including the supervisor. She said that there was one person specifically who started at the same time who was starting to make her life more and more difficult. She alleged that he harassed and bullied her.

Her [the worker's] evidence in court disclosed nothing that could be characterised as harassment or bullying by Alexander. She was at times unhappy, disgusted, annoyed but chose to deal with these feelings by ignoring him. She did not appear to have any difficulties relating to or working with the other nurses and doctors.

The worker claims she was struggling by January 2012 to carry out duties arising from ongoing feelings of alienation and ostracism.

The evidence does not support this. The worker chose to distance herself from Alexander. She was happy to have her own room to treat patients. She was happy to be given the paediatric portfolio and a training course in Darwin. She was given generous leave and there is no evidence on which I could find she was unfavourably treated regarding sick leave or call outs.

[24] The findings made in the passage extracted in [23] conflate several issues, including whether there was in fact harassment or bullying by Alexander, as distinct from the worker's emotional response to Mr Alexander's alleged conduct. The magistrate appears to have made a finding by implication that the worker's unhappiness, disgust and annoyance with Mr Alexander were not causative of her mental injury, because she was able to deal with those

²⁷ Reasons for Decision pars 10.2, 10.3, 10.4, 11.1 and 11.2.

feelings. Moreover, his Honour appears to have rejected the worker's claims of ongoing feelings of alienation and ostracism, for the reasons that (1) the worker chose to distance herself from Mr Alexander, and (2) the worker had no reason to feel alienated and ostracised, because she was given her own treatment room, the paediatric 'portfolio', the opportunity to do a training course, and generous leave. It is unclear why these were considered to be inconsistent with the worker having feelings of alienation or ostracism. Although factual findings in the absence of legal error are beyond the permitted scope of an appeal under the Act,²⁸ the issue raised on this appeal is not that the magistrate made findings against the weight of the evidence, or similar, but that his Honour did not properly analyse the evidence, apply the correct legal test, and give proper reasons for his decision.

[25] Mr McConnel of counsel for the appellant argues that, notwithstanding clear evidence that the worker had a subjective reaction to Mr Alexander, the magistrate excluded that reaction as a relevant contributing cause of the worker's injury because the reaction was unreasonable.²⁹ Mr McConnel refers to three areas of the evidence which, he contends, demonstrated the worker's subjective reaction:

²⁸ *Wilson v Lowery* (1993) 4 NTLR 79 at 84.9, par (4). A finding of fact cannot be disturbed on the basis that it is "perverse", or "against the evidence or the weight of the evidence or contrary to the overwhelming weight of the evidence", or even if no reasonable person could have arrived at the decision made, and even if the reasoning was demonstrably unsound.

²⁹ Appellant's Outline of Submissions, 28 November 2014, par 5.

- (a) The worker spoke to the clinic counsellor (on multiple occasions) about how to cope with Mr Alexander;³⁰
- (b) The worker raised her problems with Mr Alexander in her performance review meeting at which her manager, Ms Riggs, offered a mediation between the two of them in an attempt to resolve the worker's problems;
- (c) The fact that the worker was in an upset state on 19 and 20 December 2011 when discussing Mr Alexander with Ms Riggs.

[26] In relation to (c), one of the documents in evidence was Ms Riggs' record of discussions with the worker. I have extracted the following for their discussions on Monday 19 December and Tuesday 20 December 2011:³¹

Monday 19/12/2011

Jenny [*the worker*] requested to speak to me. Jenny advised me that a client had complained to her about ringing the clinic after hours on two separate occasions and on both the 2 x staff on call refused to attend to the child in question. Jenny stated the 2 x staff were Angela and Richard [*Alexander*]. I advised I would talk to them and discuss with them what their assessment was and their reasoning for not attending the call out. Jenny went on to say this was not the first time Richard had not come in to see a client.

We again discussed what was an appropriate call out and what was not an appropriate call out. We discussed Jenny's 2 x callouts at 0200hrs and 0630hrs this morning. I advised that both callouts could have waited and were not emergencies. Jenny was annoyed at this

³⁰ Worker's evidence in chief, AB vol 1, 166.

