

## Inconsistent evidence leads to release from implied undertaking

### *Carole Shales v Commonwealth Bank of Australia*

#### Key Points

- The Tribunal was required to consider whether the circumstances in this case warranted release from the implied undertaking as it related to the summonsed documents and a medical report which commented on those documents.
- The Tribunal found that Ms Shales' conduct throughout the processing of the claim took the matter out of the ordinary course, and granted the requested release.

#### Background

Ms Shales was employed by Commonwealth Bank of Australia (**CBA**) as a Savings Specialist. Ms Shales had an accepted claim in respect of "*anxiety and depressed mood*". The substantive Application before the Tribunal related to her claim for permanent impairment and non-economic loss in relation to that injury.


As part of the proceedings, CBA summonsed documents from various practitioners who had provided treatment to Ms Shales. The summonsed documents indicated that Ms Shales had experienced significant non-work related stressors at a similar time to when she claimed the work related injury arose. Ms Shales had not previously disclosed these non-work related stressors.

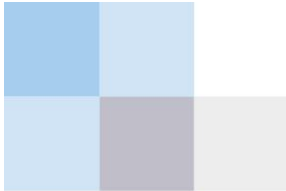
CBA briefed Dr Gemma Edwards-Smith (Psychiatrist) to provide a report commenting on the summonsed documents. On review of the documents, Dr Edwards-Smith stated that it was evident that Ms Shales had significant pre-existing long-term, non-work related stressors and the documents had changed her opinion as to the significance of work as a contributing factor to Ms Shales' psychological condition.

CBA sought to be released from the implied undertaking with regards to the summonsed documents and the report of Dr Edwards-Smith.

#### The Law

Part 5 of the Administrative Appeals Tribunal's *General Practice Direction* outlines that where documents are produced under compulsion in Tribunal proceedings, a party must not use the documents for any other purpose than the purpose for which they were provided to the Tribunal.





Practice Direction 5.6 provides that any request for release from an implied undertaking must be in writing, must specify the documents to which the request for release relates, the purpose of the release and who will use the documents, and if possible, whether consent has been provided in respect of the proposed release.

Release from an implied undertaking may be made where special circumstances exist: *Crest Homes PLC v Marks* [1987] AC 829. The Tribunal should consider whether the party applying for the release has shown circumstances which take the matter out of the ordinary course and, if so, whether an exercise of the Tribunal's discretion in favour of the release would be in the exercise of the interests of justice (*Holpitt Pty Ltd v Varimu Pty Ltd* [1991] FCA 269).

## Conclusion

Representatives for CBA submitted that Ms Shales' conduct in withholding important information relevant to the issue of liability constituted special circumstances which took the matter out of the ordinary course. It was submitted that CBA's interests would be prejudiced if the proposed release was not granted as CBA would be unable to re-examine the initial acceptance of liability in light of the new information. It was also submitted that the release was in the interests of justice as the substantive Application before the Tribunal was based upon initial liability for the claim being correctly accepted.

Brigadier Warner decided that the serious nature of CBA's submissions regarding the conduct of Ms Shales during the processing of her claim, together with the opinion of Dr Edwards-Smith, indicated that the matter was out of the ordinary and that special circumstances did exist. Brigadier Warner stated that the purpose for which the documents would be used was relevant to the Application before the Tribunal and would potentially assist the Tribunal in due course.


## Lessons Learnt

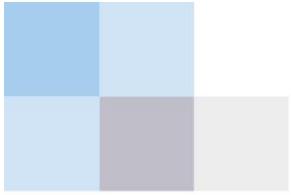
In this example, to satisfy the Tribunal that there are special circumstances for release from the implied undertaking, it was established that the applicant had withheld information, the employer would have been unfairly prejudiced if the implied undertaking was to remain, and the purpose of release was relevant to the Application before the Tribunal.

## Contact:

Brett Ablong  
Partner  
Direct: +61 (0) 8 9265 6001  
brett.ablong@hbalegal.com

Claire Tota  
Associate  
Direct: +61 (0) 8 9265 6011  
claire.tota@hbalegal.com





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