CITATION: *Q-COMP AND Jennifer Jones (C/2010/51) - Decision* *<http://www.qirc.qld.gov.au>*

INDUSTRIAL COURT OF QUEENSLAND

Workers' Compensation and Rehabilitation Act 2003 - s. 561(1) - appeal against decision of industrial magistrate

Q-COMP AND Jennifer Jones (C/2010/51)

PRESIDENT HALL 25 January 2011

DECISION

[1] By an Application for Compensation dated 3 August 2009, Ms Jennifer Jones sought benefits under the *Workers' Compensation and Rehabilitation Act 2003* (the Act) for a psychological injury said to have happened on 25 February 2009. (I interpolate that it is now clear that Ms Jones had in mind an incident that happened at or about 7.00 p.m. on 17 February 2009.) By a letter dated 28 May 2009, WorkCover Queensland informed Ms Jones that her application had not been accepted. Ms Jones sought a Statutory Review. By a decision dated 9 November 2009, Q-COMP confirmed WorkCover Queensland's decision. By a Notice of Appeal dated and filed 27 November 2009, Ms Jones appealed to the Industrial Magistrate at Townsville. On 4 August 2010, the Industrial Magistrate allowed the appeal and set aside the decision of Q-COMP. (To-date, no order seems to have been made in lieu of the order of Q-COMP which was set aside.) On 30 August 2010, Q-COMP filed an Appeal to this Court.

[2] Ms Jones was born on 18 February 1956. On about 1 August 2008, she commenced employment with Sensis Pty Ltd (publisher of the Yellow Pages) at Townsville. She was employed as a sales consultant selling advertising space. Substantially, the matters which were agitated before the Industrial Magistrate occurred when Ms Jones, her manager (Mr Glen Parkhill) and a number of her fellow consultants where temporarily located at Rockhampton. They were attempting to sell advertising space.

[3] The Industrial Magistrate was burdened with a difficult trial. To begin with, Q-COMP questioned whether Ms Jones' descent into psychological disorder was work-related, rather than related to her own health problems and concerns about her son. The Industrial Magistrate found that her own health problems had stabilised prior to the descent into disorder, and that any understandable maternal concern for one of her children had not been productive of the disorder. There is no appeal against either of the findings. I am not burdened by those aspects of the proceedings at first instance. Another contentious issue at first instance is an allegation by Ms Jones that subsequent to an incident which happened on 17 February 2009, three of her colleagues in the Rockhampton deployment, *viz.*, Ms Sheree Kennedy, Ms Sonja Kennedy and Ms Nicci Crossing had ostracised her, excluded her from conversations and excluded her from social events. The evidence of the Kennedy's (who were sisters) and Ms Crossing, was that it was Ms Jones who had ostracised them and declined to converse with them or to take meals with them. The Industrial Magistrate resolved the conflicting bodies of evidence adversely to Ms Jones. There is no Notice of Contention. Once again, I am not burdened with an issue with which His Honour had to contend. This Court is however, required to reconsider the incident of 17 February 2009.

[4] The Appellant does not, as I understand it, dispute the Industrial Magistrate's general description of the events of 17 February 2009 and it is useful to reproduce that description:

> "On 17 February 2009, Sheree Kennedy unexpectedly verbally attached [sic] Ms Jones over a work related issue. This involved the use of an expletive or expletives and a raised voice on the part of Ms Kennedy. The attack was based at least to a large extent, on factually incorrect information which Ms Kennedy had received. The latter has a strong personality and Ms Jones would have strongly felt its impact.
>
> I found Sheree Kennedy an honest and forthright witness and I accept that the attack did not last as long as suggested by Ms Jones.
>
> A few days after 17 February 2009 Sheree Kennedy apologised to Ms Jones. The apology was generous in its terms. Ordinarily that would have been the end of the matter, but Ms Jones found the apology insincere and lame. She started to question herself as she felt her integrity had been seriously undermined.
>
> I accept the evidence of Dr Promnitz that Ms Jones had sustained a mental injury on 17 February 2009 as a result of this verbal attack even though she was still able to continue to function. The evidence of Dr James, it seems, places somewhat lighter weight on the events of 17 February 2009 than that of Dr Promnitz. At any rate, it is common ground that Ms Jones sustained a psychiatric injury.
>
> I am not of the view that there were major factors such as a health scare (which had passed) and Ms Jones' son that contributed to the injury sustained on 17 February 2009.

> Accordingly, on the balance of probabilities, I have come to the view that Ms Jones (being a worker) sustained an injury arising out of, or in the course her employment with yellow pages.
>
> As this injury preceded management action, the provisions of Section 32(5) of the Workers' Compensations [sic] and Rehabilitation Act 2003 do not apply. Ms Jones' appeal must therefore succeed.".

