

HIGH COURT OF AUSTRALIA

GAUDRON ACJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

RONALD JAMES CALMAN

APPELLANT

AND

COMMISSIONER OF POLICE

RESPONDENT

Calman v Commissioner of Police [1999] HCA 60
10 November 1999
S187/1998

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 28 May 1998 and in place thereof order that:*
 - (a) *the appeal to that Court be allowed with costs;*
 - (b) *the decision of the Government and Related Employees Appeal Tribunal made on 15 June 1995 be set aside; and*
 - (c) *the matter be remitted to the Government and Related Employees Appeal Tribunal for further consideration in accordance with law.*

On appeal from the Supreme Court of New South Wales

Representation:

B J Gross QC with H W H Bauer for the appellant (instructed by Walter Madden Jenkins)

R A Conti QC with R J Weber for the respondent (instructed by Office of the Solicitor, New South Wales Police Service)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Calman v Commissioner of Police

Workers Compensation - Police - Compensation - Disease contracted in the course of employment - Aggravation of a disease where employment was a contributing factor - Whether officer entitled to compensation - Nature of entitlement - Necessity of appeal to Government and Related Employees Appeal Tribunal to vindicate entitlement - Whether "hurt on duty", *Police Regulation (Superannuation) Act* 1906 (NSW), s 1(2) - Whether an "injury", *Workers Compensation Act* 1987 (NSW), s 4(b) - Relationship between definition of "hurt on duty" and Police Service Regulations 1990 (NSW), reg 98.

Police - Compensation - Incapacity of officer - Disease contracted in the course of employment - Aggravation of a disease where employment was a contributing factor - Procedure for vindicating entitlement to compensation - Appeal from decision of Commissioner of Police to Government and Related Employees Appeal Tribunal.

Administrative law - Police - Workers compensation - Procedure for vindicating entitlement to compensation - Decision of delegate of Commissioner of Police - Appeal to Government and Related Employees Appeal Tribunal.

Words and phrases - "hurt on duty" - "injury".

Government and Related Employees Appeal Tribunal Act 1980 (NSW), ss 5, 24, 48, 54.

Police Regulation Act 1899 (NSW), s 12.

Police Regulation (Appeals) Act 1923 (NSW), s 6(1)(c).

Police Regulation (Superannuation) Act 1906 (NSW), ss 1(2), 10.

Police Regulation (Superannuation and Appeals) Amendment Act 1979 (NSW).

Police Service Act 1990 (NSW), ss 31, 186, 219.

Supreme Court Act 1970 (NSW), ss 48, 75A.

Workers Compensation Act 1987 (NSW), ss 4, 33.

Police Rules 1977 (NSW), r 76(1).

Police Service Regulations 1990 (NSW), reg 98.

- 1 GAUDRON ACJ, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ. This appeal is brought from the decision of the Supreme Court of New South Wales sitting as the Court of Appeal (Powell and Stein JJA, Priestley JA dissenting)¹ ("the Court of Appeal") which dismissed the appellant's appeal to that Court from a decision of the Government and Related Employees Appeal Tribunal ("the Tribunal"). The Tribunal had dismissed an appeal by the appellant against a decision by the Commissioner of Police ("the Commissioner") refusing, broadly, to compensate the appellant for a period of absence from his employment as a police officer. The appellant claimed that the absence was the result of being "hurt on duty".

The facts

- 2 The appellant was employed as a member of the New South Wales Police Service ("the Police Service") with the rank of Senior Constable. The appellant had been in the Police Service (and, formerly, the New South Wales Police Force) since 1966. For the greater part of his years in service he had been deployed at Belmont in the vicinity of Newcastle.

- 3 On 6 September 1993, at 9.30 am in the Newcastle Police Station, the appellant attended upon a superior officer who said to him:

"I have your papers here to be transferred to Sydney. If you feel like putting a report in we may be able to get you to Chatswood, if not you're looking at probably Kings Cross or inner suburbs."

The appellant thereafter commenced his shift at the rostered time of 2.00 pm. Having completed the shift, the appellant returned home. By that time he was in tears, had a massive headache and diarrhoea. The appellant has maintained that the receipt of the information, broadly, had a significantly detrimental effect on a pre-existing anxiety disorder.

