24/10; [2010] VSCA 77

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DEPARTMENT of EDUCATION and ANOR v UNSWORTH

Ashley and Mandie JJA and Emerton AJA

23 March, 16 April 2010

ACCIDENT COMPENSATION – PERSONAL INJURY – PSYCHOLOGICAL OR PSYCHIATRIC INJURY CAUSED BY HARASSMENT, PRESSURE, STRESS AND BULLYING – WHETHER INJURY AROSE WHOLLY OR PREDOMINANTLY FROM EXPECTATION OF ACTION WITHIN S82(2A)(a) *ACCIDENT COMPENSATION ACT* 1985 (VIC) – APPEAL ALLOWED – MATTER REMITTED TO MAGISTRATES' COURT FOR FURTHER HEARING AND DETERMINATION: *ACCIDENT COMPENSATION ACT*, S82(2A)(a).

Section 82(2A) of the *Accident Compensation Act* 1985 ('Act') provides that a person is not entitled to compensation if the injury consisted of stress arising wholly or predominantly from an expectation of the taking of action related to the ordinary and necessary workings of an employment situation. The magistrate, in deciding to award U. compensation pursuant to the Act, found that the expectation which had caused injury to U. was his subjective state of mind that he was going to be dismissed. Upon appeal (see *Department of Education and Anor v Unsworth* MC25/2009; [2009] VSC 440) Pagone J allowed the appeal and referred the matter to the Magistrate for further consideration. Upon appeal—

HELD: Appeal allowed. Remitted to the Magistrate for hearing and determination according to law.

1. Section 82(1) is one of four main provisions in the Act which prescribe the conditions of compensability of injury and precluded entitlement to payments of compensation in three broad classes of stress-caused injury. First, where the stress arose 'wholly or predominantly' from particular action taken by an employer. Second, where the stress arose wholly or predominantly from a decision of a particular nature made by an employer. Third, where the stress arose wholly or predominantly from an expectation of the taking of such action or the making of such a decision.

2. The kinds of action and decision specified by paragraphs (a) and (b) of s82(2A) were administrative in character. They were confined by the fact of their specification. The expectation referred to in paragraph (c) was anticipatory of the taking of 'such action' or the making of 'such a decision'. It was evidently meant to pick up the situation where such action or decision was anticipated by the worker, but had not been taken or made.

3. The meaning to be given to s82(2A) in its then-relevant form is as follows:
(a) the expectation referred to in paragraph (c) is the subjective expectation of the worker;
(b) the expectation is to be understood as an expectation of the taking of action or the making of a decision of the kind described in paragraphs (a) and (b), accompanied by the qualities of reasonableness set out in those paragraphs;
(c) the expectation, congruently with paragraphs (a) and (b), presupposes the existence of facts, known to the employer and the worker, which – considerations of reasonableness aside – could found a relevant expectation;
(d) paragraph (c) is not necessarily inapplicable only because the worker's expectation is that the employer will take action or make a decision which the employer does not in fact intend to take or make.

4. Bearing in mind the fact that the employer carries the burden of establishing the applicability of s82(2A), an employer could discharge that burden if it established that the worker's expectation, in the circumstances, was of reasonable action taken in a reasonable manner. But if the worker's expectation was that action would be taken which, having regard to the known circumstances, would be unreasonable, or was an expectation that action taken would be unreasonable in the manner of its taking, then paragraph (c) would not apply.

5. The question will always be: did the worker subjectively hold a relevant expectation? In answering that question, a first sub-question will be: did the worker hold an expectation of action at all? If that sub-question is answered in the affirmative, a second sub-question will be: did the worker have an expectation of reasonable action reasonable in the manner of its taking? That sub-question will require consideration whether there were any circumstances, known to the employer and the worker, which – reasonableness aside – could found an expectation of action; and then consideration whether, given those circumstances, the expectation was of reasonable action reasonable in the manner of its taking.

6. U. did have an expectation of dismissal. He formed that expectation by focusing upon circumstances in his employment which were known to both he and his employer. Considerations of reasonableness aside, those circumstances could conceivably have provided a basis for the employer taking action to dismiss him. The employer had no such intention. The unresolved question is whether the employer established that the respondent's expectation of dismissal, in the circumstances, was of reasonable action reasonable in the manner of its taking. The fact that the employer did not intend to dismiss the respondent tells against – but does not conclusively establish – the question being resolved in the employer's favour. Unless the unresolved question was answered in the employer's favour, U's claim must succeed.

