Federal Court: AFP Officer not "*double dipping*".
Friend v Comcare [2021] FCA 837

Key Points

- Ms Friend had an accepted claim for workers' compensation under the SRC Act for "*gastritis, irritable bowel syndrome, adjustment disorder with depressed and anxious mood and panic disorder without agoraphobia*".
- Ms Friend received $1.25 million in damages for sexual harassment and discrimination allegedly experienced in the course of her employment with the AFP.
- Comcare sought to recover $677,364 paid to Ms Friend in workers' compensation.
- The Federal Court found in favour of Ms Friend and declared that no part of the settlement sum paid to her was subject to section 48 of the SRC Act, because the SRC Act did not provide for compensation in respect of unlawful discrimination and the damages available were distinct and of a statutory nature.

Background

Ms Friend was employed by the Australian Federal Police (**AFP**) since 2006 and by 2011 was based at Sydney International Airport. In late 2013, Ms Friend was diagnosed with severe depression, anxiety and PTSD. On 14 March 2014, she submitted a claim for workers' compensation under the *Safety, Rehabilitation and Compensation Act 1988* (**the SRC Act**) in respect of gastritis and irritable bowel syndrome, as well as a psychological condition which she attributed to prolonged harassment and bullying from her supervisor. Liability to pay compensation was accepted under section 14 of the SRC Act for "*acute gastritis, adjustment disorder with mixed emotional features and panic disorder*" sustained on 13 July 2013.

On 27 August 2018, Ms Friend submitted a complaint to the Australian Human Rights Commission (AHRC) pursuant to section 46P of the *Australian Human Rights Commission Act 1986* (**the AHRC Act**). Ms Friend claimed that she had been sexually harassed between March 2013 and early 2014, and that she had been discriminated against because of her sex and disability, with the latter being a reference to her anxiety, depression, PTSD and the resulting physical manifestations. Ms Friend indicated that she had received workers' compensation under the SRC Act which amounted to $83,200 per annum and that she had not worked since 2014. Ms Friend stated that it would be unlikely for her to work with the AFP or an employer at a similar level again. She sought payment of damages of at least $1.3 million for economic and non-economic loss, after deducting workers' compensation payments. On 22 September 2020, the AFP entered into a deed of release with Ms Friend under which they agreed to pay her a lump sum of $1.25 million in settlement of the complaint (**the settlement payment**).

Comcare sought to recover $677,364 in workers' compensation payments made to Ms Friend under section 48 of the SRC Act.

The Law

If an employee recovers damages in respect of an injury for which compensation would be payable under the SRC Act, section 48 of the SRC Act requires an employee to notify their employer of the recovery and sum of damages. If compensation was paid to the employee under the SRC Act before the recovery of damages, the employee is required to repay the lesser of the amount of the compensation received or the damages recovered.

Conclusion

The Federal Court found that the settlement payment was not captured under section 48 of the SRC Act because it could not be characterised as a recovery of damages in respect of an injury for which compensation was payable under the SRC Act. The Court held that compensation under section 46PO of the AHRCA was a statutory remedy, rather than one arising under the common law, which meant that it was to be governed by the policy considerations of the anti-discrimination statute to which it applied. Additionally, the Court found that the damages available under section 46PO(4)(d) of the AHRCA for unlawful discrimination and sexual harassment were distinct from damages in respect of an injury for which compensable is payable under the SRC Act, because no compensation was available under the SRC Act in respect of unlawful contraventions of the sex or disability discrimination legislation.

The Court considered that the Parliament likely did not intend for 46PO(4) of the AHRCA to exclude damages for an "*injury*" within the meaning of the SRC Act, because some of the anti-discrimination legislation was enacted after the SRC Act and there would have been an opportunity for Parliament to make such an exclusion at that time. Further, the deed of release entered into by Ms Friend explicitly stated that the release and indemnity provided by her did not "*apply to any claim for liability in respect of statutory benefits payable under the applicable workers' compensation legislation*". The Court construed the foregoing to mean that section 48(1)(a) of the SRC Act had no application to the settlement sum of $1.25 million received by Ms Friend.

Accordingly, the Court found in favour of Ms Friend and declared that no part of the lump sum of $1.25 million paid under the deed of release constituted damages or a recovery of damages within the meaning of section 48 of the SRC Act.

Lessons Learnt

A lump sum paid to an employee to settle a claim or a complaint under a different statutory scheme may not be considered "damages" for the purposes of section 48 of the SRC Act, so the employee may also be entitled to workers' compensation. This may depend upon the terms of any settlement deed entered into by the employee in relation to the other statutory proceedings.

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