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Mental Injury and Reasonable Administrative Action Green and Comcare -- Case
Note

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**MENTAL INJURY AND REASONABLE
ADMINISTRATIVE ACTION *GREEN AND
COMCARE* [2018] AATA 1266 – CASE NOTE**

PHILIP EVANS *

I INTRODUCTION

Workers compensation benefits include the payment of incapacity payments to compensate for lost earnings; medical and related expenses; and lump sum payments for permanent impairment or death. The relevant authority to determine stress related or mental injury claims in the federal jurisdiction is Comcare which has been established under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (*'SRC Act'*). Comcare provides all employers with an integrated safety, rehabilitation and compensation system, no matter what Australian state or territory an employer operates in or where its employees are located. Workers compensation is compensation payable to a worker who suffers an injury or disease arising from, or during, his or her employment.¹ Its determinations are carried out in accordance with the provisions of the *SRC Act*. In Western Australia a workers compensation and injury management scheme exists to help workers return to work success-

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¹Comcare, *Overview of the Comcare scheme* <https://www.comcare.gov.au/the_scheme/overview_of_the_comcare_scheme>.

fully following a work-related injury or illness. Under the scheme workers are compensated for lost wages, medical expenses and associated costs while they are unable to work. Matters in dispute relating to workers compensation are determined in accordance with the provisions of the *Workers Compensation and Injury Management Act 1981* (WA).

II WORKPLACE MENTAL HEALTH

The National Survey of Mental Health and Wellbeing found that around 7.3 million or 45% of Australians aged 16-85 will experience a high prevalence of mental disorders in their lifetime.² In terms of workplace stress and mental injury a number of studies have indicated increasing stress in the workplace. The causes are manifold including job insecurity, downsizing and labour market changes where productivity requirements are increasing and the consequent pressures placed on employees to meet those productivity requirements has increased.³ In the Western Australian jurisdiction, Workcover WA, in its Statistical Note 2016,⁴ states that in the period 2012 to 2016 the number of work related stress claims increased by 25%. In 2015-2016 there were 547 stress related claims lodged. In this period females accounted for 59% of the stress claims. The average claim cost was \$73,895. The top three industries involving stress related claims were; Health Care and Social Assistance (25%); Public Administration and Safety (24%); and Education and Training (16%). With respect to the causes of stress related claims, Workcover in its Statistical Note states that 39% of the claims are caused by work pressure;

²ABS, *4326.0 - National Survey of Mental Health and Wellbeing: Summary of Results, 2007* (23 October 2008) <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4326.0Main%5C%20Features32007>>.

³See, for example, *Workplace Stress in Victoria: Developing a Systems Approach* <<https://www.vichealth.vic.gov.au/media-and-resources/publications/workplace-stress-in-victoria>>.

⁴'Stress-related Claims', (Report, WorkCoverWA, October 2016) <<https://www.workcover.wa.gov.au/wp-content/uploads/2016/11/Stress-Related.pdf>>.

23% by harassment and bullying, 19% by exposure to a traumatic event, 14% by exposure to workplace violence and 5% to other causes. No current figures are available from Comcare but over the four-year period to 30 June 2010, 10% of accepted Australian Government premium payer claims were attributed to mental stress; and 35% of total claims costs related to these claims.⁵

III WORKERS COMPENSATION DETERMINATIONS

Section 14 of the *SRC Act* provides that Comcare is liable to pay to employees compensation where an injury is suffered by the employee if the injury results in death, incapacity for work or an impairment or if they consider their employment caused or contributed to or aggravated the illness. The liability is not strict and for the claim to be successful, Comcare must be satisfied that issues or incidents in the course of the person's employment caused or contributed to the illness to a significant degree. Where a claim has been denied section 14 the Act confers the AAT power to review a decision made under section 64 of the *SRC Act*. The AAT has jurisdiction to consider the Comcare decision under section 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*).

Section 43(1) of the *AAT Act* requires the Tribunal to make a decision in writing;

- (a) affirming the decision under review;
- (b) varying the decision under review; or
- (c) setting aside the decision under review and:
 - (i) making a decision in substitution for the decision so set aside; or
 - (ii) remitting the matter for reconsideration in accordance with any directions or recommendations

⁵Comcare, *Compendium* <<https://www.srcc.gov.au/publications/compendium>>.