ASHLEY JA and EMERTON AJA:

1. The applicants seek leave to appeal against the orders made by a judge of the Trial Division on 2 October 2009 in an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 against final orders made in the Magistrates' Court of Victoria on 4 May 2009.

Facts

2. The appeal before the learned trial judge arose out of the respondent's claim for weekly payments of compensation and medical and like expenses pursuant to the Accident Compensation Act 1985 ('the Act') in respect of an injury alleged to have occurred in the course of the respondent's employment as a teacher at Werribee Secondary College. The respondent claimed to have suffered psychological or psychiatric injury caused by harassment, pressure and bullying.

3. The background to the respondent's claim is set out in the reasons of the learned magistrate.

4. The respondent commenced employment as a teacher at the college in August 1989. Since 'at least 1999' he has taken anti-depressant medication. In 1999, he was unable to work 'due to stress'. He was absent on sick leave for some time, and for a further two years he was absent without pay, although he performed some emergency and contract teaching. He returned to work in 2002 and started teaching under-achieving students. He continued in this work, which he enjoyed, until 2007.

5. In 2004, a workplace agreement was made between the Department of Education and the relevant union. It dealt, *inter alia*, with performance reviews.

6. In August 2005, the respondent began to undergo a performance review, the outcome of which might lead to a promotion and an increase in salary. The review was conducted by a nominee of the principal, a leading teacher and, from time to time, the deputy principal.

7. As at April 2006, the review remained uncompleted. The respondent was then asked to give a presentation and to prepare a written assignment on a particular topic. He was shocked by this request and said that he would not comply with it. He took a few days off and, when he returned to the college, his relationship with the principal was strained.

8. On 5 May 2006, the respondent lodged a claim for compensation. He said that he first noticed his injury or condition on 13 April 2006 and that it was related to the 'ongoing review process with the administration'. His claim was rejected.

9. In October 2006, the principal wrote to the respondent advising him that his 2005 performance review had been completed and that he would receive a promotion and salary increase. The principal apparently took this action because he had missed a deadline, rather than because he was content with the respondent's performance review.

10. A short time later, the respondent sought legal advice about his position. In December 2006, his solicitors wrote to the Department of Education making a complaint about the performance review process.

11. In April 2007, an investigation into the respondent's complaint was instituted by the then Acting Regional Director of the Western Metropolitan Region in the Department of Education. As part of that investigation, the respondent was interviewed. The person conducting the investigation on behalf of the Acting Regional Director wrote to the principal, requesting that the processes for the respondent's 2006 performance review be put on hold pending the finalisation of the Department's investigation.

12. But then, in June 2007, the respondent received three emails from a colleague at the college. They advised him that the principal had contacted the Department's 'Conduct and Ethics' section about the situation, and that the principal now proposed to start the respondent's 2006 performance review after the holidays.

13. The emails shocked and depressed the respondent. Again, he ceased work, though only for a few days. He consulted his general practitioner and his lawyer. He was given a certificate of incapacity and he lodged a claim for weekly payments of compensation on 25 June 2007, stating that his injury was anxiety, stress and depression, and that it was attributable to aggravated stress and depression due to his workplace. He stated that he first noticed his injury on 10 October 2006. This claim was later rejected.

14. In late June 2007, the respondent received a letter from the colleague who had previously sent him the three emails. The letter concerned the 'performance and development review process'. Couched in scarcely comprehensible jargon, it requested the respondent to complete documentation prior to 'the mid cycle review meeting'. It advised the respondent that during the meeting he would be required to 'reflect on the goals that [he] had set, action taken and progress made and the learning that has taken place as a result of feed-back/evidence gathered'.

15. The respondent was shocked to receive this letter, as he believed that his performance reviews were on hold pending the completion of the Department's investigation. Emails were exchanged between the respondent's solicitor and the Acting Regional Director of the Metropolitan Region. The latter confirmed that the performance and development review process was on hold until the Department's investigation was completed. Before the magistrate, the principal acknowledged that the sending of the letter was a mistake.

16. Even before receiving the emails to which we have referred, the respondent was in a state of constant distress and anxiety. He was seeing his general practitioner monthly and was being prescribed anti-depressants and Serepax. At around this time, he also discovered that money had mistakenly been deducted from his long service leave entitlements. After the intervention of his union and the workplace ombudsman, the relevant sum was reinstated.

17. The next step in the saga was this: the Department concluded its investigation by 5 July 2007. Notification of the results of the investigation worsened the respondent's condition. He felt that his evidence had not been accepted and that his complaint had been dismissed. His lawyer wrote to the Acting Regional Director alleging breaches of procedural fairness. The allegations were denied.

