QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Gilmour v Workers' Compensation Regulator* [2019] QIRC 022
PARTIES:	**Mark Paul Gilmour** (Appellant) v **Workers' Compensation Regulator** (Respondent)
CASE NO:	WC/2017/21
PROCEEDING:	Appeal
DELIVERED ON:	January 21 2019
HEARING DATE:	4, 5, 6 June 2018
MEMBER:	O'Connor VP
HEARD AT:	Townsville
ORDER:	**1. The appeal is allowed.** **2. The decision of the Regulator dated 20 January 2017 is set aside.** **3. The respondent is to pay the appellant's costs of and incidental to this appeal to be agreed or failing agreement to be the subject of an application to the Commission.**
CATCHWORDS:	WORKERS' COMPENSATION – APPEAL – Psychiatric or psychological injury – whether injury excluded under s 32(5) of the Workers' Compensation and Rehabilitation Act 2003
LEGISLATION:	*Workers' Compensation and Rehabilitation Act 2003* s 32

CASES:	*Allwood v Workers' Compensation Regulator* [2017] QIRC 88 *Attorney General's Department v K* (2010) 8 DDCR 120 R 52 *Byrnes v Workers' Compensation Regulator* [2018] ICQ 004 *Croning v Workers' Compensation Board of Queensland* (1997) 156 QGIG 100 *Davis v Blackwood (Workers' Compensation Regulator)* [2014] ICQ 9 *JBS Australia Pty Ltd v Q-Comp* [2013] ICQ 13 *Newberry v Suncorp Metway Insurance Ltd* [2006] QCA 48 *Read v Workers' Compensation Regulator* [2017] QIRC 72 *WorkCover Corp (SA) v Summers* (1995) 65 SASR 243 *Yousif v Workers' Compensation Regulator* [2017] ICQ 004
APPEARANCES:	Mr J Greggery QC instructed by Organic Legal for the appellant Mr S Gray directly instructed by the respondent

Reasons for Decision

[1] Mark Paul Gilmour appeals a decision of the Workers' Compensation Regulator dated 20 January 2017 that rejected his application for compensation in accordance with section 32 of the *Workers' Compensation and Rehabilitation Act 2003.* The appellant claims that he has suffered a psychiatric or psychological injury whilst employed as a first aid trainer at St Johns Ambulance (Queensland) based in Townsville.

[2] The appellant's claim relates to a period of time from approximately 4 January 2016 to 28 June 2016. The appellant alleges that during this time he was overworked, under resourced and inadequately supported. An additional component to his claim relates to an accusation of inappropriate workplace conduct which occurred when he attended a training course in Brisbane on 28 June 2018. However, the appellant submits that by the time of the accusation the appellant had already suffered an injury.[1]

Legislative framework

[3] Section 32 of the Act defines the meaning of an "injury" and, so far as it is relevant, is in the following terms:

> **32 Meaning of injury**
>
> (1) An **injury** is personal injury arising out of, or in the course of, employment if—
>
> …
>
> (b) for a psychiatric or psychological disorder—the employment is the major significant contributing factor to the injury.
>
> …
>
> (5) Despite subsection (1)…, **injury** does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—
>
> (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
>
> (b) the worker's expectation or perception of reasonable management action being taken against the worker;
>
> ….

The issues

[4] The onus is on the appellant to convince the Commission that he has suffered an injury that satisfies the provisions with of s 32. This onus gives rise to four questions:

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[1] Submissions of the appellant, para 46.

1. Did the appellant suffer a personal injury, that being a psychiatric or psychological disorder?

2. Did the appellant's personal injury arise out of, or in the course of, his employment?

3. Was his employment the major significant contributing factor to his injury?

4. Is the injury excluded from being compensable because the injury was the consequence of "reasonable management action taken in a reasonable way" by his employer in connection with his employment?

[5] The respondent accepts that the appellant has suffered an injury[2] and there is no dispute that the appellant was a worker at the relevant times.[3]

[6] For the reasons that follow, and in answering the questions above, I find that the appellant suffered a personal injury; the injury arose out of, or in the course of the appellant's employment; the appellant's employment was the major significant contributing factor to the injury; and, the appellant's injury was not excluded by operation of s 32(5) of the Act.

Background

[7] It is common ground that the appellant is both passionate about first aid and takes the role of first aid trainer seriously. The appellant's interest in first aid began when he worked as a detachment commander in the Australian Army in Cambodia. It was through this experience that it became evident to the appellant for the need for prompt and urgent first aid.[4] Between 2002 and 2011 the appellant was a contractor at the Queensland Ambulance Service as a trainer/assessor in first aid courses. The appellant commenced employment with St John Ambulance in February 2012[5] initially part time and from 14 January 2013 as a full-time employee.[6]

The appellant's role

[8] St John is a registered charitable organisation. Its mission is the provision of first aid, community support services, and, for present purposes, the delivery of first aid training. As an accredited trainer, the appellant's primary role was to deliver and assess first aid training in accordance with St John’s training agreement, policies and procedures. The

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[2] Submissions of the respondent, [3].
[3] *Workers' Compensation and Rehabilitation Act 2003* s 11.
[4] T-1 Ll 7-15.
[5] Exhibit 1.
[6] Exhibit 5.

appellant's key duties were outlined in the "duty statement for a first aid trainer" which relevantly provides:

Key duties

- Deliver and assess first aid training
- Course administration including processing course rolls, issuing certificates and taking course bookings
- Cleaning faces and manikins
- Assisting and converting potential customer enquiries relating to First Aid kits and ancillary products
- Any other duties as directed by the Executive Officer/Regional Manager/Area Manager.[7]

[9] The appellant's roster consisted of a 14 day work cycle for pay purposes but ultimately the role of a trainer was to work as required. He would normally attend the office about 7.30am depending on what had occurred the previous day and what resources were available for use. Participants would normally arrive at 8am for a course commencing at 8:30am. The courses could vary in duration from as little as three hours or as long as two days covering a range of additional topics.

[10] The first aid training required the use of manikins which the participants used to simulate the giving of CPR. The Townsville office had a stock of at least 86 adult manikins and for a course of about 20 people, 11 manikins would be required.[8] The manikins used a latex face shield which was replaceable and washable and it needed to be put into the dishwasher after every use.

[11] In addition, the appellant had responsibility for organising the resources which was the course packs, supplies and any other equipment which was needed to run the training courses. The course pack included an assessment record booklet which would need to be printed out or alternatively they would be sent up in bulk from Brisbane.

[12] Training courses were allocated to trainers via the regional manager and the allocations were listed on a whiteboard in the office that showed who had been allocated courses over a two-month period.[9]

St John Townsville Office

[13] St John headquarters is in Brisbane. The Townsville office was, until late 2015, led by Ms Robyn Altoft, the North Queensland Regional Manager who also had responsibility for the Mackay office.[10] For most of 2015 the Townsville office had three full-time

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[7] Exhibit 2.
[8] T2-16 Ll10-20.
[9] T1-20 Ll10-20.
[10] T2-111 Ll33-34.

trainers and seven office administration staff. The full-time trainers were supplemented with casual trainers. The full-time trainers were Christine Mackenzie, Bill Jewel and the appellant.

