

Kosteski v Comcare [2014] AATA 217 (14 April 2014)

Key Points

- Whether the applicant's injury arose as a result of reasonable administrative action taken in a reasonable manner in respect of her employment.
- Administrative action found to be unreasonable because the employer was on notice that the applicant would likely have a negative reaction, due to previous bullying complaints.

Background

Ms Kosteski commenced employment with the Department of Social Services in 1995. In 2011, Ms Kosteski was transferred on a temporary basis to the Emergency Processing team, however, after two weeks, Kosteski was told to return to her unit in Hurstville. Ms Kosteski alleges that on her return, she was bullied and harassed by her managers.

On 19 September 2011, Ms Kosteski was transferred on a temporary basis, however she was later advised that she would return to her previous position at Hurstville. This caused Ms Kosteski anxiety. On 21 December 2012, she lodged a claim for workers' compensation as a result of depression and anxiety.

Comcare found that it was not liable to pay Ms Kosteski's compensation on the ground that her injury arose as a result of reasonable administrative action taken in a reasonable manner, in respect of her employment. This decision was affirmed on review and Ms Kosteski sought further review in the Tribunal.

The Law

Section 5A provides that compensation is not payable where an injury arises as a result of reasonable administrative action taken in a reasonable manner in respect of employment.

Section 5A(2) of the SRC Act provides guidance as to what constitutes reasonable administrative action.

Conclusion

Dr Way, psychiatrist, diagnosed Ms Kosteski as suffering from a Major Depression whereas Dr Smith, psychiatrist, diagnosed an Adjustment Disorder with Mixed Depression and Anxious Mood, partially resolved as a result of returning to her previous position.

Comcare argued that Ms Kosteski returning to her position was reasonable administrative action undertaken in a reasonable manner. Ms Kosteski contended that the action was not reasonable because the Department was on notice that she was likely to suffer injury as a result due to her prior complaints regarding bullying.

The Tribunal was satisfied from the evidence that Ms Kostaske's condition was contributed to, to a significant degree, by her employment. The Tribunal found that she perceived that she was being harassed and bullied by her managers. Consequently, Ms Kostaske developed anxiety and depression as a result of returning to work in the Hurstville unit after her secondment.

When considering the reasonableness of the administrative action it was held that while asking an employee to return to their substantive position at the end of a temporary secondment would ordinarily be reasonable, in this case it was not reasonable given the past history and the likely reaction of Ms Kostaske, of which the employer was on notice.

The remaining question was whether, pursuant to s 14, the injury resulted in incapacity for work or impairment. The expert medical evidence of Dr Smith and Dr Way was clear that Ms Kostaske was incapacitated for work as a result of the injury on 15 November 2012. Therefore, the Tribunal found that Comcare was liable under s 14 of the SRC Act.

Lessons Learnt

The decision highlights that there are a number of factors that must be considered when determining whether an administrative action is reasonable. In this case, because the employer had prior notice in respect of the applicant's likely reaction to the administrative action, it was found to be unreasonable in the circumstances.

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