18. The respondent lodged another claim for compensation on 30 November 2007. By that time, it appears, he had been off work since the end of June. The claim form referred to - 'Stress in workplace. Issues not resolved. Actions of employer'. This claim was also rejected.

19. In early 2008, a series of events took place which made the respondent feel ostracised from the college. They included: (1) correspondence with the principal with respect to allotment of duties in 2008; (2) contact with the college's occupational health and safety officer about the safety of his materials; (3) a letter from the college requesting that he no longer contact the college by email in the interests of administrative efficiency; (4) the return of his laptop to the college; and (5) an examination by a Departmental psychologist, who opined that the respondent was unfit for teaching duties.

20. In May 2008, the respondent lodged a further claim for compensation. As we understand it, he had not resumed his duties after June 2007. This claim was also rejected.

21. The respondent's condition deteriorated during 2008. He experienced extremes of rage and anger, he could not concentrate. He was referred to a psychiatrist for treatment. His medication was changed, but he continued with anti-depressants prescribed by his general practitioner.

22. On 12 February 2008, the respondent issued proceedings in the Magistrates' Court at Melbourne seeking, amongst other things, an order for weekly payments of compensation at the appropriate rate from 22 June 2007.

23. In the proceeding, the respondent alleged that he had suffered a psychological/psychiatric injury in the course of his employment as the result of the 'harassment, pressure, stress and bullying' which he claimed to have experienced.

24. By their Notice of Defence, the applicants contended, along with a number of matters which tended to obscure the real area of dispute, that the respondent's injury was caused by stress of a type which, by reason of s82(2A) of the Act, did not create an entitlement to compensation.

25. As it later emerged, the applicants did not contend that the injury claimed by the respondent fell within paragraphs (a) and (b) of s82(2A), but rather, that his stress arose wholly or predominantly from 'an expectation' as contemplated in paragraph (c).

26. The learned magistrate was satisfied that the respondent had sustained an injury arising out of or in the course of his employment. Because, as he held, the injury was constituted by the aggravation etc of a pre-existing injury – that is, the respondent's long-time psychiatric condition – his Honour had to be satisfied that the employment was a significant contributing factor to the injury in order for it to be compensable. He was so satisfied. He was further satisfied that the respondent was incapacitated for work 'in any teaching environment where the plaintiff feels unsafe', and that this incapacity was sufficiently caused by the compensable injury.

27. The learned magistrate found that the respondent expected to be dismissed from his employment:

> From the plaintiff's perspective the review process had never gone smoothly. It had firstly lasted too long, but more importantly had been undertaken improperly from his perspective.
>
> The plaintiff believes that the true purpose of the review process, as it was conducted in respect of him, was to remove him from the College.

28. It was this expectation which caused the compensable injury, although the principal in fact never contemplated dismissing him. The respondent expected something to occur which would not.

29. From this, the magistrate concluded that the respondent did not have an expectation of a reasonable action taken in a reasonable manner. That was the relevant expectation – not simply an expectation that action be taken or a decision made of the kind mentioned in paragraphs (a) or (b). Accordingly, his Honour held that paragraph (c) of s82(2A) of the Act could not avail the applicants.

The decision below

30. The applicants appealed to the Supreme Court pursuant to s109 of the *Magistrates' Court Act* 1989 against the final orders made by the magistrate. The learned trial judge upheld the appeal, but in his reasons stated that the applicants, though successful in form, had substantially failed in the appeal.

31. His Honour held that there was a necessary linkage between the actions and decisions described in paragraphs (a) and (b) and the expectation referred to in paragraph (c). That was made clear by the word 'such' appearing before each of the words 'action' and 'a decision'. Paragraph (c) contemplated conduct of the kind specified in paragraphs (a) and (b) which was 'expected to occur in the future'. Thus:

> An expectation excluded from compensation by paragraph (c) must ... be one which would be capable of exclusion by paragraphs (a) and (b) if it matured into action or decision. . . . A quality of such action is that it be reasonable and that it be taken in a reasonable manner. A quality of such a decision is that it be made on reasonable grounds.

32. His Honour thus rejected the applicants' submission that the relevant expectation was no more than expectation of action, or the making of a decision, of any of the kinds described in paragraphs (a) and (b) respectively.

