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Costly slip up: Employer liability for day to day activities whilst travelling for employment

Garrett and Comcare (Compensation) [2015] AATA 801

Key Points

- Employee suffered an injury while in the shower of a hotel room whilst travelling for work.
- Whether the injury arose in the course of employment on the basis the injury was suffered during an interval or interlude in an overall period or episode of work.
- Held that the employer had induced or encouraged employee to shower before attending work.

Background

Mr Stephen Garrett was employed by the Department of Education, Employment and Workplace Relations (**the Department**) as the Australian Education International (**AEI**) Educational Counsellor for the Middle East. Mr Garrett was based in Dubai in the United Arab Emirates.

In 2009, due to governmental changes, the AEI Middle East position was to be discontinued and the role was to be transferred from the Department to Austrade. A new position was created with Austrade as National Education Manager and Mr Garrett successfully applied for this role.

On 8 May 2010, Mr Garrett travelled from Dubai to Sydney at the request of Austrade in order to ensure a smooth transition from the Department to Austrade. The Department agreed to Mr Garrett travelling to Sydney on the proviso he continue to perform his AEI duties from Australia.

On 16 May 2010, Mr Garrett suffered a stroke and collapsed in his hotel room in Sydney.

On 16 June 2010, Mr Garrett made a claim for workers' compensation. Comcare denied liability on the basis that the stroke did not arise out of, or in the course of, Mr Garrett's employment with the Department.

On 30 August 2010, Comcare revoked its earlier determination and accepted liability to pay compensation. On 19 November 2014, Comcare reconsidered that decision, of its own motion, and revoked it. Mr Garrett applied to the Tribunal for a review of that decision.

The Law

In considering whether the stroke that Mr Garrett suffered arose out of, or in the course of, his employment, the AAT had to consider whether the applicant suffered a stroke during an

interval or interlude in an overall period of work or episode of work and, if so, whether his employer induced or encouraged him to engage in the activity he was engaged in at the time of the stroke.

In *Hatzimanolis v ANI Corporate Ltd*, the High Court made the following observations:

> *"An interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way…"*

The High Court elaborated on this concept in *Comcare v PVYW*. The majority of the Court said:

> *"The starting point… in order to determine whether an injury was suffered in the course of employment, is the factual finding that an employee suffered injury, but not whilst engaged in actual work. The next inquiry is what the employee was doing when injured… did the employer induce or encourage the employee to engage in that activity? When injury occurs at and by reference to a place, the question is: did the employer induce or encourage the employee to be there?"*

Conclusion

Mr Garrett gave evidence to the effect that on the morning of 16 May 2010 he awoke around 7.30am and used his laptop to do some Departmental work. Mr Garrett then took a shower with the intention of doing further Departmental work and Austrade work both at the Austrade office and in his hotel room.

The Department accepted that although at the time of the stroke Mr Garrett was not actually working (as he was in the shower), he was injured during an interval in an overall period of employment. This was accepted by the Tribunal.

The Tribunal then turned to the question of whether the Department had induced or encouraged Mr Garrett to engage in the activity he was engaged in at the time of the stroke.

Mr Garrett was an employee of the Department at the time and not Austrade. Although Austrade asked Mr Garret to travel to Sydney, the Department knew of and approved of the travel and even paid his airfares and salary during the period.

The Tribunal held that in such circumstances the Department could not say that it did not also induce or encourage Mr Garrett to engage in an activity that was induced or encouraged by Austrade.

The Tribunal commented further that there need not be any causal connection between the activity and the injury as the circumstance of the injury is referable to the place. The Tribunal stated that there was an expectation that workers shower before attending work and the Department therefore impliedly induced or encouraged Mr Garrett to shower in his

hotel on the Sunday morning.

The Tribunal also commented that the expectation that a worker will shower before coming to work is not limited to working days only, especially in such circumstances where an employee is travelling for work.

The Tribunal made an order that the Comcare was liable to pay Mr Garrett compensation in respect of the stroke.

Lessons learnt

Where a worker is required to travel for employment day to day activities that appear not to relate to their employment may not always be considered an interval in an overall period of employment.

The question will be whether the employee was expressly or impliedly induced or encouraged to undertake that activity by their employer.

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