

## Full or partial remittal? That is the question

### *Lim and Comcare (Compensation) [2018] AATA 4354*

#### Key Points

- Psychological injury sustained in the course of reasonable administrative action
- Decision remitted to the Administrative Appeals Tribunal from the Full Court of the Federal Court
- There was a question over whether the Full Court's remittal to the Tribunal was a full or partial remittal
- Breach of the *Listening Devices Act 1992* (Cth)

#### Background

In July 2011, Comcare rejected Dr Lim's claim for compensation for an adjustment reaction with depressant anxiety. Comcare determined that Dr Lim's injury was suffered as a result of a mid-cycle performance appraisal conducted on 31 January 2011 (**the performance appraisal**), and therefore was excluded from compensation by operation of the exclusion provision in s 5A of the *Safety, Rehabilitation and Compensation Act 1988* (**SRC Act**). Comcare issued a reviewable decision on 14 August 2013 which affirmed the determination. Dr Lim contended that her condition was suffered in September or October 2019 and therefore could not have been the result of the performance appraisal.

In *Lim and Comcare* [2015] AATA 189, the Tribunal concluded that Dr Lim had suffered a psychological condition but found that it arose as a result of reasonable administrative action taken in a reasonable manner in respect of her employment and therefore was not an injury for the purposes of s 5A of the SRC Act. Senior Member Popple made a finding of fact that Dr Lim's condition was suffered on, or a few days before, 18 March 2011.

In *Lim v Comcare* [2016] FCA 709, Flick J dismissed Dr Lim's appeal with costs. Dr Lim appealed from Flick J's judgment to the Full Court of the Federal Court in July 2016. On 9 November 2016, between the filing of Dr Lim's notice of appeal and consideration of the appeal by the Full Court, the High Court handed down its decision in *Comcare v Martin* (2016) 258 CLR 467. In *Lim v Comcare* [2017] FCAFC 64, the Full Court remitted the matter back to the Tribunal:

*to be determined according to law and the reasons herein upon the evidence already given in the proceeding before the Tribunal, unless the Tribunal considers it appropriate to receive further evidence limited to the question set out in paragraph [44] of these reasons.*

On remittal, the Tribunal considered that it was appropriate to receive further evidence relating to the question set out in paragraph [44] of the Full Court decision. Accordingly, Comcare commissioned a medical report from Dr Wasim Shaikh, Psychiatrist.

Prior to the substantive hearing on the remitter, the Tribunal made rulings on two interlocutory questions:

1. The admission of a transcript; and
2. The scope of the remitter.

### *The transcript*

Prior to the substantive hearing, Dr Lim sought to have a transcript of her consultation with Dr Shaikh admitted into evidence. Dr Lim had covertly recorded the conversation. Dr Shaikh advised the Tribunal that he was not aware the consultation had been recorded, that he did not give his consent to the recording and that he did not record the conversation himself.

Comcare objected to the admission of the transcript on the grounds that it constituted breaches of the *Listening Devices Act 1992* (Cth) (**LD Act**). Dr Lim submitted that the recording of the consultation fell under the exception in s 4(3)(b)(i) of the LD Act, and that the use of the transcript was protected by the exemption in s 5(2).

Dr Lim relied on commentary by the Tribunal in *Milevska and Comcare* [2018] AATA 2141, where the Tribunal criticised Medico Legal Reporting Services of Australia's (**MLRSA**) process of compiling a joint report. Dr Lim contended that as MLRSA was an agent in the preparation of Dr Shaikh's report, her lawful interests were best protected by the recording of the consultation through which the report was prepared. The Tribunal noted that Dr Lim could not have known about the criticism levelled at MLRSA prior to her consultation with Dr Shaikh, which occurred on 13 March 2018, because the *Milevska* decision was handed down on 6 July 2018.

### *The Full Court's remittal*

Comcare contended that the Full Court remitted the matter to the Tribunal on a very limited basis, namely, to address the question whether the applicant would have suffered her adjustment disorder if the performance appraisal that occurred on 31 January 2011 had not been made.

Dr Lim submitted that the phrase '*according to law*' connoted a broad subject matter remittal to the Tribunal. Dr Lim's representative explained that '*according to law*' would imply that the Tribunal had to determine the matter according to all the relevant law that was involved in the case. Dr Lim argued that the legal issues in the case, particularly the date of injury, was a legal issue that needed to be addressed by the Tribunal.

### *The substantive application*

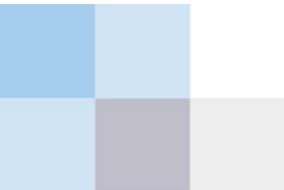
Dr Shaikh's medical opinion was that if the performance appraisal of 31 January 2011 had not occurred, Dr Lim would not have suffered her mental disorder on or around 18 March 2011. Dr Lim argued that Dr Shaikh's opinion should be rejected because he did not address and assess the casual impact on her condition of either the workplace issues in late 2010 or the administrative action of her being declared excess in February-March 2011.

The Tribunal noted that this was because Dr Shaikh was not asked to consider those questions, because they fall outside the matter remitted to the Tribunal by the Full Court. The Tribunal stated that its present task was to determine whether she would have suffered an adjustment disorder but for the performance appraisal (the *Martin* test).

## The Decision

### *The transcript*

The Tribunal noted that it was not bound by the rules of evidence and could choose to admit the transcript even if it was considered a breach of the LD Act. However, the Tribunal determined that Dr Lim did not have reasonable grounds to breach s 4(1) of the LD Act. This was determined on the basis that a mere desire to have a reliable record of conversation, or a desire to gain an advantage in civil proceedings, does not usually amount to a lawful interest within the meaning of s 4(1).



The Tribunal concluded that the defence under s 5(2) of the LD Act was most likely not available to Dr Lim because the reasonableness of the necessity for the recording should have existed at the time the recording was made.

The Tribunal also considered the likely criminality involved in obtaining the report was a factor weighing against its admission. Further, that the probative value of the evidence contained in the transcript appeared to be low. Therefore, the Tribunal decided that it would be inappropriate under the circumstances to admit the transcript into evidence.

#### *The Full Court's remittal*

The Tribunal resolved that the Full Court made a partial remittal, which was subject to one qualification. The Tribunal explained that the Full Court focused on one issue, which it considered gave rise to an error on the part of the decision-maker. That issue was the misconstruction of the expression '*suffered as a result of*' in the exclusion in s 5A(1), following the decision of the High Court in *Martin*.

The Tribunal concluded that the Full Court remitted the matter to the Tribunal for the purpose, and only for the purpose, of answering the question: would Dr Lim have suffered her adjustment disorder if the performance appraisal on 31 January 2011 had not have been made?

The Tribunal noted that if they found that Dr Lim would have suffered her disorder if the performance appraisal had not occurred, then they could consider the broader question facing the Tribunal as originally constituted, namely whether Dr Lim is entitled to compensation pursuant to s 14 of the SRC Act for her adjustment disorder.

#### *The substantive application*

The Tribunal determined that Dr Lim would not have suffered her adjustment disorder if the performance appraisal on 31 January 2011 had not occurred. Accordingly, the Tribunal concluded that Dr Lim's condition was suffered as a result of reasonable administrative action taken in a reasonable manner in respect of her employment and affirmed the reviewable decision of 14 August 2013.

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