33. His Honour further concluded that whether or not a relevant 'expectation' was held was a question of fact to be determined upon the evidence in the particular case. That question was not

to be answered by 'an investigation into the subjective mind of the employee'. Rather, the question was whether there was in fact an expectation of an action or a decision of the kind contemplated by paragraphs (a) and (b). That involved an enquiry into objective facts and circumstances.

34. His Honour further held that a second enquiry would be required if the evidence supported the existence of a relevant expectation as an objective fact: subjectively, did any stress which was productive of mental illness arise wholly or predominantly from that expectation?

35. The learned judge thus disagreed with part of the magistrate's analysis for, as we have noted, the latter considered that the relevant expectation was the respondent's subjective expectation of dismissal – albeit that it was unfounded. In his Honour's view, the magistrate ought to have considered whether, as an objective fact, there was a relevant expectation. He had not done so, but that failure did not mean that the claim should be differently decided. If the magistrate had asked the proper question, he must have found that there was no expectation in fact of any relevant action being taken or decision made. For that reason, paragraph (c) could have no application. It was thus irrelevant to inquire whether what the employee feared had any overriding quality of reasonableness of a kind contemplated by paragraphs (a) or (b).

36. Although the construction adopted by his Honour appeared inevitably to lead to the same conclusion as that which was reached by the learned magistrate, his Honour allowed the appeal and referred the proceeding to the magistrate for further hearing and determination in accordance with his reasons for decision.

Proposed grounds of appeal

37. The proposed grounds on which the applicants seek to rely are:

> 1. The learned judge erred in law in construing sub-section 82(2A) of the Act.
>
> 2. The learned judge erred in law by misconstruing sub-section 82(2A)(c) of the Act to require that stress be proved to have arisen from an expectation of reasonable action undertaken in a reasonable manner.
>
> 3. (a) The learned judge misconstrued the word 'such' in sub-section 82(2A)(c) to connote the 'quality of such action that it would be reasonable and that it should be taken in a reasonable manner';
> (b) The learned judge ought to have construed the word 'such' in sub-section 82(2A)(c) to refer to the categories of action specified in sub-sections 82(2A)(a) and (b).
>
> 4. (a) The learned judge misconstrued sub-section 82(2A)(c) of the Act by requiring '... an enquiry into objective facts and circumstances rather than the subjective mind of the employee';
> (b) The learned judge misconstrued sub-section 82(2A)(c) of the Act to require two separate enquiries: the first, to determine 'whether there was an expectation in fact'; and the second, to determine 'whether it was that expectation which gave rise wholly or predominantly to the [relevant stress] injury'?
>
> 5. The learned judge erred in holding that, although (on the learned magistrate's findings) –
> – the plaintiff expected to be dismissed; and
> – this expectation caused his injury,
> this expectation was not an 'expectation in fact' because (again on the learned magistrate's findings);
> – the employer in fact never contemplated dismissing him, hence, the respondent's expectation was not, so his Honour held, an 'expectation' for the purposes of sub-section 82(2A)(c).
>
> 6. The learned judge ought to have followed Nathan J's holding in *State of Victoria v Blythman* [1999] VSC 498 that 'the word "expectation" in the sub-section must be interpreted subjectively'.
>
> 7. On the facts as found by the learned magistrate, in particular the finding that the worker's expectation of dismissal from employment caused the worker's relevant stress injury, the learned judge was thereby bound in law to hold that the relevant stress injury arose wholly or predominantly from his expectation of dismissal, whereby, in accordance with sub-section 82(2A) of the Act, compensation was not payable.

Resolution of the application

38. We heard the application for leave to appeal on the footing that, if we considered the application to be made out, we would then determine the appeal itself. We thus heard full argument.

39. In our opinion, neither the magistrate nor the judge below captured the meaning of s82(2A)

(c). For this, no blame could possibly attach. The provision, like many provisions in the Act, is difficult to understand.[1]

40. Because we consider that the two meanings thus far given the provision were not apt, the conclusion that on either of those meanings the respondent should succeed cannot conclude the matter. But it does not follow, on the meaning which we give to s82(2A)(c), that the applicants must succeed. Depending upon findings of fact which are yet to be made, the respondent might well do so.

41. In the event, although the respondent's claim may ultimately be determined in his favour, and although there was nothing to show that there are other claims which would be affected by resolution of the issue of interpretation of the now superseded s82(2A)(c), we consider that leave to appeal should be granted, that the appeal should be allowed, and that the matter should be remitted to the Magistrates' Court (preferably as originally constituted) for further hearing and determination in accordance with our reasons.

