# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*MARSHALL v COMMONWEALTH OF AUSTRALIA (REPRESENTED BY THE BUREAU OF METEOROLOGY)* *[2012] FMCA 1052*

INDUSTRIAL RELATIONS – Application pursuant to s.545 of the *Fair Work Act* 2009 – Applicant seeks reinstatement following dismissal – Applicant claims dismissal contrary to s.340(1) of the *Fair Work Act* 2009 – Respondent argues failure on behalf of Applicant to produce satisfactory medical evidence for failure to report for and perform duties – Application granted.

*F*air *Work Act 2009*, s.340(1), s.342(1), s.390, s.545(2)

*Anderson v Crown Melbourne Ltd* [2008] FMCA 152
*Haines v Bendall* (1991) 172 CLR 60
*Kavassilas v Migration Training Australia Pty Ltd* [2012] FMCA 22
*TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (Mike Walsh Case)* (1989) 16 NSWLR 130

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| Applicant: | ADAM MARSHALL |
| Respondent: | COMMONWEALTH OF AUSTRALIA (REPRESENTED BY THE BUREAU OF METEOROLOGY) |
| File Number: | MLG 1571 of 2011 |
| Judgment of: | Whelan FM |
| Hearing date: | 20 and 21 August 2012 |
| Date of Last Submission: | 21 August 2012 |
| Delivered at: | Melbourne |
| Delivered on: | 19 November 2012 |

**REPRESENTATION**

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| Counsel for the Applicant: | Mr M Irving |
| Solicitors for the Applicant: | Kelly Workplace Lawyers Pty Ltd |
| Counsel for the Respondent: | Ms C Dowsett |
| Solicitors for the Respondent: | Australian Government Solicitor |

**THE COURT DECLARES:**

(1) That the Respondent has contravened s.340(1) of the *Fair Work Act 2009* by taking adverse action against the Applicant for exercising a workplace right.

**THE COURT ORDERS:**

(2) That the Applicant be reinstated pursuant to s.545(2) of the *Fair Work Act 2009.*

(3) That the Applicant prepare draft orders with respect to compensation and the matter be listed to this Court for settlement of those orders and further hearing with respect to the issue of costs.

# FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

## MLG 1571 of 2011

**ADAM MARSHALL**
Applicant

And

**COMMONWEALTH OF AUSTRALIA (REPRESENTED BY THE BUREAU OF METEOROLOGY)**
Respondent

# REASONS FOR JUDGMENT

## Introduction

1. This is an application under s.545(2) of the *Fair Work Act 2009* (Cth) ("the Act") in which the Applicant, Mr ADAM MARSHALL, ("the Applicant"), seeks reinstatement and in the alternative compensation for his dismissal by the BUREAU OF METEOROLOGY ("the Respondent").

2. The Applicant claims that, contrary to s.340(1) of the Act the Respondent took adverse action against him by dismissing him because he exercised a workplace right. The workplace right relied upon is an entitlement to the provisions of a workplace instrument, namely, the '*Bureau of Meteorology Enterprise Agreement 2009-2011, as varied under s.207 of the Fair Work Act 2009 (AE871544)*' ("the Agreement"), an agreement made under the provisions of the Act.

3. The particular provision relied upon by the Applicant is contained in that part of the Agreement headed Personal/Carer's Leave (Combined

Sick Leave, Personal Leave and Carer's Leave). The relevant part provides:

> *70.7 When an employee is medically unfit for duty, leave of absence with pay may be granted subject to available credits on production of satisfactory medical evidence.*[1]

4. The Respondent concedes that the action taken by the employer falls within the scope of the definition of adverse action in s.342(1) of the Act. The Respondent also concedes that the Agreement is a workplace instrument and that the Applicant was entitled to the benefit of the Agreement.

5. With respect to the particular provision relied upon by the Applicant, the Respondent concedes that the Applicant had available credits but does not accept that he was:

   (a) medically unfit; or

   (b) produced satisfactory medical evidence.

6. The Respondent accepts that the reason for the termination was the failure of the Applicant to report for and perform his duties on 8 July 2011.

## Background

7. The Applicant commenced employment with the Respondent on 10 March 2009. He was initially employed as a Trainee Technical Officer (Observer) and subsequently after nine months training as a Technical Officer Grade 2 (Observer). The position is also referred to as APS Level 3 (TOL 2 – OBSERVER) and also as a 'weather observer'. After completion of his training the Applicant was employed in Western Australia and later in Queensland as a member of the leave relief pool. This involved providing relief for other observers "*throughout the Region and interstate as required*"[2] at field stations, capital city airports and in regional offices. The duties at each of those locations varied slightly (for example, upper air soundings using

[1] *Bureau of Meteorology Enterprise Agreement 2009-2011, as varied under s.207 of the Fair Work Act 2009 (AE871544).*
[2] Exhibit R8, Affidavit of David Nottage sworn 25 June 2012, Duty Statement at 'DN1'.

weather balloons are not performed at regional offices), but in general involved the taking of observations and recording of data.

8. In 2010, the Applicant applied to be part of the Australian Antarctic program and was accepted for training which was to take place during February and March 2011 in Melbourne and Hobart. During the course of that training the Applicant felt that he was bullied and harassed – matters about which the Court is not required to make any determination – and he was withdrawn from the program. He was due to commence a posting at the Respondent's field office in Wagga Wagga in early April but proceeded on sick leave in Ballarat after seeing his doctor on 5 April 2011. The Applicant continued to see both his General Practitioner, DR JIM THOMSON ("Dr Thomson") and a psychologist DR SIOBHAN MCEWAN ("Dr McEwan") during April and May of 2011.