- 4 On either 7 or 8 September 1993, the appellant consulted a doctor (Dr Hindley), who provided a medical certificate to the effect that the appellant was unfit for work for two months. On 4 November 1993, Dr Hindley provided a further medical certificate to cover the appellant's absence from 7 November 1993 to 12 November 1993. The appellant was absent from his employment from 8 September 1993 to 12 November 1993.

1 *Calman v Commissioner of Police* (1998) 16 NSWCCR 333.

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The claim

5 The appellant lodged a claim form, entitled "Claim for Hurt on Duty Benefits", signed on 12 November 1993. A section of the form was completed by the commander of the Belmont patrol and signed on 15 November 1993. The form was addressed to "The Manager, Workers Compensation Section, NSW Police Service", and was marked as received on 19 November 1993.

6 The opening paragraph of the form recited the basis of the appellant's claim:

"I wish to claim that I sustained the injury/illness described below whilst acting in my official capacity as a member of the NSW Police Service. I desire to have sick leave taken as a result of the injury/illness classified as being hurt on duty and/or to claim for the payment of associated hospital/medical expenses."

Enclosing the medical certificates provided by Dr Hindley, the appellant sought to have the period of 7 September 1993 to 12 November 1993 "classified as being hurt on duty". The section of the form entitled "CLAIM DETAILS" sought specification from the claimant as to how and when the incident occurred and what the claimant was doing at the time. The appellant specified that the incident occurred at 9.30 am on Monday, 6 September 1993, and that his rostered shift was to commence at 2.00 pm.

7 The injury claimed was described as:

"At the time and date stated attended Newcastle Police Station received Transfer Papers to Sydney, then suffered nervous depression and ... severe anxiety".

In response to the question on the claim form, "How did the injury/illness occur?", the appellant replied:

"In regards to my previous injuries hurt on Duty (File No P22041/12381) I have been [receiving] Medical treatment for a nervous disorder, and with the added pressure of having received a transfer to Sydney I was unable to cope at all."

Further, he specified that the injury had been reported to two police officers.

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The Commissioner's decision

8 The Commissioner's decision was recorded in a letter dated 20 June 1994, signed 7 July 1994 by the delegate for the Commissioner, Mr Sackie of the Workers Compensation Section of the Police Service. There is no challenge to the authority of Mr Sackie to make the decision pursuant to s 31 of the *Police Service Act* 1990 (NSW) ("the Police Service Act"). This provides that the Commissioner "may delegate to another member of the Police Service any of the functions conferred or imposed on the Commissioner by or under this or any other Act, other than this power of delegation".

9 The decision of the delegate of the Commissioner was:

"On the basis of evidence to hand, I am unable to approve [the appellant's] condition, absence and any related medical/hospital expenses as being duty related."

10 The appellant received notice of the decision of the Commissioner on 14 July 1994. The appellant lodged a Notice of Appeal ("the Notice"), entitled "HURT ON DUTY", with the Tribunal on 18 July 1994. The Notice described the decision appealed against as:

"Application by [the appellant], to have his condition of anxiety to-gether with absence on sick report from 8 September, 1993 to 11 November, 1993 and Medical expenses, classified as Hurt on Duty which was 'REJECTED'".

The basis of the claim

11 As Priestley JA observed in the Court of Appeal², no question was raised before the Tribunal as to the basis of the appellant's right to claim full pay for absence caused by being hurt on duty. The Tribunal's reasons for rejecting the appellant's claim turned upon whether the appellant could satisfy the definition of "hurt on duty" in s 1(2) of the *Police Regulation (Superannuation) Act* 1906 (NSW) ("the Superannuation Act").

12 This definition informs the appellant's claim. However, it is necessary, having regard to the course taken by the litigation in the Court of Appeal and in order to dispose of this appeal, to determine the specific statutory basis of the appellant's claimed entitlement. In turn, that determination is assisted by an

2 (1998) 16 NSWCCR 333 at 336.

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identification of the antecedents of the legislation which applied to the appellant's claim. To this identification of statutory antecedents we now turn.