[14] The difference between a casual trainer or a permanent part-time trainer and a full-time trainer was that the casual trainers were generally not expected to prepare their course packs and were not normally expected to do things like wash faces or wash manikins.[11] The administration staff would normally assist in the preparation of the course packs.

Organisational Restructure

[15] The St John organisation experienced a significant restructure during the appellant's final months of employment. On 15 December 2015 the Chairman of St John wrote to all staff advising that as part of a review the board had decided that it would be necessary to reduce staff numbers by retrenching some positions to improve the financial viability of its operations.[12] The Townsville office was downsized from six administrative staff to one. Further, Ms Altoft announced she would be leaving St John on 30 December 2015, however that was later extended until the first week of March 2016.

Reduction in trainers

[16] The downsizing of staff coincided with the resignation of full-time trainers Ms Mackenzie and Mr Jewel in December 2015. The resignation of his two full-time colleagues prompted the appellant to send an email to Mr Murray Excel who was the State Operations Manager. In the email of 18 December 2015, the appellant wrote: "I at present am the sole permanent staff member when we recommence in 2016". Mr Excel responded in the following terms: "Thanks Mark, we will need additional trainers for Townsville and I will start the hunt as soon as we can".[13]

[17] St John advertised for a full-time trainer and Ms Amanda Burns was employed in March 2016. However, Ms Burns worked only five days before resigning. The appellant said he was saddened by Ms Burns resignation as she was a trainer with an experienced background and he had been heartened that she had joined the team.[14] During this time it was the appellant's understanding that St John was constantly looking for new full-time trainers.[15] He gave evidence that he could not fulfil the role of training and complete all of the other tasks that needed to be done around the workplace.[16]

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[11] T1-16. Ll15-35.
[12] Exhibit 10.
[13] Exhibit 12.
[14] T1-61 Ll44-46.
[15] T 1-62 Ll 9-11.
[16] T1-62 Ll 14-15.

[18] Significantly, additional full-time trainers were not employed until shortly before the appellant's last day of work on 28 June 2016.

Resourcing

[19] Since 2012 the appellant had shown a willingness to manage the store supplies because in his words "at times we were running out of things".[17] The appellant said his role broadened and that Ms Altoft supported him bringing to her attention what was required to be ordered such as disposable face shield, batteries for the defibrillators, and any other consumable. The appellant said he would spend days not training making sure that the manikin fleet was serviceable.[18]

[20] In March 2016, Ms Rebecca Pola was appointed to replace Ms Altoft as the North Queensland Regional Manager.[19] The change in manager coincided with a change in how resourcing was managed. In May 2016 the ordering process was changed to a system called 'Mainfreight' which meant that there was no warehouse and the resources would be ordered and then delivered.[20]

[21] One of the resourcing issues that the appellant spoke about was the low stock of batteries which were used on the defibrillators. He said that Mainfreight did not hold large quantities of batteries so they had to be purchased locally. The appellant claims that there seemed to be some reluctance on Ms Pola's behalf to buy batteries and he had to request them on more than one occasion when they ran low.[21]

[22] On 15 March 2016 the appellant sent Ms Pola an email outlining perceived issues with the equipment St John were using and a list of proposed resourcing purchases.[22] Ms Pola said that notwithstanding that all purchases were done through Brisbane she didn’t view the proposal as urgent because St John already had serviceable equipment however she did arrange to buy some infant manikins.

[23] Ms Pola said she remembers having discussions with the appellant about the resourcing tasks which had become an issue due to the fact that multiple courses were being run at the same time.[23] Ms Pola said that the appellant addressed her on several occasions indicating that the resourcing tasks needed to be done.[24] Ms Pola's evidence was that

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[17] T1-21 Ll42-45
[18] T1-22 Ll0-5.
[19] T3-42 L 10.
[20] T1-50, Ll1-15.
[21] T2-14 Ll1-20.
[22] Exhibit 20.
[23] T 3-45 Ll5-10.
[24] T3-45 Ll10-12.

either she would do the unfinished tasks or allocate the work to one of the casual trainers or administration staff.[25]

[24] On the afternoon of 7 April 2016 a meeting was convened for the purpose of discussing the issue of resourcing. The meeting minutes state "trainers to order and look after own resources. Tell Rebecca [Pola] if you need resources and there are not enough".[26] Ms Pola was asked how she was advised if resourcing was an issue:

> Ms Pola: The trainer would tell me, so, not always Mark, sometimes it would be a – a casual who'd come in and said, "I've just stripped my gear, and there's – there's a lot of things in the washing machine," or whatever, and I would – I would do it from there. Sometimes I would, or Meg or Sandy would, just on their course of walking through the facility, see in the laundry and would alert me or would just do it themselves; they'd put the washing machine on or they'd clear the resources just because they saw there was a backlog. So it didn't always have to be me specifically asking someone to do something; sometimes staff members just saw it and – and did it.
>
> Mr Greggery QC: All right. And Mr Gilmour was also doing the cleaning, as well?
>
> Ms Pola: Yes, correct.[27]

[25] Ms Pola said that casual trainers also had some responsibility for the cleaning and management of resources and if a trainer did not complete their resourcing responsibilities that they would advise me and I would get it sorted by allocating the work to someone else or by doing it herself.[28]

Excessive Workload

[26] There were signs that the appellant was at risk of burning out as early as 2015 and this can be seen in the appellant's performance appraisal of 5 January 2016 which was completed by Ms Altoft:

> Mark has had a very busy 2015 which has **seen him work many more hours than usual**. He has done this willingly and without complaint and maintained an excellent training standard. His knowledge in the first aid field is excellent as is his commitment to the delivery of quality training.[29](emphasis added)

[27] The performance appraisal of 5 January 2016 also discusses "whether there exist any outside factors which have been adversely affecting his performance". Relevantly it provides:

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[25] T3-45 Ll15-20.
[26] Exhibit 23.
[27] T3-49.
[28] T3-44 Ll5-10.
[29] Exhibit 14.

