IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S 142 OF 2016**

On Appeal From
the Full Federal Court of Australia

BETWEEN: **COMCARE**
Appellant

AND: **PETA MARTIN**
Respondent

REPLY OF THE APPELLANT

Filed on behalf of the Appellant, Comcare
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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II REPLY

2. The appellant does not accept the respondent's formulation of the issues at [2]-[4] of her written submissions (**RWS**). The first issue alleged by the respondent cannot be the subject of any serious contest: the Tribunal held that a number of factors contributed to her condition,[1] one of which was the realisation that her non-promotion meant that she would be returning to Mr Mellett's supervision.[2] This latter finding - that the injury *was caused by* the Respondent's *realisation* as to what the *non-promotion* meant for her – reflected the very finding the respondent invited the Tribunal to make.[3]

3. The respondent's case before the Tribunal was that a finding to this effect, as a matter of law, could not come within the exclusionary provision because 'any contribution caused by her disappointment with the loss of an opportunity for career advancement was immaterial'.[4] That is, the respondent argued before the Tribunal that, in its application to non-promotion decisions, the exclusionary provision in s 5A could only ever apply if the injured worker's disappointment resulted from a yen for the position in question (that is, a desire for career advancement or for more money). The Tribunal rejected that construction: see AB 31-32 at [60]-[61]. It is the correctness of the Tribunal's rejection of that suggested construction which arises as the central issue of principle in these proceedings.

4. Contrary to [4] of the RWS, the appellant's formulation of the issue at [2] of its written submissions (**AWS**) was not intended to suggest that the central issue is whether the exclusionary provision in s 5A(1) requires that a causal factor be, in an objective sense, the *necessary* consequence of administrative action. Here, the respondent's understanding of the effect of the non-promotion accorded with the objective reality (as to which see below), but that might not always be the case. An employee's subjective perception of the effect of administrative action might be quite wrong – but if it causes the employee's injury then, subject to satisfaction of the 'reasonableness' aspects of the exclusionary provision, that injury will be excluded.

5. To the extent paragraph [9] of the respondent's submissions suggest that Comcare accepted that the respondent suffered an adjustment disorder as a result of alleged bullying by Mr Mellett, it is incorrect.[5]

6. The RWS refer repeatedly to matters which are apt to distract or mislead.

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1 AB 29 at [60].

2 AB 31 at [58], [60], [61], and [62].

3 AB 29 at [51], last sentence.

4 Ibid.

5 AB 8-12, issues 1-9.

7. At [9]-[11] of the RWS reference is made to matters preceding the non-promotion decision. It is (only) the correctness of (i) the Tribunal's interpretation of the exclusionary provision in s 5A, and (ii) the Tribunal's application of s 5A to the facts found by it concerning the non-promotion decision, that arise for consideration in this appeal. In particular, in the two proceedings in the Federal Court below the respondent did not contest the correctness of the Tribunal's reasoning at [50] and [51] of its Reasons for Decision: see at AB 29.[6] That reasoning focuses attention on the effect of the non-promotion – not the matters canvassed by the respondent at [9]-[11] of the RWS.

8. At [23]-[28] of the RWS the respondent resists the proposition that a return to Mr Mellett's supervision was the necessary or inevitable result of non-promotion. It is suggested by the respondent that the Tribunal wrongly conflated the decision in question (not to promote) with another asserted decision: namely, to return the respondent back to the position she formerly held (RWS at [27]). However:

   8.1. the respondent's main reason for seeking the promotion was to avoid Mr Mellett's supervision: see Tribunal's Reasons AB 31 at [57] and [58].

   8.2. the respondent was acting in the subject position temporarily, pending it being filled substantively. Once another person filled the position substantively, the respondent would return to her substantive position: the respondent gave evidence before the Tribunal that she knew this.[7] Nor was there any evidence before the Tribunal to the effect that the respondent had asked her employer to take any other kind of administrative action in respect of Mr Mellett's supervision (such as a transfer at level out of the Renmark studio). She put all her eggs in the promotion basket: see the Tribunal's reference to the respondent focusing all her energy on winning the permanent position (at AB 23, [30]).