In conducting the review, section 33 of the *AAT Act* sets out the procedures to be followed. Relevantly the proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit;⁶ and the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.⁷ Tribunal hearings are held *de novo* where the decisions are determined on the merits as distinct from judicial review. The differences have been stated succinctly as follows;⁸

The role of the Tribunal in the system of administrative law is to review administrative decisions on the merits: that is, to consider afresh the facts, law and policy relevant to a decision under review and decide whether that decision should be affirmed, varied or set aside. It has many times been said that the Tribunal stands in the shoes of the original decision-maker in making its substituted decision: see, for example, *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 at 943. In undertaking its task, the Tribunal is frequently required to review the exercise of discretionary powers. This is reflected in the phrase which is usually used to describe the decision-making function of the Tribunal, namely that the Tribunal must make the “correct or preferable decision”: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591 per Bowen CJ and Deane J. The conjunction is used to accommodate the difference between a matter susceptible of only one decision, in which the “correct” decision must be made and a decision which requires the exercise of discretion or a selection between more than one available decision, in which case the word “preferable” is appropriate.

⁶*Administrative Appeals Tribunal Act 1975* (Cth) Section 33(1)(b).

⁷*Ibid* Section 33(1)(c).

⁸Justice Gary Downes AM, ‘The Administrative Appeals Tribunal – Its Role in the Regulation of the Insurance Industry’ (Speech delivered at the Australian Insurance Law Association - Northern Territory Branch, Darwin, 21 April 2006) <<http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%5C%20and%5C%20Papers/RoleRegulationInsuranceIndustryApril2006.pdf>>.

IV PRELIMINARY ISSUES

One of the preliminary or threshold issues for the determination under section 14 of the *SRC Act* is whether the injury or disease is work related. The definition of injury is provided in section 5A(1) of the *SRC Act* as;

- (a) a disease suffered by an employee; or
- (b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or
- (c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment;

but does not include a disease, injury or aggravation suffered as a *result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment*. (Emphasis mine)

In the workplace, stress claims may arise as a consequence of informal meetings, staff appraisals, counselling, or discussions relating to underperformance. However stress claims arising from these types of employee/employer interactions if, as stated in section 5A(1), are the result of 'reasonable administrative action' which is "taken in a reasonable manner" by an employer, are not compensable under the *SRC Act*. The requirements of "reasonable administrative action" and "taken in a reasonable manner" are separate and distinct. Further Section 5A(2) of the *SRC Act* provides that;

For the purposes of subsection (1) and without limiting that subsection, reasonable administrative action is taken to include the following:

- (a) a reasonable appraisal of the employee's performance;
- (b) a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;
- (c) a reasonable suspension action in respect of the employee's employment;

- (d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
- (e) anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);

The reference to disease in section 5A(1) is defined in section 5 B(1) to mean;

- (a) an ailment suffered by an employee; or
- (b) an aggravation of such an ailment; that was contributed to, to a significant degree,⁹ by the employee's employment by the Commonwealth or a licensee.

The issue of ailment or aggravation is considered in section 5B(2) as;

- (2) In determining whether an ailment or aggravation was contributed to, to a significant degree, by an employee's employment by the Commonwealth or a licensee, the following matters may be taken into account:
 - (a) the duration of the employment;
 - (b) the nature of, and particular tasks involved in, the employment;
 - (c) any predisposition of the employee to the ailment or aggravation;
 - (d) any activities of the employee not related to the employment;
 - (e) any other matters affecting the employee's health.

This subsection does not limit the matters that may be taken into account.

V GREEN V COMCARE

The decision in *Green and Comcare*¹⁰ provides definitive guidance to practitioners in the workers compensation jurisdiction with respect to pleading a stress related claim allegedly arising from an employer's administrative action. The matters listed in section 5 of the *SRC Act* are factual issues to be determined by the decision

⁹In the *SRC Act*, section 5B(3) states **significant degree** means a degree that is substantially more than material.

¹⁰*Green and Comcare (Compensation)* [2018] AATA 1266.

maker. The recent decision of the AAT in *Green and Comcare* is illustrative of the approach which will be taken by the AAT in determining if the mental injury claimed allegedly as a result of administrative action is compensable. The case is also illustrative of matters which counsel appearing in this jurisdiction should take into consideration when appearing before the AAT.

