

## *Lucie Ferguson v Commonwealth Bank of Australia* [2012] AATA 718 (18 October 2012)

### Key Points

- Counselling and advisory sessions found to be reasonable administrative action undertaken in a reasonable manner.
- In this decision of the Administrative Appeals Tribunal, the Tribunal was required to consider whether a number of meetings between a bank worker and her branch manager constituted reasonable administrative action taken in a reasonable manner, pursuant to the *Safety Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**).

### Background

Lucie Ferguson worked as a Customer Service Specialist for the Commonwealth Bank from January 2006 until mid-2011. Ms Ferguson claimed compensation for Major Depressive Disorder, which she claimed she developed as a result of bullying and harassment at work.

On 23 May 2011, the Commonwealth Bank of Australia (**CBA**) determined that it was not liable to compensate Ms Ferguson. CBA accepted that Ms Ferguson was suffering from Major Depressive Disorder, and that the events she claimed occurred at work in 2010 had contributed to a significant degree to her condition, but determined that her injury was not compensable because it was the result of reasonable administrative action taken in a reasonable manner in respect of her employment, pursuant to section 5A(1) of the SRC Act.

### The Law

Pursuant to section 14 of the SRC Act an employer is liable to compensate an employee for an injury suffered by the employee if that injury results in incapacity for work. Injury is defined in section 5A to mean, amongst other things, a disease suffered by an employee. Section 5B defines a disease further, specifically as an ailment or aggravation suffered by an employee that was contributed to, to a significant degree, by the employee's employment.

Section 5A specifies that an injury 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) goes on to say that reasonable administrative action includes but is not limited to a number of factors, including:

- a) A reasonable appraisal of the employee's performance;
- b) A reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;

- c) A reasonable suspension action in respect of the employee's employment;
- d) A reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
- e) Anything reasonable done in connection with an action mentioned in (a), (b), (c) or (d);
- f) Anything reasonable done in connection with the employee's failure to obtain a promotion, the classification, transfer or benefit, or to retain the benefit, in connection with his or her employment.

Ms Ferguson's claim centred around a condition of anxiety and depression which allegedly arose as a result of bullying and harassment by her branch manager. Ms Ferguson's branch manager was appointed to the branch at which she worked in December 2009, and was Ms Ferguson's supervisor from that date. Over the course of her employment, the relationship deteriorated until Ms Ferguson left work December 2010. She did not return, and resigned in July 2011. There were allegedly a number of events in 2010, including a number of meetings and discussions with the branch manager and other staff. The Tribunal noted that for the most part there was little dispute about the facts. Where there was a dispute, the Tribunal preferred the evidence of other witnesses over that provided by Ms Ferguson.

Ms Ferguson contended that none of the events relied on by CBA constituted administrative action for the purposes of the SRC Act because, on each occasion in question, when the bank manager spoke to her she was simply given "feedback" about her work practices, her dealings with other staff or how to perform better, or instructions or directions about her job. For the reasons outlined below, the Tribunal did not accept that argument.

The Tribunal considered the Full Federal Court Decision of *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21. The Court in *Reeve* discussed the definition of administrative action. Based on this authority, the Tribunal found that, on each occasion on which CBA relied, the bank manager had cause to talk to Ms Ferguson about *how* she was performing in her job, rather than merely imparting information, or giving directions or instructions, about *what* the job involved. It was something outside the actual job that she was required to do. It was not merely "operational". The Tribunal was satisfied that each occasion relied upon constituted administrative action for the purposes of section 5A(1).

The next question for consideration was whether that administrative action was reasonable. In order to determine whether each incident of administrative action was reasonable for the purposes of the Act, the Tribunal was required to review each meeting and discussion in detail to determine whether it was a reasonable appraisal action or reasonable counselling action, or something done in connection with either. Ms Ferguson contended that none of the meetings or discussions satisfied this test. The Tribunal looked to the Oxford English Dictionary and the Macquarie Dictionary for the meanings of appraisal and counselling, and took a literal approach to the meanings of those words. Based on the evidence of both parties, the Tribunal was satisfied that each meeting and discussion constituted either reasonable appraisal action or reasonable counselling action in accordance with the SRC Act.

The Tribunal was then required to consider whether each action was taken in a reasonable manner, as required by the SRC Act. Based on the evidence of both parties, the Tribunal determined that

each of the incidents relied upon by Ms Ferguson constituted reasonable administrative action taken in a reasonable manner.

Ms Ferguson contended that the Tribunal was also required to consider a further point, namely whether the reasonable administrative action taken in a reasonable manner contributed to her condition to a significant degree. The Tribunal did not accept that submission, and noted that nothing in section 5A(1) required the reasonable administrative action to make a significant contribution to the employee's condition. The Tribunal referred to the case of *Silk v Comcare* [2012] AATA 638, where the Applicant made the same submission as Ms Ferguson concerning the contribution of the administrative action to her disease. The Tribunal in that case also rejected the Applicant's submission.

## Conclusion

The Tribunal found that the incidents relied upon by Ms Ferguson constituted reasonable administrative action taken in a reasonable manner in respect of her employment. The Tribunal referred to the case of *Hart v Comcare* [2005] FCAFC 16, which confirmed that, however many separate causes of an injury may have arisen out of, or in the course of, an employee's employment, if any one of the causes falls within the exclusion the employee is wholly disentitled to compensation in respect of that injury. The Tribunal therefore found that Ms Ferguson's injury was not compensable, and affirmed the decision under review.

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