

NBN and RAA in the AAT: Tribunal confirms *Martin v Comcare* ‘significance’ threshold *Yunupingu and Comcare* [2017] AATA 622

Key Points

- The Tribunal considered the principles expounded in the High Court case of *Comcare v Martin*, in respect of the reasonable administrative action provisions in section 5A(2) of the SRC Act.
- This decision serves as further authority to support the view that *Martin* limits the operation of the reasonable administrative action exclusions to instances where an administrative action was a significant cause of an employee’s condition.


Background

Mr Yunupingu worked as a Senior Health Safety and Environment advisor for NBN Co in the Northern Territory. In or around October 2013, Mr Yunupingu began to have increasing difficulties in the workplace, causing significant stress. Most notably, on 6 September 2013, Ms M, a colleague of Mr Yunupingu, sent an email to Mr B, Regional Project Director, referring to “*unacceptable communications*” and complaining that Mr Yunupingu had denied her access to information and resources she required in order to perform her duties. A grievance investigation was initiated, with Mr Yunupingu being interviewed in respect of Ms M’s complaints and the investigation.

In February 2014, Mr Yunupingu became acutely unwell and was diagnosed with major depression. His employment with NBN Co was terminated by agreement on 28 November 2014.

On 19 February 2014, Mr Yunupingu lodged a claim for workers’ compensation in respect of his “*mental state*”. By a determination dated 16 May 2014, Comcare denied liability on the basis that, while his condition was significantly contributed to by his employment, it arose as a result of reasonable administrative action taken in a reasonable manner in respect of his employment, and liability was therefore excluded pursuant to s 5A(2) of the *Safety, Rehabilitation and Compensation Act 1988* (the **SRC Act**).

The determination was affirmed by reviewable decision on 3 September 2014. Mr Yunupingu applied to the Tribunal for review of that decision, and the matter was heard on 27 June and 28 June 2016. While the decision was reserved, the High Court’s decision in *Comcare v Martin* [2016] HCA 43 was handed down. The Tribunal received written submissions from the parties on the issues arising from this decision, and handed down its decision on 3 May 2017.





The law

Section 5A(1) of the SRC Act excludes liability in circumstances where a condition arose 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 factors which can be considered to be reasonable administrative action.

Naturally, the Tribunal relied on *Comcare v Martin* for guiding principles on the issue of whether Mr Yunupingu's condition was suffered 'as a result of' any reasonable administrative action. A concise summary of *Martin* was provided by Deputy President Bean (at [88]):

"Applying that test here, Mr Yunupingu's condition will not be compensable if, putting aside any contribution from a reasonable administrative action, reasonably taken, he would not have suffered a compensable injury. In other words, the exclusion will potentially be invoked if, in the absence of the administrative actions relied upon, he would not have suffered his depressive condition or the other work-related contributors to the condition would not have amounted, individually or collectively, to a significant contribution within the meaning of s 5B."

Conclusion

The Tribunal was first required to decide whether Mr Yunupingu's psychiatric condition was contributed to, to a significant degree, by his employment. If so, it was then required to decide whether the condition was suffered as a result of reasonable administrative action.


There was no dispute as to the condition being significantly contributed to by Mr Yunupingu's employment.

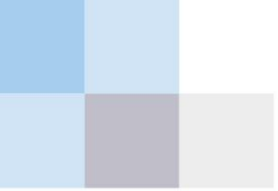
In respect of the reasonable administrative action exclusion, Comcare relied on a number of events which the Tribunal construed as amounting to one reasonable administrative action: Ms M's email of 6 September 2013, the subsequent investigation of Ms M's complaints (which were not substantiated), and the results of the investigation being reported to Mr Yunupingu.

Comcare asked that the Tribunal adopt the previous reasoning of the Tribunal in *Hollis and Comcare* [2017] AATA 49. In *Hollis*, the Tribunal found that *Martin* did not limit the operation of the reasonable administrative action exclusion to instances where an administrative action had been a significant cause of an employee's disease and there was no other employment related cause of the disease.

The Tribunal chose to reject the reasoning of Senior Member Taylor in *Hollis*. It instead preferred the interpretation of *Martin* found in *Lim v Comcare* [2017] FCAFC 64. In *Lim*, the Court relied on *Martin* to confirm that, in order for the reasonable administrative action exclusions to be invoked, it is necessary to establish that the reasonable administrative action was a significant cause of an employee's condition.

Ultimately, the Tribunal concluded that Mr Yunupingu's depressive condition was compensable. Even if Comcare's actions in response to the Ms M's complaints were reasonable administrative actions taken in a reasonable manner, the Tribunal reasoned that these actions did not





significantly contribute to Mr Yunupingu's condition, and as such did not meet the causal threshold established in Martin.

Lessons Learnt

This Tribunal decision serves as a further interpretation of the High Court's principles in Martin. The interpretation of Martin by the Tribunal goes further than the terms it was expressed in by the High Court. We will keep you updated of any appeal.

Contact:

James Makowiak
Solicitor
Direct: +61 (2) 9376 1150
James.makowiak@hbalegal.com

Nathan Hepple
Partner
Direct: +61 (2) 9376 1188
Nathan.hepple@hbalegal.com

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