³¹ Court Document Book, pp. 253 - 257.

suggestion but stated “Yes I have to learn to say no”. She said “I feel sorry for them”. I stated that going out to a call out one and a half hours before the clinic opened placed pressure on the clinic for the rest of the day as we were then short staffed. I stated that asking a client to wait 1 or 2 hours for something that was not an emergency was not unreasonable. Jenny agreed.

We then discussed Jenny’s complaint to other nursing staff about my favouring Richard. I stated I thought we had discussed this issue previously and had resolved this. We went over our conversation prior to me going to the HSM meeting. We discussed Jenny’s prior statement that she now felt better about Richard. I advised Jenny that Jo V and Heather had come to me and advised how Jenny had spoken to them about how she feels Richard is favoured by myself because he comes and speaks to me in my office. I had advised Jenny that Richard comes in and talks to me about his work and the clients he is seeing. That he is in fact either reporting or seeking advice on his clients. This had been his practice with my predecessor.

...

Tuesday 20/12/2011

1300 hrs Jenny was dropped off by her partner Tom at the back door of the clinic. I was in the car behind Jenny and her partner. I opened my car door and stepped out. Tom began reversing although he could clearly see me and nearly backed into my car. My husband drove forward to give Tom more space to leave. Tom refused to look at me even though I was directly beside him. Tom skidded the tyres of his car reversing and then accelerated very fast up the driveway spinning the tyres of the car as he drove off the clinic property. His face was set in a grim manner.

As I walked in the clinic behind Jenny I asked Jenny if Tom was alright as he seemed angry and she said “Probably but he was in a hurry to get to work”. She looked uncomfortable.

I asked to speak with Jenny about her [*rostered days off and other matters*]. Jenny came into my room and shut the door.

I asked Jenny again when Tom was angry about. She stated it was probably over our conversation the previous day. Jenny stated she

had talked with her partner about our conversation about Richard and herself. I then stated that we manage aggression with clients on a regular basis and that it was unnecessary to then have aggression perpetrated upon us by a staff member's husband. I stated his behaviour was unacceptable. Jenny agreed. I advised Jenny that Tom was not welcome on the clinic grounds if he behaved like this as his behaviour was unsafe and unacceptable. He could have run down a child or adult driving like that up our clinic driveway and at that speed. I asked Jenny to please ask Tom to come in and see me.

I asked Jenny what it was that annoyed her and made her so angry. Jenny then talked about her anger with Richard Alexander. I asked Jenny what it was about Richard's behaviour that pressed her buttons. Jenny stated it was probably that he reminded her of her mother with whom she said she had not had a good relationship. Jenny stated Richard had similar behaviours like that of her mother eg: tells her what to do. Jenny stated her mother always told her what to do and she feels Richard did the same. I asked for an example. Jenny stated when she was working beside Richard in ED one day and he started helping her with a patient she felt he was trying to take over. I asked her could that have been a perception and thinking back does she think he might have been trying help her – team work. Jenny said yes that could have been the case.

Jenny said Richard was confident and she felt annoyed that she didn't have the same confidence. Jenny stated she was annoyed with Richard when she went out to a call out with him as he took over the lead role. We discussed what the roles would be in an emergency situation. We identified a staff member would need to take on the lead role and the most experienced person would likely take this leadership position. Jenny agreed. Jenny also identified that this particular situation where she went out in the ambulance with Richard was only the 2nd emergency call she had attended. I asked Jenny to consider what would be the safest approach in managing an emergency. Jenny agreed that Richard taking the lead role would be appropriate.

Jenny said she had been to speaking with Gil the clinic counsellor about her feelings about Richard and was addressing her issues with Gil. Jenny stated she had been having regular counselling sessions with Gil since arriving at Borroloola.

