

O'Loughlin v Linfox Australia Pty Ltd [2014] AATA 577 (20 August 2014)

Key Points

- The Tribunal was required to consider whether an injury sustained as a result of an act of violence arose out of or in the course of the applicant's employment, or alternatively, whether it was excluded by the operation of section 6(3) of the SRC Act

Background

Mr O'Loughlin commenced working for Linfox Australia Pty Ltd (**Linfox**) in 2010 as a tank operator. On 7 September 2010, Mr O'Loughlin suffered an injury during an altercation with another person (**the assailant**) while delivering fuel to a service station. Linfox initially accepted liability for the claim, however this decision was revoked by reconsideration of own motion dated 7 January 2014. Mr O'Loughlin sought review of this decision at the Tribunal.

In his evidence at the hearing, Mr O'Loughlin stated that he had been trained to be aware at all times of the danger of fire and explosion from the release of petrol fumes. On the morning of the incident, a car drove into the service station where Mr O'Loughlin was delivering fuel. The female driver of the car sounded the car horn, and the assailant appeared from the service station. He threw two objects at the car and proceeded to strike the car's windscreen and one of the windows with his fist. Mr O'Loughlin said that he was shocked and alarmed at the assailant's actions.

Mr O'Loughlin said that he was concerned for the safety of the woman in the car, and feared that the objects that had been thrown might have sparked, causing a fire around the tanker. He said that he yelled at the assailant to calm down, however the assailant came at him and hit him in the face. The assailant also kicked Mr O'Loughlin several times, causing an injury to his knee. At this stage, the police were called and Mr O'Loughlin completed his fuel delivery procedure.

The Law

"Injury" is defined in section 5A of the SRC Act to mean "... a physical or mental injury arising out of, or in the course of, the employee's employment".

Section 6 provides a number of specific examples of where an employee's injury will be treated as arising out of or in the course of his employment. Specific to this case, section 6(1)(a) states that an injury sustained "*as a result of an act of violence that would not have occurred but for the employee's employment or the performance by the employee of the duties or functions of his or her employment*" will be treated as an injury for the purposes of the SRC Act.

Section 6(3) states, *inter alia*, that section 6(1) does not apply where an employee sustains an injury because he voluntarily and unreasonably submitted to an abnormal risk of injury.

Conclusion

The Tribunal was required to consider whether the injury arose out of, or in the course of, Mr O'Loughlin's employment, and whether section 6(3) of the SRC Act applied.

Counsel for Mr O'Loughlin said that as Mr O'Loughlin was employed as a tanker driver, it was part of his duties to ensure that the transfer operations involving the delivery of fuel from the tanker to the service station storage tank were conducted in a safe manner.

Linfox submitted that the claimed injury did not arise out of Mr O'Loughlin's employment. Counsel for Linfox submitted that there was no evidence that Linfox encouraged or expected Mr O'Loughlin, as part of his employment duties, to confront the assailant and persist with the confrontation in the way that he did. Linfox further submitted that there was no evidence that the confrontation was incidental to Mr O'Loughlin's duties, or that by engaging in the confrontation Mr O'Loughlin was doing something that he could reasonably have thought was part of his duty to his employer. Linfox submitted that by the time Mr O'Loughlin sustained the injury, he had ceased to be engaged in carrying out his duty and could not have believed that he was still doing so.

On balance, the Tribunal did not consider that the injury arose out of Mr O'Loughlin's employment with Linfox. It rejected Mr O'Loughlin's assertions that he was concerned for the safety of his worksite, and thought it more likely that he was concerned for the safety of the woman in the car. Accordingly, the Tribunal found that by becoming involved in the confrontation and continuing it, Mr O'Loughlin's actions were not reasonable and appropriate in the circumstances to fulfil his duty.

In respect of whether the injury arose in the course of Mr O'Loughlin's employment, counsel for Mr O'Loughlin submitted that Mr O'Loughlin was at his place of employment because he was in the act of transferring fuel to the storage tank at the service station when the injury occurred. Accordingly he considered that the injury was not sustained outside of the work period, and the recent High Court decision of *PVYW* did not apply. Linfox submitted, and Tribunal accepted, that the decision in *PVYW* was not confined to an injury suffered between periods of actual work, and the question to be asked in these proceedings was whether Mr O'Loughlin was doing the very thing that Linfox had encouraged him to do when his injury occurred. The Tribunal agreed that Linfox had not encouraged Mr O'Loughlin to confront the assailant, correct the assailant's behavior, or continue the confrontation and the injury occurred during the activity.

The Tribunal went on to find that Mr O'Loughlin unnecessarily confronted and provoked the assailant, and that these actions led to the injury that was sustained by Mr O'Loughlin. The Tribunal therefore concluded that Mr O'Loughlin's had voluntarily and unreasonably submitted to an abnormal risk of injury, and therefore section 6(3) of the SRC Act applied to exclude the application of section 6(1) of the SRC Act in this case.

Lessons Learnt

The decision provides a good illustration of the current position taken by the Tribunal in respect of interpreting the definition of "injury", particularly in the wake of *PVYW*. It is comforting for licensees to see that, although the legislation is intended to be read in a way that is beneficial to employees, the correct application of the SRC Act still results in good decisions.

Please note that this decision has been appealed. We will update this article once the decision has been handed down.

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