

## Tribunal applies *Prain* and finds that decade-long depression is not permanent *Bell and Comcare* [2021] AATA 832

### Key Points

- The Tribunal was asked to consider whether a former Customer Service Officer with the Department of Human Services was entitled to compensation for permanent impairment and non-economic loss in respect of her psychological condition.
- The Tribunal considered whether there was any ongoing contribution from the employment.
- The Tribunal found that any ongoing psychological problems were the result of non-work related stressors rather than the employment, and found in favour of Comcare.

### Background

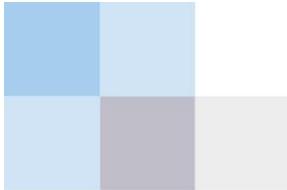
Ms Bell commenced employment with the Department of Human Services as a Customer Service Officer within the Child Support Agency, in February 2007. The role primarily involved managing Child Support cases by phone.

On 28 April 2009, Ms Bell lodged a claim for workers' compensation in respect of an anxiety disorder sustained as a result of sexual harassment by a colleague. Liability for the claim was initially denied under section 14 of the *Safety, Rehabilitation and Compensation Act 1988 (Cth)* (**the SRC Act**).

On 11 November 2010, the Tribunal decided by consent that the Department was liable to pay compensation for major depressive disorder and panic disorder with agoraphobia with a deemed date of injury of 18 December 2008. Ms Bell resigned from her employment with the Department shortly after the decision was issued.

On 10 September 2018, Ms Bell submitted a claim for permanent impairment and non-economic loss under sections 24 and 27 of the SRC Act. On 29 March 2019, the Department issued a determination which denied liability to pay compensation for permanent impairment and non-economic loss, on the basis of the evidence provided by Dr Riccardo Caniato, consultant psychiatrist, who considered that the injury was not permanent because further treatment could significantly improve it. The decision was affirmed on reconsideration and Ms Bell sought review at the Tribunal.

Ms Bell was self-represented at the hearing and gave evidence that she had ongoing psychological symptoms for which she took medication. She relied on the opinion of clinical psychologist, Ms Barbara Anderson, who concluded that Ms Bell suffered from 'Post traumatic Disorder' (sic) as a result of threats to her safety in the workplace. During cross-examination, Ms Anderson conceded that she had limited



contact with Ms Bell and did not have the training or accreditation to make formal occupational workplace assessments. Ms Anderson admitted that she had not been provided with details of Ms Bell's medical history, or the report of Dr Caniato.

During cross-examination, Ms Bell acknowledged that she was previously diagnosed with depression following her father's death in 1999 but did not accept that she was prescribed anti-depressant medication at that time. Ms Bell also acknowledged that she was diagnosed with depression and placed on anti-depressants in 2007 and 2008, and that she had started to see a psychologist for cognitive behaviour therapy at that time in relation to panic attacks she was experiencing following the breakdown of her marriage. Ms Bell agreed with the contents of various reports between May 2016 and March 2017 which outlined her active social life, ongoing gym membership, and capacity to take care of her children and maintain her home without additional support.

Dr Caniato concluded that Ms Bell's major depressive disorder predated the claimed injury date and was likely sustained in 2007 as a result of non-work stressors. While Dr Caniato considered that the injury the subject of her claim had exacerbated her pre-existing major depression and generalised anxiety, he concluded that the exacerbation had either fully resolved or that the contributions to it from work-related stressors had ceased.

## The Law

Section 24 of the SRC Act provides that compensation may be payable where an injury to an employee results in a permanent impairment. In determining whether an injury is permanent, it is necessary to consider the duration of the impairment and any likelihood of improvements in the employee's condition, whether the employee has undertaken all reasonable rehabilitative treatment of the impairment, and any other relevant matters.

Section 27 of the SRC Act provides that compensation is payable for any non-economic loss suffered by an employee where an injury results in permanent impairment that is compensable under section 24 of the SRC Act.

*Prain v Comcare* [2017] FCAFC 143 (*Prain*) is authority that the Tribunal is required to consider whether an applicant continues to suffer from an accepted injury before an entitlement to compensation for permanent injury or non-economic loss arises. This means that an applicant will need to satisfy the Tribunal that their injury meets the criteria of sections 5A or 5B of the SRC Act at the time of the application, even if liability for that injury has been previously accepted.

## Conclusion

The Tribunal preferred the evidence of Dr Caniato over Ms Anderson, and that any symptoms Ms Bell was experiencing were unrelated to the work injury and were instead caused by non-work stressors.

Importantly, the Tribunal accepted the Department's argument regarding the need for Ms Bell to demonstrate a continuing injury and applied *Prain*. The Tribunal found that at the date of the hearing, Ms





Bell no longer suffered from the work injury for the purposes of the SRC Act.

The Tribunal concluded that Ms Bell had no entitlement to compensation for permanent impairment and non-economic loss pursuant to sections 24 and 27 of the SRC Act, and affirmed the reviewable decision.

## Lessons Learnt

To establish liability for permanent impairment and non-economic loss, a Tribunal will consider whether the compensable injury continues to meet the threshold tests set out in sections 5A and 5B of the SRC Act. For a psychological ailment, the injury will need to continue to be contributed to, to significant degree by the employment. Without this continued contribution from employment, a claim for permanent impairment and non-economic loss is unlikely to succeed.

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