

Georgoulas and National Australia Bank Limited [2013] AATA 512 (22 July 2013)

Appeal Update

- *National Australia Bank v Georgoulas* – Appeal Update
- The Tribunal's decision in this matter was appealed to the Federal Court. The appeal was dismissed with costs
- Perry J did not accept the arguments advanced by NAB, and did not find that the Tribunal erred in its decision
- A summary of the Tribunal's decision is set out below

Key Points

- The Tribunal developed the following process for determining whether the applicant had made a wilful and false misrepresentation pursuant to section 7(7) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**)
 1. identify the disease suffered by the applicant which is the subject of her claim;
 2. determine whether the applicant made a representation that she did not suffer or had not previously suffered from that disease; and
 3. if the applicant made such a representation, determine whether the representation was wilful and false.
- The key issue to be determined is whether the previous condition is the same or substantially the same as the condition for which compensation is being claimed

Background

Ms Georgoulas commenced employment with NAB in February 2008. Just prior to her employment with NAB, Ms Georgoulas was employed by Wizard Home Loans (**Wizard**).

During her employment with Wizard, Ms Georgoulas took leave from August 2007 to January 2008, while she was receiving treatment for lower back pain, sinusitis, anxiety and stress.

On 4 July 2010, Ms Georgoulas lodged a workers' compensation claim in respect of "*stress and anxiety*" sustained on 23 February 2009. In response to the question "*Have you ever had previous similar symptom, injury or illness; work-related or otherwise?*", Ms Georgoulas ticked "No"

Liability was initially accepted in respect of "*chronic adjustment disorder with mixed features anxiety, panic and depressed mood*", however from 13 December 2010, NAB determined that there was no ongoing liability in respect of Ms Georgoulas' claim. This was affirmed by reviewable decision dated 17 February 2011. Ms Georgoulas sought review of that decision with the Tribunal.

NAB did not dispute that the applicant suffered from a psychological condition, or that the condition was work-related. The issue in dispute was whether the applicant's claim should be excluded on the basis that the applicant made a wilful and false misrepresentation on her workers' compensation

claim form that she did not suffer, or had not previously suffered, from the condition for which she was claiming compensation.

The Law

The issue of whether the claim was excluded by the operation of section 7(7) was decided to be a preliminary issue, and was determined in a separate hearing.

Section 7(7) of the SRC Act states, in relation to a disease (as defined by section 5B):

A disease suffered by an employee, or an aggravation of such a disease, shall not be taken to be an injury to the employee for the purposes of this Act if the employee has at any time, for purposes connected with his or her employment or proposed employment by the Commonwealth or a licensed corporation, made a wilful and false representation that he or she did not suffer, or had not previously suffered, from that disease.

The issue for determination was whether Ms Georgoulas made a “wilful and false representation” by denying suffering from a similar condition in her claim for compensation.

Ms Georgoulas’ solicitors argued that section 7(7) had draconian consequences, and should not be construed liberally for those seeking to rely upon it (*Secretary, Department of Employment and Workplace Relations v Comcare* [2008] FCA 52). They argued that the provision applies to the disease itself, rather than the symptoms. So, while there was evidence the applicant had previously suffered “anxiety” and “stress”, she had never suffered “chronic adjustment disorder with mixed features anxiety, panic and depressed mood”, and as such, no wilful and false representation had been made.

NAB argued that section 7(7) was directed at the component symptoms of a psychiatric condition, so the question should be whether Ms Georgoulas was suffering from an ailment in respect of which anxiety was one of or the predominant symptom, and had made a representation that she had not previously suffered from such an ailment.

Conclusion

The question to be determined was whether the representation made by Ms Georgoulas in her claim form was false, and the Tribunal was required to consider whether she had previously suffered from the disease in respect of which she now claimed compensation. The Tribunal noted that there was no direct authority on whether it is enough for the conditions to be similar or substantially the same, or whether the words “that disease” should be confined in their meaning to a reference to the actual disease suffered.

Madgwick J in *Secretary, Department of Employment and Workplace Relations v Comcare* at [54] stated that section 7(7) “should not be applied liberally in favour of those resisting the claim”. Noting this, the Tribunal stated:

Having regard to the purpose of the provision, we are of the view that to confine the meaning of the words “that disease” to the actual condition suffered or diagnosed would be unduly restrictive as this may operate to exclude minor deviations between a well-recognised physical or psychiatric condition. In contrast, to construe these words more liberally to include a similar condition or, as the respondent contended, a condition with similar or the same symptoms as a current condition, would be contrary to the beneficial nature of the

legislation.... We are therefore of the view that the words “that disease” includes a condition that is the same or substantially the same as the current condition diagnosed. (emphasis added)

The Tribunal developed the following process for determining matters relating to section 7(7):

1. identify the disease suffered by the applicant which is the subject of her claim;
2. determine whether the applicant made a representation that she did not suffer or had not previously suffered from that disease; and
3. if the applicant made such a representation, determine whether the representation was wilful and false (this is a question of fact).

Based on the above test, the Tribunal found that Ms Georgoulas’ claim was not excluded by section 7(7), on the following basis:

1. Ms Georgoulas suffered from chronic adjustment disorder with mixed features of anxiety, panic and depressed mood, and was claiming compensation in respect of this condition;
2. by answering “No” to the question on her claim form regarding a previous similar symptom, injury or illness, Ms Georgoulas made a representation that she did not suffer or had not previously suffered from the illness in respect of which she was seeking compensation, namely “*stress and anxiety*”; and
3. the representation was not wilful or false, because there was insufficient evidence to conclude that the episodes of anxiety experienced by Ms Georgoulas prior to her employment with NAB constituted a psychiatric condition which was the same or substantially the same as the condition for which she was now claiming compensation.

Lessons Learnt

The process implemented by the Tribunal provides a helpful guide of the questions that should be asked when attempting to exclude claims pursuant to section 7(7) of the SRC Act.

The test set out by the Tribunal in this case make it more difficult for employers to exclude claims on the basis that the worker has made a wilful and false misrepresentation regarding a previous condition. In order for a claim to be excluded, the worker must have previously suffered a condition which is the same or substantially the same as the condition for which compensation is being claimed.

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