> Mark has faced some challenges from within the organisation with regard to a number of issues. NQ continues to work, quiet often, with substandard equipment and out of date and incorrect training resources. Mark has attempted on numerous occasions to resolve some issues and to find a workable solution, however these attempts are not being addressed. This is certainly not from lack of trying, as I believe Mark continually notifies Brisbane training department and attempts to rectify any problems with course materials and resources that he comes across. Unfortunately these issues continue to snowball which has led to some frustrations arising. **Marks continued diligence can be very exhausting on him personally. I would like to see him take a step back and be a little kinder to himself.** (emphasis added)
>
> Mark is always reliable and has taken on the task of equipment maintenance. He recognised the need for some responsibility in this area and did this without prompting. Thankyou Mark, you do a wonderful job ensuring the equipment is in good working order and ready to go – this is very much appreciated.[30]

[28] Mr Gray, counsel for the respondent asked Ms Altoft whether her comment that the appellant needed to "step back" was referring to the appellant trying to deliver too much course content during training courses. Ms Altoft agreed but added that it was also to do with the appellant feeling solely responsible for the maintenance of course equipment.[31]

[29] The performance appraisal of the appellant indicates that the employer was aware that the appellant had been working more hours than usual and that his work ethic meant he did this willingly and without complaint. It also identifies that the appellant had made numerous attempts to resolve issues at work however the employer had not addressed these attempts. In her own words, Ms Altoft says "Unfortunately these issues continue to snowball which has led to some frustrations arising. Marks continued diligence can be very exhausting on him personally". It was Ms Altoft's view that the appellant was beginning to become overworked because he was the only full-time trainer.[32]

[30] On the issue of sourcing additional trainers, Ms Altoft's evidence was that she was trying to keep everything going at the Townsville office until they had replaced or put another trainer. Ms Altoft also had responsibility to manage the Mackay office and she said that she was "literally just maintaining what I could with my Mackay office as well, because I had no staff at all in Mackay, so I was trying to manage that office as well".[33] Ms Pola also gave evidence regarding recruiting new trainers:

> Mr Gray: And so, at the time that you started in March 2016, what familiarity did you have with Mr Gilmour's role, as to what he was expected to perform?
>
> Ms Pola: So the handover was that he was the only full-time trainer for Townsville - - - at that point in time; that they were actively trying to recruit other full-time trainers; that

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[30] Exhibit 14.
[31] T2-119, Ll33-34.
[32] T2-113 L45.
[33] T2-115 Ll1-6.

> Mark was the full-time trainer at the time; and that he was basically – when we looked at the training roster, first – full-time trainers are assigned first out of that – that roster, and then additional courses are assigned as needed to the other staff members – casuals.[34]

[31] Ms Pola said she was mindful of trying to use casual trainers however she acknowledged that she probably did not pay a great deal of attention for the first couple of months of her employment.

[32] It should be remembered that the appellant's complaints about there being a lack of trainers was occurring in the background of an organisation that had recently undergone a restructure resulting in the downsizing of staff in an effort to improve the financial viability of its operations.

[33] On 6 April 2016 Ms Pola heard the appellant use profanity when speaking to a client.[35] When she spoke to the appellant about this incident his response was that he was "feeling a little bit burnout by his training allocation". Ms Pola said she spoke to him about the fact he had significant "Time Off In Lieu" owing as well as annual leave and that if he wanted to submit a leave application she would support it. Ms Pola's evidence was that it would not have been difficult to find a casual trainer to replace the appellant if he did take leave.

[34] On 7 April 2016 the appellant sent an email to Ms Pola which followed on from the incident which occurred the day prior.

> This email is the reflection of yesterdays and todays meaningful conversations we had, I had not really processed how saddened I was that I was still here alone when discovering Amanda would not be staying.
>
> Rebecca, without a second or potentially third trainer in centre…I am approaching six months of going it alone.
>
> …
>
> Rebecca, if at present quality of training it still a 'work in progress' then I suggest the following: please seek to hire casual trainers for a share of my training; primarily to reduce my training workload till we improve staffing.
>
> Reason, when I am training, I am still doing bulk of the resources. I am still staying back to do things for the organisation. I am picking up after others then coming in early to prep again for next course rebuilding gear as I go. I am still finding resources not assembled correctly or unserviceable.
>
> …
>
> Till we have better systems and accountability in place for course outcomes I wish to train less, this will directly assist my organisational loyalty by reducing frustration of at times clear choices of

[34] T3-43 Ll 8-16.

[35] T3-38 Ll 10-15.

> people to not be responsible and simply fatigue. It will also create an opportunity for a casual to perhaps be proficient for full time consideration.
>
> …
>
> Of course I would still train but propose we limit it to seven days a fortnight, prefer keep some longer courses to attempt quality as possible for the client who has sought it. I will in this fashion be able to keep centre running functionally and not suffer as best as possible fatigue by being responsible or embitterment in seeing my own career side tracked.
>
> …
>
> The light at the end of the tunnel; Amanda gone I think you very accurately commented yesterday I was acting out of character.
>
> …
>
> Rebecca please assist me in surviving the bridging process by reducing my training load.[36]

[35] Ms Pola sought advice from Mr Steve Moren concerning the issues following her conversations with the appellant and, in particular, the emails with the appellant concerning his level of burn-out, and his requests to reduce his training hours. Mr Moren's advice to Ms Pola was to look at the training roster and to reduce it where possible. It was agreed that this would be a sufficient approach in the short-term. It was Ms Pola's evidence that "reducing where possible" was understood by her to mean "where possible within organisational requirements". Ms Pola was asked under cross-examination about the steps St John took to reduce the appellant's workload:

> Mr Greggery QC: Yes. All right. And can I suggest to you then now that if we've at least gone through that exercise to refresh your memory that no steps were taken to source trainers from outside the Townsville area to reduce Mark Gilmour's workload during that period of time?
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> Ms Pola: Not outside of what you've mentioned, no.
>
> Mr Greggery QC: Yes. All right. And you don't recall any other occasions?
>
> Ms Pola: No, not off the top of my head.[37]
>
> …
>
> Mr Greggery QC: Can I suggest to you that in the week immediately following the email you sent to Steve Moren on 12 April 2016 and his advice to you that you would reduce where possible Mark Gilmour's workload, that he wasn't crossed out of any training that week and substituted with a casual trainer from Townsville?
>
> Ms Pola: Without looking at the rosters I couldn't tell you.
>
> Mr Greggery QC: All right. Do you recall ever doing that during that period of time?
>
> Ms Pola: Reassigning courses to casuals? From Mark Gilmour, yes? I'm – I'm fairly confident I must have at some point if I was reducing the thing, yeah.

[36] Exhibit 24.

[37] T3-75 Ll 37-40.

Mr Greggery QC	Yes. Well, that's right, but one follows the other. I'm asking if you specifically recall doing that on any occasion?
Ms Pola:	No, not – not two years later, no. I couldn't give you a date where I did that, no.[38]

[36] The respondent contends that whilst there was a period that the appellant was the only full-time trainer the appellant has not demonstrated that he did in fact have an increased workload during the relevant period.[39]

The Avatar Complaint – Meeting of 28 June 2016

[37] On 28 June 2016 the appellant was in Brisbane for a Salesforce software training course. As part of the afternoon session one of the tasks assigned to participants was to create an avatar profile. The appellant used Winston Smith, a fictional character from George Orwell's *1984*. During the course, Mr Noel Gillard asked the appellant to leave the training room and he told the appellant "Look, on orders of the CEO that you are to report to head office."[40] The appellant was advised that a complaint had been made regarding his use of an avatar which it was suggested resembled Adolf Hitler. The appellant denied the allegations. Nevertheless, the appellant was asked to gather his things and to report to St John Head Office in Fortitude Valley.

