23/10; [2010] VSCA 76

SUPREME COURT OF VICTORIA — COURT OF APPEAL

STATE OF VICTORIA v LECK

Ashley and Mandie JJA and Emerton AJA

23 March, 16 April 2010

ACCIDENT COMPENSATION – PERSONAL INJURY – STRESS RELATED MENTAL INJURY – WHETHER INJURY AROSE WHOLLY OR PREDOMINANTLY FROM ACTION TAKEN BY EMPLOYER OR EXPECTATION OF SUCH ACTION – DISCIPLINE – TRANSFER – WHETHER S82(2A)(a) *ACCIDENT COMPENSATION ACT* 1985 (VIC) TO BE READ DISTRIBUTIVELY OR DISJUNCTIVELY – MEANING OF THE WORD "OR" – APPEAL ALLOWED – MATTER REMITTED TO MAGISTRATES' COURT FOR FURTHER HEARING AND DETERMINATION: *ACCIDENT COMPENSATION ACT* 1985, S82(2A)(a).

S82(2A) of the *Accident Compensation Act* 1985 ('Act') provides:

> Compensation is not payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from—
>
> (a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or
>
> (b) a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or
>
> (c) an expectation of the taking of such action or making of such a decision.

L. a police officer, was involved in a series of incidents involving disagreements with his police superiors. After a series of meetings with his superiors, L. was transferred to another police station but took time off work due to psychiatric/psychological illness. Over time, L. resumed working on a full-time basis and applied for compensation in respect of time off work due to his illness. The application was rejected. L. then sued the State of Victoria claiming weekly payments for confined periods of total and partial incapacity. In upholding the claim and making an order for weekly payments of compensation, the Magistrate found that the stress arose predominantly from one or more actions and accordingly, was not covered by s82(2A) of the Act. The Magistrate was of the view that s82(2A) was intended to limit recovery in respect of injuries otherwise covered by the Act. The actions listed in sub-section 82(2A)(a) ("transfer", "demote", "discipline", "redeploy", "retrench" or "dismiss") are separated by the word "or", which on ordinary construction has a disjunctive meaning. Thus, as a matter of ordinary construction, s82(2A)(a) *prima facie* required the employer to show that the stress emanated "wholly or predominantly" from only one of the alternative actions listed therein. On appeal to the Supreme Court, the appeal was dismissed. The Judge held that the *prima facie* disjunctive interpretation in this case should prevail. If Parliament had intended a conjunctive approach, it could easily have said so, particularly where 'or' is plainly used in a disjunctive way elsewhere in the relevant section. Accordingly, the magistrate was not in error in upholding the claim and making the order for weekly payments of compensation. [See *State of Victoria v Leck* MC07/09; [2009] VSC 92]. Upon appeal—

HELD: Appeal allowed. Remitted to the Magistrate for further hearing and determination according to law. *State of Victoria v Leck* MC07/09; [2009] VSC 92, overruled.

1. The first reason why the matter must be remitted is that, even accepting that there was but one injury constituted by stress-induced mental illness, the Magistrate made no finding either way whether the stress arose wholly or predominantly from actions falling within paragraph (a) of s82(2A) and/or an expectation falling with paragraph (c). Evidently, there were other work stressors.

2. The second reason why the matter must be remitted is that the Magistrate's findings appear to leave open a conclusion that the worker suffered compensable mental illness before any action conforming with paragraph (a) was taken, or expectation conforming with paragraph (c) was formed. It might then be concluded that the effect of such action and/or expectation was to cause further injury – that is, the aggravation of pre-existing mental injury. In those circumstances, L. would be entitled to compensation if the initial injury was a sufficient cause of the claimed incapacity. It would matter not that the 'aggravation injury' also sufficiently contributed to the incapacity, and that s82(2A) precluded entitlement to compensation in respect of that injury.