9. The Applicant was considered by Dr Thomson to be fit to return to work subject to certain conditions on 7 June 2011, but was required by his employer to see the Australian Government Medical Officer ("AGMO"), who he saw on 9 June 2011. The AGMO – DR GRAS – ("Dr Gras") provided a report on 28 June 2011, which was the subject of a meeting between the Applicant and his employer on 30 June 2011.

10. On 1 July 2011, the Applicant was directed to resume work and to take up a position in the observer relief pool based at the Brisbane Regional Office, on 6 July 2011. Due to accommodation difficulties associated with a State of Origin game, this was later revised to 8 July 2011.

11. On 4 July 2011, the Applicant sent an email to a STEVEN PERRY ("Mr Perry"), an employee of the Respondent, copied to two other staff of the Respondent, concerning his return to work in Brisbane. There followed a chain of emails, involving MR GARRY SUGRUE ("Mr Sugrue"), MR DAVID NOTTAGE ("Mr Nottage") and MR STAN BURNELL ("Mr Burnell") (all employees of the Respondent) concerning administrative arrangements for his return to Brisbane, on 4 and 5 July 2011.

12. On 3 July 2011, the Applicant also emailed JULIET DEN HOLLANDER ("Ms Den Hollander") about accommodation in the Brisbane area.

## The medical evidence

13. On 5 July 2011, the Applicant saw his treating psychologist Dr McEwan and later the same day, Dr Thomson. The Applicant described his condition at the time as follows:

> *I was very stressed at that point … quite anxious. I sort of – I was struggling to concentrate on basic tasks. I wasn't getting very good sleep… I seemed to have recurring headaches… my cognitive ability sort of seemed impaired. I had trouble remembering things when people were talking to me and then they would sort of mention something to me a short while after and I would – couldn't recall them saying it, but yes dizziness… a general loss of appetite – I had difficulty – sort of expressing myself… I just generally felt agitated and sort of on edge, but also fatigued at the same time, if that makes sense.*[3]

14. Dr Thomson had Dr McEwan's report when he saw the Applicant. That report referred to various tests administered by Dr McEwan and the results of those tests. Dr Thomson's own notes describe the Applicant as "*anxious, pale and some tremor and agitated*".[4] Dr Thomson issued a medical certificate to the Applicant which stated that he was suffering from:

> *A recurrence of Traumatic stress symptoms relating to his recent anxiety state as documented in previous correspondence.*[5]

The certificate went on to say:

> *He will be unfit to continue his usual occupation – but would be fit for modified duties doing field work and located in Victoria or near area closer to home in neighbouring states as part of a planned Return to Work (RTW) Plan for the period 05/07/2011 to 23/07/2011 inclusive.*[6]

15. The certificate included further details of Dr Thomson's consultation with the Applicant and his concerns. It concludes:

> *Due to his current state of health I have advised him not to go to Brisbane due to the work not being as we had advised and note*

[3] Transcript of proceedings 20 August 2012, p.17, lines 27-39.
[4] Exhibit R5, p.4, Entry 6/07/2011.
[5] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012, at 'JT11'.
[6] Ibid.

*that the work doctor – AGMO – had concurred with the type of RTW Plan both I and S. McEwan had recommended.*[7]

16. In his oral evidence Dr Thomson explained that the symptoms he was referring to in the certificate were those noted by him on 5 April 2011,"*Emotionall* (sic) *upset and self esteem lowered and anxiety and impaired concentration and recent memory…"*.[8] He stated, *"the symptoms referring to is a flare up of those same symptoms in addition to the comments I've made."*[9]

## Beauty and the Geek

17. In June 2010, the Applicant submitted an online application to be a contestant on a reality television show – '*Beauty and the Geek*'. He was contacted by a casting producer and was invited to audition for the show. He submitted a video clip and was advised that he had been shortlisted. He later notified the producers that he would not be able to participate because of work commitments.

18. On 5 May 2011, he was telephoned by another casting producer who invited him to apply for season three of the show. He was later asked to attend an audition on 28 May 2011. The Applicant's evidence was that as the filming of the show was not until late July he intended to return to work and seek leave without pay if he was selected for the show. If he was not granted leave without pay he would advise the show, as he had the year before that he was not available.

19. The application form submitted by the Applicant to the show in late May contains the following question, "*Have you ever been treated for any serious physical or mental illness(es) or had any serious injuries? If YES, please describe*", to which he responded, "*No, a clean bill of health*".[10]

20. In oral evidence the Applicant admitted that at that time he was on sick leave and had been referred to a psychologist. He stated further:

[7] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012, at 'JT11'.
[8] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012, at 'JT1'.
[9] Transcript of proceedings 20 August 2012, p.57, lines 6-10.
[10] Exhibit R4, Application form for 'Beauty and the Geek'.

> *I may have been a bit optimistic in a clean bill of health... However, there was no medical diagnosis of a particular condition or disorder at that time, I believe.*[11]

He later stated that the diagnosis at the time he believed was "*anxiety and fatigue*".[12]

21. On 5 July 2011, the Applicant communicated with a MS O'KEEFFE ("Ms O'Keeffe"), from the show and suggested to her a form of words to use in a letter to his employer in support of his application for leave without pay for a period of six weeks from 25 July 2011.

22. It was the Applicant's evidence, supported by Dr Thomson's evidence, that Dr Thomson had considered there to be potential health benefits for him in participating in the show.[13]

23. On 22 July 2011, the Applicant filled in a 'Declaration to be Completed by Participant'[14] ("the Declaration") in relation to his participation in '*Beauty and the Geek*'. Dr Thomson, on the same day, completed a 'Medical Report Form'.[15]

24. The Declaration asks, "*Are you now and have you been for some years past in good health?*" The Applicant agreed that in answering "*Yes*" to that question it was not correct.

