[2014] AATA 649

|  |  |
| --- | --- |
| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2013/2001 |
| Re | Annie Casey |
|  | APPLICANT |
| And | Comcare |
|  | RESPONDENT |

# Decision

|  |  |
| --- | --- |
| Tribunal | **Senior Member A K Britton** |
| Date | **5 September 2014** |
| Place | **Sydney** |

The Tribunal sets aside the reviewable decision and in substitution of that decision, decides that the Respondent is liable for the Applicant’s Adjustment Disorder under section 14 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth).

....................[SGD]....................................................

**Senior Member A K Britton**

**Catchwords**

COMPENSATION — Commonwealth employees — Psychological injury — Whether the injury was contributed to, to a significant degree, by the employees employment by the Commonwealth — Whether the injury is a result of reasonable administrative action taken in a reasonable manner — meaning of “action taken in a reasonable manner” —— Decision set aside

**Legislation**

Safety, Rehabilitation and Compensation Act 1988 (Cth) ss 5A(1), s 5A(2), 14

Workers Rehabilitation and Compensation Act 1986 (SA)

**Cases**

Comcare v Martinez (No 2); (2013) 212 FCR 272

Commonwealth Bank of Australia v Reeve (2012) 199 FCR 463

Drenth v Comcare (2012) 128 ALD 1

Keen v Workers Rehabilitation and Compensation Corporation (1998) 71 SASR 42

National Australia Bank Limited v KRDV (2012) 204 FCR 436

Hart v Comcare (2005) 145 FCR 29

**Secondary Materials**

Defence Instruction (General) PERS 35-3 Management and Reporting of Unacceptable Behaviour, 11 February 2004

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 5th ed, 2013 (DSM-V)

# REASONS FOR DECISION

**Senior Member A K Britton**

**5 September 2014**

## Background

1. Ms Annie Casey worked as a Public Affairs Officer with the Department of Defence, attached to the Royal Australian Navy between 1999 and 2012. In 2009 her position was declared “change affected”. The collective agreement under which Ms Casey was employed required the Navy to assist her to find a suitable alternative position. If that proved not possible within a reasonable period, the Navy could declare Ms Casey “excess to Defence’s requirements” and she could be redeployed or retrenched.
2. After being declared change affected, Ms Casey was appointed to a temporary position as Duty Curator with the Navy’s Heritage Centre. In mid-2012 she was told that this position would come to an end in four weeks’ time. It is agreed that as a result, Ms Casey suffered an Adjustment Disorder and became unfit for work. Apart from a brief and unsuccessful attempt in late December 2012, Ms Casey has not returned to work.
3. In November 2012 Ms Casey made a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the Act**) in respect of “psychological injury as a result of incidents at work”. In refusing that claim, Comcare accepted Ms Casey suffered a psychiatric condition but decided it was a result of “reasonable administrative action taken in a reasonable manner” and, by the operation of s 5A(1) of the Act, it was not liable for that condition. Ms Casey challenges that decision and applies for review by the Administrative Appeals Tribunal.
4. It is common ground that Ms Casey’s Adjustment Disorder was contributed to, to a significant degree, by her employment with the Navy and it was “a result” of the decision to end her position at the Heritage Centre. I must decide:
5. whether the decision to end Ms Casey’s position at the Heritage Centre constitutes “reasonable administrative action”; and
6. if so, whether that action was “taken in a reasonable manner”.

If the answer to one or both of these questions is no, it will be necessary to decide whether Ms Casey’s Adjustment Disorder was also a result of one or more of the four other actions nominated by Comcare, and, if so, whether that action(s) constitutes reasonable administrative action and was taken in a reasonable manner.

## STATUTORY FRAMEWORK

1. Section 14 of the Act provides that Comcare is liable to pay compensation in respect of an injury suffered by an employee. Injury is defined by s 5A(1) of the Act to include “a disease suffered by an employee but does not include a disease … suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee’s employment”.
2. Section 5A(2) provides that reasonable administrative action is taken to include:

…

* 1. anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.