The 1979 legislation

- 13 The starting point is the second reading speech on the bill for what became the *Police Regulation (Superannuation and Appeals) Amendment Act 1979* (NSW) ("the Amendment Act"). This was delivered on 16 October 1979. The Minister described the main purpose of the bill as fulfilling a commitment to "improve the benefits and entitlements of police hurt on duty"³. The Minister described the content of these improved benefits and entitlements in the following terms⁴:

"The proposals given legislative form in the bill are the outcome of consideration given to the question of whether or not police should be covered by the workers' compensation scheme. Members of the police force have been excluded from workers' compensation from the enactment, in 1926, of the principal workers' compensation legislation now in force. The reason for the exclusion was the existence of a scheme of compensation for police hurt on duty in the [Superannuation Act]. Possibly also of influence was the common law origin of the office of police constable in English law^[5], which may have led to the conclusion that workers' compensation – based on injury arising out of the performance of a contract of employment – was inappropriate for members of the police force."

Whilst confirming that the exclusion of police from the ambit of workers' compensation was to continue, the Minister then said⁶:

"However, it is recognized that the compensation elements in the police superannuation scheme need to be improved and, in certain respects, brought

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- 3 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 October 1979 at 1843.
- 4 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 October 1979 at 1844.
- 5 See *Enever v The King* (1906) 3 CLR 969; *Attorney-General for New South Wales v Perpetual Trustee Company Ltd* (1955) 92 CLR 113 at 118-120; [1955] AC 457 at 478-479.
- 6 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 October 1979 at 1844-1845.

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into line with the compensation provided for the general work force. As things stand under the [Superannuation Act], a member of the police force who is incapable of discharging the duties of his office due to an infirmity occasioned by a wound or injury received in the actual execution of his police duty may be granted an annual superannuation allowance. Similar provision is made for widows of police killed on duty. The parallel provisions of the Workers' Compensation Act, which confer entitlements on workers, operate in respect of a personal injury arising out of or in the course of employment, whether received at or away from the place of employment. The workers' compensation provisions were given an extended operation by legislative addition to cover daily and other periodic journeys, and the provisions in the police scheme were similarly extended. Notwithstanding the similar treatment in this aspect, the fundamental differences between the operation of the police and the workers' compensation schemes have remained.

It has been decided that provision be made to ensure that police may be compensated whenever they are injured in circumstances in which a worker would be covered by workers' compensation. To achieve this end, the police scheme would operate in respect of police hurt on duty. The expression 'hurt on duty' would be defined as meaning, in relation to a member of the police force, injured in such circumstances as would, if he were a worker within the meaning of the Workers' Compensation Act, 1926, entitle him to compensation under that Act." (emphasis added)

- 14 The Amendment Act omitted s 6(1)(c) of the *Police Regulation (Appeals) Act 1923* (NSW) ("the Appeals Act") and inserted a new paragraph. The omitted paragraph had provided for appeals to the Crown Employees Appeal Board ("the Board") against decisions of the Commissioner "to grant or refuse leave of absence on full pay to a member of the police force during any period of absence occasioned by a wound or injury received in the same circumstances as those referred to in section 10 of the [Superannuation Act]". The circumstances referred to in s 10 were:

- "(a) by a wound or injury received in the actual execution of the duty of his office; or
- (b) by a wound or injury received, without his serious and wilful misconduct, on any of the daily or other periodic journeys referred to in

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section 10A(1) or any of the other journeys referred to in section 10A(2)^[7], which wound or injury was not received –

- (i) during or after any substantial interruption of, or substantial deviation from, any such journeys made for a reason unconnected with his attendance at a place referred to in section 10A(2)(a); or
- (ii) during or after any other break in any such journey which, having regard to all the circumstances, was not reasonably incidental to any such journey; or
- (c) by a wound or injury received, without his serious and wilful misconduct, on any day on which he had, in the actual execution of the duty of his office, attended at a police station or other place to which he had been detailed to perform duty –
 - (i) while he was temporarily absent therefrom on that day during any ordinary recess; and
 - (ii) if he had not during that absence voluntarily subjected himself to any abnormal risk of wound or injury."

The new s 6(1)(c) provided for appeals to the Board against decisions of the Commissioner "to grant or refuse leave of absence on full pay to a member of the police force during any period of absence caused by that member being hurt on duty within the meaning of section 1(2) of the [Superannuation Act]". As inserted⁸ by the Amendment Act, s 1(2) provided:

"'hurt on duty', in relation to a member of the police force, means injured in such circumstances as would, if he were a worker within the meaning of the *Workers' Compensation Act, 1926*, entitle him to compensation under that Act".