25. The Declaration also asks, "*To the best of your knowledge and belief, are you or have you ever been subject to or suffering from any of the following … mental disorder?*", to which the Applicant answered, *"No"*.

26. The Applicant stated that he did not believe adjustment disorder fell under a strict mental disorder, but agreed that he should, at that point, have mentioned adjustment disorder "*and then it would have been left to whoever reads it to decide on its classification*".[16]

27. The Applicant went on to say he was embarrassed by his diagnosis and was embarrassed about the way he would be perceived by stating he

[11] Transcript of proceedings 20 August 2012, p.33, lines 34-37.
[12] Transcript of proceedings 20 August 2012, p.33, line 43.
[13] Transcript of proceedings 20 August 2012, p.77, lines 16-17.
[14] Exhibit R5, 'Beauty and the Geek' Participant Declaration Form.
[15] Exhibit R6, 'Beauty and the Geek' Medical Report Form.
[16] Transcript of proceedings 20 August 2012, p.35, lines 40-41.

had adjustment disorder. He agreed that if he did make mention of it that it would possibly harm any potential involvement (in the show).[17] He stated that he did not want to harm any potential involvement because he had been told if it was possible and his work situation permitted then going on the show could provide some benefit.

28. The Declaration went on to ask:

> *Are you aware of or have you now any ailment or defect which is in any way likely to cause indisposition or, in a talking production, likely to effect your voice? If so give particulars.*

29. The Applicant stated that he did not believe that there would be any ailment that would affect his voice. He agreed there were times when he found it was very difficult to get the words out and other times when he was fine. He stated that he was not really sure what 'indisposition' was. If he had known at the time that it might refer to "*difficulty sleeping, problems with concentration and cognition*" he would have answered it differently.[18]

30. He stated that in completing the Declaration he did not mention his adjustment disorder because he felt the stigma attached to having an adjustment disorder caused him great feelings of embarrassment and shame. He agreed that his adjustment disorder "*probably would have*" held him back from his participation in the show. He did not know if he was fit to participate or not. He left the diagnosis of fitness to his GP.[19]

31. Dr Thomson agreed that in answering yes to the question, "*Are you now and have you been for some years in the past in good health?*", the Applicant was not strictly correct. It was his evidence that the Applicant may not see an adjustment disorder as a mental disorder.[20] He considered that the Applicant's symptoms could cause indisposition in a certain environment, but would subside when he was away from that environment. He thought that "*going on the show wouldn't necessarily trigger or aggravate those symptoms*".[21]

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[17] Transcript of proceedings 20 August 2012, p.36, lines 16-21.
[18] Transcript of proceedings 20 August 2012, p.38, lines 14-15.
[19] Transcript of proceedings 20 August 2012, p.40, lines 12-16.
[20] Transcript of proceedings 20 August 2012, p.75, lines 11-12.
[21] Transcript of proceedings 20 August 2012, p.76, lines 26-27.

32. Dr Thomson was not aware that the show involved a 'lockdown' of the participants.[22] He agreed that at the same time that he had certified the Applicant as unfit for work he had certified him as fit to 'meet his contractual requirements' of participating in '*Beauty and the Geek*'.[23]

33. His evidence was that he saw them as totally different environments and that that was "*very crucial in terms of understanding his medical condition... The environment of the 'Beauty and the Geek' would have been quite different and possibly could have been beneficial*".[24]

34. On 25 July 2011, the Applicant told his doctor that he was pulling out of the chance to go on the show.[25] He contacted the Production Co-ordinator around noon on 26 July 2011, to tell her he could not be a participant. Later in the day he was informed by his solicitor that he had been dismissed by the Respondent. He telephoned the Production Co-ordinator again and told her he was available to participate.

## Circumstances surrounding the return to work at the Brisbane Regional Office

35. On 4 June 2011, Dr Thomson wrote a medical certificate in which he certified the Applicant to be "*fit for his field work near Victoria from 7/6/2011 to 7/7/2011*".[26] The Certificate went on to give reasons for this:

> *[t]he reason for this recommendation is that this is the work Adam is trained for and at the present time is the area he would be best psychologically suited to as opposed to an office administration environment which would have a negative impact on him given the association this environment would have with recent events. One of the reasons for the above RTW plan is for Adam to be closer to his supportive family and friends which will facilitate his return to full duties. I deem this to be the first appropriate step in his Return to Work plan.*[27]

[22] Transcript of proceedings 20 August 2012, p.76, lines 35-36.
[23] Transcript of proceedings 20 August 2012, p.77, line 7.
[24] Transcript of proceedings 20 August 2012, p.77, lines 15-18.
[25] Exhibit A2, Affidavit of Adam Marshall sworn 4 June 2012 at 'AM2'.
[26] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012 at 'JT9'.
[27] Ibid.

36. It is not in dispute that the Applicant had written to Dr Thomson on 1 June 2011 advising him that he would be sent to head office in Brisbane on his return to work. The letter went on:

> *Now I'm not keen on that prospect as I want to get back to doing the Field Observation I am trained for and which I enjoy doing. I also feel being placed in that environment would be similar to the environment I experienced the bullying in Melbourne and Hobart during my Pre-Antarctic Training.*[28]

37. On 26 June 2011, in correspondence between Mr Nottage, Supervisor of Field and Network Operations, with the Respondent and the Applicant's then solicitor, Mr Nottage outlined that he wished to speak to Dr Thomson to explain and outline the duties associated with a person in the leave relief pool based in Brisbane and his plan for the Applicant on his return to work.