A The Factual Background

Mr Green commenced work as a safety and compliance officer with the Royal Australia Navy in June 2011 and in 2013 continued as a civilian employee in the same role in a newly established unit. In the following two years difficulties emerged between Mr Green and his two supervisors a Captain Chandler and a Commander Dobie.¹¹

Subsequently on 4 February 2016 Mr Green provided a medical certificate to his employer certifying that he was unfit for duties as a consequence of perceived work stress. That same day Mr Green consulted with his general practitioner who recorded in his notes that Mr Green had complained of being bullied at work.¹² The next day, 5 February 2016, Mr Green lodged a claim for compensation under the *SRC Act* claiming anxiety caused by his employment. His claim was considered but rejected both initially and on internal review, on the basis that his psychological condition was a result of reasonable administrative action taken in a reasonable manner. Mr Green subsequently sought a review of the decision in the General Division of the AAT.¹³

¹¹Ibid [7].

¹²Ibid [10].

¹³Ibid [12]–[13].

VI THE DECISION

The decision of the AAT was handed down on 11 May 2018.¹⁴ The Review Decision and Reasons commenced with a statement of the relative provisions of the *SRC Act* with a restatement of section 14 which by way of paraphrasing provides that Comcare is liable to pay compensation in respect of an injury suffered by an employee if the injury results in death, incapacity for work or employment. Next, the definition in section 5A(1) of “injury” was noted together with the provisions of subsection 5A(2) defining reasonable administrative action as reproduced above. The Tribunal then listed the provisions section 5B dealing with the term “disease.”¹⁵

VII THE MEETING OF 15 DECEMBER 2015

The relevant issues for the determination of the tribunal were; firstly was Mr Green’s condition an ailment within the definition of “disease” within the meaning of section 5B(1) of the *SRC Act*? Secondly were the events in the course of his employment identifiable as reasonable administrative action taken in a reasonable manner and thirdly was his diseases suffered as a result of reasonable administrative action taken in a reasonable manner?¹⁶

¹⁴The tribunal was constituted by a single Senior Member, Dr Alexander.

¹⁵Ibid [15]–[16].

¹⁶Other relevant issues are listed in the Decision and Reasons for decision at [21].

A Was Mr Greens condition an ailment within the definition of
“disease”?

As with matters of this kind the Tribunal was required to consider a large number of medical opinions from both general practitioners and psychiatrists with respect to Mr Green’s alleged mental condition. Again as is not uncommon where experts are engaged by both parties,¹⁷ these opinions were conflicting and generally lacking definite conclusions or the basis for the opinion. The medical opinions were significantly based on information of events and symptoms provided by Mr Green to the medical practitioners and subsequently recorded in their clinical notes. The weight to be given to evidence based on medical practitioner’s clinical notes can be problematical. It is generally held that clinical notes are rarely if ever a complete record of the exchange between a patient and a busy practitioner and accordingly they must be treated with some caution.¹⁸ In addition to the issue of incomplete records, it has been noted that medical practitioners may sometimes receive or report on subjective histories incorrectly or inaccurately with a consequent effect on the weight of medical evidence based on information provided by patients.¹⁹ After consideration of all of the medical opinion evidence²⁰ the Tribunal concluded that notwithstanding the difficulties in assessing the evidence overall the Tribunal was satisfied that Mr Green’s condition was a mental ailment for the purposes of the *SRC Act* with the date of onset on or about 3 February 2016. However apart from Mr Greens self-report there was no persuasive or corroborative evidence to conclude that Mr Green suffered significant and increasing psychological symptoms

¹⁷The author was a sessional arbitrator under the *Workers Compensation and Injury Management Act 1981* (WA) from 2013 to 2016.

¹⁸See, *Nominal Defendant v Clancy* [2007] NSWCA 349; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34.

¹⁹See, *Department of Education v Amitia* [2014] WADC 85.

²⁰*Green and Comcare (Compensation)* [2018] AATA 1266, [24]–[55].

during the period 2014 to 2015.²¹ The comments by the Tribunal demonstrate a continuing problem with opinion medical evidence in workers compensation review Tribunals. When read objectively it would appear that generally the medical opinions in the case do not satisfy the principles for the reception of medical evidence as stated in *Pollock v Wellington*²² and the reports do not satisfy the AAT Guideline for Persons Giving Expert and Opinion Evidence.²³