I asked Jenny what it was that then made her angry with me. Jenny stated it was the fact that I was manager and she felt Richard was

walking all over me. I asked Jenny to outline the behaviours that annoyed her that she thought I should manage and how she would like to see them managed. Jenny stated Richard sometimes texts during the morning meeting and she would like to see him pulled up about that. Jenny stated he was caught by another member on Google one day when he worked in the treatment room. I asked Jenny when was the last time Richard worked in the Treatment room and she stated it was some time ago and she couldn't remember. I advised Jenny I had also seen her on Google before and using the clinic phone to manage her business. I advised Jenny that appropriate management of a staff member's behaviour was not chastising them in front of other staff members. I advised that would be bullying. We discussed appropriate ways to manage behaviours and strategies to ensure you got the behaviour you wanted. This was in an attempt to educate Jenny around appropriate staff management strategies.

Jenny then went on to talk about Richard's smoking. I advised Jenny that Richard had given up smoking now for 5 x days. Jenny stated she was unaware of this.

I directed Jenny not to team split by continuing to talk to other staff about her anger and dislike of Richard and also saying to staff that I favour Richard. I advised this behaviour was now bullying and it had to stop.

I advised that as discussed yesterday it was Jenny that I had given 2 weeks leave in an effort to be supportive, after she had only been working at Borroloola for 4 weeks. I advised Jenny I had sent her off to 2 x training sessions in the first month and a half she had been at Borroloola. Jenny had wanted to work in the Children's room and I had given her that portfolio. I again stated that if one looked at the big picture one would see that Jenny had been given more support than other staff. Jenny agreed.

I stated that this behaviour was divisive and bullying and it must stop. Jenny said she now understands and stated she won't go around talking to all the staff complaining anymore. I reiterated that this behaviour was team splitting and during our last conversation Jenny also said she would stop this behaviour but 2 x other staff had both come to me and advised Jenny had stated she still felt I was favouring Richard and that she was also very angry with Richard. I advised Jenny that while other staff had likely sympathised with her they obviously had not felt comfortable with Jenny's disclosure as they had mentioned this to me. I stated she obviously didn't take on

board the last conversation we had as she was still going to other staff complaining and demonstrating team splitting behaviours.

I asked Jenny what it was that would make her feel better and what it was she wanted to see happen. Jenny wanted to see Richard berated and pulled up in the meeting in front of staff. I advised Jenny there were many ways of managing a situation and confrontation was not the approach supported by management. Jenny commented that this was the acceptable approach in a hospital. I stated we are not in a hospital. I advised that the pressures on staff were different in a clinic to that of a hospital. I again advised an authoritarian approach was not the most acceptable approach in the management of staff.

I advised Jenny she needed to be more positive in the management of her feelings about Richard. I stated her present ruminating about him was unhealthy. I advised her not to dwell on negative feelings towards Richard. But instead to concentrate on the positive aspects of their working relationship. Jenny asked what were they? I stated everyone had good points and not so good points. I stated Richard worked differently and was probably moulded by his time in other remote communities. In answer to Jenny's comment about what were Richard positive points I stated to Jenny that Richard was a team player, he had very good emergency skills and he never talked to staff about other staff. I advised if he had a complaint, it was about work issues. I advised that Richard had excellent cannulation skills especially in a pressured situation. Jenny stated this was a bit of an issue for her as she felt it highlighted her own inadequacies. I stated that from our conversation Jenny's issues appeared to be more about herself than Richard. Jenny appeared to accept this premise.

[27] It could be inferred from the lengthy extract in [26] that the worker had been, and probably still was, unable to get over her feelings of resentment and bitterness directed towards Mr Alexander. The summary of Ms Riggs made clear that the worker was probably unreasonable in her response to Mr Alexander and that likewise her perceptions were unreasonable. However, Ms Riggs referred to and seemed to acknowledge the worker's anger with Mr Alexander, and appeared to accept that Mr Alexander did