[38] The appellant travelled from Adelaide Street to Fortitude Valley. He was given little detail about the nature of the complaint. The complaint was apparently made by a course trainer and possibly one other person. The appellant attended the Head Office and after a wait of approximately 20 minutes entered into a meeting to discuss the allegation. The meeting was attended by Murray Excel, Steve Moren and Peter Mulholland. The appellant was not offered a support person although Mr Mulholland suggested in his evidence that he was willing to perform that role.

[39] The appellant told the Commission that it took a number of attempts to persuade those attending the meeting that it was not Adolf Hitler but rather the fictional figure, Winston Smith. He was shocked by the allegation which he found deeply offensive. Mr Moren said that it was an obvious misunderstanding which did not warrant any further investigation. Mr Mulholland said in evidence:

Mr Mulholland:	And, I mean, it's always tricky with who takes offence. I mean, I think everyone has a right to take offence. And that was my first thought. I thought, "Oh, okay, someone's been offended". A – but I also – I also knew at the time, Mark – Mark is intelligent, he might be better read than other people

[38] T3-76 Ll 1-15.
[39] Respondent Submissions, para 96-97.
[40] T1-74 L.26.

> who were offended. I understand those things and I thought, "Okay, fair enough". Like, it wasn't a – I didn't see it as a big deal, necessarily. This is all in the space of an hour or two. So yeah, so I – I - - -
>
> Di – didn't see what is a big deal?---I – the – the fact – the fact that there's the – the avatar and the confusion. I mean, I – I – I – once – once that was explained I thought, "Okay, that's fair enough, yep". So – but I al – I can see both sides of the picture. Yeah.[41]

[40] The appellant recalled that he felt bewildered and gutted as a result of the allegation. He said he could not believe that after flying from Townsville and being excited to undertake the training that this would happen.[42] The appellant said that if someone had taken the slightest offence from the graphic then he would have, if asked, changed the graphic, and made a public apology. The appellant could not believe that something so minor had led to him being requested to leave the training and asked to attend a meeting at Head Office.

[41] Whilst the meeting was originally convened for the purpose of discussing the complaint, it moved into a broader discussion regarding the appellant's wellbeing. The appellant told the Commission that during the meeting Mr Excel said that he was worried about the appellant and had been worried about him for some time. The appellant said that Mr Excel made it clear that he should rest and have some time away from the organisation. The appellant was advised at the meeting that Mr Moren would be arranging access for the appellant to St John's new Employee Assistance Provider (EAP) and that the details of that service would be forward to the appellant's home email. However, as Mr Moren told the Commission the offer of assistance under the EAP was not forthcoming as no such scheme existed to which the appellant could access.[43] In an email dated 29 June 2016, Mr Mulholland confirmed that the appellant had been directed to take his TOIL entitlement and, if necessary, sick leave.[44] The appellant was not required to return to work until 7 July 2016.

The medical evidence

[42] Dr Michael Likely, a consultant psychiatrist examined the appellant on 14 August 2017. In his report dated 16 August 2017, Dr Likely diagnosed the appellant's psychiatric or psychological disorder as Bipolar Disorder Type I.[45] Responding to questions posed by the appellant's solicitors Dr Likely wrote:

> in my opinion Mr Gilmour suffers from Bipolar Disorder Type I. This initially presented as a depressive episode from September 2015 to October 2016 when Mr Gilmour's condition switched

[41] T3-30 Ll 36-43.
[42] T1-76 Ll 44-46.
[43] T2-59 Ll.15-18.
[44] Exhibit 30.
[45] Exhibit 40.

to one of mania, necessitating hospital admissions on two occasions. He is currently in partial remission.[46]

[43] The respondent in their submissions created a list of Dr Likely's report of 16 August 2017, which I have extracted below:

a) The appellant described disturbance in his mental health from mid to late 2015 onwards which he attributed to stressors in the course of his workplace;

b) The appellant had always prided himself on his strict work ethic and demands of himself an extremely high level of performance. He also expects this of other, particularly the nature of his role as a Trainer; "we are risking people's lives, so shoddy will not do"

c) The appellant told me that unfortunately there exists within the St John's Ambulance organisation what he perceives as a somewhat lackadaisical and lack lustre approach to the momentous nature of the job as First Aider.

d) During the appellant's tenure at St John, the work load was a high one. Initially this was of no concern to him since he was used to strict and intense workloads (due to his military background) but that over time he was effectively only one of three Trainers and Assessors required in Townsville.

e) The appellant felt unsupported, particularly as a mentor. He told me that the standard of mentoring throughout Queensland was "poor" and this manifested itself when he was asked to mentor two new Trainers/Assessors in 2016. The appellant described that, initially the recruitment of these two individuals had "made me see the light at the end of the tunnel" with respect to more sharing of the workload, but that "mentoring was not respected".

f) The appellant made efforts to help junior Trainers, but his efforts had "fallen on deaf ears".

g) The appellant said he constantly worked with a high workload and in an unstaffed environment. He worked long hours and despite bringing these issues to the attention of management, no remedial actions were taken until it was "too late";

h) The appellant said he was a victim of a spurious allegation. This culminated on 28 June 2016 when the appellant attended a software workshop in Brisbane. A complaint was received after he created an avatar of the character "Winston Smith" from the George Orwell's novel "Nineteen Eighty Four". This was mistaken by one of the other workshop attendees as being an image of Adolph Hitler and this was reported to St John

i) The appellant was then the subject of a complaint about which he reacted in a rather heated fashion and this led to the matter being investigated and Mr Gilmour being exonerated by the next day but at the same time advised to take some time off work. He has not returned ever since.

j) The appellant said he feels "let down by the entire organisation". He was aware of complaints made about him to the Senior Trainer by another worker to the effect that he was incompetent and that his character was called into question. He told me that he believed that this in itself reflected a sense that other employees had a "total lack of understanding of their job

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[46] Exhibit 40, p 7.

description" and of the substandard levels of achievement that were deemed to be exceptional within the organisation.

k) The appellant said that he had been aware of these issues since commencing work with St John in 2012 but they had no subjective effect upon his health until late 2015 (approximately September of that year). At that time he recalls developing a subjectively experienced mood disturbance which was characterised by Mr Gilmour reporting a depressed mood, present most of the day, more days than not. In turn, this was associated with neurovegatative disturbance. The appellant described broken and unrefreshing sleep, anergia, amotivation, anhedonia (loss of interest in previously enjoyed leisure activities such as model making, creative writing and scuba diving), social withdrawal, introspection, irritability, a pre-occupation with morbid themes and cognitive deficits with respect to poor attention, concentration and short-term memory.

