

Tribunal dismisses claims due to “abuse of process” *NXPQ and Comcare* [2021] AATA 4094

Key Points

- The Tribunal was asked to dismiss two applications on the basis that they were made on substantially the same facts as a claim which had already previously been decided by the Tribunal.
- The Tribunal found in favour of Comcare and dismissed both applications on the basis that to permit them to proceed would be an abuse of process.

Background

In August 2017, NXPQ lodged a claim for workers’ compensation in respect of a psychological condition allegedly as a result of the nature and conditions of his employment. Liability for his claim was denied and that determination was affirmed on reconsideration. NXPQ sought further review at the Administrative Appeals Tribunal (**the Tribunal**). Senior Member Kelly affirmed Comcare’s decision, and NXPQ did not appeal the Tribunal’s decision.

On 20 March 2020, NXPQ lodged a further claim for workers’ compensation for a psychological condition sustained as a result of the nature and conditions of his employment during the period 2007 to 2014. Liability for his claim was denied and that determination was affirmed on reconsideration. NXPQ sought further review at the Tribunal

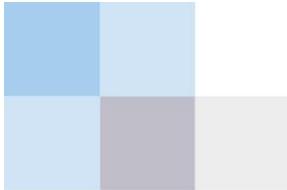
NXPQ also appealed to the Tribunal to review Comcare’s decision to refuse his claim for permanent impairment and non-economic for a psychological condition.

On 18 May 2021, Comcare applied for dismissal of NXPQ’s application for review in accordance with section 42B of the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**) on the ground that NXPQ was “*seeking to essentially relitigate a matter that has already been decided or which belonged to an earlier proceeding*”.

The Law

Section 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) provides that the employer is liable to pay compensation in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

Section 42B(1) of the AAT Act provides the Tribunal with power to dismiss an application at any stage of the proceeding, if the Tribunal is satisfied that the application:

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- a) is frivolous, vexatious, misconceived or lacking in substance; or
 - b) has no reasonable prospect of success; or
 - c) is otherwise an abuse of the process of the Tribunal.

Conclusion

Counsel for NXPQ argued that the precise diagnosis of NXPQ's mental illness was a matter of controversy before SM Kelly and that NXPQ had continued to suffer a mental illness since that time. In October 2020, NXPQ was diagnosed as suffering from two distinct clinical conditions, being post-traumatic stress disorder and major depressive disorder. Accordingly, Counsel contended that in circumstances where NXPQ had previously run a case arguing that he suffered from PTSD, and where a Tribunal rejected that diagnosis, then NXPQ was allowed to argue in the present Tribunal that he suffered from a mental illness attracting another diagnosis.

The Tribunal was satisfied that the issue before SM Kelly was whether NXPQ had suffered a psychological injury, irrespective of how that injury was described, for the following reasons:

1. it was clear that NXPQ's claims in the two applications to the Tribunal were the same.
 - a. In his claim form dated 8 April 2020, he described the injury as a "*Mental injury through nature and condition of employment...*". He first sought treatment for this injury on 6 July 2009.
 - b. In his claim form dated 14 August 2017, he described the condition as "*Psychiatric injury*" as a result of "*[the] nature and conditions of my employment with the AFP, between 2007 and my resignation in 2014 were causative of my condition*". He first sought treatment for this condition on 6 July 2009, which was the same day he sought treatment for the current condition claimed in the application before the Tribunal.
 - c. In his most recent claim form, NXPQ answered 'no' to the question '*Have you ever experienced a similar symptom, injury or illness, work-related or otherwise?*', indicating that the injury for which he was claiming compensation was the same as that for which he had previously claimed.
2. SM Kelly was satisfied that NXPQ suffered from a mental ailment at the time of the hearing.
3. SM Kelly had evidence before her that NXPQ suffered from depression beyond the depressive symptoms found in post-traumatic stress disorder.
4. During the hearing before SM Kelly, the Tribunal and both parties approached the proceedings on the basis that the issue before the Tribunal was whether NXPQ had suffered a psychiatric injury. It was a forensic choice made on behalf of NXPQ to present the case as a claim for post-traumatic stress disorder.



The Tribunal accepted Comcare's argument that to permit NXPQ to continue with his application would be:

1. Unfair and unjust because Comcare would be required to respond without good reason to essentially the same claim a second time.
2. Uneconomical because Comcare had already had to expend time and resources, as well as legal costs and disbursements for at least three days of hearing, in responding to essentially the same claim.
3. Not quick because of the lapse of time between relevant events.
4. Not promote public trust and confidence in the decision-making of the Tribunal – for instance, Commonwealth resources would continue to be used to manage and respond to a case which was, or ought to have been, finalised years ago.

Accordingly, the Tribunal was satisfied that NXPQ's application should be dismissed as being an abuse of process of the Tribunal. The application relating to the permanent impairment decision was also similarly dismissed.

Lessons Learnt

This decision highlights the general position of the Tribunal that an employee cannot continue to seek liability for claims that have previously been denied. This is an abuse of process and applications may be dismissed on this basis.

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