provoke a very negative response in the worker (“presses her buttons”). Ms Riggs even referred, possibly presciently, to the worker’s unhealthy ruminating about Mr Alexander. There were a number of actual events, mentioned by the worker, which triggered the worker’s unreasonable responses and perceptions including: Mr Alexander spending time in Ms Riggs’ office (which, to the worker, suggested favouritism); Mr Alexander helping the worker with a patient on one occasion in the Emergency Department (which the worker perceived to be an attempt by Mr Alexander to take over from her); Mr Alexander taking over the lead role from the worker in an emergency call-out; Mr Alexander being more competent and confident than the worker in remote nursing skills, for example, cannulation skills; Mr Alexander sending text messages during morning meetings; and Mr Alexander’s smoking.³² Although the worker’s expressed dissatisfaction with Ms Riggs’ management of Mr Alexander reflected a problem between the worker and Ms Riggs, it was linked to the worker’s dislike of Mr Alexander and her resentment of him.

[28] The discussions between the worker and Ms Riggs on 19 and 20 December 2011 took place three weeks or thereabouts before the worker learnt that management had concerns about her clinical competence, resulting in a state of physical and mental collapse in which the worker found herself unable to continue working.

³² These matters might well have satisfied the “reality test” referred to by von Doussa J in *Wiegand v Comcare Australia* [2002] FCA 1464 at [24].

- [29] Given that the worker's case was based on her alleged perceptions, pleaded and summarised in [18], the magistrate was required to decide whether the worker had such perceptions (reasonable or not), and, if she did, whether they were perceptions about an incident or incidents which actually happened, or an actual state of affairs, as explained in [20]. The next step was to consider whether those perceptions caused the worker's mental injury. In that last respect, the expert psychiatric evidence became relevant.
- [30] As described in [9] above, the magistrate made a finding as to the mental injury suffered by the worker, and then quoted extracts from the evidence of psychiatrists Dr Rodney, Professor MacLeod and Dr Frost. Those extracts included a reference to causes (although the magistrate did not actually adopt the postulated causes). The "major precipitating factor" stated by Dr Rodney (or attributed by the magistrate to Dr Rodney) was the worker's perception of bullying and harassment within the workforce. The magistrate did not attribute any specific statement of causation to Professor MacLeod, but quoted extracts which referred to the worker having "suffered a relapse of a major depression *following* a revelation of concerns regarding her work competency", and to fact that the worker "had been *very mildly* relapsing consequent upon issues at work and her perception of being watched and bullied" [italic emphasis added]. In relation to Dr Frost, the magistrate referred only to the fact that work related issues had, in Dr Frost's view, contributed a substantial part to the worker's depression.

[31] Relevant to the issue argued on appeal in relation to Mr Alexander, the medical evidence at trial was far more extensive than the brief parts extracted in pars 5 and 6 of the magistrate's Reasons. I set out below extracts from the reports of the three psychiatrists which suggest that the worker's problematic relationship with Mr Alexander was a cause of her mental injury.

[32] I start with the report of Dr Mary Frost, dated 13 June 2012:³³

Ms Corbett noted from the outset that she had some difficulties with a male colleague. She found his attitude to be "rude and disrespectful to both staff and patients". She described him as often "avoiding work, standing outside smoking". Ms Corbett mentioned her concerns regarding the male nurse to her nurse manager. However, the manager always "made excuses" for the male nurse, leading to Ms Corbett believing that she was not able to be supported with this issue, which directly impacted upon her own workload. The allegiance between her manager and her colleague gave rise to feelings of alienation and ostracism for Ms Corbett.

...

From the history provided by Ms Corbett, it would appear that a poor working relationship with a colleague at the same level as herself, coupled with a lack of support from her nurse manager, started to gradually undermine her wellbeing. However, it would appear that a process of review made her increasingly anxious. As her anxiety mounted her confidence and thus competence decreased. Finally, allegations of incompetency were made.

From the history provided by Ms Corbett, it would appear that the "final straw" was an apparent lack of procedural fairness whereby Ms Corbett was rung at home when she was off duty, sleeping, to inform her that a recent performance review had been unfavourable. From this time onwards Ms Corbett has been unable to work as a nurse. ...