l) The appellant also experienced a breakdown in his relationship with his long-term partner.

m) The appellant said that he believed the incident involving the complaint against him regarding the avatar was "fluff" which was against him to air grievances on the part of others which had been building up over a significant amount of time. He told me " I went from being an exemplary employee to a nuisance" pointing out that he had habitually received good performance appraisal reviews and had extremely good support from an external Queensland Ambulance Service consultant. Nonetheless, he told me "I am always seen as an outsider" in St John's Ambulance.

n) In September 2016 he was notified of the decision of WorkCover to reject his claim and it appears that this stressor on top of the accumulation of stressors listed above was the nidus for the precipitation of a switch from depression to mania in the appellant's condition.[47]

[44] Dr Likely told the Commission that it was his opinion that the largest cause of stress for the appellant was in September 2016 when he was notified of WorkCover's decision to reject his claim. In his opinion, this precipitated the switch from depression to mania; leading to the appellant's hospitalisation.[48]

[45] However, Dr Likely thought it was reasonable to diagnose the appellant as having either an adjustment disorder or a major depressive disorder as at July or August 2016.[49] Dr Likely explained that someone with a diagnosis of bipolar disorder, it is a commonly relapsing one which can be characterised by further episodes of mania, further episodes of depression or further episodes of both. From the history given to him by the appellant, Dr Likely said that the appellant was aware of issues at St John from 2012 onwards, but they were not that severe as to have any effect on his mental health until approximately September 2015.[50] That was when the appellant started to develop symptoms consistent with depression or a depressive order. Dr Likely was asked:

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[47] Submissions of the respondent, pp 17-19.
[48] T3-6 Ll1-5.
[49] T3-6, Ll10-15.
[50] T3-7 Ll25-28.

Mr Gray: So if we look at the second paragraph on that page, it's Mr Gilmour's strong work ethic that he's talking about?

Dr Likely: Yes.

Mr Gray: And because of that work ethic, he demands of himself an extremely high level of performance?

Dr Likely: Correct.

Mr Gray: So that's a personality trait that Mr Gilmour took into the workplace with him?

Dr Likely: Yes, that's true.

Mr Gray: And that required Mr Gilmour, of himself, to have an extremely high level of performance, as you've described there?

Dr Likely: Yep.

Mr Gray: But not only that, but also he expected that exacting standard from his co-workers, didn't he?

Dr Likely: Yes.

Mr Gray: And that when Mr Gilmour didn't think that his co-workers – their level of work or their performance didn't meet that exacting standard, that's what he's talking about or what you've described in the third paragraph of what Mr Gilmour perceived to be the lackadaisical and lacklustre approach?

Dr Likely: That's correct.

Mr Gray: So that's because, as he described to you, these people just didn't meet that exacting standard that he thought they should meet?

Dr Likely: That's correct. [indistinct] failure in that regard when we were discussing his high standards to the military service. Of course, that would be inculpated in him during his time in the military.

Mr Gray: Yes. And so – and that's the underlying theme for Mr Gilmour, isn't it? It's his standards and what he expects to occur in the workplace?

Dr Likely: Yes, it's very important to him.

Mr Gray: Yes. And so – and that's why he then – you talk about it in the next paragraph. Doing the best for the British Empire, what was he talking about there?

Dr Likely: That was from – I think that was a comment to – I was alluding to his psychosis – the term is psychosis – because when I saw him [indistinct] – I noted it in the paragraph. [indistinct] when I saw him, he was still fairly manic.

Mr Gray: Yes. So that's – just particularly, that's what you would put down to his manic episode, as you saw him at that time?

Dr Likely: On the 14th of – yes.

Mr Gray: But then the – the final bit of that paragraph is that corporate have let him down by not living up to their own alleged beliefs, and that's what you then go on to talk about in the next paragraph?

Dr Likely: Yes.[51]

[46] Mr Gray, counsel for the respondent made the point that the appellant did not explain that there was a part time or casual pool of trainers that St John could call on which meant that Dr Likely was under the impression that the appellant was the only person doing training and assessing.

Mr Gray: Did he explain to you that St John's also had a pool of part-time or casual trainers that they could also call on?

Dr Likely: No. It's just not that I recall. It wouldn't have been discussed.

Mr Gray: So you – you got the impression from what he told you that he was the only one who was doing the training and assessing?

Dr Likely: One of three.

Mr Gray: Well – but he then – he was only one of three trainers required in Townsville?

Dr Likely: That's correct, yes.

Mr Gray: So an important part of the history was that he didn't have any support to do his work?

Dr Likely: Yep.[52]

[47] Dr Likely agreed that it was an important part of the history that the appellant did not have any support to do his work and that there "weren't any other trainers that could do the delivery of the training."[53]

[48] The respondent submits that when all the evidence is considered the following observations can be made:

(c) that is evident by the analysis of the evidence undertaken above, which shows that the appellant's complaints have been exaggerated or, not supported by the evidence; and

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[51] T3-38 LL 1-43

[52] T3-9 Ll2-15.

[53] T3-9 Ll1-15.

(d) the history given by the appellant that he was "one of only 3 trainers" required in Townsville is not correct. Putting aside St John's attempts to employ other full-time trainers, there were other casual trainers available to fulfil the training role.[54]

[49] However, as the evidence has demonstrated, whilst a panel of casuals may have been available, they were not utilised. The evidence of Ms Pola was that St John would usually use the permanent staff before calling on a casual trainer to assist.

[50] Mr Gray asked Dr Likely about the appellant's failed attempts at mentoring other trainees:

> Mr Gray: I know you've explained that in the – in that paragraph where he spoke about – asked – being asked to mentor two new trainers and assessors in 2016 - But his mentoring was not respected. What else did he tell you about that particular aspect of things?
>
> Dr Likely: That was – that was about it. His [the appellant] skills were not – he didn't think he was being valued high enough and the – the issues as discussed. There was a somewhat shoddy approach to training and assessing in the organisation and that, as we discussed, his personality was one which demands the highest of efforts and levels of achievement, but there was – as he pointed out or I wrote down in paragraph 1 on page 2, [indistinct] risking people's lives, so shoddy will not do. That's really his approach to work.[55]

[51] Dr Likely said that because the appellant had been experiencing episodes of depression, or periods of depression, one of the symptoms is depressive cognition. In short, this meant that the appellant would see the worst side of everything "cup half empty rather than half full" and that those types of people tend to catastrophise.[56]

[52] Although the appellant received reassurance during the meeting on 28 June 2016 about the complaint, Dr Likely believes his depressive symptoms would have left him dwelling on that and viewing that as another significant negative label.[57]

Was his employment the major significant contributing factor to his injury?