- 15 Thus, in 1979 the Amendment Act effected a significant change in the availability of entitlements for members of the police force injured, broadly, during the course of their employment. Whilst the entitlement remained contingent on a

7 Section 10A made specific provision as to those daily or periodic journeys to which s 10 applied.

8 Section 5 and item 1(b) of Sched 1.

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decision of the Commissioner, from which an appeal lay to the Board, the potential entitlements were expanded. Specifically, the limited circumstances referred to in s 10 of the Superannuation Act were expanded to those circumstances provided for by the definition of "hurt on duty" in s 6(1)(c) of the Appeals Act. Thereby the existing structure was overlaid by the workers' compensation coverage to which the Minister had referred.

16 The entitlements of members of the Police Service pursuant to the statutory regime established in 1979 turned, at first instance, upon a decision of the Commissioner. This decision-making process of the Commissioner was governed by the Police Rules 1977 (NSW). These were made under s 12 of the *Police Regulation Act* 1899 (NSW).

17 Rule 76(1) reproduced, in substantially similar terms, the circumstances which gave rise to an entitlement previously specified in s 10 of the Superannuation Act. The Commissioner was thus not compelled, when deciding a claim at first instance, to apply the criteria specified in the definition of "hurt on duty" in s 1(2) of the Superannuation Act. In *Lambidis v Commissioner of Police*⁹, the Court of Appeal, comprising Kirby P, Priestley and Powell JJA, considered a claim brought pursuant to r 76(1)(b) for an absence from duty occasioned by infirmity of body or mind arising from an injury received in the "actual execution" of the duty of the claimant's office.

18 It was unnecessary for that Court to dispose of the question of whether there was an identity of content¹⁰ between r 76(1)(b), which replicated the repealed s 10(a) of the Superannuation Act, and the definition of "hurt on duty" in s 1(2) of the Superannuation Act. However, in order to dispose of this appeal, it is necessary to consider this question as it arises under corresponding provisions in force at the time of the appellant's claim in 1993. As the first step in doing so, we return to consider the regime in the form established in 1979.

19 Two categories of potentially meritorious claimants, under this regime, were distinguishable: first, a member who was within both the criteria provided for in r 76(1) and also the definition of "hurt on duty" in s 1(2) of the Superannuation Act; second, a member outside the criteria provided for in r 76(1) but within the definition of "hurt on duty". In the ordinary course, a claimant in the former category would obtain his or her entitlement by reason of a decision of the

9 (1995) 37 NSWLR 320 at 330, 334.

10 (1995) 37 NSWLR 320 at 327-328, 334, 337.

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Commissioner in which r 76(1) alone was applied. In that event, there would be no occasion for an appeal to the Board in which the Board would apply s 1(2). However, in the ordinary course, a claimant in the latter category would fail in a claim to the Commissioner and to vindicate his or her entitlement the claimant would be obliged to proceed by way of an "appeal" to the Board. Thus, the establishment of the respective entitlements of claimants in this latter category was contingent upon there first having been an adverse decision by the Commissioner.

20 This two step administrative process may appear procedurally onerous. However, this process gave effect to the scheme for the 1979 legislation, which the Minister had explained in the second reading speech, by ensuring workers' compensation coverage. Also, this regime did not involve any inconsistency or repugnancy between r 76(1) and the statutory definition of "hurt on duty". Rather, the statutory "entitlement" of a claim in this second category arose cumulatively, taking as the first step the decision-making process of the Commissioner under r 76(1).

21 It is convenient now to turn to the statutory provisions which applied to the appellant's claim. It will be seen that they continued in substance the relationship between the regulations and the statute which we have described above.

Applicable legislation and regulations

22 Section 186(1) of the Police Service Act reproduces, subject to one difference, the now repealed s 6(1)(c) of the Appeals Act¹¹. Instead of an "appeal" from the decision of the Commissioner to the Board, "appeal" now lies to the Tribunal.

23 Section 1(2) of the Superannuation Act retained, in substantially similar terms, the definition of "hurt on duty". As indicated above, the definition turns on the criterion of whether the member was "injured in such circumstances as would, if he were a worker within the meaning of the *Workers Compensation Act 1987*, entitle the member to compensation under that Act". In s 4 of the *Workers Compensation Act 1987* (NSW) ("the Workers Compensation Act") "injury" was materially defined as follows:

"(a) means personal injury arising out of or in the course of employment,

11 The repeal was effected by s 5 and Pt 1 of Sched 5 of the *Police Service (Complaints, Discipline and Appeals) Amendment Act 1993* (NSW).