³³ Appeal Book vol 2, pp. 381, 385 - 6.

[33] In her report dated 11 November 2013, Dr Mary Frost wrote as follows:³⁴

Based on the history provided by Ms Corbett, it would appear that the perceived bullying and harassment from a co-worker, coupled with adverse treatment by her manager and subsequent punitive reactions by the employer, led to her mental health deteriorating. After Ms Corbett was told that she would be performance managed, having shared concerns about her male colleague's competence and its impact upon patient care, Ms Corbett experienced undermining of her self-worth and vastly reduced self-confidence which, from the employer's perspective, further contributed to an impression of impaired performance. However, Ms Corbett previously had a vulnerability with regard to her confidence and self-worth, which the stressors in the workplace had aggravated.

[34] I next turn to the report of Dr James Rodney, dated 21 March 2013:³⁵

Towards the end of 2012 Ms Corbett felt that she came into conflict with a couple of the staff members including the supervisor. She said that there was one person specifically, Richard, who started at the same time who was starting to make her life more and more difficult. She alleged that he harassed her and bullied her. He was overbearing and disrespectful to her and the patients. This led to ongoing friction and conflict within the workforce.

Ms Corbett discussed this with her manager and then eventually with the Director of Nursing who visited the site and she felt that they were just not listening to her complaints about this alleged harassment. She felt that management gave her no support.

By the end of November 2011, Ms Corbett felt quite under siege. She said that the only feedback that she could get from management was negativity and criticism.

Despite that, Ms Corbett was not verbally warned about her capacity for work and suddenly without warning she said that she got a letter in January 2012 to indicate that she was subject to performance management, that she was incompetent in her work and that she was impaired and not suitable to the job. This came like a lightning bolt out of the blue for her.

³⁴ Appeal Book vol 2, p. 402.

³⁵ Appeal Book vol 2, p. 415 - 416.

Ms Corbett has never felt so devastated following this matter.

When Ms Corbett received the abovementioned letter, she just felt that she collapsed completely and she feels that she has remained unwell throughout the last 12 months.

[35] Finally, I refer to the report of Associate Professor MacLeod, dated 30 December 2013:³⁶

She acknowledged that prior to the work related “incident” at Borroloola, probably over the month or two before it, that she was a little fatigued but she stated that consequent upon the issues at work, and her perception of being watched and bullied, she became tearful, her fatigue was dramatically enhanced and her mood deteriorated. She stated that she was shattered to be informed that there were concerns regarding her competency for she had felt that she had been working reasonably well. She stated that she loved the job and though she appreciated that there were some issues with the manager and another colleague, these she did not consider were issues of competency. She recalls being dumbfounded by the telephone call requesting the meeting regarding her competency.

She said that she went to bed and did not get up again. She cried inconsolably. She felt angry. She yelled at her partner, she consulted the Union, she attended a counsellor at the clinic and discussed her predicament with a colleague who apparently had had a similar crisis.

...

I do not think there is any diagnostic doubt that Ms Corbett suffered a relapse of a major depression following the revelation of concerns regarding her work competency at Borroloola. She may have been very mildly relapsing prior to this for she noted that for the month or so before she was a little tireder than usual but also at that time she was acclimatising to new employment.

...

³⁶ Appeal Book Vol 2, p. 428, 432, 433.

... it would appear that the frank confrontation at her workplace regarding her competency served to exacerbate a pre-existing but relatively well-controlled depression. ... It may be [that] over the first two months the stresses associated with new employment initiated some minor exacerbation of her mood.

[36] It may be noted that the psychiatrists did not place equal importance on the causative significance of events and circumstances preceding the worker's breakdown on 10 January 2012. Dr Frost appears to have adopted the worker's history that her relationship with Mr Alexander was a contributing cause of her injury, in that it "undermined her well-being".