[53] The appellant submits that Dr Likely's evidence at trial was unchallenged and uncontradicted expert opinion that the appellant's employment was the major significant contributing factor to the injury.[58] I agree.

[54] Notwithstanding the medical evidence of Dr Likely, the respondent contends that the appellant had a pre-existing depressive condition which has adversely impacted on his

[54] Submissions of the Respondent, p 21-22.
[55] T3-9 Ll25-30.
[56] T3-11 Ll30-31.
[57] T3- Ll25-40.
[58] Submissions of the appellant, para 1.

view of what was occurring in the workplace. The respondent contends that it is the appellant's personality traits which have contributed to the development of any injury. Accordingly, the appellant's employment is not the major significant contributing factor to the development of his injury and his claim should be dismissed on that basis.

[55] The claim that the appellant's perception or personality traits contributed to the development of his injury does not form part of the respondent's Statement of Facts and Contentions. In *Yousif v Workers' Compensation Regulator,* Martin J took the opportunity to examine the role and status of Statements of Facts and Contentions. His Honour wrote:

> [a Statement of Facts and Contentions] alerts the other party to the case it will have to deal with and it identifies the issues which exist which, in turn, allow for a confinement of the matters in dispute. An appeal under the Act is not the time for a broad ranging inquiry into an unlimited number of complaints or grievances. The time and resources of the Commission are constrained and it is necessary for those constraints to be acknowledged in this way. Subject always to the Commission's power to allow appropriate amendments (so that s 531 may be observed) a party will be bound by its Statement of Facts and Contentions and may not lead evidence which is not relevant to the identified issues.[59]

[56] Notwithstanding, the omission from the Statement of Facts and Contentions of the claim that the appellant's perception or personality traits was the significant contributing cause of the injury, the issue was nevertheless raised in the cross-examination of Dr Likely and addressed in the respondent's submissions. For completeness, I will briefly refer to the argument advanced by the respondent.

[57] In support of the submission, the respondent seeks to rely on *Croning v Workers' Compensation Board of Queensland.*[60] *Croning* is a case which is based upon its own set of unique facts. It is therefore distinguishable. In that case, the Industrial Magistrate found that the employment had not led to the worker's injury, rather it had been the worker's "almost obsessive desire to implement his own preferred system [of tuition]".

[58] On appeal de Jersey P observed:

> The conditions in which the work was to be performed by the appellant obviously contributed to the appellant's condition. But the Magistrate is to be taken to have found that that contribution was not 'significant'. The significant contributing factor, in the Magistrate's judgment, and the only one, was the appellant's own difficulty accepting the working conditions to which, as the Magistrate has found, he was reasonably subject.

[59] His Honour went on to find that the Industrial Magistrate was entitled to make the findings of fact which he did make. He wrote:

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[59] *Yousif v Workers' Compensation Regulator* [2017] ICQ 004, [15].

[60] (1997) 156 QGIG 100.

> The work conditions did, as I have said, certainly provide the setting or background against which the appellant's particular disposition came into play. Although no doubt one should conclude then that the system operating at the place of employment was in that sense a 'contributing factor', it was not necessarily, as indeed the Magistrate must be taken to have found, a 'significant' one – **the only significant contributing factor** in accordance with his findings being the appellant's own disposition. (emphasis added)

[60] I do not accept that this is a case in which it can be said that "the only significant contributing factor" was the appellant's own peculiar attitude which led to the injury.

[61] In *Attorney General's Department v K* (2010) 8 DDCR 120 R 52 Acting President Roche drew the following conclusions of the leading authorities dealing with perception:

> a) employers take their employees as they find them. There is an "egg-shell psyche" principle which is the equivalent of the "egg-shell skull" principle (Spigelman CJ in Chemler at [40]);
>
> b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in Chemler at [54]);
>
> c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in Chemler at [69]);
>
> d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in Sheridan);
>
> e) there is no requirement at law that the worker's perception of the events must have been one that passed some qualitative test based on an "objective measure of reasonableness" (Von Doussa J in Wiegand at [31]), and
>
> f) it is not necessary that the worker's reaction to the events must have been "rational, reasonable and proportionate" before compensation can be recovered.

[62] As was accepted in *Attorney General's Department v K* employers take their employees as they find them and so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind.

[63] The respondent's assertion that the appellant's injury was caused by his perception or his personality traits cannot, in my view, be accepted. As the appellant rightly submits, there is no evidence to suggest that he "suffered symptoms of endogenous depression by reason of his personality traits".[61]

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[61] Appellant's submissions in reply, [25](a).

[64] For employment to be the major significant contributing factor to the injury, the employment must be important or of consequence, and there should be some linkage between the employment and the injury.

[65] In *Byrnes v Workers' Compensation Regulator*,[62] Martin P wrote:

> Section 32(1)(a) of the Act makes the primary factor for consideration whether the employment was a significant contributing factor to the injury. The requirement is preceded by another condition, namely, that the injury arise out of, or in the course of, employment. Those words are to be regarded as alternative conditions not cumulative. It was explained in this way by Fullagar J in *Kavanagh v The Commonwealth*
>
> > [T]he effect of requiring a causal connexion between employment and injury is always attributed to the words 'out of' and not to the words 'in the course of'. (The words 'out of' do indeed import causation: the words 'in the course of' do not.) The conclusion seems inevitable that the main object of the changing of the conjunction was to eliminate the necessity of finding such a causal connexion. If there was such a causal connexion, the injury was to be compensable even though it did not occur while the worker was engaged in his employment or anything incidental to his employment. If, on the other hand, the injury occurred in the course of the employment, it was to be compensable even though no causal connexion could be found between it and the employment. And it necessarily follows, I think, **that the words 'arising in the course of his employment' ought not to be regarded as meaning 'anything more or less than arising while the worker is engaged in his employment'**. For I can find no tenable half-way house between this view and the view that the words in question have the same meaning as the words 'arising out of his employment.(emphasis added)

[66] In *Newberry v Suncorp Metway Insurance Ltd,* Keane JA, with who de Jersey CJ and Muir J agreed, wrote:

> It cannot be disputed that, when s 32 of the WCRA speaks of "employment" contributing to the worker's injury, it is referring to employment as a set of circumstances, that is to the exigencies of the employment of the worker by the employer. The legislation is referring to "**what the worker in fact does during the course of employment**". The requirement of s 32 of the WCRA that the employment significantly contribute to the injury is apt to require that **the exigencies of the employment must contribute in some significant way to the occurrence of the injury** which the claimant asserts was caused by the breach of duty of the person (not the employer) against whom the claim is made.[63]

[67] Their Honours' also wrote:

> That having been said, however, I should also observe in passing that the fact that an injury has been suffered arising out of employment, or in the course of employment, is not sufficient to establish that the employment has been "a significant contributing factor to the injury". To read s 32 of the WCRA in that way would be to read the latter words out of the section, and in my respectful opinion to accord scant respect to the evident

[62] [2018] ICQ 004.