   8.3. therefore, returning to Mr Mellett's supervision was, on the evidence, the well-understood consequence of non-promotion. The medical experts put the causal issue in 'night follows day' terms: namely, when the respondent was notified that she had not won the promotion there was a 'significant deterioration' in her mental state: see Tribunal's Reasons at AB 25, [37]. They attached no significance to any alleged intermediate decision.

   8.4. Ms Raabus, a more senior officer (and Chair of the Selection Panel), gave evidence to the effect that as the conversation concerning non-promotion progressed, and the issue of returning to work in [the respondent's] substantive position was raised, the respondent became 'very upset and emotional'.[8] The respondent apparently accepts that it was never put to Ms Raabus that non-return to Mr Mellett's supervision was administrative action which should reasonably have been taken following non-promotion. The respondent herself gave no evidence to this effect. There is no

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6 Before the Full Court, Counsel for the respondent expressly conceded that the history preceding non-promotion was relevant, if at all, only because it explained why she decompensated after being informed of the non-promotion (Transcript of Full Federal Court appeal at p 6). Further, for present purposes it matters not whether the non-promotion caused an original injury or an aggravation of a pre-existing injury. The definition of 'injury' in s 5A includes the aggravation of an injury; and the exclusionary provision in s 5A applies equally to an original injury and the aggravation thereof.

7 Tribunal transcript 11/06/14 at p43 lines 14-22.

8 AB 30, [53].

suggestion it was raised as an issue in the Tribunal until *the respondent's counsel* referred to it in the course of final submissions.

8.5. in the absence of any evidentiary support for the causal role played by any so-called intermediate decision, little wonder the Tribunal gave it short shrift and found, instead, that: 'In her mind, the former [returning to work under Mr Mellett] was a direct and foreseeable consequence of the decision'.[9]

8.6. the error now asserted by the respondent at [27] of the RWS (overlooking the alleged intermediate decision) was not the subject of a Notice of Contention before Griffiths J, nor was it the subject of an appeal ground before the Full Court.

9. The asserted error is, with respect, a complete distraction. To the extent it has any relevance at all, it could only be relevant (on remittal) to the reasonableness aspects of the exclusionary provision – not to the causation question. Given the specific terms of s 5A(2)(f), discussing the respondent's return to her substantive position, following her non-promotion, was necessarily connected with her non-promotion, and therefore within the exclusionary provision unless some aspect of that discussion was not done reasonably.[10]

10. In the concluding part of [31] of the RWS, the psychiatric evidence is misstated. The psychiatric evidence was to the opposite of that asserted by the respondent: see Tribunal's Reasons at AB 25, [37]; AB 30, [56]; AB 31, [58].

11. At [33] of the RWS it is submitted that the non-promotion made no 'independent causative contribution' to the respondent's condition. However:

11.1. in the realm of psychiatric injury, with which s 5A is primarily concerned, administrative action will rarely, if ever, make an independent causative contribution beyond its impact upon the mind or psyche of an employee.

11.2. if the respondent had developed her injury upon realising that she would not attain a yearned-for prospect of career advancement that would not render the non-promotion any more of an 'independent causative contribution'.

11.3. in neither case can the non-promotion be regarded as merely chronologically precedent: in each case the non-promotion is causative precisely because of the effect it produces on/in the mind or psyche of the employee.

12. At [37] and [38] of the RWS various non-analogous examples are prayed in aid.

13. The example of an employee being directed to work at a particular place, falling down stairs, and suffering physical injury, is wildly different. In such a case, the cause of any physical injury is not being directed to work at a particular location – it is the physical force or impact of solid surfaces upon the body which is the

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9 AB 32, [61].

10 For the same reasons canvassed at [9] the majority in the Court below was wrong to attach any, albeit non-central, significance to this issue: see Murphy J at AB 142, [122]-[123], Siopsis J agreeing.

operative cause of injury. Nothing remotely similar happened to the respondent: her mind/psyche reacted to news of the non-promotion in a particular way. There was no intervening event of any kind.