Professor McLeod states that the worker "may have been very mildly relapsing", prior to her ultimate breakdown following her competency being questioned. Dr Rodney said the worker believed that "her anxiety level began building up in late 2011 with the allegation of harassment and victimisation".³⁷

Conclusions

[37] On my reading and analysis of the Reasons, I am satisfied that the learned magistrate failed to apply the relevant legal test in deciding the issues raised by the employer's pleading of reasonable administrative action. His Honour's findings and conclusions, on the significant issue identified in the case below and on appeal, did not analyse the worker's contentions in the manner required by law. He did not refer to the principles explained in [20] above. He failed to make findings as to whether the worker did react emotionally or psychologically to actual events, situations or relationships

in the workplace. Rather, he conflated the issue of whether the worker had reactions or perceptions with whether those reactions or perceptions were reasonable and/or justified by the behaviour of Mr Alexander and others. The magistrate did not subject all the evidence, including the documentary evidence extracted in [26], to proper analysis directed to the legal issues raised by the pleadings and the arguments of counsel. As a result, the magistrate did not decide the issue as to whether the worker's alleged feelings of anger, resentment and bitterness towards Mr Alexander caused or contributed to her mental injury. Although his Honour considered the medical evidence, he did not analyse the medical evidence, parts of which I have extracted above, with specific reference to the identified issue.

[38] In not making a finding as to whether or not the worker's relationship with Mr Alexander caused her mental injury, the magistrate did not properly decide whether the defence of reasonable administrative action could apply in the circumstances.

[39] The errors referred to in [37] and [38] are properly characterised as errors of law for the purposes of s 116 of the Act.

[40] Mr McConnel submits that, given the learned magistrate's errors, I should allow the appeal, set aside the decision of the Work Health Court, make a finding that the worker's injury was contributed to by the worker's problems

³⁷ Appeal Book vol 2, p. 417.

with Mr Alexander and, in consequence, uphold the worker's claim.³⁸ In the alternative, if I cannot be satisfied that the worker's injury was contributed to by the worker's problems with Mr Alexander, I should still allow the appeal "on the basis of the totality of errors by his Honour in his approach to deciding the issues in the case and the failure to provide adequate reasons".³⁹ Mr McConnel contends that the matter should then be remitted to the Work Health Court for rehearing by another magistrate to determine the defence of reasonable administrative action.

[41] I do not think that it would be appropriate to make a finding on this appeal that the worker's injury was contributed to by her problems with Mr Alexander. The magistrate made findings adverse to the worker's credit in significant respects. He did not accept that the worker's evidence was truthful in relation to the Work Partnership Plan document, which the worker said was completed in her absence by Ms Riggs. The magistrate found that the worker "appeared to be prepared to exaggerate and/or reconstruct events in an attempt to show unfair treatment and harassment where none existed."⁴⁰ He also found that the worker's evidence that Ms Riggs "made her life hell" was unconvincing and contrived.⁴¹ In another context the magistrate found that the worker's description of incidents which were minor occurrences appeared to be "an attempt by the worker to

³⁸ Appellant worker's Outline of Submissions, 28 November 2014, par 90.

³⁹ Appellant worker's Outline of Submissions, 28 November 2014, par 91.

⁴⁰ Reasons for Decision par 14.

⁴¹ Reasons for Decision par 12.4.

paint a picture of unfair treatment or harassment” and that her evidence was unconvincing.⁴²

[42] Moreover, with respect to the worker’s alleged perception of being bullied or harassed by a co-worker or adversely treated by the manager, referred to in the report of Dr Frost extracted at [33], the magistrate made the following findings:⁴³

I find no basis for the worker perceiving being bullied or harassed by a co-worker or adversely treated by the manager. I accept the assessment of Riggs that the worker was upset with Alexander and wasn’t happy with how she was managing him. I accept Riggs’ evidence that the issues that arose were managed appropriately and the relationship was not rocky. The worker has reconstructed small incidents that caused her to be upset and angry with Alexander and, to some extent, unhappy with Riggs, as to amount to bullying or harassment by them. [underline emphasis added]

[43] It is unclear whether or not the magistrate’s finding in [42], that the worker had “reconstructed small incidents”, meant that the worker had deliberately and falsely re-constructed those incidents. However, the earlier finding that there was no basis for the worker’s perception of bullying and harassment came very close to being to a finding that the worker’s perceptions were not only unreasonable but did not pass the “reality test” referred to by von Doussa J in *Wiegand v Comcare Australia*.⁴⁴

⁴² Reasons for Decision par 16.