3. Given that the word 'or' will most often carry a disjunctive meaning, that is not always so. Whether it does so in a particular instance will be influenced by the context in which it appears. Context is primarily set by the particular provision in which the word appears. The word 'or' is found many times in the Act; and even within s82. But its meaning in those other provisions is of limited

relevance when considering its meaning in s82(2A). Contextually, the meaning to be given to 'or' in s82(2A)(a) is informed by the concept of 'action'. Not preceded by the indefinite article, 'action' is apt to embrace a course of conduct – possibly, though not necessarily, extending over some period of time. Whilst action, even over a period of time, might be constituted by conduct meeting one only of the descriptors in paragraph (a), the word sensibly fits a course of conduct involving more than one of those descriptors. For instance, disciplining and demoting a worker may be so intimately connected that it is not possible to break up the action constituted by such conduct into individual acts. The fact that 'action' might be constituted by conduct fitting only one descriptor does not yield the conclusion that each descriptor in paragraph (a) must be read as if the word 'or' preceded and followed it. 'Act' and 'action' should not be understood, in the particular context, as interchangeable.

4. In this case, the State of Victoria's conduct by which it disciplined and transferred L. was so intimately connected as to constitute 'action' for the purposes of s82(2A)(a). The State of Victoria ought be able to rely upon it notwithstanding that it involved more than one descriptor.

ASHLEY JA and EMERTON AJA:

1. State of Victoria appeals against the decision given and the final orders made by a judge of the Trial Division on 23 March 2009 in an appeal brought by the appellant pursuant to s109 of the *Magistrates' Court Act* 1989 (Vic) against final orders made on 16 June 2008 in the Magistrates' Court at Melbourne.

2. The Magistrates' Court proceedings were brought by the respondent against the appellant seeking orders for weekly payments of compensation pursuant to the *Accident Compensation Act* 1985 (Vic) ('the Act') for incapacity caused by anxiety and depression.

Facts

3. The respondent is a Senior Constable in Victoria Police. From 2003, he was stationed at the Healesville Police Station. In the second half of 2006, he was involved in a series of incidents involving disagreements with his police superiors about the manner in which he performed his duties. On 12 December 2006, the respondent took part in a meeting with the senior officers. He sought medical assistance the following day from a general practitioner, who prescribed an anti-depressant and recommended counselling. A further meeting took place two days later at which the respondent was issued with an 'Admonishment Notice' and a document entitled 'Local Workplace Counselling'. The respondent again attended a doctor on 9 January, and a diagnosis of depression and anxiety was made. The doctor placed the respondent on sick leave. The respondent did not resume duty until 30 January 2007, on which date he met again with senior officers and was given a memorandum concerning his future. It foreshadowed a possible transfer.

4. On 9 March 2007, the issue of transfer was again discussed by the respondent and senior officers. Following this meeting, the respondent was transferred to Mooroolbark Police Station. The transfer was intended to commence on 13 March 2007, but the respondent did not attend work on that day, having taken time off work due to psychiatric/psychological illness. He did not return to duty until 9 July 2007, and then only on a reduced basis. Over time, the respondent increased his hours and on 4 May 2008, he resumed working on a full-time basis.

5. On 14 March 2007, the respondent completed a claim for weekly payments of compensation pursuant to the Act. By notice dated 16 April 2007, the claim for compensation was rejected.

The proceeding in the Magistrates' Court

6. On 29 August 2007, the respondent commenced a proceeding in the Magistrates' Court of Victoria against 'State of Victoria (Victoria Police)' claiming, amongst other things, weekly payments for confined periods of total and partial incapacity.[1] By its defence, apart from general denials which did not assist identification of the real issue, the appellant contended that if the respondent had suffered an injury arising out of or in the course of employment that injury arose in circumstances in which s82(2A) of the Act precluded entitlement to compensation.

7. Section 82(2A) provides:

> Compensation is not payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from—
> (a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or

(b) a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or

(c) an expectation of the taking of such action or making of such a decision.

