

Pettiford v Comcare [2014] AATA 95 (27 February 2014)

Key Points

- The Tribunal was required to consider whether the administrative action complied with the employer's relevant policies and procedure
- It also had to consider whether communications regarding rehabilitation fall within the scope of the phrase "the employee's employment with the Commonwealth"

Background

Ms Pettiford was a psychologist employed as a job capacity assessor with Centrelink.

Ms Pettiford filed two claims for workers' compensation in respect of psychological injuries she claimed to have sustained as a result of two separate incidents. Liability for both claims was denied on the basis that the injuries arose as a result of reasonable administrative action taken by Centrelink in respect of Ms Pettiford's employment. Both decisions were affirmed on reconsideration, and Ms Pettiford sought review of those decisions at the Administrative Appeals Tribunal.

There was no dispute as to the fact that Ms Pettiford suffered from a psychological injury. The Tribunal was required to determine whether liability was excluded as a result of the operation of section 5A(2).

First claim

Between June 2006 and March 2010, Ms Pettiford was supervised by Mr Nugent. On 8 March 2010, Ms Pettiford lodged a formal complaint against Mr Nugent alleging that certain actions taken by him, including actions in respect of Ms Pettiford's hours of work, constituted bullying and harassment. Shortly after lodging her complaint, Ms Pettiford was removed from Mr Nugent's supervision. Ms Pettiford's complaints were investigated and a report released in April 2010 which found that Mr Nugent's behaviour did not constitute bullying and harassment. In August 2011, Mr Nugent was reappointed as Ms Pettiford's supervisor.

Mr Nugent requested Ms Pettiford attend a meeting in August 2011. Ms Pettiford reported feeling distressed on learning of the meeting but attended nonetheless. At the meeting, Ms Pettiford's work hours were discussed, as she had been working outside of normal office hours as she found it more convenient, and she was directed to commence working normal hours. After the meeting, Ms Pettiford attended her GP and was certified unfit.

Second claim

Ms Pettiford's second claim was in respect of an aggravation of her psychological condition. She claimed that the aggravation was a result of "*HR response since 30/8/11*", including Centrelink's failure to comply with the relevant rehabilitation guidelines and her treatment by Centrelink since she stopped work.

Comcare argued that the aggravation was actually caused by Ms Pettiford receiving notification that a consultant psychiatrist had considered her fit to return to work. Liability for her claim was denied on the basis that this letter constituted reasonable administrative action.

The Law

Section 14 provides that Comcare is liable to pay compensation in respect of an injury, as defined in section 5A. Injury is defined in that section, *inter alia*, as a disease suffered by an employee which does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee's employment. A non-exhaustive list of actions considered to constitute reasonable administrative action is set out at section 5A(2).

In order for a disease to constitute an injury under the SRC Act, it must have been contributed to, to a significant degree, by the employee's employment. Section 5B(2) provides a non-exhaustive list of matters to be taken into account when considering whether an employee's employment has contributed to a significant degree.

First claim

In respect of the first claim, the Tribunal accepted that Ms Pettiford had sustained an anxiety condition which had been contributed to, to a significant degree, by her employment with Centrelink. Comcare argued that the condition arose as a result of the meeting between Ms Pettiford and Mr Nugent, and specifically, the direction that she begin working normal office hours. Ms Pettiford argued that her condition did not arise as a result of that direction, and that, in any event, the direction did not constitute reasonable administrative action.

Second claim

In addition to arguing that receiving notification of the psychiatrist's opinion caused Ms Pettiford's condition, Comcare argued that the aggravation was not contributed to by her employment. In considering whether the notification that Ms Pettiford could return to work was related to her employment for the purposes of the SRC Act, the Tribunal considered the decision of *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34, which stated at 641:

"When the Act speaks of 'the employment' as a contributing factor it refers not to the fact of being employed but to what the worker in fact does in his employment. The contributing factor must in my opinion be either some event or occurrence in the course of the employment or some characteristic of the work performed or the conditions in which it was performed."

Conclusion

The Tribunal noted that it was notoriously difficult to determine the cause of psychological conditions, however considered that it was more probable than not that Ms Pettiford's condition arose as result of the direction given by Mr Nugent. Similarly, the Tribunal considered that the direction was more than operational, and constituted administrative action taken in respect of Ms Pettiford's employment.

In determining whether the action was reasonable and taken in a reasonable manner, the Tribunal had regard to the agreement under which Ms Pettiford was employed. That agreement provided for "flexitime" and allowed an employee to negotiate their hours of work with their supervisor. As there had been no

genuine negotiation between Ms Pettiford and Mr Nugent in respect of her hours, the Tribunal found that the direction had not taken into account the relevant provisions of the agreement and was therefore not reasonable or taken in a reasonable manner.

Accordingly, the Tribunal found that the exclusionary provisions of section 5A(2) did not apply, and that Comcare was liable in respect of the first claim.

Second claim

The Tribunal considered that the letter from Comcare no doubt contained information about the employment relationship, however the more difficult distinction was whether it went beyond that to the extent that it could be categorised as being related to Ms Pettiford's employment. The Tribunal accepted Ms Pettiford's argument that "but for" her employment with Centrelink she would not have received the letter, however based on the narrow test employed by Kitto and Windeyer JJ in *Federal Broom*, found that the letter did not fall within the scope of the phrase "the employee's employment with the Commonwealth".

Lessons Learnt

The decision in respect of the first claim illustrates the importance of ensuring that decisions on which a decision maker seeks to rely in respect of reasonable administrative action comply with the relevant policies and procedures. If they do not, then they will not be considered reasonable or to have been taken in a reasonable manner.

The decision in respect of the second claim confirms that there are some protections for employers in respect of what falls within the scope of the phrase "the employee's employment with the Commonwealth".

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