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WORKERS COMPENSATION & SELF INSURANCE

Managment Prerogative

The High Court of Australia reinforces an Employer's right to legitimate management action

By Patrick Walsh

The recent decision of the High Court of Australia in *Comcare v Martin* [2016] HCA 43 has reaffirmed that employers will not incur workers compensation liabilities as a consequence of reasonable management action taken in a reasonable manner.

The dispute in *Martin* arose out of a claim for workers compensation made by Ms Martin arising out of her employment with the Australian Broadcasting Corporation ('**the ABC**').

Ms Martin had raised a complaint of bullying and harassment against her supervisor Mr Mellett. These allegations were investigated and found to be unsubstantiated.

Ms Martin continued working with Mr Mellett, but made a number of unsuccessful attempts to obtain another position with the ABC in order to remove herself from Mr Mellet's supervision. In 2011 Ms Martin was able to obtain a temporary position as a cross media reporter, which removed her from Mr Mellett's direct supervision. In 2012 this temporary role was advertised as a permanent appointment and Ms Martin applied.

Ms Martin was interviewed by a selection panel, which included Mr Mellett and her supervisor in the cross media reporter role. The selection panel made a decision not to appoint Ms Martin to the permanent role.

During the course of the Trial in the Administrative Appeals Tribunal, the medical evidence supported Ms Martin's claim that she suffered an adjustment disorder during the time that she was employed in the cross media role, but that this was aggravated by the decision not to appoint her to that role on a permanent basis. The High Court noted that it was this aggravation that ultimately caused Ms Martin to decompensate and make a claim for workers compensation.

The Tribunal in its decision found that Ms Martin's adjustment disorder had been caused by the failure to obtain the position of cross media report, but that Mr Mellett's participation in the selection panel meant the decision making process that resulted in the decision not to appoint Ms Martin had not been undertaken in a reasonable manner.

On appeal to the Federal Court, Comcare challenged the Tribunal's finding that the decision not to appoint Ms Martin to the position of cross media reporter had not been taken in a reasonable manner. Ms Martin also challenged the Tribunal's finding that her adjustment disorder had arisen as a consequence of the ABC's decision.

The Federal Court allowed Comcare's appeal and dismissed Ms Martin's notice of contention.

Ms Martin then appealed to the Full Bench of the Federal Court. One of the issues raised in the appeal was the proper construction of section 5A(1)(a) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) which states an injury means 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.** This is a legislative provision which is largely replicated, in different forms, across all Australian jurisdictions.

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The majority of the Full Bench, in an interesting decision, construed the phrase *"as a result of"* as requiring the application of a "common sense" approach to causation. The majority then went on to take issue with the Tribunal's finding of fact and stated that there was no evidence to substantiate a finding that returning to work under the supervision of Mr Mellett was a direct and foreseeable consequence of the decision not to appoint Ms Martin to the role of cross media reporter, and Ms Martin being returned to her substantive role was an inevitable consequence of her failure to obtain the position of cross media reporter. As a consequence the majority allowed the appeal and remitted the matter to the Tribunal to be reconsidered.

In a unanimous judgment the High Court rejected the approach taken by the Full Bench of the Federal Court. Their Honours stated that:

"Having regarding to the text and structure of ss 5A and 5B, and consistently with the statutory purpose of the exclusion in s5A(1), what is required to meet the causal connection connoted by the exclusionary phrase in s 5A91) in its application to a disease within s 5A(1)(a) is therefore that the employee would not have suffered that disease, as defined by s 5B(1), if the administrative action had not been taken. ***That is to say, the causal connection is met if, without the taking of the administrative action, the employee would not have suffered the ailment or aggravation that was contributed to, to a significant degree, by the employee's employment."***

My own experience in the South Australian Employment Tribunal and the Fair Work Commission is that some applicants are seeking to draw a line between the action taken by an employer in relation to an employee's employment, and the consequences that flow from it. An example of this is where an employee might allege that allegations of misconduct are made in a reasonable manner, but the allegations themselves have contributed to an injury allegedly suffered by the employee.

The High Court's decision is timely reassurance for employers that, at least with respect to workers compensation, they will not be held liable for the consequences that flow from legitimate and reasonable management action.

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