8. As the parties put the matter to the magistrate, the critical question became this: if the compensable injury 'consisted of an illness or disorder of the mind caused by stress', and assuming (as was common ground) that the employer carried the burden of establishing the matters made relevant by s82(2A), would the provision apply in the employer's favour only if it was established that the stress arose wholly or predominantly from one of the actions identified in paragraph (a), or the expectation of such an action; or was it enough that the stress arose wholly or predominantly from one or more of those actions (or the expectation thereof)?

9. The learned magistrate reached these conclusions:

In my opinion, the plaintiff's mental disorder caused by stress did not arise wholly from the defendant's action taken to transfer nor did it arise wholly from its action taken to discipline the plaintiff. It certainly did not arise wholly from an expectation of either.

Nor can it be said that the disorder, etc, arose predominantly from either action. The plaintiff's stress injury was caused by a variety of the defendant's actions including the action of transfer and the action of discipline. Also included was the plaintiff's perception of being 'picked on' by Butera, which climaxed in his reaction to e-mails containing criticism of his handling of the alleged offender in the car chase. Relevantly, neither the actions of disciplining the plaintiff nor the actions of transferring considered separately were predominant. Again, the expectation of either does not figure.

The decision below

10. On appeal under s109 of the *Magistrates' Court Act*, the question was essentially whether the magistrate had correctly construed s82(2A) of the Act. As before the magistrate, argument centred on the meaning of the word 'or' in paragraph (a). The competing arguments were, for the appellant, that it was to be read as meaning 'or, or as well'; and, for the respondent, that it expressed the last of a series of alternatives.

11. The appellant argued that:

(a) a disjunctive and conjunctive approach (elsewhere referred to as 'distributive') was not unusual and there were other places in the Act where such an interpretation of the word 'or' was required;

(b) the provision should be interpreted consistently with its purpose, which was to immunise specified classes of management action from yielding an entitlement to compensation as long as the actions were reasonable actions taken in a reasonable manner, and so long as the stress-induced mental illness or disorder was due wholly or predominantly to such actions;

(c) a wholly disjunctive interpretation of the word 'or' could produce results unintended by the legislature, by unfairly disadvantaging the employer. Employers undertaking a series of reasonable actions could find themselves unable to defend those actions only because no action on its own could constitute the whole or predominant cause of the stress;

(d) moreover, the same action might be described in different ways and it might be impossible to make the choice between them as causal factors, and some actions may not be able to be 'unpicked' in the manner required by the disjunctive construction.

12. For his part, the respondent made the following submissions:

(a) the respondent's injury arose partly from workplace incidents and therefore did not arise wholly from the actions of discipline or transfer;

(b) the actions of transfer and discipline were two distinct actions and it was understandable that the Parliament's intention was not to aggregate the effect of those actions – clear language would be required to do so;

(c) the underlying intent of the Act is to be found in s82(1), which contains 'a *prima facie* entitlement to compensation under the Act';

(d) the word 'or' had been used in a clearly disjunctive way in many instances where it occurred in s82(2A), so it was not justified to ascribe a different meaning to it in paragraph (a) without a clear indication that a different meaning was intended.

13. The learned trial judge held that the *prima facie* position was that 'or' meant 'or'. It was disjunctive. There needed to be good reason to depart from this construction.

14. His Honour considered the consequence for both the employer and the employee of the competing constructions. He did so in the context that the illness onset occurred prior to any management action of the kind listed in s82(2A)(a). If the construction advanced by the appellant were accepted, the employee's entitlement to compensation for an injury arising independently of any management actions of the kind described could be overridden by the effect of subsequent management actions. The management actions taken were ostensibly reasonable and conducted reasonably, for there was a problem that had to be addressed and it was reasonable to address it by moving the employee from the workplace he was in. The process of transfer and the disciplinary process appeared to have been carried out in accordance with standard procedures. Thus, the employee had a work-related illness, but because two things occurred – action to discipline and action to transfer – and because in combination they predominated as causal factors, the employee, on the appellant's analysis, would lose the compensation to which he was otherwise entitled under the Act.

