Abuse of process crystallised after claiming for an injury which had been settled

Britton and Comcare [2023] AATA 3505

Key Points

- The Tribunal was asked to consider whether the applicant's application for review ought to be dismissed for abuse of process.
- The Tribunal found that the applicant had agreed to settle a claim which found that Comcare was not liable for the applicant's injury and the applicant could not re-litigate a further claim for the same injury. The application was dismissed for abuse of process.

Background

Ms Britton suffered a fall and injury to her skull, shoulder, and hip in 2001 (**2001 claim**) for which liability was accepted by Comcare. In November 2018, Ms Britton experienced severe pain in her cervical spine and had surgery. She made a workers compensation claim for cervical spine injury (**CSI**) (**2018 claim**). Comcare accepted liability for reasonable medical treatment for 'neck strain' and a period of incapacity payment however denied liability for CSI on the basis that the CSI was a product of degenerative changes and was not work related. In 2019, Ms Britton applied to the Tribunal for review.

Ms Britton denied that she had experienced prior symptoms in her cervical spine and believed that her pain resulted from her work, in particular a large filling task which had taken months to complete between March and May 2018. A month before the hearing in the Tribunal, a medical report drew the attention of Ms Britton to the 2001 fall and its potential connection with the CSI. Ms Britton subsequently wrote to her solicitor commenting that she was concerned that her 2001 fall injury was the cause of her CSI or her "degenerative changes". She provided instructions to apply for an adjournment of the proceedings to conduct further investigations of the 2001 fall. Following exchanges of email with her solicitor, Ms Britton later withdrew her instructions to seek an adjournment and gave instructions to settle her claim.

The Tribunal issued a decision on 6 October 2020 pursuant to the settlement agreement (**2020 consent decision**). The consent terms included a finding that Comcare was not liable for the applicant's CSI under section 14 of the *Safety, Rehabilitation and Compensation Act* 1988 (**SRC Act**). The parties also agreed no compensation was payable for incapacity under section 19 of the SRC Act other than within a prescribed period in respect of 'neck sprain', and Comcare was to waive any overpayment.

The Tribunal found that it was clear that Ms Britton gave consent to the finding of no liability for her CSI in circumstances where she knew she may have suffered some sort of CSI in 2001 which may have

Commented [BA1]: When did the Tribunal find this? Is this in relation to her re-agitating the claim? If so, can you put in the conclusion section?

been compensable, and that the injury may have a relationship to her CSI symptoms in 2018, while securing a waiver of an overpayment amount which would have crystalised if she had continued with the proceedings and been unsuccessful.

In 2021, Ms Britton wrote to Comcare seeking to 're-open' her 2001 claim on the basis that 'the exacerbated pain I have experienced since 2018 is directly related to [her] initial 2001 injury'. Comcare declined her claim. Ms Britton applied to the Tribunal for review, arguing that her CSI was sustained in 2001 and was contributed to by her repetitive tasks in 2018.

Before hearing, Comcare brought an application for dismissal, however the Tribunal deferred consideration of the application on the basis that the hearing would be comfortably completed in three days.

Commented [BA2]: Dismissal or abuse of process - can you set out which section they applied under the Aat Act?

Ms Britton's cross-examination was extremely slow due to her hearing impairment and speech impediment. Cross-examination was not concluded within the three-day hearing but continued in writing with the next hearing day allocated five months after the first day of hearing.

Three days prior to the resumed hearing, Ms Britton sought an adjournment to formally re-open her 2018 claim. She foreshadowed that if the application was not granted, she would withdraw the current application and make a fresh application re-characterising her injuries.

The Tribunal decided it was unnecessary to decide the issue of adjournment at that stage, but was prepared to consider the respondent's application for dismissal, as the case would be "back to square one" if an adjournment was granted. The issue was whether the proceedings could be dismissed under section 42B of the *Administrative Appeals Tribunal Act* 1975 (**AAT Act**).

The Law

Section 42B of the AAT Act provides that the Tribunal has power to dismiss an application for review, if at any stage of the proceeding, the Tribunal is satisfied that the application:

(a) is frivolous, vexatious, misconceived or lacking in substance; or

(b) has no reasonable prospect of success; or

(c) is otherwise an abuse of process of the Tribunal.

Conclusion

The Tribunal noted *Novosel v Comcare* [2017] AATA 1421; *Re Quinn and Australian Poster Corporation* (1992) 15 AAR 519 and *Re Grimsley and Telstra Corporation Ltd* (2010) 51 AAR 401 constituted authorities for the Tribunal to disallow re-litigation of the same issue on the basis that it would be an abuse of process.

The Tribunal found Ms Britton's application was based on the denial of liability for her CSI which

properly belonged to the 2020 consent decision. The addition of further evidence and re-characterising of the claim did not alter the fact that Ms Britton was attempting to relitigate that issue. The Tribunal found the prejudice to Comcare was clear and Ms Britton had increased the time, expenses, and allocation of resources of Comcare to repeatedly answer the same claim. The Tribunal also found that Ms Britton had chosen to leave the 2001 claim unexplored by accepting Comcare's offer in 2020 to deny liability for her CSI. Ms Britton's choice was conscious as she was aware of the potential connection between the 2001 claim and the CSI, and by giving up exploring such a potential connection, she had extracted a specific advantage from Comcare being a waiver of a debt which had the potential to arise if she continued with the proceeding and was unsuccessful. By seeking to raise an agreement that was available to Ms Britton at the point of settlement, the application was found to be an abuse of process and therefore dismissed.

Lessons Learnt

The acceptance of a settlement offer has significant impact on a claimant's ability to make further claims in respect of the same injuries. Careful consideration must be given to the scope and effect of consent terms.

Contact:

Ruby Wang
Law Graduate
Direct: 08 9265 6007
ruby.wang@hbacrawford.com.au

Claire Tota
Partner
Direct: 08 9265 6011
claire.tota@hbacrawford.com.au

Visit www.hbalegal.com for more case articles and industry news.