### Ms Casey’s position is declared change affected

1. In late March 2010 Ms Casey received a letter from her direct supervisor, Captain Jonathon Mead, advising that as a consequence of a restructure within the Navy, her position had been “disestablished” and she was deemed a “change affected” employee. He advised that as a consequence of that decision:

* priority would be given to reassign her to a position within the Navy, and, if this proved not possible, within the Department of Defence;
* if, within a reasonable period, reassignment proved not possible, the Navy could recommend that Ms Casey be declared “excess”;
* Ms Tracy Rogers had been nominated to act as Ms Casey’s “change manager” to work with her to develop and implement a “staff transition plan” (**the Plan**);
* throughout this process Ms Casey would be provided with a range of supports and entitlements, including financial assistance to undertake training.

1. Ms Casey claims the decision came “out of the blue” and she was extremely shocked. She said she found the whole process “unfamiliar territory” and spent the following Easter break feeling sick, depressed and anxious.
2. Over the ensuing months, Ms Casey attempted to have the decision that she had been declared change affected reversed. In August 2010 she wrote to Commodore David Letts requesting mediation to resolve “the dispute”. Commodore Letts refused and advised Ms Casey that if she wished to challenge the decision she must lodge a “review of action”. He wrote that he was concerned that despite several periods of leave and “time extensions” Ms Casey had yet to respond to, or provide feedback on, the Plan. He directed Ms Casey to:

* immediately engage in the change process;
* provide any feedback on the draft Plan and complete a Personal Redeployment Plan by 8 October 2010;
* contact Ms Rogers by 8 October 2010 to identify suitable gainful employment.

1. In October 2010 Ms Casey took an extended period of leave.

## Ms Casey commences with Navy Heritage Centre

1. On her return to work in February 2011, Ms Casey commenced with the Navy Heritage Centre (**the Centre**) based at Garden Island Sydney in the temporary role of Duty Curator. In an email sent on 8 March 2011 Ms Rogers clarified the nature of that appointment:

As previously outlined to you **this is a temporary gainful employment opportunity.** **It is not a permanent position** and you will need to continue to work with me … as part of the redeployment process to attempt to secure a permanent position within Navy or another Defence Group. [emphasis added]

1. According to Ms Casey, at the Centre she found herself in the difficult and uncertain position of having the responsibilities of a manager, but not the title and certainty of the position. She said her duties were constantly changing and her managers demeaned her role and referred to it as “babysitting”.
2. For all but the last three weeks Ms Casey spent at the Centre, she worked under the supervision of Commander  Shane Moore. There is no evidence that Commander Moore made any adverse comment or report about Ms Casey during that period. Ms Rogers testified that Commander Moore told her that he was satisfied with Ms Casey’s performance and she received no advice to the contrary.

### Complaints lodged by Ms Casey about Heritage Centre staff

1. In May 2012, Ms Casey lodged a formal complaint about a “string of incidents” involving staff based at the Centre said to have occurred over the previous six months. A copy of the complaint was not produced in these proceedings but from the available material it appears the matters raised by Ms Casey included:

* allegations of “subordinate staff rudeness” to visitors to the Centre, members of the public and Ms Casey herself;
* the failure by a security guard to charge visitors to the Centre the required admission charge;
* uncertainty regarding the status of Ms Casey’s position;
* “chain of command” concerns ― who Ms Casey was required to report to and whether, as she believed, Centre staff were required to report to her;
* various health and safety issues, including: lack of signage, failure to replace light bulbs and an alleged rat infestation.

1. Ms Casey’s complaint was referred for Quick Assessment (**QA**) — a tool used by the Department to quickly assess, among other things, allegations of “unacceptable behaviour” (as defined by the Defence Instruction (General) PERS 35-3, Management and Reporting of Unacceptable Behaviour, 11 February 2004 (**Instruction on Managing and Reporting Unacceptable Behaviour**)). In a report dated 20 July 2012, the investigator appointed to conduct the QA, wrote that the conduct about which Ms Casey complained relating to other members of staff, did not constitute “unacceptable behaviour”. The investigator noted that some of the concerns raised by Ms Casey had been resolved. He recommended that staff at the Centre be given “difficult conversation training”, the status of Ms Casey’s position be clarified, and that the health and safety issues she had raised, be addressed.
2. In late June 2012, two members of staff lodged complaints about Ms Casey. Those complaints were also referred for QA. That assessment was not concluded until some months later.