⁴³ Reasons for Decision par 17.2.

⁴⁴ See [20] and footnote 22 above.

[44] It would also appear, from the evidence which I have considered, that the worker had an irrational or near irrational dislike of Mr Alexander.⁴⁵ In those circumstances, I am not prepared to adopt the worker's narrative in which she (or any psychiatrists, on the basis of the worker's history⁴⁶) attributed the cause of her mental injury to a toxic relationship with her *bête noire*. It may simply be that the worker misattributed her breakdown to events and situations involving Mr Alexander.

[45] A further reason why it would not be appropriate for me to make a finding on this appeal that the worker's injury was contributed to by her problems with Mr Alexander is that are nuances in the facts relating to causation. For example, by reference to the worker's conversation with Ms Riggs on 20 December 2011,⁴⁷ it is apparent that Ms Riggs was attempting to make the worker understand that Mr Alexander's taking over the lead role in the particular emergency callout described by the worker was appropriate (or at least not inappropriate), as was Mr Alexander's helping the worker with a patient in ED one day. The record of the conversation disclosed a series of attempts by Ms Riggs to enquire about and understand the worker's complaints and concerns, and to explain that the worker's conclusions and perceptions were not reasonable, just as the worker's "team-splitting" conduct was also not reasonable. The worker subsequently complained to Dr Mary Frost, psychiatrist, of "an allegiance" between Ms Riggs and Mr

⁴⁵ See the worker's explanation given to Ms Riggs on 20/12/2011, extracted in [26] above.

⁴⁶ For example, Dr Frost seems to have accepted the worker's own attribution of her mental illness – see her evidence at Appeal Book Vol 1, p.273.2

Alexander, and a lack of support for the worker from Ms Riggs. The suggested allegiance and lack of support gave rise to feelings of alienation and ostracism and eventually undermined the worker's well-being.⁴⁸ The causation question arising from this evidence is whether the worker's mental injury was caused by the relatively innocuous things which Mr Alexander had done, or by the worker's psychological response to those things, or by the fact that the worker's manager did not support her, in not making an example of Mr Alexander in front of other team members at a staff meeting, as the worker requested. These causes (and possibly others) may have applied in combination. Depending on the court's assessment of evidence relating to alleged causative factors, it may be that the sole causative factor was Ms Riggs' attempt to sensibly counsel the worker and manage her inappropriate tendencies, which in turn may be found to be reasonable administrative action taken in connection with the worker's employment. I note in this context that the magistrate found Ms Riggs' actions to be appropriate management and "the reasonable actions of a manager".

[46] In summary, for reasons explained in [41] to [45], a decision in favour of the worker is not the inevitable result of my allowing the appeal.⁴⁹

Therefore, regrettably, a new trial is required. The matter must be remitted to the Work Health Court.

⁴⁷ Extracted in [26] above.

⁴⁸ See extracts from the report Dr Mary Frost, dated 13 June 2012, in [32] above.

⁴⁹ *Athval Management Pty Ltd v Doherty* [2000] NSWCA 277 at [31] per Heydon JA; *Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd* [2013] NSWCA 46 at [10] per McColl JA.

[47] Mr McConnel submits that, because there has been no appeal from the magistrate's findings as to injury, the matter should be remitted for rehearing to determine only the defence of reasonable administrative action. I respectfully disagree. I consider that all aspects of the statutory definition of "injury" should be re-litigated. The course proposed by the appellant's counsel would be quite artificial and could also result in significant unfairness to the employer.

Orders

[48] I allow the appeal. Pursuant to s 116(2)(c) of the Act, I make an order setting aside the learned magistrate's order dismissing the worker's claim. I remit the matter to the Work Health Court for retrial.