15. The learned trial judge, dismissing the appeal, concluded that the disjunctive interpretation should prevail. The learned magistrate had been correct to give 'or' a wholly disjunctive meaning.

Grounds of Appeal

16. The Grounds of Appeal on which the appellant relies are:

1. The learned judge erred in failing to hold that the learned magistrate erred in law in construing sub-section 82(2A) of the *Accident Compensation Act* 1985.
2. The learned judge erred in failing to hold that the learned magistrate erred in law in holding that on a proper construction of sub-section 82(2A) the Appellant (defendant) was required to establish that the Respondent's (plaintiff) disorder of the mind arose either wholly or predominantly from stress because of the Appellant's action of transferring him or either wholly or predominantly because of the action of disciplining him, or either wholly or predominantly from an expectation of taking action of transferring him, or either wholly or predominantly from an expectation of taking action of disciplining him.
3. The learned judge erred in failing to hold that the learned magistrate ought to have held that on a proper construction of sub-section 82(2A) the Appellant (defendant) was required only to establish that the Respondent's (plaintiff) disorder of the mind arose wholly or predominantly from stress because of the Appellant's actions of transferring him, disciplining him, or from an expectation of the taking of such an action, whether individually or jointly.
4. The learned judge erred in failing to hold that the learned magistrate erred in law by giving the word 'or' in s82(2A) a wholly disjunctive meaning.
5. The learned judge erred in failing to hold that the learned magistrate ought to have construed the word 'or' in s82(2A)(a), (b), and (c) as having the sense when applied distributively, of 'or, or as well'.

Resolution of the appeal

17. The submissions for the parties advanced in this Court were essentially the submissions already twice advanced, and which we have already mentioned. We will not repeat them.

18. The issue raised by the appeal is of importance to the parties. It will also be of relevance to the parties to proceedings in respect of injury allegedly sustained before 5 April 2010. But the combined effect of ss2(7), 12 and 14 of the *Accident Compensation Amendment Act* 2010 is that the decision on this appeal will have no impact on claims for injuries sustained on or after 5 April this year. The point now raised appears to have been legislatively resolved in favour of employers.

19. In our opinion, the preferable reading of s82(2A) is the reading advanced for the appellant. The appeal must be allowed. But this does not mean that the respondent's claim will necessarily fail. The matter must be remitted to the Magistrates' Court for further hearing and determination in accordance with these reasons. It would be preferable, we think, that the further hearing be conducted before the learned magistrate from whose order the appeal to the Supreme Court was brought.

20. It is convenient to explain immediately why the matter should be remitted. The magistrate found that 'the onset of the [worker's] mental illness due to stress was on 12 December', and that '[t]he preceding events, as well as the [worker's] own nature, provided the base from which the

events of 12 December could work on'. His Honour also found that the worker's reading of emails critical of his performance in early January 2007 – emails which 'had nothing to do with issues of transfer or discipline' – 'was sufficient for him to react in such a way for him to be sent home'. He found, again, that 'the [worker's] stress injury was caused by a variety of the [employer's] actions including the action of transfer and the action of discipline. Also included was the [worker's] perception of being 'picked on' by Butera …'

21. The first reason why the matter must be remitted is that, even accepting that there was but one injury constituted by stress-induced mental illness, the learned magistrate made no finding either way whether the stress arose wholly or predominantly from actions falling within paragraph (a) of s82(2A) and/or an expectation falling with paragraph (c). Evidently, there were other work stressors.