### Ms Casey notified position at the Heritage Centre was to come to an end

1. Captain David Michael took over from Commander Moore as Director of the Naval Heritage Collection in early July 2012. In that role he was responsible for, among other things, the management of the Centre. He was based at Spectacle Island. When he took over from Commander Moore, in addition to Ms Casey, there were two security officers and three caterers working at the Centre. All, apart from Ms Casey, were employed on a contract basis. From time to time, curators based at Spectacle Island visited the Centre to manage and care for the Centre’s heritage collection.
2. When advised that her position at the Centre was to come to an end, Ms Casey had been under Captain Michael’s supervision for about three weeks. (She was on leave in the first week of his appointment.) Throughout that period he visited the Centre once or twice a week. Ms Casey described her dealings with Captain Michael during that period as “very brief and in passing”. He agreed that he had few face-to-face meetings with Ms Casey but claimed on most days when he did not visit the Centre, Ms Casey contacted him by phone to raise what he considered to be relatively trivial matters.
3. On 31 July 2012, Captain Michael visited the Centre and told Ms Casey that he wanted to discuss a matter concerning her employment. At Ms Casey’s suggestion, they went to her office. While there is disagreement about the actual words used, it is agreed that Captain Michael in effect told Ms Casey she would be finishing at the Centre in four weeks. The meeting lasted about five minutes and at its conclusion Ms Casey turned away to work on her computer.
4. According to Captain Michael, before the meeting he had consulted “Navy HR” and acting on their recommendation took a “simple and straightforward approach” and used the words “there will be no gainful employment for [you] at the Centre”. He recalled that Ms Casey appeared a little taken aback and not to “immediately digest … the directive”. In his opinion the meeting was not unpleasant.
5. Ms Casey, on the other hand, claims that Captain Michael told her she would be “terminated” and when she asked whether the decision had anything to do with her “grievance action”, Captain Michael denied it played any role in his decision. Captain Michael denies that the grievance issue was raised at the meeting and insists he had carefully chosen his words and followed the script recommended by Navy HR.

### Reason for ending Ms Casey’s employment at the Centre

1. According to Captain Michael, when he arrived at the Centre his initial impression of Ms Casey was “satisfactory” but while she appeared to interact well with visitors she took a superior and critical attitude towards her work colleagues.
2. According to Captain Michael, after examining the complaints made by and about Ms Casey, speaking to Centre members of staff (except Ms Casey) and the curators based at Spectacle Island, and observing the “staff dynamic”, he concluded that Ms Casey acted in a bullying manner towards staff. Captain Michael claimed the reason he decided to act quickly was because he had formed the opinion that the Centre was a very unhappy workplace and an unhealthy “tit for tat” complaint culture had developed. In his opinion, Ms Casey was in conflict with all staff and the complaints made about her indicated that her bullying manner was neither “one-off nor uncharacteristic”.
3. In these proceedings, Captain Michael denied that he formed the view that Ms Casey was to blame for the problems he encountered on his arrival at the Centre. He said he took the approach that where there was an internal staff dispute and one of the persons involved was change affected and employed on a temporary basis, it was reasonable to ask that person to “move on”.
4. Captain Michael said it was his understanding, based on advice received from Navy HR, that because Ms Casey was a change affected employee he was not obliged to provide an explanation for his decision. He agreed that after Ms Casey’s departure there continued to be a need for the work she had been performing to be undertaken and indeed someone was ultimately appointed to replace Ms Casey.
5. Ms Rogers testified that she recalled being contacted by Captain Michael about Ms Casey’s employment at the Centre. She testified that it was her understanding that Captain Michael no longer had any “gainful employment” for Ms Casey to perform, not, that he did not want that employment undertaken by Ms Casey. Ms Rogers said when she spoke to Captain Michael she was not aware of any grievance within the Centre. She testified that she advised Captain Michael that as it was a “gainful employment” position, Ms Casey must be given several weeks’ notice to allow her to find alternative employment.

### Ms Casey becomes unfit for work

1. Ms Casey claimed she was shocked and devastated when told by Captain Michael that her position at the Centre was to come to an end. She said over the following weeks her levels of stress and anxiety increased dramatically and she found it difficult to sleep. She consulted her GP on 11 August 2012 who made a diagnosis of anxiety and depression. On 20 August 2012, while driving home from work, she experienced heart palpitations and severe chest pain. She was alarmed and believed she was suffering a heart attack, in part because of a family history of cardiac problems. She was taken to hospital by ambulance. Testing revealed the pain was attributable to a panic attack, not cardiac problems. According to Ms Casey she found the period awaiting the results of testing extremely distressing and felt she was facing her “own mortality”.
2. Ms Casey did not return to work at the Centre after 20 August 2012 and was certified unfit for work.
3. In early December 2012 Ms Casey was certified fit to commence a graduated return to work with the Young Endeavour Youth Scheme. On her first day at work she became extremely upset and broke down. She has not returned to work since that day.