42. We must now explain the way in which we read s82(2)(c).

43. Section 82(1) is one of four main provisions in the Act which prescribe the conditions of compensability of injury.[2]

44. Section 82(2A) – we speak of it as it stood at relevant times – precluded entitlement to payments of compensation in three broad classes of stress-caused injury. First, where the stress arose 'wholly or predominantly' from particular action taken by an employer. Second, where the stress arose wholly or predominantly from a decision of a particular nature made by an employer. Third, where the stress arose wholly or predominantly from an expectation of the taking of such action or the making of such a decision.

45. The kinds of action and decision specified by paragraphs (a) and (b) of s82(2A) were administrative in character. They were confined by the fact of their specification.

46. The expectation referred to in paragraph (c) was anticipatory of the taking of 'such action' or the making of 'such a decision'. It was evidently meant to pick up the situation where such action or decision was anticipated by the worker, but had not been taken or made.

47. We consider, if stress could be held to arise at all from such an expectation, then the expectation must have been subjectively held by the worker. Critical to the concept of an expectation inducing stress-caused injury is the impact of an expectation actually held upon the worker's mind.[3] We respectfully disagree with the opinion of the learned judge below that the first question was whether there was in fact an expectation of a relevant action or decision, that question to be determined upon an investigation of the objective facts and circumstances. To that point, in our opinion, the learned magistrate's reasons were correct.

48. But the magistrate then concluded that the respondent's expectation fell outside paragraph (c) because the college principal never in fact contemplated dismissing him. For that reason, it was not an expectation of reasonable action taken in a reasonable manner. With respect, we do not agree with that analysis.

49. Counsel for the applicants submitted that paragraph (c) would be satisfied if a worker (but not the employer) knew of circumstances which would justify the employer taking action or making a decision of a kind referred to in paragraphs (a) or (b) adverse to the worker, and if stress induced by that knowledge caused mental illness. He argued from this starting point to the proposition that the operation of s82(2A)(c) could not depend upon any actual intention of the employer to take relevant action or make a relevant decision.

50. We agree with the proposition, but do not assent to the starting point. Paragraphs (a) and (b) pre-suppose the existence of circumstances, known to the employer and the worker, which – considerations of reasonableness aside – could found a relevant expectation. That is how the expectation in paragraph (c) should be understood. In our view, it does not follow from a conclusion that action would not have been taken in the particular circumstances that an

expectation of action would necessarily fall outside paragraph (c). An employer might be able to persuade a magistrate at trial that the worker did have an expectation of reasonable action taken in a reasonable manner despite the expectation being unfounded.

51. In the preceding paragraph, we have assumed that the magistrate correctly framed the enquiry as being whether the respondent had an expectation of reasonable action taken in a reasonable manner.[4] In fact, the applicants contended for a different construction of paragraph (c). Their counsel submitted that 'such action' and 'such a decision' referred only to the kinds of actions and decisions specified in paragraphs (a) and (b) – that is, shorn of the various requirements of reasonableness. The terminology of paragraph (c) was said to refer to the outcome, not to the outcome and the process by which that outcome was brought about. Counsel argued that to read 'such action' and 'such a decision' to import the requirements of reasonableness required reading words into paragraph (c). He relied upon *Jones v Wrotham Park Settled Estates*[5] and *Victorian WorkCover Authority v Wilson.*[6]

52. Consistently with his submission that the terms 'such action' and 'such a decision' should be read as referring simply to an expectation of action or decision of the kinds specified, applicants' counsel argued that paragraph (c) should be read so as to bring within its preclusive operation stress-induced mental illness wholly or predominantly attributable to an entirely unfounded subjective expectation. The extreme example would be an expectation founded entirely upon circumstances existing only in the worker's mind. Counsel contended, at least implicitly, that if such cases did not attract the disentitling effect of s82(2A)(c) then the provision would fail to address the cases most meriting disentitlement.

53. In our opinion, the learned magistrate and the judge below were correct to construe the terms used in paragraph (c) as importing the reasonableness requirements respectively set out in paragraphs (a) and (b). The following considerations are in point.

54. First, we do not agree that 'reading in' is required in order to import those requirements. The question is simply what is meant by the phrases 'such action' and 'such a decision'. We see no reason why those combinations of words should be read as linked only to the kinds of action and decision specified in paragraphs (a) and (b), shorn of the descriptive requirements of reasonableness. Rather, to read the words in paragraph (c) as embracing the reasonableness requirements in paragraphs (a) and (b) would tend to dovetail the subject-matter of the three paragraphs. So, for example, an expectation would readily fall within paragraph (c) if it was founded – *vide* paragraph (a) – upon an expectation of specified action reasonable in itself and such as, if taken, would be reasonable in the manner of its taking.