14. The example of an employee who endures/experiences a corrosive fear of a renewal of perceived bullying, and then succumbs to a psychiatric illness in circumstances where, in his/her mind, no significance is attached to a long-forgotten non-promotion is also wildly different from the present case. Here, the respondent conducted her case on the basis that her injury was the result of an acute response to specific administrative decision (based on what it 'meant' for her),[11] rather than being the result of stress and pressure to which she was subjected in the course of her employment. But even in the example given, the question of liability may depend on particular factors (not relevant here) – such as whether the employee's fear was the product of underlying illness operating on a wholly inert workplace; or whether the employee's fear was based on the taking of administrative action which was not bullying but reasonable.

15. Much closer examples can be given which illuminate the vice in the respondent's approach to causation: for example, an employee who develops an illness because, in their mind, the non-promotion means having to work under a person of a particular race or gender.

16. At [39] of the RWS it is suggested that unstated additional limitations are warranted to somehow harmonize the reach of the exclusionary provision with the overall objectives of the SRC Act. The explicit constraints in s 5A tell against the need for any unstated limitations. The respondent's approach is a muted invitation to re-draw the supposedly fuzzy boundaries of s 5A.

17. The submissions in [40]-[43] of the RWS boil down to four propositions: **first**, the tort law approach to causation can be grafted on to s 5A without modification; **second**, the causal test posed by s 5A involves the application of common sense; **third**, the 'but for test' should not be applied; and **fourth**, the Tribunal's conclusion in relation to causation defied common sense.

18. As to the **first** proposition, s 5B has very significantly modified tort-law causation principles in relation to diseases.

19. As to the **second** proposition, resort to common sense as a framework should be rejected for the reasons referred to in [21]-[43] of the AWS. Further, judicial comments made in cases prior to the enactment of the SRC Act, to the effect that causation under workers' compensation legislation is to be resolved merely by the application of common sense, should not inform the proper interpretation and application of a provision such as s 5A, which was clearly inserted to achieve a particular purpose. For many years now this Court has made clear that resort to common sense, without proper regard to statutory context and purpose, can be misleading and unhelpful. Causation for the purpose of attributing legal responsibility does not attract a uniform set of principles. It is always purposive.[12]

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11 See, in particular [51], [53], [58] and [61] of the Tribunal's reasons.

12 *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [137]; see also *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [28]-[30], [45]-[46]; *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 29-32.

20. As to the **third** proposition, the appellant does not suggest that meeting the 'but for test' is sufficient to demonstrate the causal connection required by s 5A. There is nothing in the Tribunal's decision to indicate it applied such a test.

21. As to the **fourth** proposition, the RWS at [43(a)–(d)] mischaracterise certain findings of the Tribunal and/or their significance. In particular:

    21.1. as to the finding described at [43(a)] of the RWS, see at [7] above.

    21.2. as to [43(d)], the psychiatrists qualified by each party agreed that any 'yen' for the position was so minor its contribution to the respondent's adjustment disorder was immaterial.[13] They did not say that any contribution made by the failure to obtain the promotion was immaterial.[14]

    21.3. the respondent does not mention a number of the Tribunal's findings in relation to the link, in the respondent's mind, between her non-promotion and the return to the supervision of Mr Mellett.[15]

22. Paragraph 45 of the RWS goes to the heart of the difference between the parties. The respondent commences this paragraph by again ignoring the paragraphs of the Tribunal's reasons showing the Tribunal concluded the respondent understood that returning to the supervision of Mr Mellett would be a necessary consequence of non-promotion (well before she was advised of it) (see at [30], [55], [56], [57] and [58] of the Tribunal's reasons). Paragraph 45 concludes with the contention that the only issue is whether disappointment with the promotion decision itself contributed to the injury and this issue was resolved against the appellant. In advancing this contention the respondent confines 'disappointment with the promotion decision itself' to not gaining career advancement or additional monetary reward. This is an unduly narrow construction of s 5A that finds no warrant in its text or evident purpose.

Dated: 25 July 2016

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13 AB 30 at [56].

14 AB 25 at [37], AB 30 at [56] and AB 31 [58].

15 AB 30-31 at [55], [56], [58] and [61].