### Was the subject action reasonable administrative action?

1. Comcare contends that the decision to end Ms Casey’s employment at the Heritage Centre was entirely reasonable. Ms Casey disagrees.
2. Counsel for Comcare, Miss Henderson, points out that from day one, Ms Casey was on notice that the Duty Curator position was temporary in nature and could be terminated at any time. She argues that confronted with the “tit for tat” culture at the Centre, Captain Michael’s decision was entirely reasonable. Further, she points out that Ms Casey was given double the requisite notice period and in that period, found a comparable position with the Young Endeavour Youth Scheme as a Public Affairs Officer.
3. Counsel for Ms Casey, Mr Grey, contends that in ending Ms Casey’s employment in the first month of his appointment, Captain Michael acted like a “Commander in war time”. He argues that in the context of public sector employment it was unreasonable for Captain Michael to have acted on allegations that he had neither put to Ms Casey, nor independently evaluated. Mr Grey points out not only did Captain Michael fail to afford Ms Casey the opportunity to comment on allegations made about her but did not attempt to obtain a briefing from Commander Moore, the person responsible for Ms Casey’s supervision in the 18 months prior to his appointment.
4. When Captain Michael took over the management of the Centre, the QA into the complaints made by Ms Casey had just been completed and the QA into the complaints made about her had not commenced. The investigator appointed to assess Ms Casey’s complaints found that the conduct about which she complained did not constitute “unacceptable behaviour”. While not the most comprehensive document, a fair reading of the report indicates that that finding turned on the assessment of the nature of the conduct complained about, not whether it had occurred.
5. I accept that the reason Captain Michael decided to act to end Ms Casey’s employment at the Centre was because, as claimed, he had formed the opinion that the relationship between staff was in free fall and a circuit breaker was needed. The objective evidence indicates that relationships between staff were at a low ebb. Ms Casey herself described a “rather damaging work atmosphere” (see statement prepared by Ms Casey, 5 November 2012, p 1). However, I am unable to accept Captain Michael’s claim that he did not attribute blame for the staff problems largely to Ms Casey. Given his admission that Ms Casey was relentlessly negative in her dealings with other staff and acted in a bullying manner, it is implausible that he had not formed an opinion about culpability. Whether this played a role in his ultimate decision, is more difficult to say.
6. A number of options were available to Captain Michael to address the staff problems at the Centre. He could have, for example:

• deferred any action until the investigation into the complaints made against Ms Casey was finalised and/or referred those complaints, together with those made against Ms Casey, for further investigation

• arranged “difficult communication” training for staff, as suggested by the QA investigator

• attempted to broker the peace between staff

• counselled Ms Casey

• arranged for the transfer of someone other than Ms Casey.

1. In my opinion, it could not be said that the decision to end Ms Casey’s employment with the Centre was unreasonable because it was taken before all complaints made by and against Ms Casey had been fully investigated, and a determination made about whether any conduct found proven, constituted unacceptable behaviour. Given the seriousness of the situation that confronted Captain Michael it was not unreasonable that he decided against deferring taking action until all complaints had been investigated. There is no evidence to suggest that in so doing, he breached some applicable rule, guideline or practice. Mr Grey suggested the Instruction on Managing and Reporting Unacceptable Behaviour might have precluded that course of action. As Mr Grey correctly points out the Instruction makes clear that a QA is not the equivalent of a final determination of a complaint but rather a tool used to quickly determine the known facts where complaints of unacceptable behaviour are made. Nonetheless, there is nothing in the Instruction to suggest that a manager is prevented from taking action following receipt of a report of a QA.
2. The decision made by Captain Michael was not determinative of the complaints made by, and about, Ms Casey. Those complaints were the subject of separate and concurrent investigations. Had Captain Michael determined those complaints, in circumstances where he failed to give Ms Casey the opportunity to comment on the substance of the allegations made by and about her, that action would plainly be unreasonable. However, that is not what occurred. There is no evidence to suggest that the decision to end Ms Casey’s position as Duty Curator was determinative of, or played any role in, the concurrent investigations into the complaints made by and about Ms Casey.
3. The objective evidence indicates that by the time Captain Michael took over the management of the Centre, the relationships between Ms Casey and other members of staff together with the curators based at Spectacle Island, had deteriorated. Given the duration and intensity of the staff conflict, it was reasonable in my opinion that Captain Michael took steps to prevent matters deteriorating further. The issue raised is whether the particular form of action taken, namely removing Ms Casey from the Centre, was reasonable.
4. The decision to end Ms Casey’s position as Duty Curator had no impact on her position within the Navy, her salary or conditions. It neither improved nor weakened her position as a change affected employee and she was transferred to a comparable position. In the circumstances of a protracted staff dispute that required resolution, and where Ms Casey was the common denominator in all staff complaints, had no right of permanency, and was not subjected to any disciplinary or other adverse action, I am satisfied that the decision to end her employment at the Centre was reasonable.