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(b) includes:

- (i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor, and
- (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration".

24 The applicable regulations were contained in the Police Service Regulation 1990 (NSW) ("the Police Regulations"), made under s 219 of the Police Service Act. Regulation 98 did not repeat the terms of s 4 of the Workers Compensation Act. In particular, it repeated the phrase in the previous r 76(1)(b), upon which the decision of the majority of the Court of Appeal turned, "in the actual execution of the duty of his or her office". The regulation materially provided:

"(1) This clause applies to police officers who are contributors to the Police Superannuation Fund.

(2) Any such police officer absent from duty because of infirmity of body or mind is to be allowed full pay for the whole of the period of the absence if the Commissioner so approves:

- (a) if the absence from duty is occasioned by infirmity arising from a wound or injury received *in the actual execution of the duty of his or her office*, or
- (b) if the absence from duty is the result of an injury (within the meaning of the [Workers Compensation Act]) for which compensation would be payable (if the officer were a worker under that Act) under section 10 (journey claims) or section 11 (recess claims) of that Act." (emphasis added)

25 It was not disputed that the appellant was a contributor to the Police Superannuation Fund. However, as referred to above, the delegate of the Commissioner rejected the appellant's claim at first instance on the basis that it could not be identified "as being duty related". It was from that decision that "appeal" lay to the Tribunal pursuant to s 186(1) of the Police Service Act.

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The Tribunal

26 Section 5 of the *Government and Related Employees Appeal Tribunal Act* 1980 (NSW) ("the GREAT Act") created the Tribunal. Together with cognate legislation, this Act was enacted as a consequence of the recommendations of the 1978 Bowen Committee Report¹². The second reading speech referred to the legislation as a "fresh start"¹³, in part implemented by the repeal of the legislation¹⁴ under which the Board had been operating since 1944.

27 Section 186(2) of the Police Service Act provides that the GREAT Act applies to and in respect of an appeal under s 186 "in the same way" as it applies to a disciplinary appeal under Div 2 (ss 23-27) of Pt 3 of the GREAT Act. The applicable provision of Div 2 in this case was s 24. Section 48(2) of the GREAT Act provides that, in relation to an appeal under s 24 of the GREAT Act, the Tribunal "may decide to allow or disallow the appeal or make such other decision with respect to the appeal as it thinks fit". Further, s 48(3) provides that the decision of the Tribunal on appeal is "final", subject to the operation of Pt 5 (ss 54-56), entitled "Appeals from the Tribunal". In addition, s 48(4) obliges the Tribunal on appeal to provide its decision in the "form of an instrument in writing signed by the Senior Chairperson or Chairperson before whom the appeal was heard and shall include the reasons for the decision".

28 Various provisions of the statute disclose that the Tribunal is empowered to inquire into the merits of the matter before it, at a formal hearing and in a manner which is distinct from the process adopted by the administrative decision-maker at first instance. The effect of these provisions is as follows.

29 The sitting of the Tribunal was "formal" (s 36), as opposed to an "informal" hearing for promotion appeals under s 20 of the GREAT Act (s 35(1)). Evidence at such a sitting of the Tribunal is given on oath and is subject to cross-examination (s 38(1)). The scope of the evidence available to the Tribunal is not bound by the rules or practice as to evidence (s 43(1)). Further, the Tribunal, subject to an

12 New South Wales, Parliament of New South Wales, *Report of the Committee of Inquiry into the Appeal Rights of Government and Quasi-Governmental Employees in Promotion and Disciplinary Matters*, April 1978.

13 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 February 1980 at 4548.

14 Section 58 and Sched 5 of the GREAT Act.

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exception in s 43(2), may inform itself on "any matter in such manner as it thinks fit" (s 43(1)). Section 43(2) prohibits the Tribunal informing itself on, or taking into consideration, "any matter which has not been disclosed in evidence at a sitting of the Tribunal if the matter is one which ought, in the interests of justice, to be available for challenge or testing by the persons entitled to be present at the sitting". Moreover, s 44 confers power on the Senior Chairperson or Chairperson of the Tribunal to compel discovery of documents and the attendance of witnesses.