[63] [2006] QCA 48, at para 27.

> intention of the legislature to require a more substantial connection between employment and injury than is required by the phrases "arising out of employment" or "in the course of employment".
>
> Further, there is no warrant in the language of s 32 of the WCRA for reading the words "if the employment is a significant contributing factor to the injury" as lessening the stringency of the requirement that the injury "arise out of the employment", as was suggested in the course of argument on the appeal. It is clear, as a matter of language, that the words "if the employment is a significant contributing factor to the injury" are intended to be a requirement of connection between employment and injury additional to each of the requirements that the injury occur in the course of employment or arising out of the employment. It cannot, in my respectful opinion, sensibly be read as lessening the stringency of the latter or increasing the stringency of the former.[64]

[68] I accept that the appellant had a demanding workload. The restructure within St John and resignation of the two full-time trainers increased the appellant's workload. He was the only full-time trainer in Townsville. On occasions he worked up to 87.5 hours per fortnight. This is not withstanding that his contract of employment specified that his ordinary hours of work were 38 hours per week.[65] He had administrative responsibilities including planning resources, preparation and cleaning. He complained about his workload and it was known and acknowledged by the employer that the appellant's workload was having an adverse impact on his health. Notwithstanding this, the appellant's responsibilities were not reduced or modified.

[69] The fluctuation in the appellant's workload was attributable to the demands of his employment and no positive steps were taken by the respondent to manage the workload. Dr Likely's diagnosis of adjustment disorder or a major depressive disorder was consistent with the appellant's complaints. The appellant's employment was according to Dr Likely the major significant contributing factor to his injury.

[70] I accept that the appellant's employment was the major significant contributing factor in the occurrence of the injury. I do not accept the argument that the employment was the setting in which the injury occurred or the background to its occurrence. It was in my view more probable than not that there was a clear causal relationship between the appellant's employment at St John and the development of his psychiatric or psychological condition.[66]

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[64] [2006] QCA 48, paras 41,42.
[65] Exhibit 5.
[66] *JBS Australia Pty Ltd v Q-Comp* [2013] ICQ 13, [3].

Is the injury excluded by s 32(5), the reasonable management action provisions of the Act?

[71] The respondent contends that even if the appellant suffered a work related psychological or psychiatric injury, the injury would be excluded by s 32(5) of the Act because it arose out of or in the course of reasonable management action taken in a reasonable way.

[72] To answer the question, it is first necessary to consider the meaning of "management action".

[73] Section 32(5)(a) operates to exclude from the definition of injury a psychiatric or psychological disorder arising out of or in the course of reasonable management action taken in a reasonable way by the employer in connection with the worker's employment.

[74] The Act sets out examples of actions that may be reasonable management actions taken in a reasonable way. They include action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker or a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment.

[75] Whilst the examples set out in s 32(5) are not exhaustive, they nevertheless act as an aid to interpretation of the section as they elucidate which "actions" are appropriately deemed "management action".[67]

[76] The management action said by the respondent to enliven s 32(5) of the Act included the responses to the appellant's complaints regarding his workload; putting in place systems to reduce the work which the appellant had to perform; and the management action taken to address the "conduct" in the training session on 28 June 2016.

[77] The appellant argues that the injury is not excluded by virtue of s 32(5) because:

(a) The appellant informed the employer (and the employer independently knew) the appellant's workload was excessive;
(b) The appellant informed the employer (and the employer independently knew) that the excessive workload was negatively affecting his health causing symptoms of frustration, fatigue and burnout;
(c) The employer's human resources manager accepted that the framework for reasonable management of the appellant obliged the employer to identify steps which reduced the appellant's workload and to take those steps; and

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[67] See: Section 14D of the *Acts Interpretation Act* 1954 (Qld).

(d) The employer's human resource manager and the appellant's supervisor discussed and identified those steps but took no action to reduce the appellant's workload.[68]

[78] In *Allwood v Workers' Compensation Regulator*[69] and *Read v Workers' Compensation Regulator*[70] I had cause to examine the meaning of "management action" within the context of the Act. In *Allwood*, I wrote the following:

> The concept of management action in the context of a worker's employment, and for the purposes of the Act, is not so broad that it encompasses anything and everything that a manager does or says in the particular workplace, rather the expression "management action" relates to those actions undertaken when managing the worker's employment. This statement is informed by the reasoning of Doyle CJ, with whom Prior and Williams JJ agreed in *WorkCover Corp (SA) v Summers*.[71]
>
> In *Summers*, their Honours were called upon to construe the words "reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment" in s 30(2a) of the *Workers Rehabilitation and Compensation Act* 1986 (SA). I note the similarities of that provision to the one under consideration in this matter. In *Summers*, Doyle CJ wrote:
>
>> "The appellant argued that "administrative action" referred to "every instruction given by the employer or action taken by the employer which relates to the performance of the worker's duties, whether directly or indirectly". That is how it was put in the appellant's outline. In his submissions counsel for the appellant said that administrative action embraced every instruction or action by the employer, indirectly or directly ….
>>
>> I am unable to accept this submission.
>>
>> If it is correct, it means that it becomes necessary to identify all instructions and directions given by the employer which did contribute or might have contributed to the stress, and then to examine the reasonableness of each one of them. That would be a daunting task, and I would hesitate to conclude that Parliament intended that it be performed. …if the stress resulted from instructions or actions of the employer (and presumably an implied instruction would be as good as an express instruction), then the claim would fail unless the instruction or action was unreasonable. Commonsense suggests that many, and probably most aspects of a worker's work could be related back to instructions given by an employer or action taken by an employer. It is clear that Parliament intended to restrict stress claims, but it is another matter whether it intended to go as far as this….
>>
>> Moreover, the words chosen by Parliament — "administrative action" do not seem apt to embrace every instruction of and action by an employer. The expression chosen suggests that Parliament had in mind a particular type of action by an employer, and something other

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[68] Submissions of the appellant, para 2.
[69] [2017] QIRC 88.
[70] [2017] QIRC 72.
[71] *WorkCover Corp (SA) v Summers* (1995) 65 SASR 243.