38. Mr Nottage then gave evidence as follows:

> *On 27 June 2011 I telephoned Dr Thomson. I explained Mr Marshall's job to Dr Thomson, namely that he was based in Brisbane on day shift, but that he would be eligible to go on leave relief at field stations after he had established himself in Brisbane and re-familiarised himself with his observer duties.*
>
> *Dr Thomson said words to the effect that he was satisfied that Mr Marshall could return to work in Brisbane and he had no objection to Mr Marshall doing so if he was not based permanently in an office based administrative situation. I told Dr Thomson that Mr Marshall's job involved periods of administrative work, but he was eligible to go on leave relief postings.*[29]

39. In his oral evidence Dr Thomson had a difference recollection of that conversation. He recalled Mr Nottage telling him about the proposed job because they had no vacancies in the Victorian area or nearby. All he said was that he would relay his information to the Applicant and discuss it further. He denied that he was satisfied that the Applicant could return to Brisbane and work in an office-based administrative

[28] Exhibit R2.
[29] Exhibit R8, Affidavit of David Nottage sworn 25 June 2012, page 12, paragraphs 82-83.

role because that was contrary to what Dr McEwan and himself had wanted or would recommend.[30]

40. Dr Thomson's notes record that he discussed his conversation with Mr Nottage with the Applicant on 29 June 2011. Following that consultation, Dr Thomson wrote to Mr Nottage as follows:

> *Following my consult with Adam today, I am concerned that the suggested Brisbane offer is not as suitable as I would have liked given that Adam has pointed out some of the practicalities eg getting accommodation sorted out whilst also working and the fact* (sic) *that would have no ability to get home to see family for about 8 weeks. I feel that a full discussion with a suitably trained rehab case manager would be most adviseable to work out any RTW plan in detail looking again carefully into whether there is not any nearer field location he can be placed in.*[31]

41. On 1 July 2011, the Applicant was directed to return to work on 6 July 2011 in the Brisbane Regional Office.

42. On 4 July 2011, in an email to the Applicant, Mr Sugrue wrote:

> *At the moment I cannot say how long you will be in QROS. This will depend on the relief requirements around the state. I currently have planned leave covered for the next month or so.*[32]

43. Dr Thomson, in his certificate of 6 July 2011, states that the Applicant had informed him that the work in Brisbane

> *would be Admin only and that there would be no field work available at the present time or the foreseeable future for him. In addition to this Adam is under the impression that he would not get leave to return home to see family for about 8 weeks if he went there*.[33]

44. The Applicant in his evidence denied that he had told Dr Thomson he would not be able to come home for eight weeks and agreed that while doing day work he could fly home from Brisbane on weekends. Dr Thomson's evidence was that the information had come from the Applicant.

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[30] Transcript of proceedings 20 August 2012, p.60, lines 20-21.
[31] Exhibit R8, Affidavit of David Nottage sworn 25 June 2012 at 'DN29'.
[32] Exhibit A1, Affidavit of Adam Marshall sworn 1 February 2012 at 'AM13'.
[33] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012 at 'JT11'.

45. On 8 July 2011, when he failed to attend for work, the Applicant was sent via his then solicitor what might be termed a 'show cause' letter.

46. On 12 July 2011, the Applicant saw Dr Thomson who noted, "*headaches worsening poor sleep and tremor ++ and very agitated and distressed*."[34] He issued a certificate for the period 12 July 2011 to 23 July 2011 stating, "*he will be unfit to continue his usual occupation and the reason for this has been a further deterioration in Adam's health…*"[35]

47. On 22 July 2011, the Applicant again saw Dr Thomson who certified him to be unfit to continue his usual occupation for the period from 25 July 2011 to 8 August 2011 inclusive.

48. On 26 July 2011, the Applicant's employment was terminated on the ground of 'non-performance of duty'.

## Was the Applicant medically unfit for duty on 8 July 2011?

49. The Applicant submitted that the evidence of the Applicant and of Dr Thomson set out the symptoms with which the Applicant presented on 5 and 6 July 2011. He needed to be fit at that time to be able to turn up to Brisbane and perform duties there. He may have been fit to perform administrative duties, the exact same work in one location, but not another. Dr Thomson's evidence was that the last thing to be addressed in these sorts of anxiety disorders is the root of the fear. Sending him to Brisbane would have re-agitated that fear and made worse his symptoms.

50. The Applicant admits that he carried out various functions on 5 and 6 July 2011. He made enquiries about accommodation and movement orders but even then there was evidence of the problems he was having. The people from '*Beauty and the Geek'* described him as 'vague'. He 'got his days mixed up' in enquiring about accommodation[36] and he stated he was somewhat confused about movement notices.[37]

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[34] Exhibit R5.
[35] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012 at 'JT12'.
[36] Exhibit A4.
[37] Exhibit R8, Affidavit of David Nottage sworn 25 June 2012 at 'DN32'.

51. Dr Gras saw the Applicant on 9 June 2011 – some three or four weeks before Dr Thomson saw him on 5 July. Dr Gras reached a conclusion about fitness for duty based on the duty statement which described the job in terms of field work. Mr Nottage agreed that the statement was incomplete as he was not just providing relief but also performing duties within the Regional Office. This was a very different environment. It was an environment similar to the environment in Melbourne and Hobart. He had explained to his doctor his fear of being placed in the same environment as those places.

52. The Applicant says that the medical certificate of 6 July 2011 referred to a recurrence of certain symptoms. Mr Nottage agreed that he was aware of what those symptoms were. There had been a steady recovery over a period of months. This was new evidence of unfitness.

53. The Applicant was told on 4 July 2011 that for the foreseeable future there would be no field work available and Dr Thomson refers to this in his certificate. He was unfit because he suffered from a recurrence of traumatic stress symptoms.

54. The Respondent submits that the Court is not bound to accept the certificate of Dr Thomson on its face and is entitled to question the validity of that certificate, including by reference to the surrounding circumstances.[38]

55. The Applicant's usual occupation was as an observer in the leave relief pool. The duties of an observer are essentially the same no matter where they are undertaken. The certificate says he is unfit for his usual occupation but could do field work – which is part of his usual occupation.