- 30 Thus the proceeding which the appellant initiated in the Tribunal, pursuant to s 186(1) of the Police Service Act, was, by the operation of s 48(2) of the GREAT Act, in substance, a fresh exercise of administrative power, this now being pursuant to the criteria laid down in s 186(1) of the Police Service Act. In that sense, the "appeal" may be described as an administrative hearing *de novo*.

The Tribunal's decision

- 31 The Tribunal applied to the appellant's claim the criterion provided in the definition of "hurt on duty" in s 1(2) of the Superannuation Act. It follows from what has been said above as to the relationship between the statute and the Police Regulations, in particular reg 98, that the Tribunal was correct in approaching the exercise of its function in this way. The Tribunal found that, at the time of the appellant's incapacitation and immediately prior to it, the appellant had been suffering a disease in the nature of an underlying anxiety disorder contracted in the course of his employment and to which his employment as a police officer was "a contributing factor". This finding was neither contested before the Court of Appeal¹⁵ nor before this Court. Further, the Tribunal properly characterised anxiety disorder as a "disease" within the meaning of the Workers Compensation Act.

- 32 The appellant submitted that both sub-pars (i) and (ii) of par (b) of the definition of "injury" in s 4 of the Workers Compensation Act applied to his case. The greater part of the Tribunal's decision was directed to the claim based on sub-par (ii) of s 4(b). The appellant contended that the disease had been exacerbated and that his employment was a "contributing factor" to that exacerbation, within the meaning of s 4(b)(ii). The Tribunal accepted that the appellant's incapacity for work was the result of the exacerbation of his anxiety disorder. However, it rejected the contention that it was the appellant's employment which was a "contributing factor".

15 (1998) 16 NSWCCR 333 at 339.

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33 The Tribunal identified the sole factor which contributed to the exacerbation to be the decision to transfer the appellant to "perform general duties in the Sydney metropolitan area and the consequential effect upon him of that decision when it had been communicated to him". Further, the Tribunal found that the decision to transfer the appellant:

"was not an event which occurred in the course of his employment as a police officer. A decision was made to transfer a number of police officers, the appellant being one of them, and the making of that decision was not an event in the course of his employment. Although there is a logical connection between the making of the decision and the appellant's employment, the thing or event which is the relevant exacerbating factor must be something which can properly be described as a part of the appellant's employment." (original emphasis)

34 The Tribunal distinguished between "relevant" exacerbating factors and other factors by reference to the performance of duties by the appellant as a police officer. In the event that the appellant's "duties or matters incidental to the performance of those duties [contributed] to the exacerbation of [his] disease", the Tribunal would have found in favour of the appellant. The Tribunal did not find that the notification of transfer by the appellant's superior officer was within this category of relevant exacerbating factors.

35 In the alternative, the appellant contended that his incapacitation was a manifestation of the disease within the meaning of s 4(b)(i) of the definition of "injury" in the Workers Compensation Act. Whilst, on the one hand, recognising that this disease arose in the course of his employment and that his employment had been a contributing factor, the Tribunal rejected the claim based on s 4(b)(i). It said that the appellant failed "[f]or the same reasons" as it had given with respect to the claim under s 4(b)(ii). The Tribunal concluded:

"We cannot accept that had the decision to transfer the appellant not been made, the anxiety disorder he was suffering from would have progressed to such a stage that he would in any event have been incapacitated for work commencing on 8 September 1993. This argument fails to recognise the significance of the timing of his absence from duty two days after he received notification of the decision to transfer him and the medical evidence that the appellant's symptoms had stabilised and improved in the first six months of 1993."

36 It is not apparent how these matters would have the effect of denying the application of s 4(b)(i) to the appellant. In applying s 4(b)(i) in this way, the Tribunal erred in law.

37 The finding that the underlying disease was contracted in the course of employment and that the appellant's employment was a contributing factor was sufficient to bring the matter within the meaning of "injury" in s 4(b)(i) of the Workers Compensation Act. Whether the particular occasion for the absence from work was triggered by an event within, or outside, the appellant's employment was irrelevant.