1 *Reasonable Administrative Action*

The next issue for determination by the Tribunal was whether the events in the course of Mr Green's employment were identifiable as reasonable administrative action taken in a reasonable manner. Mr Green based his claim on the causal connection between two employment events. Firstly a meeting on 16 December 2015 involving discussions with his Level 1 supervisor, Commander Doble and secondly his employer contacting him in February 2016 in order to organise a meeting with him and his Level 2 supervisor, Captain Chandler. The Respondent (Comcare) submitted that Mr Greens psychological condition was excluded from the section 5A(1) of the *SRC Act* definition of an injury, as the two employment incidents each constituted reasonable administrative action taken in a reasonable manner.²⁴ The 16 December 2015 meeting between Mr Green and Commander Doble was held in order to identify Key Expected Results (KER) necessary to formulate a performance agreement for Mr Green for the following year. These discussions involved matters such as "standards of expected behaviour, skilling requirements,

²¹Ibid [57-69].

²²(1996) 15 WAR 1. The rule in *Pollock v Wellington* requires sufficient factual foundation for any medical opinion as to 'injury' and 'incapacity'. See also *Skippers Aviation Pty Ltd v Curtin* (2015) WADC 82.

²³Justice Duncan Kerr, 'Persons Giving Expert and Opinion Evidence' (Report, AAT, 2015) <<http://www.aat.gov.au/AAT/media/AAT/Files/Directions%5C%20and%5C%20guides/Guideline-Persons-Giving-Expert-and-Opinion-Evidence.rtf>>.

²⁴*Green and Comcare (Compensation)* [2018] AATA 1266, [70].

learning needs, training and career development activities, work arrangements and leave plans.”²⁵ Mr Green gave evidence that following the meeting he felt depressed and suffered shortness of breath. The Tribunal considered a number of written submissions, particularly a trail of email correspondence, the *Defence Enterprise Collective Agreement 2012-2014* (‘DECA’) and oral evidence with respect to matters prior to the meeting and details of the meeting itself. The Tribunal determined that in the context of Mr Green’s continuing employment the meeting constituted reasonable administrative action. Further on the evidence Mr Green had not been bullied.²⁶ A significant factor in the Tribunal’s determinations was the low weight given to Mr Green’s oral evidence. The Tribunal formed the view that generally Mr Green’s evidence was not reliable and noted that;²⁷

His evidence in general and particularly oral evidence which was lengthy and complex demonstrated a clear conflict in his perception and recollection of details that are relevant to the various issues that are to be considered in this matter when compared to other evidence.

However the Tribunal noted that despite its reservations with respect to the reliability of Mr Green’s evidence, it was still necessary for the Tribunal to focus on all the evidence with respect to the competing versions of events.²⁸

In considering competing evidence which is essentially oral, Tribunals pay close regard to the witnesses’ demeanour, forming views as to their credibility and reliability as witnesses. As can be seen some of these views were expressed by the Tribunal. However, whilst expressing these views the Tribunal was clearly cognisant of the benefits (and limitations) that a witness’ demeanour affords a decision maker. Although the Tribunal was influenced by difficulties with respect to Mr Green’s evidence it was nevertheless obligatory for the Tribunal to arrive at conclu-

²⁵Ibid [74].

²⁶Ibid [160].

²⁷Ibid [158]. See also [161]–[164].

²⁸Ibid [166].

sions as noted above by focusing on all of the evidence. This approach appears to reflect the principle determined in *Fox v Percy*; where it was stated that decisions must be made; ‘on the basis of contemporary materials, objectively established facts and the apparent logic of events’²⁹

The additional evidence, in addition to the competing oral evidence considered by the Tribunal comprised a series of lengthy emails and contents of written submissions.³⁰ In determining this issue the tribunal however again made a number of general observations about Mr Green’s evidence before the Tribunal. It clearly formed the view that Mr Green’s evidence was not reliable. Specifically the evidence was self-serving, and diminished by frequent inconsistency and at times evasive and unconvincing.³¹ On balance the Tribunal found that process relating to the performance exchange meeting proposed for 16 December 2015 was consistent with the express requirements of the DECA and thus a reasonable administrative action.³² The second limb of section 5A(1) requires that even if the administrative action itself is reasonable, the administrative action must be taken in a reasonable manner. As with reasonable administrative action this is a question of fact and not law. Whilst not bound by the decisions of earlier Tribunals, in determining this issue, the Tribunal referred to the decision in *Re Lynch and Comcare*.³³ Firstly what is reasonable is assessed objectively and relates to the specific conduct involved.³⁴ Next for action to be reasonable it must be established that there is nothing “un-toward” about the actions involved and thirdly the actions must not be “irrational absurd or ridiculous”³⁵ It is also trite to say that in matters concerning allegations against an employee the principles of natural justice apply 10 but this was not an

²⁹[2003] 214 CLR 118 at [30]-[31], per Gleeson, CJ, Gummow and Kirby JJ.

