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Tribunal won't be drawn into making conclusions on RAA without sufficient and direct evidence in support

Want and Comcare [2018] AATA 877

Key Points

- Whether a claimed psychological condition arose as a result of reasonable administrative action (RAA) and whether condition would not have arisen in absence of RAA.
- A lack of direct evidence on whether condition would **not** have arisen in absence of RAA prohibited the decision maker from applying the RAA exclusion.

Background

Mr Gary Want was a public servant who had served in the Royal Australian Air Force (RAAF) for 12 years. From 2006 to September 2014, Mr Want was employed at the Department of Defence in an Executive Level 1 (EL1) position at a variety of locations.

In March 2010, Mr Want submitted a claim for "*sciatica and L5/S1 disc prolapse*" sustained in February 2010 when he fell off his chair at work while attempting to pick up a set of keys from the floor. Comcare accepted liability for an "*aggravation of degeneration of intervertebral disc*" and "*aggravation of sciatic (left)*".

On 22 September 2014, Mr Want submitted a claim for "*nausea and anxiety*" said to have been sustained on 7 September 2014 as a result of receiving an email from a staff member that was critical of him. Comcare denied liability in respect of "*adjustment reaction with mixed emotional features*". This decision formed the basis for Application 2015/2353.

On 15 April 2016, solicitors for Mr Want asked Comcare to accept liability for a psychiatric injury as a sequela of his accepted back injury. Comcare also denied liability for that injury, stating that there was no evidence to support that the claimed psychiatric injury was a separate injury to the claim he submitted in September 2014. This decision formed the basis for Application 2016/3847.

In addition, Mr Want was subjected to three Performance Improvement Plans (PIPs) between 2009 and 2014 due to issues with his performance and style of management, had a poor relationship with his superiors and subordinates, failed to obtain a transfer to a suitable position in Queensland in mid-2013, and suffered a number of non-work related injuries and stressors, including a building dispute that resulted in a $130,000 Supreme Court judgment being handed against him in August 2013. It was this administrative action and non-work related issues that Comcare sought to exploit to reject the claim.

The Decision

Deputy President Humphries concluded that Mr Want sustained an "*adjustment disorder with anxiety and depressed mood*" on 21 June 2013 and that this condition was significantly contributed to by his employment, namely the PIP process commenced in June 2014 and workplace friction that commenced in or around 2013. However, Deputy President Humphries concluded that Mr Want's failure to obtain a transfer in mid-2013 was not a significant contributing factor.

In respect of the PIP process, Deputy President Humphries opined that this constituted RAA because there were valid concerns regarding Mr Want's style of leadership. Deputy President Humphries went further by stating that although some of the steps taken by Mr Want's superiors and others dealing with his work performance could have been conducted in a different matter, to say that administrative action must be reasonable is not the equivalent of saying it must be perfect.

When turning his mind to the cause of Mr Want's psychological condition, Deputy President Humphries endorsed the test established in *Lim v Comcare* [2017] FCAFC 64 when applying the principles in *Comcare v Martin* [2016] HCA 43 in circumstances where a number of employment and non-employment factors were contributing to an ailment.

Deputy President Humphries noted that there was a lack of direct evidence concerning whether Mr Want would have suffered his psychiatric ailment if the PIP process had not been undertaken, therefore the Tribunal was unable to draw a conclusion. As a result, Deputy President Humphries set aside the reviewable decision subject to Application 2015/2353 and instead found that Mr Want suffered an "*adjustment disorder with depression and anxiety*" on 21 June 2013. However, Deputy President Humphries affirmed the reviewable decision subject to Application 2016/3847, which denied liability for a psychological condition as a sequelae of Mr Want's accepted back injury.

Lessons Learnt

The Tribunal has again endorsed the principle established in *Lim v Comcare*, as applied in circumstances where numerous work and non-work related factors exist and the RAA exclusion is relied upon. It is important to remember that for the RAA exclusion to apply, the employer must prove that if it were not for the administrative action the employee would not have suffered their psychiatric condition. For example, an employer must adduce evidence that in the absence of a reasonable performance appraisal or disciplinary action, or if an employee were granted a transfer, the employee would not have sustained their psychological condition.

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