38 Once the appellant established that his underlying anxiety disorder was an injury within the meaning of the Workers Compensation Act, he was entitled "to compensation ... under [that] Act"¹⁶ upon proof that his total or partial incapacity for work resulted from that injury¹⁷. The question then for the Tribunal was whether the appellant's incapacity was causally connected to the underlying anxiety disorder. It has long been settled that incapacity may result from an injury for the purposes of workers' compensation legislation even though the incapacity is also the product of other – even later – causes¹⁸. Indeed, death or incapacity may result from a work injury even though the death or incapacity also results from a later, non-employment cause. Thus, in *Conkey & Sons Ltd v Miller*, Barwick CJ, with whose judgment Gibbs, Stephen, Jacobs and Murphy JJ agreed, held that it was open to the Workers' Compensation Commission to find from the medical evidence in that case "that the death by reason of myocardial infarction when it did

16 Superannuation Act, s 1(2).

17 Workers Compensation Act, s 33. Section 9A of that Act, which applies to injuries occurring after 12 January 1997, introduces a further requirement for a worker relying on a s 4(b)(i) or s 4(b)(ii) injury. In respect of such an injury, it is no longer sufficient that the injury arose out of or in the course of employment. An employer is not required to pay compensation merely because the injury has a causal or temporal connection with the employment. The worker must also prove that the employment was a "substantial contributing factor to the injury". However, s 9A does not apply in this case because the appellant's injury occurred before 12 January 1997.

18 *Salisbury v Australian Iron and Steel Ltd* (1943) 44 SR (NSW) 157 at 162; *The Commonwealth v Butler* (1958) 102 CLR 465 at 476; *Conkey & Sons Ltd v Miller* (1977) 51 ALJR 583 at 585; 16 ALR 479 at 484; *Bushby v Morris* [1980] 1 NSWLR 81 at 86-88.

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ultimately occur, 'resulted' from the work-caused injury of the first infarction, even if it could not be said that the final infarction was itself caused by work-caused injury"¹⁹.

- 39 Whether incapacity results from injury is a question of fact. Upon the findings in this case, however, the answer to that question could admit of only one answer. As a matter of law, the Tribunal was bound to find that the incapacity of the appellant resulted from injury within the meaning of s 33 of the Workers Compensation Act. Although the incapacity would not have arisen but for the appellant being told that he was to be transferred, there would have been no incapacity but for the existence of his underlying anxiety disorder. The incident, which was the immediate cause of his incapacity, merely exacerbated the underlying anxiety disorder which continued to exist, notwithstanding that immediately before the incident it manifested no symptoms. In those circumstances, the injury was a contributing cause to the incapacity. As Jordan CJ pointed out in *Salisbury v Australian Iron and Steel Ltd*²⁰:

"It is not necessary that the employment injury should be the sole cause of disability. It is sufficient if it is a contributing cause²¹. It may be the catalyst which precipitates disability in a medium of disease. But when the stage is reached at which the employment injury ceases to produce effects and could therefore no longer be a contributing cause to any incapacity which may then exist, the right to compensation ceases."

- 40 In the present case, the underlying anxiety disorder continued and was capable of producing serious effects if exacerbated or aggravated, as the Tribunal's findings showed. That being so, the Tribunal was bound to find as a matter of law²² that the appellant's incapacity resulted from injury within the meaning of s 33 of the Workers Compensation Act.

- 41 It was unnecessary for the Tribunal to consider the question of whether the disease was exacerbated in a manner whereby the appellant's employment could be identified as a "contributing factor". Such an inquiry may properly be made by

19 (1977) 51 ALJR 583 at 585; 16 ALR 479 at 484.

20 (1943) 44 SR (NSW) 157 at 162.

21 *Harwood v Wyken Colliery Company* [1913] 2 KB 158 at 166-169.

22 *Farmer v Cotton's Trustees* [1915] AC 922; *Hope v Bathurst City Council* (1980) 144 CLR 1; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389.

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the Tribunal with respect to an appeal falling within sub-par (ii) of s 4(b) of the Workers Compensation Act. Such appeals will concern any disease not otherwise contracted "in the course of employment".

42 It is convenient now to consider the appellant's appeal to the Court of Appeal.

The Court of Appeal

43 Section 54 of the GREAT Act provides for an "appeal to the Supreme Court against any decision of the Tribunal on a question of law". Section 48 of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act") assigned to the Court of Appeal appeals from any "specified tribunal", a term which, by force of s 48(1)(a)(iii), included the Tribunal. Section 75A(5) of the Supreme Court Act had the effect that the appeal was to be "by way of rehearing". The jurisdiction of the Court of Appeal thus was entirely statutory. It represented the first exercise of jurisdiction by a court with respect to the dispute²³.