³⁰Ibid [81]-[147].

³¹Ibid [157]-[165].

³²Ibid [184].

³³[2010] AATA 38. See also *Re Quick and Comcare* [2010] AATA 209.

³⁴*Re Lynch and Comcare* [2010] AATA 38, [106].

³⁵Ibid [107].

issue with respect to Mr Green.

In his evidence Mr Green alleged he had been bullied by both his supervisors particularly Commander Doble. However as noted above, the Tribunal found that the evidence overall did not support a conclusion that Mr Green had been bullied.³⁶ It is interesting to note that issues of bullying in the context of reasonable administrative action are also considered in the *Fair Work Act 2009* (Cth) which states that behaviour will not be considered bullying if it is reasonable management action carried out in a reasonable manner.³⁷ The Tribunal determined on the evidence that the performance exchange meeting of 16 December 2015 was clearly necessary in the context of Mr Green’s continuing employment and thus a reasonable administrative action for the purpose of the SRC.³⁸

B Was the meeting of 6 December 2015 conducted in a reasonable manner?

Nevertheless the Tribunal was still required to determine if the meeting of the 6 December 2015 was conducted in a reasonable manner. The Tribunal considered from the evidence that the meeting was not conducted in a reasonable manner and thus the reasonable manner exception provision of s 5A(1) of the *SRC Act* could not be applied.³⁹ It appears that the decision was determined in part from evidence critical of Commander Dobie’s management of the meeting which was described as “having an uncomfortable and charged atmosphere with both parties showing an intransigent attitude to each other”.⁴⁰ In determining if actions are

³⁶ *Green and Comcare (Compensation)* [2018] AATA 1266, [160].

³⁷ *Fair Work Act 2009* (Cth) section 789FD(2).

³⁸ *Green and Comcare (Compensation)* [2018] AATA 1266, [184].

³⁹ *Ibid* [197].

⁴⁰ *Ibid* [191].

taken in a reasonable manner Tribunals are required to look at both the motivation behind the employer's action and the conduct of the action. In *Nguyen and Comcare (Compensation)*⁴¹ whilst the Tribunal was critical of some aspects of the employers conduct towards the applicant and the applicant was not managed perfectly or handled with great sensitivity, the Tribunal noted that the standard for reasonableness was not perfection in management.⁴²

VIII THE EVENTS OF FEBRUARY 2016

The second employment incident considered by the Tribunal was the event in February 2016 the where the Department of Defence attempted to arrange a meeting between Mr Green and Captain Chandler to discuss further issues relating to Mr Green's workplace performance. Counsel for Mr Green submitted that as the meeting never took place there had not been an administrative action with respect to Mr Green's employment⁴³ and secondly that the purpose of the proposed meeting was to deal with operational issue involving the performance of Mr Green's duties.⁴⁴ In determining if the meeting request⁴⁴ was a reasonable administrative action the Tribunal again referred to the email exchanges between Captain Chandler and Mr Green. The Tribunal found that the request for a meeting and the associated email correspondence was not only reasonable but in fact necessary in respect of Mr Green's continuing employment.⁴⁵

⁴¹[2018] AATA 1623]

⁴²*Nguyen and Comcare (Compensation)* [2018] AATA 1623, [63].

⁴³*Green and Comcare (Compensation)* [2018] AATA 1266, [199].

⁴⁴*Ibid* [200].

⁴⁵*Ibid* [216]–[219].

A *Did the administrative action contribute to a significant degree to Mr Green's ailment?*

As with the 16 December 2015 meeting it was still necessary to determine if the administrative action associated with the request for the meeting contributed to a significant degree to Mr Green's ailment? Again the Tribunal was not helpfully assisted in this determination by the evidence of Mr Green or the patient notes made by the two treating physicians nor the submissions of Mr Green's counsel which the tribunal found 'to be somewhat speculative and not entirely consistent with the available evidence'⁴⁶ Nevertheless the Tribunal, whilst noting that the reasons for Mr Green's psychological symptoms were unclear, felt that there was no other plausible reasons that would explain the sudden deterioration in Mr Green's symptoms which commenced two days after he returned to work.⁴⁷

The Tribunal referred to the decision of the High Court in *Comcare v Martin*⁴⁸ which considered the nature of the causal connection required to establish that an injury was suffered as a result of the administrative action in order for the exclusion in section 5A(1) of the *SRC Act* to apply. The High Court held in part;⁴⁹

That is to say, the causal connection is met if without the taking of the administrative action, the employee would not have suffered the ailment or aggravation of the administrative action that was contributed to, to a significant degree by the employer's employment.