56. The certificate then refers to work located in Victoria or near areas closer to home. If it is the capacity to get home, the Applicant could have flown home from Brisbane so that is not a reason he is unfit for his usual occupation.

57. By reference to the other medical evidence and by reference to what the Applicant was doing at the time the certificate was issued and in the

[38] *Anderson v Crown Melbourne Ltd* [2008] FMCA 152.

days and weeks which followed, the Court is entitled to question whether the certificate is in fact evidence of medical incapacity.

58. There is a dispute about the content of the conversation between Mr Nottage and Dr Thomson on 27 June 2011. The letter of 29 June 2011, however, from Dr Thomson does not refer to medical reasons but to practicalities which would make the position in Brisbane not as suitable as he would like. It was not until the hearing that Dr Thomson referred to the environment as the issue.

59. The Respondent also refers to the report of DR ROSE ("Dr Rose") who examined the Applicant for the purposes of his workers compensation claim.[39] That report, notes the Applicant as saying that "*in early June 2011, his doctor cleared him to return to work*"[40] but makes no mention of a recurrence in July.

60. Further, while the Applicant gave evidence of being "*stressed … quite anxious … struggling to concentrate on basic tasks … I wasn't getting very good sleep … and the sleep I was getting was interrupted and variable.*"[41] He had difficulty concentrating, difficulty expressing himself with what he wanted to say and with slurring[42] and at the same time he was able to speak to, and possibly send an email to, Ms O'Keeffe and to draft a letter for her to send to his employer. The evidence does not suggest that he was vague with her, but that he "*has just been quite vague with work so far*".[43] Both the Applicant and Dr Thomson agreed that the letter provided a reasoned argument in support of his request for leave without pay.

61. The Applicant was also able to make accommodation arrangements and make enquiries of Mr Burnell. Dr Thomson accepted that the correspondence was evidence of the Applicant's ability to concentrate on a task and to do work of essentially an administrative nature.

62. Dr Thomson did say that the certificate was not directed to the tasks, but to the environment in which they were performed. The Applicant was to return to Brisbane to a small team of five people. There was no

[39] Exhibit A3, Affidavit of Adam Marshall sworn 13 August 2012 at 'AM-H'.
[40] Ibid.
[41] Transcript of proceedings 20 August 2012, p.17, lines 28-31.
[42] Transcript of proceedings 20 August 2012, p.17, lines 30-39.
[43] Exhibit R3.

suggestion that any person who had been involved in the events in February, in Hobart, or March, in Melbourne, would be involved in his work in Brisbane. The Applicant had been able to communicate with people in administration in Brisbane after the alleged recurrence.

63. Dealing with the issue of the Applicant's need for ongoing support, the Respondent submitted that Dr Thomson admitted that the Applicant could obtain treatment in Brisbane. He could also have used flex time or rostered days off to return to Ballarat to see his doctor and psychologist. In any case this support could not have been crucial to the Applicant because he was willing to separate himself from his support network – his family, his doctor and psychologist – for up to eight weeks in order to participate in '*Beauty and the Geek*'.

64. The Applicant acknowledged that the answers he gave on documents to be selected for '*Beauty and the Geek'* were not true. He thought if he told the truth he might not be selected. This suggests he was willing to say what was necessary to achieve the outcome he desired.

65. In considering the validity of the certificate of 6 July 2011, the Respondent further submits that the Court should consider the overlapping medical certificates given by Dr Thomson:

- The certificate issued on 6 July 2011 says "*fit for modified duties 5 July to 23 July 2011"*.[44]
- The certificate issued on 12 July 2011 says "*unfit, 12 July to 23 July 2011*".[45]
- The certificate issued on 22 July 2011 says "*unfit, 25 July to 8 August 2011*".[46]
- Exhibit R6 also issued on 22 July 2011, says the Applicant is "*fit to fulfil the requirements of his contract with Beauty and the Geek during the next 6 weeks*".[47]

66. Exhibit R7 is the Centrelink certificate of 4 August 2011. In it, the Applicant is described as "*unfit for work, 7 July to 26 July*".

[44] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012 at 'JT11'.
[45] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012 at 'JT12'.
[46] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012 at 'JT13'.
[47] Exhibit R6.

67. The fact that the certificates were prepared for three different purposes does not explain the inconsistency. The Respondent invites the Court to conclude that the documents were provided by Dr Thomson to the Applicant on request and based on the information provided by the Applicant to Dr Thomson – information which did not provide a full and complete picture.

68. The Respondent submits that while the Applicant may have been exhibiting some or all of the symptoms that he reported, those symptoms did not incapacitate him for work.

## Did the Applicant produce satisfactory medical evidence?

69. The Applicant submits that there is a real danger in requiring 'satisfactory evidence' to meet an exacting standard as clause 70.7 of the Agreement applies equally to one day of sick leave and three months of sick leave. The phrase 'satisfactory evidence' refers to an objective satisfaction. It is not the production of evidence that in the opinion of the employer is satisfactory.

70. The Respondent in its affidavit evidence says that the evidence was not satisfactory because it required new medical evidence. The Applicant submits that the medical certificate dated 6 July 2011 was new medical evidence. Mr Nottage conceded that it was new evidence of unfitness.

71. The Respondent says that there was no reason provided in the medical certificate as to why the Applicant was unfit for work. The Applicant submits that it was unnecessary to provide a reason but even so a reason was provided. The Applicant was unfit because he was suffering from a recurrence of traumatic stress symptoms.