### Was the action taken in a reasonable manner?

1. The parties also disagree about whether the action was taken in a reasonable manner. Ms Casey contends that the decision was not taken in a reasonable manner as it was announced without notice, she was not offered the opportunity to bring a support person and, in addition, not provided with an honest explanation for the decision. Comcare on the other hand contends that Captain Michael acted appropriately and, given that the position was temporary in nature, was under no obligation to inform Ms Casey of the reasons for the decision.
2. In *Comcare v Martinez (No 2)* (2013) 212 FCR 272 Robertson J cited with approval (at [83]) the following passage from *Keen v Workers Rehabilitation and Compensation Corporation* (1998) 71 SASR 42, where commenting on a similar (but not identical) provision to s 5A of the Act contained in the *Workers Rehabilitation and Compensation Act 1986* (SA), Lander J stated (at pp 47-48):

Whether the administrative action was taken in a reasonable manner by the employer will depend upon the administrative action, the facts and circumstances giving rise to the requirement for the administrative action, the way in which the administrative action impacts upon the worker and the circumstances in which the administrative action was implemented and any other matters relevant to determining whether the administration [sic] action was taken in a reasonable manner by the employer.

1. In *Keen,* in a separate judgment Bleby J said (at p 63):

…whether administrative action is taken in a reasonable manner is very much a question of objective fact, and is to be determined against the ordinary standards of reasonable employers in all the circumstances of the case. Whether administrative action is reasonable or is taken in a reasonable manner depends first on the finding of the primary facts as to what occurred in the taking of the administrative action, namely what decision was made, who made it and why it was made, what was done, what was omitted to be done and the factual background against which the decision was made or implemented.

The above passage was cited with approval by Cowdroy J in *National Australia Bank Limited v KRDV* (2012) 204 FCR 436 (at [51]).