Put simply it must be clearly determined that the employee's employment would not have significantly contributed to the employee's injury, had the reasonable ad-

⁴⁶Ibid [225].

⁴⁷Ibid [230].

⁴⁸(2016) 258 CLR 467. In *Comcare v Martin*, an employee suffered an adjustment disorder after she was informed that she was unsuccessful in achieving a promotion. Her failure to obtain the promotion meant that she would be required to return to her substantive position where she would be supervised by a person she alleged had bullied her in the past.[47]

⁴⁹*Comcare v Martin* (2016) 258 CLR 467, [47].

ministrative action not been taken by the employer. These issues may be complicated by the fact that the employee may suffer a range of or rather multiple work related causes of the psychological injury but only one is related to issues arising from the reasonable administrative action.

In *Lim v Comcare*,⁵⁰ the Full Federal Court applied *Comcare v Martin* noting that the determinative issue is whether the employee would have suffered the injury if the administrative action had not occurred. The exclusionary provisions of section 5 of the *SRC Act* will only apply if the question is answered in the negative. Prior to the decision in *Comcare v Martin*, liability was excluded where an employee's injury had been caused by multiple work-related causes, but only one of those causes was as a result of reasonable administrative action. Subsequently the Tribunal held that there was a clear temporal relationship between the administrative action and Mr Green's ailment with no other reasonable explanation to explain the change in Mr Green's symptoms and behaviour and thus Mr Green would not have suffered the disease had the reasonable administrative action not occurred.⁵¹ The Tribunal found this despite noting that the precise reasons as to why the issues associated with the proposed meeting 'had such a significant impact on Mr Green's mental functioning and behaviour is, in my view, unclear and open to speculation'⁵² On consideration of the available evidence, the Tribunal found that Mr Green's disease for the purpose of the *SRC Act* was suffered as a result of the reasonable administrative action of his employer which was taken in a reasonable manner. Consequently this was not an injury for the purposes of section 5A(1) of the *SRC Act* and the decision under review was affirmed and Comcare was not liable to pay

⁵⁰[2017] FCAFC 64. In this case, the employee had an adjustment reaction with depressive anxiety. Comcare accepted that the employee's disease was contributed to by a number of employment related factors, including discussions about her voluntary redundancy, a performance appraisal and dealings with her supervisor.

⁵¹*Green and Comcare (Compensation)* [2018] AATA 1266, [232].

⁵²*Ibid* [233].

Mr Green compensation.⁵³

IX CONCLUSION

The question of whether administrative action was taken in a reasonable manner is one of fact. Whilst the Tribunal might be critical of aspects of an employer's conduct it does not look for perfection in management. The Tribunal will consider all of the specific incidents and the respective individuals behaviour in determining whether the subsequent administrative action is reasonable but it will not examine every decision in order to determine if those decisions could have been made differently or better. With respect to the onus of proof in the AAT, it is well established that the Latin maxim; 'semper necessitas probandi incumbit ei qui agit', which means 'he who asserts must prove', is the accepted legal burden of proof in common law justice systems. However the onus of proof, as applied in the common law courts does not generally apply to proceedings under the *SRC Act* in the AAT.⁵⁴ In the AAT, there is an evidentiary onus as distinct from an onus of proof. The evidentiary onus, or the onus of proving the necessary facts, lies with an employee where the employee is seeking an entitlement to compensation. However where an employer seeks to rely on the reasonable administrative action exclusion defence, the onus is on the employer to adduce evidence that if it were not for the administrative action (albeit taken in a reasonable manner) the employee would not have suffered the alleged mental condition.

The decision in *Green* also highlights the difficulties that Tribunals have with

⁵³Ibid [236].