22. The second reason why the matter must be remitted is that the magistrate's findings appear to leave open a conclusion that the worker suffered compensable mental illness before any action conforming with paragraph (a) was taken, or expectation conforming with paragraph (c) was formed. It might then be concluded that the effect of such action and/or expectation was to cause further injury – that is, the aggravation of pre-existing mental injury. In those circumstances, the respondent would be entitled to compensation if the initial injury was a sufficient cause of the claimed incapacity. It would matter not that the 'aggravation injury' also sufficiently contributed to the incapacity, and that s82(2A) precluded entitlement to compensation in respect of that injury.

23. We said above that the preferable reading of s82(2A) was that advanced by the appellant. That is so for these reasons.

24. First, given that 'or' will most often carry a disjunctive meaning, that is not always so. Whether it does so in a particular instance will be influenced by the context in which it appears.

25. Second, context is primarily set by the particular provision in which the word appears. The word 'or' is found many times in the Act; and even within s82. But its meaning in those other provisions is, we consider, of limited relevance when considering its meaning in s82(2A).

26. Third, we consider that, contextually, the meaning to be given to 'or' in s82(2A)(a) is informed by the concept of 'action'. Not preceded by the indefinite article, 'action' is apt to embrace a course of conduct – possibly, though not necessarily, extending over some period of time. Whilst action, even over a period of time, might be constituted by conduct meeting one only of the descriptors in paragraph (a), we consider that the word sensibly fits a course of conduct involving more than one of those descriptors. For instance, disciplining and demoting a worker may be so intimately connected that it is not possible to break up the action constituted by such conduct into individual acts. The fact that 'action' might be constituted by conduct fitting only one descriptor does not yield the conclusion that each descriptor in paragraph (a) must be read as if the word 'or' preceded and followed it. We reject such a conclusion.

27. Fourth, accepting that s82(1) creates the bedrock entitlement to compensation, it is inescapable that s82(2A) intendedly delimits that entitlement. We accept that the latter provision should not be read any more broadly than its language requires. But we also consider that it should not be read so as to create a nonsense. Suppose that (1) a worker, at a meeting with his or her superior, was disciplined and given notice of demotion; (2) the worker developed a stress reaction to those events; (3) in response to the stress reaction, the worker developed an incapacitating mental illness. It could certainly be said that the stress arose wholly from the acts of discipline and demotion. We think it extremely improbable, however, that any doctor would be able to sensibly ascribe the mental illness to stress arising wholly or predominantly from one or the other act. As the respondent would have it, s82(2A)(a) would not work to the employer's advantage in such a case. But the respondent accepted that if the same worker was simply disciplined and developed a mental illness by reason of stress reaction, or was demoted and developed a mental illness by reason of stress reaction, then s82(2A)(a) would apply to the employer's advantage. We do not accept that the provision should be given such an operation. To our mind, 'act' and 'action' should not be understood, in the particular context, as interchangeable.

28. In this case, it appears to us that the appellant's conduct by which it disciplined and

transferred the respondent was so intimately connected as to constitute 'action' for the purposes of s82(2A)(a). The appellant ought be able to rely upon it notwithstanding that it involved more than one descriptor.

29. We should add this: although we are of opinion that 'action' may include conduct meeting more than one of the descriptors in paragraph (a), and although it may extend over some period of time, it does not necessarily follow that conduct fitting different descriptors which is separated in time will constitute 'action' for the purposes of the paragraph. Whether or not it does so will involve questions of fact and degree. We do not decide, because we do not need to decide, whether different actions constituted by conduct meeting different descriptors could be aggregated by an employer in reliance on s82(2A)(a).

Orders

30. The appeal should be allowed, and the matter remitted to the Magistrates' Court for further hearing and determination in accordance with these reasons.

MANDIE JA:

31. I have had the benefit of reading in draft the joint reasons of Ashley JA and Emerton AJA and I agree with those reasons and with the proposed disposition of the appeal contained therein.

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[1] We use language connoting the substance of the claim rather than the obscure language of the Act.

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.