72. The issue of the access to support was raised by Dr McEwan. It would be more beneficial to the Applicant to have access to his own doctor who had treated him for 18 years and the psychologist he had seen a dozen times if he was going to confront his fears. Participating in '*Beauty and the Geek*' was a completely different environment and one which Dr Thomson did not think would trigger his symptoms.

73. There is no conflict with Dr Rose's certificate which dealt with the period covered by the workers compensation claim. That claim did not

relate to July. If there was no recurrence in July then both Dr Thomson and Dr McEwan were duped.

74. The Respondent submits that the evidence of the surrounding circumstances provides a basis to question whether the certificate dated 6 July 2011 is in fact evidence of medical incapacity. The environment in Brisbane did not change between 29 June 2011 when Dr Thomson wrote to Mr Nottage raising issues about practicalities, not medical concerns, and 5 July 2011. He does not say in the certificate that the environment of a multi-storey office building is the factor making the Applicant unfit for work in Brisbane.

75. The Respondent submits that it is not enough to write 'unfit for work from this period to this period'. If someone is medically unfit for work, it may, in some circumstances be necessary to say why.

76. Clause 70.7 of the Agreement is a general provision which applies to everyone. It applies to a one day absence as well as a 30-day one. That is why satisfactory medical evidence can and does have a shifting base. What is satisfactory in one instance may not be satisfactory in another. In this instance the Applicant had been through a fitness for duty assessment and he was to return to work. He did not. He was issued with a 'show cause' letter and nothing in the material put in response caused Mr CHRISTOPHER STOCKS (Assistant Director, People Management Branch of the Respondent) ("Mr Stocks") to change his decision that there was no medical reason on the evidence before him for that non-attendance at work.

77. Clause 70.7 of the Agreement does not cast an onus on the employer to seek the evidence. It is on the employee to provide it.

## Conclusions

78. Section 340(1) of the Act provides:

> *A person must not take adverse action against another person:*
>
> *(a) because the other person:*
>
> *(i) has a workplace right; or*
>
> *(ii) has, or has not, exercised a workplace right; or*

*(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or*

*(b) to prevent the exercise of a workplace right by the other person.*[48]

79. In this case the Applicant relies on his entitlement under cl.70.7 of the Agreement to be absent from work. The Respondent disputes that he meets the requirements of the clause and that he therefore cannot rely on it providing him with a right to be absent from work. It is accepted by the Respondent that in dismissing the Applicant it took adverse action against him and that his absence from work was the reason for his dismissal.

80. The Respondent accepts that the Applicant provided a medical certificate for the relevant period of his absence. The Respondent argues however that it was entitled to disregard these certificates because of the surrounding circumstances.

81. The Respondent relies on the decision of Burchardt FM in *Anderson v Crown Melbourne Ltd* [2008] FMCA 152 ("*Anderson*") in support of its proposition that the medical certificates provided by Dr Thomson did not provide satisfactory medical evidence and that it was, therefore, entitled to disregard those certificates.

82. *Anderson* is very much a case determined on the peculiar facts before the Court. It does not represent judicial carte blanche for employers to ignore medical certificates issued by registered medical practitioners. At paragraph [6] of that judgment his Honour says, "*I should stress at the outset that this case is very unusual in a number of respects*." Among those respects are the facts that Mr Anderson had purchased both a ticket to a football match and plane tickets to fly interstate to see it prior to making an appointment to see a doctor five days before the match. He obtained a certificate dated before the match and covering his absence that day.

83. Furthermore, Mr Anderson had told several people of his intention to attend the match and made attempts to obtain his employer's consent to be absent on the day. He had gone so far as to tell his employer that he

[48] *Fair Work Act 2009*, s.340(1).

intended to take sick leave to go to the match and had been warned against doing so. A further significant fact was that the doctor involved had been previously disciplined for issuing false sickness certificates.

84. The circumstances in this matter bear no resemblance to those in *Anderson*. There is no suggestion that Dr Thomson was dishonest in issuing the Applicant with certificates. He clearly knew the Applicant well, having treated him since he was a child. He had been treating him, in July 2011, for some time for an adjustment disorder and was familiar with his condition. Further, he liaised with the Applicant's treating psychologist and had the benefit of her assessment of the Applicant's condition.

85. In my view, Dr Thomson gave cogent explanations for the differing certificates he issued. The Applicant's condition was, in his assessment, related to situational anxiety. The prospect of returning to work in a metropolitan office environment of the Respondent, in Dr Thomson's view had a negative impact upon the recovery the Applicant had shown. Dr Thomson did not consider that working in an isolated field office would be likely to trigger such symptoms and that participation in the '*Beauty and the Geek*' program might assist the Applicant in a positive way.

86. Furthermore, Dr Thomson's certificates were not of the one line variety, for example, 'X is unfit to work from A to B', but provided reference to the Applicant's condition and his assessment of what would be appropriate.

87. The certificate of 6 July 2011 is worth reproducing in full. It reads:

> *[The Applicant] is suffering from a recurrence of Traumatic stress symptoms relating to his recent anxiety state as documented in previous correspondence.*
>
> *He will be unfit to continue his usual occupation – but would be fit for modified duties doing field work and located in Victoria or near area closer to home in neighbouring states as part of a planned Return to work Plan for the period from 05/07/2011 to 23/07/2011 inclusive.*
>
> *Following lengthy discussion with Adam on 5/7/2011 and with the assistance of a report from his treating Psychologist S McEwan, it*

*is my concern that his health has been adversely affected by his recent meeting in Melbourne and subsequent email from BOM re directive to go to Brisbane on 7/7/2011 – as my understanding is that there was no agreement reached re RTW at the Melbourne meeting and then an email was sent directing him to go to Brisbane. He states that he had contacted Brisbane ROM who explained the work would be Admin only and that there was no field work available at the present time or for the foreseeable future for him. In addition to this Adam is under the impression that he would not get leave to return home to see family for about 8 weeks if he went there.*