> than a mere instruction or requirement that the worker perform her duties. In my opinion the appellant's submission fails to give any effect to the adjective "administrative"."[72]

Summers was considered by the Full Court of the Federal Court in *Commonwealth Bank of Australia v Reeve.*[73] In that matter their Honours examined, amongst other things, s5A(1) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth). Gray J, in dismissing the appeal, wrote the following:

> "The use of the word "administrative" in the exclusion is significant. In accordance with normal principles, it is not to be assumed that a word in a legislative provision has no function to perform. The word "administrative" must have been inserted to distinguish the kind of action to which the exclusion is directed from other kinds of action that might also be taken with respect to the employment of a particular employee. Such action that is not "administrative" could be operational, in the sense that it relates to the activities or business of the institution or enterprise in which the employee is employed. Thus, an instruction to perform work at a particular location, to drive on a particular route, **or to perform particular duties would not be regarded as "administrative" action, but as operational action with respect to the employee's employment.**"[74]

Rares and Tracey JJ, also dismissing the appeal, stated that:

> "It is one thing to contemplate disciplining an employee or taking steps under his or her contract of employment, and quite another to define or delimit or supervise the employment, job or task entrusted to the employee for him or her to perform or to give directions to him or her as to how and when he or she is to perform it. The former is comprehended by the expression "administrative action" in s 5A(1); the latter deals with the way in which the employee carries out the employment for which he or she was engaged. The latter is not "administrative action"."[75]

In discussing the definition of "administrative" their honours wrote:

> "The ordinary and natural meaning of "administrative" concerns the management of a body or enterprise as opposed to the task or job entrusted to a person who is subject to that management. "Administrative" has the following relevant dictionary meanings:
>
> - relating to administration ("administration" being defined as "the management or direction of any office or employment") (The Macquarie Dictionary online);
> - pertaining to, or dealing with, the conduct or management of affairs (The Oxford English Dictionary online);[76]

[79] I respectfully adopt the approach of Rares and Tracey JJ in *Reeves*. The exclusory action in s32(5) of the Act was, in my view, intended by Parliament to relate to specific management action directed to the appellant's employment itself, as opposed to action forming part of the everyday duties or tasks that the worker performed in their employment. Therefore the management action said to enliven s 32(5) of the Act must

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[72] Ibid 247.
[73] *Commonwealth Bank v Reeve* (2012) 199 FCR 463.
[74] Ibid 473-4 [31].
[75] Ibid 486 [74].
[76] Ibid 548 [52].

be something different to the everyday duties and incidental tasks of the appellant's employment.

[80] In *Davis v Blackwood (Workers' Compensation Regulator)* Martin J, President, made the following observations concerning s 32(5)(a) of the Act:

> The task of the Commission when applying s 32(5) does not involve setting out what it regards as the type of actions that would have been reasonable in the circumstances. There may be any number of actions or combinations of actions which would satisfy s 32(5). The proper task is to assess the management action which was taken and determine whether it was reasonable and whether it was taken in a reasonable way. Sometimes that may involve consideration of what else might have been done but that will only be relevant to whether what was done was, in fact, reasonable.[77]

[81] The management action said to enliven s 32(5) is in my view more akin to what might be described as operational, being the management and regulation of the appellant's employment. The management action taken to address the "conduct" in the training session on 28 June 2016 would be of a different character fitting more readily into the definition of management action.

[82] Whilst it is clear that Parliament in enacting s 32(5) of the Act intended to restrict stress claims, it is another matter whether Parliament intended to enact a provision which would have the effect of making any instruction given by an employer or action taken by an employer, management action. As was observed by Rares and Tracey JJ in *Reeves*:

> It is one thing to contemplate disciplining an employee or taking steps under his or her contract of employment, and quite another to **define or delimit or supervise the employment, job or task entrusted to the employee for him or her to perform or to give directions to him or her as to how and when he or she is to perform it**. (Emphasis added)

[83] Irrespective of what view is taken as to the question of whether the action taken by the employer can properly be regarded as management action under s 32(5), I am of the opinion that the action taken by the employer was unreasonable. I have formed that view having regard to the fact that during the period of December 2015 (when the other full-time trainers resigned) until shortly before his last day of work, the appellant was the sole full-time trainer. It was well known to the employer that the appellant was under stress and this is demonstrated in the performance appraisal of the appellant completed in January 2016. It was clear to Ms Pola that the appellant was demonstrating symptoms of frustration, fatigue and burnout arising from his work in April 2016. Ms Pola accepted in her evidence that the employment of an additional full-time trainer would have reduced the appellant's workload. Whilst the employer maintained a list of casual trainers I accept that Ms Pola adopted a position whereby she would assign full-time trainers first and then additional courses would be assigned to casuals as needed. When asked in cross-examination if she could recall a single instance when she had allocated a casual trainer

[77] [2014] ICQ 9, [47].

she was unable to do so. Ms Pola accepted that she took no steps to source trainers from outside the Townsville area to reduce the appellant's workload this is not withstanding the evidence of Mr Moren that there was no impediment in doing so.

[84] The respondent accepts that the appellant has sustained a personal injury, namely, a psychiatric or psychological disorder. It is Dr Likely's medical opinion that the appellent's injury arose out of his employment and that his employment was a significant contributing factor to the appellant's injury.[78] Importantly, Dr Likely's evidence was unchallenged. There is no contrary medical opinion. It has not been demonstrated on the evidence before the Commission that there were factors external to his employment.

[85] In regards to the respondent's submission that Dr Likely relied on a history which failed to mention that a pool of casual trainers existed I accept that Dr Likely was never asked whether the issue of the availability of casual trainers would have altered his expert opinion. Dr Likely said in his oral evidence that the issue of causal trainers was never discussed or was not raised. It was correct that he was told that the appellant was one of three trainers. That statement is correct. The appellant was one of three full-time trainers. Two of the full-time trainers resigned in December 2015 and were not replaced until June 2016.

[86] I do not regard the management action taken in relation to the complaint on 28 June 2016 was reasonable. The appellant was asked to leave a training session course; was given limited explanation as to the nature and extent of the complaint; his explanation in relation to the avatar was not initially accepted; he was asked to attend a meeting at head office; three senior executives were in attendance; there was significant power imbalance between the appellant and the executive team; and, he was not offered a support person. The meeting was conducted against the background that the employer had knowledge that the appellant was not in good health. Whilst it may have been necessary to investigate the complaint, I do not accept that it was necessary to conduct the investigation in the manner that it was. I do not consider that the nature of the complaint required that the appellant be asked to leave the training session and it could have been appropriately addressed at the conclusion of the session. There is no material before the Commission to suggest that the matter required an immediate response. In the circumstances, the approach taken by the employer was not, in my view, reasonable management action taken in a reasonable way. Accordingly, s 32(5) of the Act is not enlivened to exclude from the definition of injury the appellant's psychiatric or psychological disorder.

[87] For the reasons given above I have concluded that the appellant:

a) suffered a personal injury, that being a psychiatric or psychological disorder;

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[78] Exhibit 41.

b) that the appellant's personal injury arose out of, or in the course of, his employment;
c) that his employment was the major significant contributing factor to his injury; and
d) that the injury is not excluded from being compensable because the injury was not the consequence of "reasonable management action taken in a reasonable way" by his employer in connection with his employment.

Orders

[88] I make the following orders:

1. The appeal is allowed.
2. The decision of the Regulator dated 20 January 2017 is set aside.
3. The respondent is to pay the appellant's costs of and incidental to this appeal to be agreed or failing agreement to be the subject of an application to the Commission.