

Employee succeeds in claim for netball injury during NAIDOC week

Rye and Comcare [2020] AATA 4963

Key Points

- An employee claimed workers' compensation for an injury to her right knee, sustained as a result of playing netball in a competition arranged as part of NAIDOC Week.
- The Tribunal was asked to consider whether the injury arose out of, or in the course of, her employment with Services Australia.
- The Tribunal found in favour of Ms Rye.

Background

Ms Katherine Rye commenced employment with Services Australia in Newcastle in 2009. A Family Sports Fun Day was held on 5 July 2017 as part of NAIDOC week celebrations.

Ms Rye's Manager informed Ms Rye that she could take cultural leave for the day to attend the Fun Day to play in the netball competition. On 5 July 2017, Ms Rye drove to the NAIDOC Week netball competition. Shortly after the competition began, Ms Rye injured her right knee and was taken to hospital.

Ms Rye submitted a claim for workers' compensation for the knee injury. Liability for the claim was denied, pursuant to section 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**), on the basis that her injury did not arise out of, or in the course of, her employment. The decision was affirmed on reconsideration. Ms Rye sought review of the decision at the Administrative Appeals Tribunal.

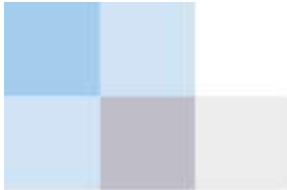
The Law

An injury is defined under section 5A of the SRC Act as an injury arising out of, or in the course of, an employee's employment.

Section 6(1)(c)(i) of the SRC Act provides that an injury may be considered to have arisen out of, or in the course of, an employee's employment, where an employee was temporarily absent from their workplace, while undertaking an activity associated with their employment.

Conclusion

The Tribunal made the following findings of fact based on the Manager's evidence:

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- Ms Rye needed her Manager's permission to leave the event prior to its coming to an end;
 - Her Manager exercised some managerial control over Ms Rye during the event;
 - Had Ms Rye intended to leave the event early, her Manager would have expected her to tell him why she was leaving early, and he would have determined whether she should return to work that day; and
 - Ms Rye would have been subject to sanction if she refused to return to work if directed to do so by her Manager.

The Tribunal was satisfied that Ms Rye's Manager had encouraged her to participate in the NAIDOC family fun day on 5 July 2017, because she identified as Indigenous, and because he thought it would be a great way to build rapport with her as her supervisor and within Services Australia.

The Tribunal was required to consider:

1. Was the injury suffered by Ms Rye an injury "*arising out of*" her employment within the meaning of subsection 5A(1) of the Act?
2. If not, was the injury suffered by Ms Rye "*sustained while Ms Rye was temporarily absent from her place of work undertaking an activity associated with her employment*" within the meaning of paragraph 6(1)(c) of the Act?
3. If not, was the injury suffered by Ms Rye an injury suffered "*in the course of,*" her employment within the meaning of subsection 5A(1) of the Act?

"Arising out of"

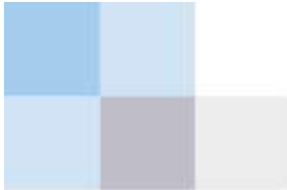
At the time of the netball competition, Services Australia had published its *Aboriginal and Torres Strait Islander Employees Plan*, which encouraged employees to consider how they could actively assist in increasing the number of Indigenous people joining their workforce. Services Australia's *Reconciliation Action Plan* referred to the building of stronger relationships with Aboriginal and Torres Strait Islander People. The Tribunal was satisfied that Services Australia's policy was to encourage employees to attend events such as the NAIDOC Week family fun day.

The Tribunal found that Ms Rye identified as an Indigenous person and was encouraged to take part in the competition. Further, Ms Rye engaged in the competition, at least in part, to establish and strengthen her relationships with other members of the Indigenous community in accordance with Services Australia's policies. In addition, Services Australia purported to exercise some control over Ms Rye while she was participating in the competition. Accordingly, the Tribunal was satisfied that Ms Rye's injury arose out of her employment with Services Australia.

"Temporarily absent"

Comcare submitted that the Tribunal should follow the principles set out in *Wheele and Comcare* [2010] AATA 200. While the Tribunal did not agree that the words "*temporarily absent*" should be interpreted with the degree of elasticity suggested in the *Wheele* reasons, it accepted Comcare's argument that "*the phrase 'temporarily absent' should ordinarily be regarded as referring to absences during the same working day*". The Tribunal cautioned that circumstances may vary, and this conclusion should not be taken as an indication that an employee can never be temporarily absent for a period which spans more than one working day.





It was not disputed that Ms Rye worked a full day on 4 July 2017, and had she not been injured at the conclusion of the events on 5 July 2017, she was not obliged to return to her workplace until the commencements of the working day on 6 July 2017. In this context, Ms Rye’s absence from work on 5 July 2017 should be seen as an extension of the usual period during which she was not obliged to attend her workplace rather than any form of temporary absence.

The Tribunal concluded that Ms Rye was not temporally absent from her employment when she was injured on 5 July 2017.

“In the course of”

The Tribunal stated that to find that an injury was suffered *“in the course of employment”* it is necessary that it be shown that there was a temporal connection between the injury and the employment.

The Tribunal was satisfied that when Ms Rye was injured, she was not engaged in actual work. Given Ms Rye’s injury was brought about while she was engaged in an activity rather than by reference to the place at which that activity occurred, the Tribunal was required to determine whether Services Australia induced or encouraged Ms Rye to engage in the netball competition as part of the NAIDOC Week activities. The Tribunal found that Services Australia did encourage Ms Rye to engage in the competition and the injury suffered by Ms Rye on 5 July 2017, arose in the course of her employment.

Accordingly, the Tribunal set aside the reviewable decision and in substitution, decided that Comcare was liable to pay compensation to Ms Rye in respect of an injury to her right knee sustained on 5 July 2018.

Lessons Learnt

This decision emphasises that the timeline of events leading up to the injury, along with any relevant policies, will be scrutinised by the Tribunal when it determines whether an injury arose as a result of an employee’s employment.

Contact:

Lauren Bishop
Solicitor
Direct: +61 (08) 9265 6012
lauren.bishop@hbalegal.com

Kate Watson
Partner
Direct: +61 409 578 461
kate.watson@hbalegal.com

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