44 The Notice of Appeal to the Court of Appeal was so drawn as to raise grounds alleging the misapplication by the Tribunal of both sub-pars (i) and (ii) of s 4(b) of the Workers Compensation Act. However, Powell JA (with whom Stein JA agreed), after setting out the legislative provisions, approached the appeal on a different footing, saying²⁴:

"Despite the reference in s 186(1) of the [Police Service Act] to the [Superannuation Act], the various statutory and other related provisions which I have set out above make it, in my view, clear, that the source of a serving police officer's right to receive 'hurt on duty' benefits is not the [Superannuation Act], but, rather, [reg] 98 of the [Police Regulations], which [regulation], in 1993 was, as it still is, in the terms which I have set out above."

On that footing and after construing reg 98(2), in particular the phrase "in the actual execution of the duty of his or her office", Powell JA concluded that the appeal should be dismissed.

45 In this Court, the respondent sought to uphold the decision of the Court of Appeal. Further, the respondent submitted that Powell JA's construction of

23 *Walsh v Law Society of NSW* (1999) 73 ALJR 1138 at 1155; 164 ALR 405 at 429.

24 (1998) 16 NSWCCR 333 at 369.

Gaudron ACJ
McHugh J
Gummow J
Kirby J
Callinan J

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reg 98(2) was correct. However, as has been indicated earlier in these reasons, the question for the Court of Appeal was whether there had been an error of law by the Tribunal in its determination of the task given the Tribunal by s 186(1) of the Police Service Act. Section 186(1) both established the entitlement to appeal to the Tribunal from the decision of the Commissioner and specified the legal criterion to be applied in the determination of a proceeding so instituted²⁵. This was whether the period of absence was caused by the officer in question being "hurt on duty" within the meaning of s 1(2) of the Superannuation Act. The task given the Tribunal had not been to determine whether the appellant had been injured "in the actual execution of the duty of his ... office" within the meaning of reg 98(2)(a) of the Police Regulations.

46 Priestley JA, who dissented in the result, proceeded on the footing that the appeal turned upon the application of s 4(b) of the Workers Compensation Act, as picked up by s 186(1) of the Police Service Act and s 1(2) of the Superannuation Act. His Honour decided the appeal by reference to sub-par (ii) of s 4(b) and did not find it necessary to advert to sub-par (i).

47 His Honour said that²⁶:

"the Tribunal left out of account that the communication of the decision was an integral aspect of '*the factor*' that the Tribunal had earlier found was the only factor which contributed to the exacerbation of [the appellant's] disease from which his incapacity for work resulted. ...

In the present case the uncontested evidence was that [the appellant] was informed from the station that he had to go to see the Chief Superintendent. He did this and was called into the Chief Superintendent's office and told about the transfer papers. Attending upon his superior in his superior's office in these circumstances upon a request by that superior seems to me to be hard to characterise as anything but something the worker had to do in the course of his employment. I therefore think the Tribunal was mistaken in its decision to dismiss [the appellant's] appeal."

25 cf *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 73 ALJR 238 at 242-243; 159 ALR 268 at 274-275; *Attorney-General (Cth) v Oates* (1999) 73 ALJR 1182 at 1185-1186; 164 ALR 393 at 398.

26 (1998) 16 NSWCCR 333 at 342.

17.

Priestley JA also found that the Tribunal's error arose from applying "a proper legal standard to a significantly different fact from the one the Tribunal had found to be the relevant fact". In turn, this was "a question of law" which enlivened s 54 of the GREAT Act²⁷.

48 With these conclusions and for the reasons his Honour gave for supporting them, we agree. We would also hold that there was an error of law in the application by the Tribunal of sub-par (i) of the definition in s 4(b). Indeed, as indicated earlier in these reasons, it is through sub-par (i) that there lies the clearer path for the appeal to be allowed.

Conclusion

49 The appeal should be allowed with costs. The orders of the Court of Appeal made on 28 May 1998 should be set aside. In place thereof it should be ordered that the appeal to that Court be allowed with costs. Further, it should be ordered that the decision of the Tribunal made on 15 June 1995 be set aside and the matter be remitted to the Tribunal for further consideration in accordance with law.

27 (1998) 16 NSWCCR 333 at 343.