

Comcare v Martin [2015] FCA 4 (14 October 2014)

Key Points

- Whether the Tribunal applied the wrong test in assessing what constitutes “*reasonable administrative action taken in a reasonable manner*”

Background

Ms Martin was employed by the Australian Broadcasting Corporation (**ABC**) as a radio producer under the supervision of Mr M from January 2010 to March 2012. From August 2011, she worked temporarily as a cross-media reporter (**the position**) under the supervision of Ms R. Ms Martin applied to work in the position on a full-time basis and was interviewed by a recruitment panel which included Ms R and Mr M. Ms Martin was unsuccessful in obtaining the position and made a workers' compensation claim on 22 June 2012 in respect of a psychological condition arising out of alleged bullying and harassment by Mr M.

On 14 October 2012, Comcare issued a determination denying liability to pay compensation to Ms Martin on the basis that ABC's rejection of Ms Martin for the position was a “*legitimate human resource management action and [could] be considered as administrative action*”. On 6 December 2012, Comcare affirmed its determination, and Ms Martin sought review of this decision at the Tribunal.

Notes prepared by Mr M were produced which revealed his ongoing issues relating to Ms Martin's performance. On 11 August 2014, the Tribunal set aside Comcare's decision and declared it liable to pay compensation pursuant to section 14 of the Act on the basis that the decision not to promote Ms Martin to the position was administrative action which was not taken in a reasonable manner. The Tribunal considered that Mr M's views on Ms Martin could not be “*quarantined*” from his deliberations as a manner of the recruitment panel. Comcare appealed the decision.

The Law

Section 5B(1) defines “*disease*” to mean an ailment or aggravation of such ailment which was contributed to, to a significant degree, by the employee's employment. Section 5A confirms that the definition of disease “*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*”.

Section 5A(2) provides a non-exhaustive list of actions which are considered to be reasonable administrative action for the purposes of section 5A(1).

Conclusion

The Court found that the Tribunal had committed an appealable error of law in relation to whether or not administrative action was taken in a reasonable manner. The Court noted that although “*reasonable administrative action*” is defined in the Act, there are no attempts to define what amounts to “*taken in a reasonable manner*” for the purposes of that provision. The Court referred to the decision of *Keen v Workers Rehabilitation & Compensation Corporation* (1998) 71 SASR 42

which held that whether administrative action is reasonable or is taken in a reasonable manner depends on “*the findings of the primary facts as to what occurred in the taking of the administrative action, namely what decision was made, who made it and why it was made, what was done, what was omitted to be done and the factual background against which the decision was made or implemented*”. The Court found that the Tribunal had not taken into account all the relevant matters, focusing instead on whether the recruitment process was tainted by apprehended bias on Mr M’s behalf.

The Court considered that the reference in section 5A of the Act to “*taken in a reasonable manner*” was not synonymous with the doctrine of apprehended bias in administrative law. The Court also considered that in any event, the Tribunal had misunderstood or misapplied the doctrine by equating a case of pre-judgement with conflict of interest. The Court also found the Tribunal did not adequately appreciate that Mr M was only one of three members on the recruitment panel and failed to appreciate the hypothetical “*fair minded observer*” must have knowledge of all of the relevant facts. Lastly, the Court found the Tribunal failed to appreciate that the recruitment panel made a recommendation only and that the ultimate-decision maker was a third party with no allegation of apprehended bias. As such, the Court set aside Tribunal’s decision and allowed the appeal.

Lessons Learnt

This decision confirms that the test for considering whether administrative action has been “*taken in a reasonable manner*” is a test of objective fact that should take into account all relevant factors. It was also confirmed that the doctrine of apprehended bias does not apply to considering whether administrative action has been taken in a reasonable manner.

For more information on this article, please contact:

Lori Lim
Solicitor
Email: lori.lim@hbalegal.com
Direct Line: (08) 9265 6007

Brett Ablong
Partner
Email: brett.ablong@hbalegal.com
Direct Line: (08) 9265 6001

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