1. The meeting between Captain Michael and Ms Casey on 31 July 2012 was short and business-like. There is no evidence, and nor is it suggested, that Captain Michael raised his voice or acted in a bullying manner. The only significant factual issues in dispute are whether he used the word “terminated” and whether Ms Casey asked whether the decision had been made because she had lodged a “grievance action”.
2. The assessment of what was said in the meeting is difficult as there were no independent witnesses and neither party made contemporaneous notes. Captain Michael is confident that he “kept to the script” and used the words “there will be no gainful employment for [you] at the Centre”, but admits he remembers little else that was said at the meeting. Ms Casey is insistent that Captain Michael used the word “terminated” and that when she said, “Is it like, I raise a grievance and I am terminated?”, he replied, “It’s not like that”.
3. I find it more probable than not that as claimed, Captain Michael kept to the script and used the words “there will be no gainful employment for [you] at the Centre”. That finding is consistent with the evidence that he approached the meeting with a degree of caution and was keen to avoid becoming embroiled in a discussion with Ms Casey. I also find it more probable than not that Ms Casey asked whether the decision was taken because she had lodged a grievance action. It seems implausible that confronted with a decision of significance that affected her directly, and in her mind adversely, that Ms Casey would not have asked why the decision was made.
4. The parties differ on the meaning conveyed by the words used by Captain Michael. Comcare contends that they conveyed the meaning Captain Michael intended to convey, that is, that there would be **no further work for Ms Casey** at the Centre. Ms Casey on the other hand contends that the meaning conveyed was that **the work she had been undertaking was no longer available**, which as Captain Michael admits was not the case.
5. In my opinion the words used are ambiguous and lend themselves to several interpretations including those favoured by the parties. What is plain is that they shed no light on the reasons for the decision, that is, Captain Michael’s assessment that the workplace had become dysfunctional and in those circumstances the best option was to remove Ms Casey.
6. Captain Michael testified that it was his understanding that he was not required to give reasons for his decision because Ms Casey was a change affected employee and, as such, she should have appreciated that she could be “bounced around” the Navy. Apart from stating that he was advised by Navy HR to take a simple and straightforward approach and to use the words he did, Captain Michael gave no explanation for not informing Ms Casey of the reason she was told to “move on”. It is unclear who in Navy HR advised Captain Michael to take the course he did. It is apparent from Ms Rogers’s evidence that she did not proffer that advice.
7. As Bleby J stated in *Keen*, whether a particular administrative action is taken in a reasonable manner must be determined against the “ordinary standards of reasonable employers in all the circumstances of the case”. Apart from that given by Ms Rogers, there is no evidence about the practice within the Navy where employees are asked to “move on”. Ms Rogers, who had worked in Navy HR for over a decade, held the opinion that before a manager could ask a person in a “meaningful employment role” to move on, they must have a legitimate reason for doing so. She stated that she would normally expect a manager to explain the reason they had decided to “let go” a person, even where that person held a temporary, or “meaningful employment” position.
8. The desirability of transparency and accountability in decision-making in a public sector employment context is self-evident. It allows those directly affected by a particular decision to know the reasons for that decision. Importantly, it allows those affected by the decision together with those charged with overseeing decision-making within the APS, to make an informed assessment of whether a particular decision was lawful and reasonable.
9. When informed that her position at the Centre was to come to an end Ms Casey had held that position for 18 months. While that did not give Ms Casey an entitlement to continue in the position, it meant it was highly likely that she would have been curious to know why it had been decided that the position was to come to an end, especially given neither Captain Michael, nor his predecessor, had raised with her any concerns about her work or conduct. In the absence of reasons, it is hardly surprising that she concluded (wrongly) that she was in effect being victimised for having made complaints about the conduct of her colleagues.
10. It is not possible to say whether Ms Casey would have been less adversely affected had she been informed of the reasons for the decision, however, that is irrelevant to the question I must decide, namely, whether objectively assessed, the action was taken in a reasonable manner. Whether an administrative action was taken in a reasonable manner is a question of fact and degree that can only be determined after all relevant factors have been taken into account. As observed by Robertson J (at [82]) in *Comcare v Martinez (No 2)* there will often be more than one way of doing things reasonably. The proviso in s 5A of the Act is not confined to those circumstances where the reasonable administrative action was taken in the **most** reasonable manner. As long as the action was taken in a manner that falls within the spectrum of reasonableness, the proviso will apply.
11. Whichever account of the meeting is accepted, it is apparent that Captain Michael did not give Ms Casey an explanation for the decision that her position at the Centre was to come to an end. In the absence of an alternative explanation it is not surprising that she concluded that it was because she had made complaints about her colleagues. Comcare adduced no evidence which might support a finding that the approach taken by Captain Michael of simply announcing the decision and when asked, not giving reasons for the decision, was standard practice within the Navy, or a practice considered reasonable by those responsible for the management of public servants working within the Navy. While Ms Rogers’s evidence that reasons would normally be given cannot be elevated to the status of an authoritative statement of Navy practice, it nonetheless lends support to Ms Casey’s contention that the action was not taken in a reasonable manner. There is no evidence and nor has it been suggested that Ms Casey was not given reasons because of concern that to do so may have put other members of staff at risk or prejudiced their interests, or those of the Centre or the Navy. I accept that Captain Michael had a legitimate reason for terminating Ms Casey’s employment at the Centre but am not persuaded that the action was taken in a reasonable manner.

## Was Ms Casey’s adjustment disorder a result of any other administrative action?

1. Comcare contends that in addition to the decision to end her employment at the Centre, Ms Casey’s Adjustment Disorder was a result of:

The decision to declare Ms Casey change affected.

Actions taken by Ms Rogers to assist Ms Casey to find a permanent APS 5 position after being declared change affected.

The QA undertaken in relation to Ms Casey’s complaint of inappropriate conduct by other employees.

The preliminary investigation in relation to complaints of inappropriate behaviour by Ms Casey.