⁵⁴Special rules as to the onus of proof will apply in cases alleging a connection between a health condition and war service brought under the *Veterans' Entitlements Act 1986*. In tax disputes, s 14ZZK(b) of the *Taxation Administration Act 1953* effectively requires the taxpayer to establish the Commissioner's objection decision was wrong and provide a better alternative explanation in its place.

respect to the reception of and weight to be given to expert medical opinions. The Tribunal in *Green* noted on a number of occasions that the expert medical opinions were unhelpful. This case note has referred to the issues which may arise as a consequence of opinions based essentially on the historical and symptomatic narrative provided by the claimant employee but more importantly there seems to be a lack of awareness amongst medical experts as to the principles articulated in *Pollock v Wellington*.⁵⁵ These are;

1. Before an expert medical opinion can be of any value, the facts upon which it is founded must be proved by admissible evidence and the opinion must be founded on those facts.
2. A court ought not act on an opinion, the basis for which is not explained by the witness expressing it.
3. Unless the process of inference by which an opinion is reached is expressed in a manner which permits the conclusions to be scrutinised and a judgment made as to its reliability, the opinion can carry no weight.

Additionally in 2015, the AAT published its *Guideline for Persons Giving Expert and Opinion Evidence* which essentially mirrors the Pollock principles and the principles for the reception of opinion evidence as found in *Makita (Australia) Pty Ltd v Sprowles*.⁵⁶ Paragraph 1.7 of the Guidelines requires that;

Parties or their representatives must ensure that any person who is engaged to prepare a report or to give evidence in proceedings before the AAT is provided with a copy of this Guideline at the time the person is engaged; or already has a copy of this document.

However compliance with the Guidelines does not appear to be mandatory as paragraph 1.6 states that; ‘Compliance with the matters referred to in this Guideline may be relevant to determining the weight that will be given to evidence from the person’

In *Green* despite the reference to the lack of assistance provided by the expert medical opinions there was no reference to the Guidelines. Whilst the proceedings

⁵⁵Per Anderson J in *Pollock v Wellington* (1996) 15 WAR 1, at 3.

⁵⁶[2001] NSWCA 305.

in the AAT are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate,⁵⁷ it is suggested that the problematic issues associated with expert medical opinion evidence could be reduced or even prevented by a requirement for mandatory compliance with the Guidelines.

For example, in New South Wales court proceedings, expert witnesses are bound by the *Expert Witness Code of Conduct* as required by the *UCPR*. The expert must not only comply with the Code, but must expressly acknowledge that they have read the Code and agree to be bound by it. The Code is binding on experts. Failure to subscribe to the provisions in the Code may result in the experts report being inadmissible, unless the court orders otherwise.⁵⁸

With reference to the email messages, as noted above, a large number of email messages were submitted in evidence by both parties. The Tribunal appeared to have considered that the hearsay exception policy in the AAT⁵⁹ allows evidence with respect to the truth of what was contained in the text particularly as the emails were sent by the parties. It appears that the emails were given some significant weight by the tribunal because the contents did not seem to be disputed by either party.⁶⁰ In the AAT, evidence may be received in a form which would

⁵⁷See *Uniform Civil Procedure Rules 2005* (NSW) Schedule 7

⁵⁸See, *Welker & Ors v Rinehart & Anor (No 6)* [2012] NSWSC 160.

⁵⁹For a discussion of the hearsay exception policy in the AAT see, *Rus v Comcare* [2017] FCA 239.

⁶⁰It is interesting to note that emails and SMS text messages now being the single most relied upon form of evidence submitted in family law proceedings in Australia see, Jacob Romano, 'Can your SMS Text Messages be used as Evidence in the Family Court?' on Jeremy Gans, *Family Law Express* (3 July 2018) <<http://www.familylawexpress.com.au/family-law-news/evidence/can-your-sms-text-messages-be-used-as-evidence-in-the-family-court/3721/>>.

not be permitted in accordance with the rules of evidence. However, the opposing parties will always be given the opportunity to test the evidence if it is reasonably challenged. The problems with respect to the medical opinion evidence have been discussed above together with the low weight given to Mr Green's evidence because of his credibility.

The responsibility of the parties is to provide cogent and probative evidence in the knowledge that the Tribunal approaches the matter afresh. The Tribunal is required to provide reasons for its conclusions and articulate the findings of fact and the evidence relied upon. It is therefore incumbent on each party to provide the necessary evidence and respond to evidence led by the other party that will assist the Tribunal in arriving at the correct and preferable decision.