

Tribunal Declines Liability for both Husband and Wife's Claims due to Reasonable Administrative Action Exclusion

Messenger and Comcare (Compensation) [2023] AATA 2407

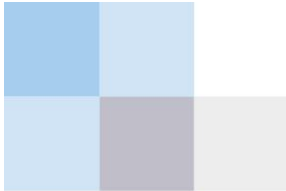
Key Points

- The Tribunal was asked to consider the applications of Mr and Mrs Messenger relating to psychological injuries said to have arisen or have been aggravated during their employment. Mr and Mrs Messenger's applications were heard together due to the considerable factual overlap in their claims.
- The Tribunal held that if Mr Messenger had suffered from an ailment (which the Tribunal found he did not) then it was suffered as a result of reasonable administrative action.
- The Tribunal concluded there was no aggravation to Mrs Messenger's pre-existing ailment, and if there were, such an aggravation would also have been suffered as a result of reasonable administrative action.
- The Tribunal found in favour of Comcare and affirmed the two decisions under review.

Background

Mr Rob Messenger and Mrs Fern Messenger (together, **the Messengers**) were employed with the Commonwealth Department of Finance from 1 July 2014 in the office of Senator Jacqui Lambie. Their relationship with Senator Lambie broke down and they were dismissed on 3 May 2017.

On 14 March 2018, Mr and Mrs Messengers submitted separate claims for compensation in respect of psychological injuries said to arise or have been aggravated during their employment. On 9 July 2018, Comcare declined liability pursuant to section 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**) on the basis that the reasonable administrative action exclusion in section 5A of the SRC Act applied. This decision was later affirmed by reviewable decision.



The Messengers lodged their applications for review with the Administrative Appeals Tribunal **(the Tribunal) in October 2018**. Their applications were heard together due to the considerable factual overlap in their claims. Unless otherwise stated, the findings of the Tribunal related to both applications.

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.

A disease is defined under section 5B of the SRC Act as an ailment, or an aggravation of an ailment, which has been contributed to, to a significant degree, by the employee's employment.

Section 14 of the SRC Act 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 5A(1) of the SRC Act provides as follows:

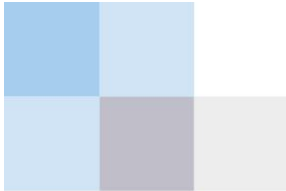
"injury" means:

- a) a disease suffered by an employee; or
- b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or
- c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment;

but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

Conclusion

The Tribunal accepted that there was no material dispute that the injuries the Messengers claimed occurred during their terms of employment from 1 July 2014 to 3 May 2017 and shortly thereafter. It was noted that the Messengers gave notice of their injuries to Comcare on 21

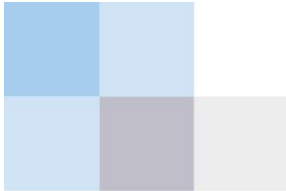


March 2018. The Messengers contended that notice of their injuries was in fact given on 12 April 2017, in their letter in response to a show cause notice from their employer. That letter was sent to Senator Lambie and not Comcare. The Tribunal did not consider that to be fatal because in *Frosch v Comcare* [2004] FCA 1642, the Federal Court expressed no concern about the Tribunal's finding that claimants generally did not communicate directly with Comcare but did so through their employing authority acting as agent for Comcare, and so notice could be said to be provided in this fashion.

The Tribunal accepted the evidence of Senator Lambie and Mr William Heffernan (former Senator) and preferred it over the evidence of Mr Messenger. Mr Messenger's serious allegations against Senator Lambie were either not corroborated by other evidence, or were contradicted by other staff who the Tribunal accepted were truthful witnesses. The Tribunal accepted that it was the conduct of Mr and Mrs Messenger that caused issues within the workplace. The Tribunal rejected Mr Messenger's allegations of assault and noted it was implausible that no complaint of the alleged events was made, there were inconsistencies in evidence concerning the dates of assaults, and Mr Messenger did not recall precise details of any of the attacks. The Tribunal also rejected Mrs Messenger's evidence that Mr Messenger had told her about the attacks and held this as an example of Mrs Messenger fabricating evidence to assist their case. The rejection of the allegations relating to behaviour of Senator Lambie and Mr Heffernan was critical as this underpinned much of the medical evidence of ailments arising during the Messengers' employment.

The Tribunal rejected the evidence of Dr Ben-Sion Elijah (General Practitioner) because the diagnoses of major depression and PTSD were based on a history of false reports by Mr Messenger. The Tribunal concluded that if Mr Messenger suffered an ailment (which the Tribunal found that he did not), it was suffered as a result of reasonable administrative action and therefore fell outside of the definition of injury in section 5A(1) of the SRC Act. It followed that if there was an ailment, it did not give rise to a compensable injury.

The Tribunal accepted that prior to her employment, Mrs Messenger suffered from a major depressive disorder based on the medical evidence available. Mrs Messenger contended that this condition was aggravated during her employment. The Tribunal accepted that were numerous events prior to 17 February 2019 which may have caused Mrs Messenger to be stressed or upset but was not satisfied that they gave rise to any aggravation of her previously



diagnosed major depressive disorder. The Tribunal rejected Mrs Messenger's evidence about death threats and their aftermath, and considered she exaggerated the impact these had on her. In addition to providing false testimony, the Tribunal believed Mrs Messenger provided false reports of workplace events and exaggerated her symptoms to treating doctors who prepared reports for the case. The Tribunal concluded there was no aggravation to her pre-existing ailment by February 2017, and that if there were, the aggravation suffered would have been as a result of reasonable administrative action and therefore fall outside of the definition of injury in section 5A(2) of the SRC Act. Accordingly, the Tribunal affirmed the decisions under review.

Lessons Learnt

This decision confirms that there are clearly limits to what the Tribunal will consider to be reasonable in the circumstances of each case and that findings in relation to the credibility of claimants can be crucial. The Tribunal will carefully assess the factual and medical evidence before reaching a decision in this respect. The Tribunal also has the discretion to hear two related claims at the same time providing there is considerable factual overlap in the claims.

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