1. Ms Casey’s condition will be suffered as a result of one or more of the above actions, if they were an operative cause of her Adjustment Disorder, even if there were other unrelated causes. (*Hart v Comcare*; (2005) 145 FCR 29 at [18] – [26]; *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463 at [54] – [56]; *Drenth v Comcare* (2012) 128 ALD 1 at [29]).

### Medical opinion on causation

1. After making her claim for compensation, Ms Casey was assessed by four psychiatrists: Dr Howard Synnott (in December 2012), Dr Michael Hong (in January 2013), Dr Stephen Allnutt (in July 2013) and Dr Selwyn Smith (in November 2013). All were of the opinion that Ms Casey was, or had been, suffering from an Adjustment Disorder. Each prepared reports that were before me in these proceedings. In addition, Drs Smith and Allnutt gave oral evidence concurrently.
2. Dr Smith is of the opinion that while Ms Casey had been suffering from symptoms of anxiety and depression since at least 2010, it was only in August 2012 that she satisfied the diagnostic criteria for an Adjustment Disorder. He thought it relevant that prior to August 2012 she had not taken any significant periods off work and her GP, Dr Johnson, did not conclude until 11 August 2012 that she was suffering from a diagnosable psychiatric condition. In Dr Smith’s opinion any symptoms suffered by Ms Casey prior to August 2012 were probably transitory and within the “normal range” of reactions to the types of stressors she was experiencing.
3. In Dr Smith’s opinion, the sole stressor which resulted in Ms Casey suffering an Adjustment Disorder was the decision to end her position with the Heritage Centre. He explained that under the American Psychiatric Association, D*iagnostic and Statistical Manual of Mental Disorders*, 5th ed, 2013 (**DSM-V**) the “essential feature” of an Adjustment Disorder is:

[A] psychological response to an identifiable stressor(s) that results in the development of clinically significant emotional or behavioural symptoms **within three months of the onset of the stressor** [emphasis added]

In his opinion the decision that she had been made change affected was a backdrop to, but not causative of, her Adjustment Disorder.

1. Dr Allnutt on the other hand was of the opinion that a diagnosis of Adjustment Disorder could probably have been made in February 2012, and the termination decision caused an exacerbation of Ms Casey’s symptoms. He thought that while Ms Casey had been experiencing psychiatric symptoms prior to early 2012, they were insufficient to support a diagnosis of an Adjustment Disorder. According to Dr Allnutt, Ms Casey was significantly affected by the decision that she had been change affected and the resultant uncertainty and insecurity constituted a chronic stressor. When taken to the evidence that for most of the period Ms Casey worked at the Centre, she had no significant time off work, and had apparently carried out the duties of her position at least to Commander Moore’s satisfaction, Dr Allnutt conceded that Dr Smith’s analysis was probably correct.
2. The focus of the reports prepared by Drs Hong and Synnott primarily addressed Ms Casey’s fitness to return to work. Each recorded a history of psychiatric symptoms dating back to 2009/2010 but neither addressed the probable date of onset of Ms Casey’s condition. They agreed that employment was a substantially contributing factor to Ms Casey’s condition but did not address in any detail what aspect of Ms Casey’s employment contributed to her condition.

### What was the date of onset of Ms Casey’s Adjustment Disorder?

1. The consensus of medical opinion is that Ms Casey was suffering symptoms of anxiety and depression prior to August 2012 and her condition dramatically deteriorated after being notified that her position at the Centre was to come to an end. The point of difference between Drs Smith and Allnutt, turns primarily on their assessment of the severity and duration of the symptoms experienced by Ms Casey prior to being told her position at the Centre was to end. Making that assessment was a difficult task as both experts were reliant on a history given by Ms Casey sometime after the emotionally charged events of 2012 and against the backdrop of a legal dispute. Dr Smith was firm in his opinion that the symptoms experienced prior to August were not clinically significant. While he revised his original opinion, Dr Allnutt was not as confident as Dr Smith about the nature of Ms Casey’s pre-August 2012 symptoms.
2. While possible that Ms Casey was suffering an Adjustment Disorder in the early part of 2012, I prefer the opinion expressed by Dr Smith that onset probably occurred in August 2012.

