

Managers beware: reasonable administrative action in the post-*Comcare v Martin* world

Lim v Comcare [2017] FCAFC 64

Key Points

- The Full Court of the Federal Court of Australia was required to consider whether the Administrative Appeals Tribunal had made an error in law by misconstruing the meaning of the expression “suffered as a result of” contained in the exclusion set out in section 5A(1) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) (**SRC Act**) when read in conjunction with section 5B of the SRC Act.
- The Full Court found that the Tribunal had made an error in law by failing to answer the key question: would the employee have suffered the disease, or aggravation of that disease, in the absence of the employment-related factors.


Background

Dr Lim was an employee of the Australian Communications and Media Authority (**ACMA**), having commenced her employment there in September 1995. Dr Lim stated that over a six month period between 2010 and 2011, she was subjected to a sustained campaign of bullying and harassment by her supervisor. On 24 March 2011, she submitted a claim for workers’ compensation in respect of “adjustment reaction with depressant anxiety” said to have been sustained in September/October 2010.

Comcare accepted that Dr Lim had sustained a psychological condition that was significantly contributed to by her employment at ACMA, and cited 18 March 2011 as the date of injury, being the date of first medical treatment. Liability was denied on the basis that this condition arose as a result of reasonable administrative action, taken in a reasonable manner, in respect of Dr Lim’s employment. Specifically, it was determined that Dr Lim’s condition arose as a result of discussions concerning voluntary redundancies, her performance appraisal, and the events that followed Dr Lim being advised that her position was excess to requirements.

The Tribunal decision

The Tribunal, relying on the decision in *Hart v Comcare* [2005] FCAFC 16, affirmed the reviewable decision, noting that Dr Lim had sustained her condition as a result of at least one instance of reasonable administrative action, namely the reasonable performance appraisal conducted by her supervisor on 31 January 2011. The Tribunal held that her psychological condition was not an



injury for the purposes of section 5A of the SRC Act and Comcare was not liable to pay compensation.

The Federal Court decision

Dr Lim appealed the Tribunal's decision to the Federal Court on a number of grounds. Most relevantly, Dr Lim submitted that the Tribunal had misconstrued the meaning of the phrase "as a result of" in section 5A of the SRC Act.

Flick J dismissed Dr Lim's appeal.

The Full Court decision

Dr Lim, now self-represented, appealed the Federal Court decision to the Full Court on the basis that Flick J had erred by failing to find that the Tribunal misconstrued the expression "suffered as a result of" set out in section 5A(1) of the SRC Act. Importantly, the High Court decision of *Martin* had been released since the Federal Court decision.


Kenny, Tracey and Bromberg JJ upheld Dr Lim's appeal and found that the Tribunal had made in error of law in failing to address the entirety of the question of whether or not Dr Lim would have suffered her psychological condition if the performance appraisal undertaken by her manager on 31 January 2011 had not occurred.

The Law

Section 5B(1) provides that a 'disease' means an ailment, or an aggravation of such an ailment, that was contributed to, to a significant degree, by an employee's employment.

Section 5A(1) relevantly excludes liability where a disease, injury or aggravation is suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee's employment. Section 5A(2) provides a non-exhaustive list of examples of reasonable administrative action.

In coming to its decision, the Full Court considered a number of relevant decisions, but importantly it considered the High Court decision in *Comcare v Martin* [2016] HCA 43. In that case, the High Court examined the question to be addressed in applying the reasonable administrative action exclusion in section 5A(1) and held that in order to establish the causal connection in section 5A(1)(a), it must be determined that the employee would not have suffered a disease if the administrative action had not been taken. In other words, the causal connection is met only if the employee would not have suffered an ailment or aggravation that was contributed to, to a significant degree, by their employment but for the administrative action.





Conclusion

The Full Court held that Dr Lim had suffered an ‘ailment’, as defined by section 5B(1)(a), which was contributed to, to a significant degree, by her employment with ACMA.

Noting the decision in *Comcare v Martin*, the Full Court found that, given the only causal factors identified in Dr Lim’s case were employment-related, the exclusionary provisions of section 5A(1) would only be applicable if the Tribunal was satisfied that Dr Lim would not have suffered her psychological condition if the performance appraisal undertaken on 31 January 2011 had not occurred.

The Full Court held that in a situation where both employment and non-employment factors are determined to have significantly contributed to an ailment or aggravation, in order to rely on the reasonable administrative action exclusion, it would be necessary to determine that the administrative action was taken in a reasonable manner and that the ailment or aggravation would not have been suffered if that action had not been taken.

Lessons Learnt

The Full Court decision further weakens the *Hart v Comcare* defence, and forces employers to prove that in the absence of the claimed reasonable administrative action the employee would not have suffered their claimed condition. Only if the answer is in the affirmative can the exclusionary provisions of section 5A(1) apply in circumstances where an employee has suffered a ‘disease’, as defined by section 5B of the SRC Act.

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