*A further concern has been that I have been informed that it is BOM policy for any RTW Plan to involve meetings with Adam and the appropriately trained Rehab officer – Adam told me this one lady appeared when called in during the meeting in Melbourne last Friday and Adam had had no chance to have prior discussion with her re RTW.*

*In addition to this it has been experience that when a RTW Plan has been finalised that I as a treating GP would be involved in sighting the plan and signing off on the plan with discussion with adam [sic] prior to the RTW taking place.*

*Adam's stress level has worsened in relation to this process and he is understandably left feeling unsupported by the department in the manner in which this RTW Plan has been handled.*

*Due to his current state of health I have advised him not to go to Brisbane due to the work not being as we had advised and note that the work doctor – AGMO – had concurred with the type of RTW Plan both I and S McEwan had recommended.*[49]

88. This was followed by a further certificate on 12 July 2011:

*[The Applicant] is suffering from a medical condition & he will be unfit to continue his usual occupation and the reason for this has been a further deterioration in Adam's health following receipt of the Bureau's letter on 8/7/2011 – in my opinion Adam's health can only begin to improve if there were to be a appropriate RTW meeting to try to discuss his capabilities and where he can best perform given the health issue he has had as a result of the events in recent months. I still stand by my earlier advice and that of his treating psychologist re field work being the area he would best be able to perform in but for the next 2 weeks deem that he*

[49] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012 at 'JT11'.

*remains totally unfit as his psychological well being has deteriorated further after receiving this letter of 8/7/2011.*

*I can only hope that the Bureau would reconsider their opinion. I will be reviewing Adam's state of health on the 22/7/2011.*

*for the period from 12/07/2011 to 23/07/2011 inclusive.*[50]

89. And a further certificate on 22 July 2011:

> *[The Applicant] is suffering from a medical condition & -he still is suffering a flare up of his current condition – caused by his employer not providing a proper RTW plan that I can approve of and his early recovery is entirely dependent on his being able to have a proper RTW plan, taking into account the views of his treating psychologist and myself with regards to appropriate work to return to. – In the meantime he will remain unfit to continue his usual occupation for the period from 25/07/2011 to 08/08/2011 inclusive.*[51]

90. It would be difficult to contend that these certificates were not 'satisfactory medical evidence'. It would appear that the Respondent did not accept the certificates because it did not accept that the Applicant was 'medically unfit'. Dr Thomson was therefore either colluding with the Applicant to present him as being 'medically unfit' or the Applicant had fooled Dr Thomson into believing that this was the case.

91. Dr Thomson impressed me as a truthful witness. He is an experienced general practitioner. If he was colluding with the Applicant, then so, presumably, was Dr McEwan, his psychologist. I have no reason to believe that this was the case.

92. The Respondent suggested that the different certificates given to the Respondent, to the '*Beauty and the Geek*' and to Centrelink were somehow evidence of collusion. I accept Dr Thomson's evidence that he did not believe that participating in '*Beauty and the Geek*' would be likely to trigger the adjustment disorder symptoms which had their origin in the Applicant's workplace. A logical and more innocent explanation for the different certificate given to Centrelink is that it

[50] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012 at 'JT12'.
[51] Exhibit A5, Affidavit of Dr. Jim Thomson sworn 30 January 2012 at 'JT13'.

covered the period during which the Applicant was stood down without pay prior to his dismissal.

93. Was the Applicant capable of deceiving Dr McEwan and Dr Thomson? The Applicant clearly was not frank with the producers of '*Beauty and the Geek*'. I accept that he did this because he was embarrassed by his condition and did not want to jeopardise his chances of being selected for the show. That does not, however, mean that the symptoms he exhibited to Dr Thomson and Dr McEwan were a charade.

94. The Applicant impressed me as somewhat young for his age. It is not difficult, also, to see why he was considered to be a suitable candidate for '*Beauty and the Geek'*. He was clearly able to communicate with other people in a rational way during the period just prior to Dr Thomson diagnosing him with a recurrence of traumatic stress symptoms. None of this communication was, however, face to face and all of it was presumably conducted from the Applicant's home.

95. My assessment of the Applicant was that he did not have the sophistication necessary to manipulate both Dr McEwan and Dr Thomson into believing that he was suffering a recurrence of symptoms such as to make him unfit to resume work in the Brisbane Regional Office of the Respondent in early July 2011.

96. The Respondent appears to, at the very least, suggest that the Applicant misled Dr Thomson with respect to matters which influenced his view about the risks of a deterioration in the Applicant's condition should he return to work at the Brisbane Regional Office.

97. I am satisfied that taking the evidence as a whole, Dr Thomson was of the view that the symptoms exhibited by the Applicant in early July 2011, were a reaction to the prospect of returning to work in a Regional office environment and that this was exacerbated by the fact that Brisbane was a long way from the Applicant's supports and medical practitioners. While the Applicant may have exaggerated his difficulties in accessing 'home', I accept that Dr Thomson's observations of the Applicant, reinforced by Dr McEwan's report to him, provided a sound basis for the certificate he issued on 6 July 2011.

98. I am satisfied that the medical evidence was sufficient to establish that the Applicant was 'medically unfit' to attend for work in Brisbane on 8 July 2011 or at any time up until his dismissal by the Respondent. I am further satisfied that the medical certificates supplied objectively constituted satisfactory medical evidence of his medical unfitness.

99. It is uncontested that the reason for the termination of the Applicant's employment was the view of the decision-maker, Mr Stocks, that his failure to report for and perform his duties was "*not excused by any medical condition*".[52]

100. I am, therefore, satisfied that the Respondent in dismissing the Applicant took adverse action against the Applicant, within the meaning of s.342 of the Act and breached s.340(1) of the Act.

