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No compo for 'white knight' trucker – AAT dismisses worker's claim for injuries suffered in service station brawl

O'Loughlin v Linfox Australia Pty Ltd [2016] AATA 606

Key Points

- The employer initially accepted this claim for injuries suffered as a consequence of the worker's decision to become involved in a "domestic dispute" that occurred at a service station where he was delivering fuel.
- Following the High Court's *PVYW* decision (the motel sex case) the employer rejected the claim on the basis that the injuries did not "arise out of the course of employment".
- The Tribunal initially confirmed the rejection but following a Federal Court appeal and remission back to Tribunal, liability was excluded on the grounds that the worker "voluntarily and unreasonably submitted himself to an abnormal risk of injury".

Background

Mr O'Loughlin was employed by Linfox Australia as a tanker driver. On 7 September 2010, he delivered a load of fuel to a service station in Pascoe Vale. As he was discharging the fuel a woman drove into the service station, stopping at the bowsers and started beeping her horn. A mechanic then came outside and threw two heavy objects at the car and started to beat his fists on the window and windscreen.

Mr O'Loughlin's evidence was that he was concerned for the woman in the car, so he shouted at the man to calm down. The situation escalated, with the man punching Mr O'Loughlin on the left cheek and kicking him in the left knee.

Mr O'Loughlin submitted a claim for workers' compensation in respect of injuries to his face and left knee as a result of the altercation. The employer initially accepted liability in respect to the claim, however two years later revoked the acceptance and denied the claim on the basis that, pursuant to the *PVYW* decision, the injuries did not occur in the course of employment because Linfox had not "induced or encouraged" Mr O'Loughlin to get involved in altercations.

The AAT initially affirmed Linfox's decision based on that reasoning. However, after a Federal Court appeal and remission back to the Tribunal, the claim was rejected on the basis of the "voluntary and unreasonable assumption of risk" provisions of the SRC Act.

The Law

Section 6 of the SRC Act provides an extension to the usual definition of injury together with and exclusion to the extension. It states that:

> *(1) without limiting the circumstances in which an injury to an employee may be treated as having arisen out of, or in the course of, his or her employment, an injury shall, for the purposes of this act, be treated as having so arisen if it was sustained and*
>
> *(a) as a result of an act of violence that would not have occurred but for the employee's employment or the performance by the employee of the duties or functions of his or her employment, or*
> *(b) while the employee was at the employee's place of work, for the purposes of that employment, or was temporarily absent from that place during an ordinary recess in that employment*
> *(c) …*
>
> *(3) subsection (1) does not apply where an employee sustains an injury*
>
> *(a) while at a place referred to in that subsection, or*
> *(b) during an ordinary recess in his or her employment.*
>
> *if the employee sustained the injury because he or she **voluntarily and unreasonably** submitted to an **abnormal risk of injury**.* [emphasis added]

The Decision

Prior to rejecting the claim based on the "voluntary and unreasonable assumption of risk" exclusion the Tribunal disposed of a number of preliminary issues as follows:

- Despite some lately made statements that he became involved in the dispute because he thought the altercation could cause an explosion, the Tribunal found that the injuries did not "**arise out of employment**". Obviously becoming involved in altercations was not part of Mr O'Loughlin's job description.
- However, based on reasoning that Mr O'Loughlin was doing exactly what he was engaged to do at the time of the incident, the Tribunal found that the injuries did "arise in the course of employment". This is despite the decision to become involved in an altercation.
- Based on reasoning that it would be incorrect to subdivide Mr O'Loughlin's duties so as to find the incident occurred on an "interval or interlude" in his employment, the Tribunal found that the issue of whether Mr O'Loughlin had been "induced or encouraged" to become involved in altercations or required by the decision of *PVYW* was irrelevant.

The final consideration for the Tribunal was whether the exclusionary provision in section 6(3) applied. Section 6(3) can only apply in the circumstances listed in section 6(1), but is expressly stated not to limit the circumstances upon which a worker might otherwise be entitled to compensation.

Mr O'Loughlin argued that section 6(3) was not applicable because he was otherwise entitled to compensation. However, Linfox successfully argued that Mr O'Loughlin qualified under section 6(1)(b), as he was at a place referred to in that subsection. The Tribunal commented that it would be inconsistent with the scheme if an employee was able to choose not to rely on section 6 in order to avoid the exclusion provided by section 6(3).

Noting Linfox's comprehensive evidence that it had provided instructions to drivers not to engage in altercations of any kind with members of the public and that Mr O'Loughlin had undoubtedly provoked the assailant, the Tribunal found that Mr O'Loughlin had put himself at abnormal risk of injury and that the exclusion was therefore enlivened.

Lessons Learnt

The section is, as a general rule, under utilised, which is in some part attributable to the fact that it can only apply in relation to the specific examples listed within section 6(1). While the decision is under appeal, it demonstrates that when an employer has strong policies with respect to conduct, claims can be sustainably rejected where there is a substantial breach of those policies.

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