

No compo for missing out: injury from failure to obtain promotion not compensable due to reasonable administrative action

RSBQ and Comcare
[2017] AATA 1965

Key Points

- A government worker applied for a promotion, did not succeed, and lodged a claim for psychological injury
- He alleged his condition was caused by an unreasonable selection process
- The process was found to constitute a reasonable administrative action taken in a reasonable manner

Background

The Applicant commenced his employment with a Commonwealth Government agency (the Agency) in an APS5 position on 28 April 2005. He began acting in an APS6 position (a higher position) in September 2011. Between July 2012 and January 2013, the applicant's substantive duties were those of the APS5 role which he had initially held. The APS6 position was advertised as a permanent role in 2013. The Applicant applied and was unsuccessful.

The day after being notified by his supervisor of his failure to obtain the position, the applicant e-mailed his supervisor raising a number of grievances with the process. He then took pre-arranged leave a few days later and, upon returning from this leave, produced a medical certificate certifying him unfit for work for the period during which he was away. He then took a further four weeks' unpaid leave and produced medical certificates stating he was unfit for work for roughly five more months.

A fitness for duty assessment was arranged with an independent psychiatrist, who diagnosed the applicant with an Adjustment Disorder suffered solely as a result of the specific stressor of his failure to be appointed to the position.

On 31 March 2014, the applicant lodged a claim for workers' compensation for '*anxiety and depression symptoms*', suffered as a result of a '*corrupted recruitment and selection process*'. The claim arose as a result of the applicant's alleged faults in the Agency's recruitment process, and his disappointment at failing to be appointed to the APS6 position.

On 26 October 2014, a second claim was lodged. The applicant alleged an aggravation of his condition, caused by an alleged lack of a proper RTW plan following his periods of absence.

Both claims were both determined with a denial of liability. The applicant sought reconsiderations of the determinations, which were both affirmed. The applicant then applied for review of both



decision with the Administrative Appeals Tribunal. The Tribunal heard both applications simultaneously.

The law

At Hearing, the Agency conceded that the applicant had suffered an injury for the purpose of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**), and that the injury had been contributed to, to a significant degree, by the applicant's employment. The Tribunal was therefore asked to consider whether the injury was suffered as a result of reasonable administrative action (**RAA**) taken in a reasonable manner.

The Tribunal first referred to the factually similar *Comcare v Martin* (2016) 258 CLR 467, in which it was held that the RAA exclusion is made out if the disease suffered is a mental condition or aggravation of a mental condition brought on by a failure to obtain promotion, including a reaction to a perceived consequence of the failure to obtain promotion.

It then applied *Comcare v Martinez* (No 2) [2013] FCA 439, in which the Federal Court approved the Tribunal's reasoning in *Re Georges and Telstra Corporation Ltd* [2009] AATA 731:

The underlying assessment [of reasonableness] must remain objective... a particular administrative action pertaining to an individual employee [is] usually taken in accordance with a corporate policy framework... [which] often provide the context of a particular administrative action.

The Agency contended that the principles in *Hart v Comcare* [2005] FCAFC 16 should apply, namely that where there are multiple causative factors of an injury, if any one of those factors falls within the exclusionary RAA provisions in s 5A(1) of the SRC Act, the injury is not compensable. That is, if there are many discrete causes that arose out of, or in the course of, employment, and any one of those causes constitutes an RAA, then the entire injury will not be compensable. The Tribunal agreed.

The relevant 'administrative action' in the present case was the recruitment process conducted by the Agency in 2013 for the APS6 position the applicant failed to obtain. In assessing reasonableness, the Tribunal looked at the composition of the selection panel, training provided to panel members, the availability to the applicant of referees, the maintenance of documents recorded during the applicant's interview, and the coherence of the process with Agency policy.

The second application (regarding an apparent aggravation of the injury) largely turned on the medical evidence before the Tribunal. It considered the requirement for an 'aggravation' to satisfy the requirements for an ailment within the meaning of s 4 of the SRC Act, and applied *McKinnon and Australian Postal Corporation* [2001] AATA 297 which required the Tribunal to ask whether





an ‘aggravating’ incident occasioned or brought about any permanent symptoms, or future permanent susceptibility to symptoms.

Conclusion

The Tribunal found that the recruitment process through which the applicant was placed, and which he maintained had caused his injury, constituted a reasonable administrative action undertaken in a reasonable manner.

The Tribunal reinforced its decision by concluding that even if the recruitment process was not reasonable, or carried out in a reasonable manner, a significant causative factor was the applicant’s reaction to not being promoted and liability for injury would be excluded due to the principles set out in *Hart v Comcare*.

As to the second claim for aggravation, the Tribunal found that there had been no medical evidence to sufficiently ‘disentangle’ the alleged aggravation from the initial injury. No new injury had been suffered and, as such, no ailment existed to satisfy the requirements under section 4 of the Act.

Lessons Learnt

Processes alleged to constitute reasonable administrative actions will be assessed by an objective standard. This involves a separation of a worker’s perceived consequences from the *objective* reasonableness of the administrative action, which is an entirely different consideration. That is to say, the end result does not necessarily make the means unreasonable.

We are also reminded of the need for an ‘aggravation’ to be different from an initial injury or ailment. If the alleged aggravation cannot be separated from the initial injury, the claim for the aggravation will not succeed.

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