## Remedy

101. The Applicant seeks an order under s.545(2) of the Act, that he be reinstated to the position he previously held with the Respondent. The Applicant relies on the following in support of this submission:

- The Respondent is the only employer of meteorological observers in Australia.
- The Applicant is passionate about his work – the evidence shows his commitment to obtaining the necessary qualifications and to obtaining employment with the Respondent.
- The Applicant has been largely unsuccessful in obtaining other employment either before or after his employment by the Respondent.
- There is no suggestion that he was anything other than an excellent employee.
- Compensation would be an insufficient remedy.

102. The Applicant also seeks compensation for lost wages. The parties have agreed that for the purpose of calculating his annual salary, the

[52] Exhibit R13, Affidavit of Christopher Stocks sworn 25 June 2012 at paragraph 22.

appropriate total salary is $75,010.48. After deduction of income earned and termination payment this comes to $60,550.00.

103. In the absence of reinstatement, the Applicant seeks compensation. The Applicant submits that the calculation of compensation should be approached in accordance with the ordinary principles – that is to put the employee in the position he would have been in if the employer had not contravened the Act.[53]

104. The Applicant submits that the evidence shows that he would have stayed in the job with the Respondent until retirement. This is an area of employment in which people remain for very long periods of time, with average employment of 20 years or more. The Applicant is qualified for nothing else and is passionate about his job.

105. The Applicant in his affidavit of 13 August 2012 sets out the action taken by him to mitigate his loss since the termination of his employment.[54] The onus is on the employer to establish that the Applicant has failed to mitigate his loss. The Applicant referred to relevant authorities.[55]

106. The Applicant further submits that in relation to future loss, the onus is on the employer to show that the employee will probably mitigate the loss by obtaining alternative employment.[56]

107. The Applicant has retrained as a barista. He has not been successful in finding employment and there is no basis to assume that he will find a well paid job in hospitality in the foreseeable future.

108. In response to the Respondent's evidence that increasing automation will have an impact on the need for observers,[57] the Applicant submits that:

- First, there is no evidence of involuntary redundancies;
- Second, the employer is continuing to recruit; and

[53] *Haines v Bendall* (1991) 172 CLR 60.
[54] Exhibit A3, Affidavit of Adam Marshall sworn 13 August 2012.
[55] M. Irving, *The Contract of Employment*, Lexis Nexis Butterworths, Australia, 2012, p.898.
[56] *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (Mike Walsh Case)* (1989) 16 NSWLR 130.
[57] Exhibit R9, Affidavit of David Nottage sworn 17 August 2012, at paragraph 12.

- Third, there is an aging population in this field of work.

There is no suggestion that there will be no field observers and the Enterprise Agreement provides for retraining and redeployment.

109. The Respondent submits that reinstatement is not an appropriate remedy in this case for the following reasons:

- The workforce is decreasing in size.
- The Applicant could return to work only to be offered voluntary redundancy.

110. The Respondent further submits that compensation is a discretionary remedy and as such, it is not necessary to compensate the Applicant for all loss sustained.[58]

111. The Applicant has given evidence about undertaking postgraduate qualifications to become a meteorologist. If he had intended to pursue that aim he would have had to leave his employment with the Respondent and reapply to come back as a meteorologist. There are other employers of meteorologists as evidenced by Mr Nottage.[59]

112. The Applicant gave oral evidence of dozens of job applications, but none of these applications were in evidence before the Court.

## Conclusions on remedy

113. While the provisions of s.545 of the Act provide no priority for the making of orders with respect to reinstatement or 'an order awarding compensation for loss that a person has suffered because of the contravention', unlike s.390 of the Act, which provides for reinstatement to be the principal remedy, it is accepted by both the Applicant and the Respondent that reinstatement is the primary remedy. Section 545 of the Act gives the Court a wide discretion to make any order it considers to be appropriate. Where reinstatement is sought, the Court, in my view, should only refuse such an order, where it would clearly be inappropriate.

[58] *Kavassilas v Migration Training Australia Pty Ltd* [2012] FMCA 22 at [87].
[59] Exhibit R9, Affidavit of David Nottage sworn 17 August 2012, at paragraph 18.

114. The only substantial reason given by the Respondent why reinstatement would be 'inappropriate' is the evidence that technology is replacing some of the functions of weather observers, that the Respondent has reduced its level of recruitment to these positions and that voluntary redundancies have been offered.

115. On the other hand the evidence clearly shows the Applicant's commitment to a career with the Respondent and his lack of success in seeking employment in other occupations. Furthermore, there was no evidence to suggest that his performance or conduct as an employee was in any way unsatisfactory.

116. The potential that a position may become redundant is one which faces many employees. It is perhaps one of the vicissitudes of life which may confront an employee. In the circumstances of this case, there is no evidence of involuntary redundancies either occurring or being contemplated. Further, while the Respondent had reduced its recruitment, it has not ceased to recruit to equivalent positions. The Applicant has shown a willingness to improve his qualifications in the area. There is no reason to assume that, should he resume his employment with the Respondent, his tenure is doomed to be a limited one.

117. I am satisfied that the Applicant should be reinstated to the position previously occupied by him or an equivalent position with the Respondent. Further, I am satisfied that he has made efforts to mitigate his loss, albeit that such efforts have not met with much success. He should, therefore, be compensated for the earnings lost by him since the termination of his employment.

118. The Applicant is to produce draft Orders to give effect to this judgment and the matter is listed for settlement of those Orders and for any argument with respect to costs.

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**I certify that the preceding one hundred and eighteen (118) paragraphs are a true copy of the reasons for judgment of Whelan FM**

Associate:

Date: 19 November 2012