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Reasonable administrative action in the face of Chronic Fatigue Syndrome

DNJN and Comcare [2015] AATA 928 (2 December 2015)

Key Points

- Whether aggravation of chronic fatigue syndrome was suffered as a result of reasonable administrative action taken in a reasonable manner in respect of DNJN's employment, pursuant to the exclusionary provisions in subsection 5A(1) of SRC Act.

Background

DNJN was employed in the Australian Public Service. In 2005 she suffered anxiety and depression arising, in part, from the type of investigative work she was undertaking. DNJN eventually transferred from her role in Disability Processing to a Random Sample Team. On 2 August 2010, DNJN informed her employer she wished to return to Disability Processing on medical grounds. She was not transferred back to Disability Processing but instead arranged to work away from the Random Sample Team. On July 2011, DNJN went on leave and subsequently retired on medical grounds in August 2014.

Comcare issued a reviewable decision on 12 September 2012 affirming an earlier determination, which denied liability for aggravation of DNJN's Chronic Fatigue Syndrome (**CFS**), depression and anxiety. On 24 April 2014 the Tribunal upheld Comcare's decision. On appeal, this was set aside by the Federal Court.

Following the Federal Court's decision, the Tribunal was required to consider whether an aggravation of CFS was suffered as a result of reasonable administrative action taken in a reasonable manner in respect of DNJN's employment, pursuant to the exclusionary provisions within the definition of injury in section 5A(1).

The Law

Subsection 14(1) of the SRC Act provides Comcare is liable to pay compensation for an injury suffered by an employee, if the injury results in incapacity for work or impairment.

Subsection 5A(1) relevantly defines injury as a disease suffered by an employee. However, it excludes from this definition "*a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment*".

Disease is defined in section 5B to mean an ailment or an aggravation of an ailment suffered by an employee. Ailment is defined in section 4 as any physical or mental ailment, disorder, defect or morbid condition.

In coming to its decision, the Tribunal referred to the decision of *Commonwealth Bank of Australia v Reeve and Anor* [2012] FCAFC 21. In that decision, Justice Gray cautioned against a broad interpretation of the exclusion and stated that the words "*as a result of*" must be confined to a causal relationship of sufficient proximity between the relevant condition and the administrative action. It was also concluded that "administrative action" in subsection 5A(1) referred to specific administrative action directed to the employee's employment, as opposed to an action forming part of the employee's duties.

Conclusion

DNJN submitted that it was the performance of her duties in the new position, separate from her transfer, which aggravated her condition and that this performance was not subject to the exclusionary provisions.

Comcare accepted that the aggravation of DNJN's condition was caused by the duties she was required to perform. However, Comcare argued that the "administrative action" in this case was the transfer and that this included the performance of duties. In the alternative, Comcare argued the aggravation was "*a result of*" the administrative action of the transfer and therefore the exclusionary provisions of subsection 5A(1) applied.

The Tribunal accepted that DNJN's CFS was aggravated by her realisation that duties in her new position included an assessment of marriage-like relationships. The Tribunal also accepted that DNJN had not known at the time of her transfer that she would be expected to do that work.

The Tribunal determined that both arguments of Comcare failed to satisfy the exclusionary provisions within the definition of injury in subsection 5A – that the disease, injury or aggravation be suffered "*as a result of*" the relevant administrative action. As there was no causal link between DNJN's transfer and the aggravation of her condition, it was her duty to undertake assessment of marriage-like relationships that caused aggravation of her CFS. The administrative action was not what caused DNJN's condition and hence the facts fell outside of the necessary causal relationship for the exclusion to operate.

The Tribunal also considered when DNJN's injury first occurred, and referred to subsection 7(4) of the Act which provides, in part, that an employee shall be taken to have sustained injury when the employee first sought medical treatment. The Tribunal therefore held DNJN sustained her injury when she first consulted her general practitioner on 23 July 2010. Consequently, the Tribunal set aside Comcare's reviewable decision on 12 September 2012 and decided, in accordance with section 14 of the SRC Act, that Comcare was liable to compensate DNJN for aggravation of CFS.

Lessons Learnt

This decision is an important reminder that the provisions in section 5A(1) do not only apply to psychological injuries. It emphasises that there must be a causal link between the injury claimed and the "administrative action" for the exclusion provision in subsection 5A(1) to apply. The decision cautions against a broad interpretation of the term "administrative action" and notes this refers to actions taken specifically in respect of an employee's employment, rather than actions taken with respect to duties included in that employment.

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