55. Second, and further to what we have just said, the taking of action or the making of a decision referred to in paragraphs (a) and (b) is predicated on fact, not fantasy; and paragraph (c) is anticipatory of the taking of such action or the making of such a decision. It would be anomalous if paragraph (c) was read to include the situation in which a worker suffered stress-caused illness arising, wholly or predominantly, from an expectation – founded in fantasy – that an action or decision conforming with paragraphs (a) or (b) was to be taken or made. There would be an inexplicable disconnect between the subject-matter of paragraphs (a) and (b) on the one hand, and paragraph (c) on the other.

56. Third, the submission which we noted at [52] assumed that a case of the kind there mentioned would fall for consideration under s82(2A)(c). The submission assumed that a case of that kind would satisfy the conditions of compensability. That could not safely be assumed.

57. In summary, the meaning which we give to s82(2A) in its then-relevant form is as follows: (1) the expectation referred to in paragraph (c) is the subjective expectation of the worker; (2) the expectation is to be understood as an expectation of the taking of action or the making of a decision of the kind described in paragraphs (a) and (b), accompanied by the qualities of reasonableness set out in those paragraphs; (3) the expectation, congruently with paragraphs (a) and (b), presupposes the existence of facts, known to the employer and the worker, which – considerations of reasonableness aside – could found a relevant expectation; (4) paragraph (c) is not necessarily inapplicable only because the worker's expectation is that the employer will take action or make a decision which the employer does not in fact intend to take or make. Bearing in mind the fact

that, as was common ground, the employer carries the burden of establishing the applicability of s82(2A), an employer could discharge that burden if it established that the worker's expectation, in the circumstances, was of reasonable action taken in a reasonable manner. But if the worker's expectation was that action would be taken which, having regard to the known circumstances, would be unreasonable, or was an expectation that action taken would be unreasonable in the manner of its taking, then paragraph (c) would not apply.

58. We have referred, more than once, to there being, for the purposes of paragraph (c), a presupposition of the existence of facts which – considerations of reasonableness aside – could found a relevant expectation. This does not mean, however, that there is to be the kind of enquiry contemplated by the learned judge below. The question will always be: did the worker subjectively hold a relevant expectation? In answering that question, a first sub-question will be: did the worker hold an expectation of action at all? If that sub-question is answered in the affirmative, a second sub-question will be: did the worker have an expectation of reasonable action reasonable in the manner of its taking? That sub-question will require consideration whether there were any circumstances, known to the employer and the worker, which – reasonableness aside – could found an expectation of action; and then consideration whether, given those circumstances, the expectation was of reasonable action reasonable in the manner of its taking.

Conclusion

59. The respondent did have an expectation of dismissal. He formed that expectation by focusing upon circumstances in his employment which were known to both he and his employer. Considerations of reasonableness aside, those circumstances could conceivably have provided a basis for the employer taking action to dismiss him. The employer had no such intention. The unresolved question is whether the employer established that the respondent's expectation of dismissal, in the circumstances, was of reasonable action reasonable in the manner of its taking. The fact that the employer did not intend to dismiss the respondent tells against – but does not conclusively establish – the question being resolved in the employer's favour. Unless the unresolved question was answered in the employer's favour, the respondent's claim must succeed.

MANDIE JA:

60. I agree with Ashley JA and Emerton AJA.

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[1] A new s82 (2A) has been substituted by the *Accident Compensation Amendment Act* 2010. See also the new s82(10) introduced by that Act. It is outside the scope of these reasons to pass upon the clarity or otherwise of the new provisions.

[2] The others are ss82(2), 82(6) and 86.

[3] This was also the conclusion of Nathan J in *State of Victoria v Blythman* [1999] VSC 498 [18]. His Honour conflated stress and injury. But that is beside the point for present purposes.

[4] We will not repeat the language of onus. It was accepted that the onus of showing that circumstances fell within s82(2A) lay upon the employer.

[5] [1980] AC 74, 105-106; [1979] 1 All ER 286.

[6] (2004) VSCA 161; (2004) 10 VR 298.

APPEARANCES: For the appellant State of Victoria: Mr RP Gorton QC with Mr MF Fleming, counsel. Wisewoulds Mahony, solicitors. For the respondent Leck: Mr M O'Loghlen QC with Mr CA Miles, counsel. Maurice Blackburn, solicitors.