### Was Ms Casey’s Adjustment Disorder suffered as a result of the decision to declare her change affected?

1. The evidence of Ms Casey taking time off work, consulting her GP and seeking counselling, after being told that she had been made change affected, indicates that she was distressed by that decision. I agree with Dr Smith’s analysis, that those symptoms were probably not clinically significant.
2. The task of evaluating the extent to which a particular stressor contributes to an Adjustment Disorder is notoriously difficult, especially where, as in this case, the person experiences multiple stressors over an extended period. It is possible, as Dr Allnutt believes, that being declared change affected was a chronic stressor and contributed to the development of Ms Casey’s Adjustment Disorder. However, given that over two years had elapsed between Ms Casey being notified of that decision and the onset of her Adjustment Disorder, I prefer the opinion of Dr Smith, that the decision was merely a back drop to, and not an operative cause of the disorder. I am not satisfied on the balance of probabilities that Ms Casey’s Adjustment Disorder was suffered as a result of the decision to make her change affected.

### Was Ms Casey’s Adjustment Disorder a result of the action of Ms Rogers to find a permanent APS5 position between 2010 and 2012?

1. While not entirely clear, I understand Comcare to have abandoned this purported reasonable administrative action. In the interests of completeness I will address the question of causation.
2. Comcare identified the relevant action as the steps taken by Ms Rogers in her role as change manager, to assist Ms Casey find a permanent position. While not the subject of considered submissions, in my opinion that action was operational, not administrative. In any event there is simply no evidence that Ms Casey was dissatisfied with the steps taken by Ms Rogers to assist her to find a permanent position, or, that any action taken by Ms Rogers in that regard, contributed to Ms Casey’s Adjustment Disorder.

### Was Ms Casey’s Adjustment Disorder a result of the Quick Assessment undertaken in relation to her complaint of inappropriate conduct by other employees?

1. There is no direct evidence about when Ms Casey was advised of the results of the QA. Comcare contends, based on a minute addressed to Ms Casey dated 30 July 2012, that she heard of the results on that day. Ms Casey, on the other hand, claims that she did not learn of the results until sometime after she became unwell.
2. There is little, if any, evidence about Ms Casey’s reaction on learning of the results of the QA. While there can be no doubt she was troubled by the conduct of her colleagues, the available evidence does not suggest that she was troubled by the way the QA was conducted, or, the recommendations made by the investigator. While the investigator found the conduct about which Ms Casey complained did not constitute inappropriate behaviour, he recommended that the other issues she had raised be addressed and that staff be provided with communication training. The investigator in his report did not attribute culpability to what he euphemistically described as the “communication problems” within the Centre.
3. None of the histories taken by the experts who assessed Ms Casey and whose opinions are before me, suggest that Ms Casey was upset by, or ruminated over, the QA. Further none of the experts suggested that the investigation into the complaints made by Ms Casey was causative of her condition.
4. Even if accepted that Ms Casey learnt of the results of the QA into the complaints made by her before the onset of her Adjustment Disorder, I could not be satisfied her condition was a result of the QA into her complaints.

### Was Ms Casey’s Adjustment Disorder a result of the preliminary investigation in relation to complaints of inappropriate behaviour by Ms Casey?

1. In late June 2012, the two members of staff about whom Ms Casey had complained, lodged complaints about Ms Casey. Those complaints were also referred for QA. That assessment did not commence until August 2012. There is no evidence about when that investigation was concluded or when Ms Casey learnt that formal complaints had been lodged by other staff members. Nor is there any medical evidence to suggest that the investigation into those complaints was a factor that contributed to Ms Casey’s Adjustment Disorder.
2. On the available evidence I could not be satisfied Ms Casey’s condition was a result of the QA into complaints made about her.

# Conclusion

1. Ms Casey’s Adjustment Disorder was contributed to, to a significant degree, by her employment with the Department of Defence. It was not the result of reasonable administrative action taken in a reasonable manner in respect of her employment. I find that Ms Casey suffered an injury within the meaning of the Act. For these reasons I have decided to set aside the decision under review and in substitution of the decision under review, decide that Comcare is liable for that injury under s 14 of the Act.

|  |
| --- |
| I certify that the preceding 73 (seventy-three) paragraphs are a true copy of the reasons for the decision herein of |

....................[SGD]....................................................

Dated 5 September 2014

|  |  |
| --- | --- |
| Date(s) of hearing | **14, 15 and 16 July 2014** |
| Counsel for the Applicant | **Leo Grey** |
| Solicitors for the Applicant | **Carroll & O'Dea Lawyers** |
| Counsel for the Respondent | **Rhonda Henderson** |
| Solicitors for the Respondent | **Sparke Helmore** |