Whilst the Appellant is content to accept the Industrial Magistrate's description of the incident of 17 February 2009, the Appellant is highly critical of the Industrial Magistrate's decision to prefer the evidence of the treating psychologist, Dr Promnitz, over the evidence of the psychiatrist, Professor James, who had been engaged to prepare a medico-legal report.

[5] Dr Promnitz's qualifications are detailed by her report. She holds a Bachelor of Arts with First Class Honours in psychology and a PhD based in psychology. She holds membership of apparently relevant professional associations. There is no evidence that Ms Jones' condition is related to pharmacological or other medical issues. Indeed, by his report, Dr James opines that workplace stressors were the only relevant aetiological factors. In those circumstances, there is no justification for treating the opinions of a psychiatrist as having greater weight than the opinion of a psychologist, compare *R v Whitbread*[1] at 460 per Hampel J with whom Teague J agreed.

[6] Doubtless there are those who consider that neither psychiatrists nor psychologists should give a medico-legal opinion about a patient. The concerns relate to potential harm to the doctor-patient relationship, compare *Batiste v State of Queensland*[2] at [32] per Wilson J. The concerns do not go to inherent lack of objectivity or lack of weight attaching to such evidence, compare *Levi v Unisure Pty Ltd (University of Adelaide)*[3] at [49] to [50] per Mulligan J with whom Doyle CJ and Bleby J agreed and *Batiste v State of Queensland, op. cit.* at 32 per Wilson J. Here, Dr Promnitz had seen Ms Jones on 10 occasions over the period 5 May 2009 to 11 November 2009, prior to the penultimate meeting on 12 January 2010 which lead to the preparation of the medico-legal report. Professor James had sighted the report. He considered the history recorded to be consistent with the history which Ms Jones had recounted to him. By her report, Dr Promnitz acknowledged that lack of managerial response and dashed expectations of procedural fairness had contributed to Ms Jones disorder of the mind. In oral evidence, Dr Promnitz acknowledged that management inaction had played some role. The point at which Dr Promnitz and Professor James differed was about the impact of the incident of 17 February 2009. Dr Promnitz was of the view that the shock and horror of the abuse caused Ms Jones to lapse into psychological disorder. Absent that event, Dr Promnitz considered that the management inaction would have been harmless. Professor James considered the event of 17 February 2009 to have helped wear down Ms Jones' coping mechanisms. In his view those mechanisms ultimately failed in the face of workplace stressors, including management inaction. Whilst Professor James accepted that an incident might involve collapse into disorder, the Professor did not consider the event of 17 February 2009 to have been of that nature.

[7] I must stress that each of Professor James and Dr Promnitz have demonstrated expertise to express opinions of the type which were proffered. Each of the opinions proffered has persuasive merit. However, the Industrial Magistrate was locked into a position in which His Honour was required to choose between competing views. It is apparent from the transcript that the Industrial Magistrate was very alive to the difference in view. His Honour interrupted the evidence of Dr Promnitz to enquire of Mr Wiltshire who appeared for Ms Jones about the case which was being put. It is no criticism of Mr Wiltshire that he answered questions put to him. It is no criticism of the Industrial Magistrate that the exchange occurred in the presence of a witness who was not a party but an expert. Having clarified that the case was based on the incident of 17 February 2009, the Industrial Magistrate enquired of Dr Promnitz if that was her evidence, she confirmed that it was. On a fair reading of her evidence, I rather think that Dr Promnitz was reluctant to express that opinion. I rather suspect that psychologists would rather talk about the patients condition and all that contributed to it rather than descend into the forensic analysis of cause required by s. 32(1) and (5) of the Act. Howsoever all of that may be, Dr Promnitz confirmed that the incident of 17 February 2009 was the dominant incident. In fairness to the Industrial Magistrate, I should say also that His Honour had the opportunity to hear and observe the witnesses. Not for a moment do I suggest that the advantage was material to the evaluation of the testimony of the expert witnesses. However, there were lay witnesses. An appreciation of the vigour of the exchange of 17 February 2009, was not irrelevant to the weighing of the expert opinions. The language used by Ms Jones in evidence was of some concern. It was for the Industrial Magistrate to determined whether Ms Jones was (a) exaggerating, (b) overcome by an event outside her experience, or (c) giving an entirely truthful account. The Industrial Magistrate adopted a view favourable to Ms Jones. The Industrial Magistrate had the advantage and there is nothing to suggest that His Honour misused it.

[1] *R v Whitbread* (1995) 78 A Crim R 453
[2] *Batiste v State of Queensland* [2000] QSC 315
[3] *Levi v Unisure Pty Ltd (University of Adelaide)* [2002] SASC 167

[8] I dismiss the Appeal. I reserve all questions as to costs.

Dated 25 January 2011.

D.R. HALL, President.

Released: 25 January 2011

Appearances:
Mr C. Clark directly instructed for the Appellant.
Mr J. Wiltshire instructed by Shine Lawyers for the Respondent.