

## *Ting v Comcare* [2014] AATA 85 (21 February 2014)

### Key Points

- In order to reach its decision, the Tribunal had to define when Mr Ting's claimed psychological injury arose, with reference to the contemporaneous medical evidence and the subsequent specialist psychiatric reports
- The Tribunal also considered the criteria set out in *Reeve* in respect of whether the administrative action relied upon by the Comcare to deny the claim was reasonable and taken in a reasonable manner

### Background

Mr Ting is a qualified accountant, and was employed by the Australian Taxation Office (**ATO**). Mr Ting commenced with the ATO in 1988. During his employment with the ATO, Mr Ting was under the supervision of various senior officers, and took a number of periods of stress leave, however did not lodge any claims for workers' compensation. A brief outline of the relevant aspects of Mr Ting's employment is as follows:

- In 2001/2002, Mr Ting experienced difficulties with his then supervisor. Mr Ting took stress leave for a short period in August and another in September.
- Mr Ting experienced difficulties with a new supervisor in 2004. Due to him taking considerable sick leave, the ATO requested that he undergo a fitness for work assessment, which concluded that he was unable to perform his usual duties as a result of work related anxiety. Mr Ting took 3 weeks of stress leave.
- In early 2008, Mr Ting had a further new supervisor and began to experience difficulties. This lasted until 2010, when Mr Ting accepted an offer of redundancy, effective 30 June 2010.

Mr Ting lodged a claim for workers' compensation on 2 September 2011 in respect of depression which he claimed arose as a result of bullying and harassment which occurred while he was employed with the ATO. Liability for the claim was denied on two grounds: that the condition did not arise as a result of Mr Ting's employment with the ATO, or alternatively, that it arose as a result of reasonable administrative action taken in a reasonable manner in respect of Mr Ting's employment.

### The Law

Section 14 of the Act provides that Comcare is liable to pay compensation where an employee suffers an injury which results in some incapacity for work. The terms injury and disease are defined in sections 5A and 5B, and section 5A(2) specifies that compensation is not payable where an injury arises as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

At hearing, there was no dispute as to the fact that Mr Ting suffered from a psychological disorder, specifically, Adjustment Disorder with Depressed and Anxious Mood as diagnosed by both specialists. Noting this, the Tribunal identified the following issues as requiring consideration:

- (1) the date on which Mr Ting's psychological condition arose. Mr Ting contended that it arose in 2004, however the specialist evidence indicated that it arose in 2007 or 2008.
- (2) whether Mr Ting's psychological injury arose as a result of his employment with the ATO. Mr Ting contended that this was the case.

if the Tribunal concluded that the condition was a result of Mr Ting's employment, whether it arose as a result of reasonable administrative action and was therefore excluded pursuant to section 5A(2). This was the basis upon which liability for the claim was denied by Comcare.

## Conclusion

The Tribunal heard evidence from Mr Ting, his most recent supervisor at the ATO, and the independent psychiatrists.

The Tribunal first considered the issue of the date of onset. In relation the stress leave taken by Mr Ting in 2002, the Tribunal was not satisfied that there was sufficient evidence to reach a psychiatric diagnosis, or in fact to suggest that Mr Ting was suffering anything more than stress. The Tribunal did not consider that Mr Ting's condition in 2002 satisfied the test outlined in *Comcare v Mooi* (1996) 69 FCR 439 that it caused him to function "*outside the boundaries of normal mental functioning and behavior*".

When Mr Ting was assessed in 2004, he was diagnosed with "*an adjustment disorder with stress and depression*" and was certified unfit. He was then referred to an Employee Assistance Program, and was certified fit after receiving some counselling and other treatment. On this basis, the Tribunal found that Mr Ting had suffered a psychological condition in 2004, but that he had recovered from this condition shortly thereafter. The Tribunal again found that the condition did not satisfy the test in *Mooi*.

Mr Ting's evidence was that he did not experience further problems until a new manager was appointed in 2008. Noting the expert evidence and the notes from Mr Ting's GP consultations, the Tribunal considered it likely that Mr Ting had sustained a psychological injury around this time, and that this injury was contributed to, to a significant degree, by his employment with the ATO.

The Tribunal next considered the issue of reasonable administrative action, focusing on a period between 2008 (when the new manager was appointed), and 2010 (when Mr Ting's employment ended as a result of his acceptance of the redundancy offer). The Tribunal noted a history of poor performance by Mr Ting, and evidence that he was highly sensitive to criticism which in turn caused him stress.

The Tribunal examined the principles set out in *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463, particularly, whether the administrative action was reasonable and taken in a reasonable manner. The supervisor in question no longer worked for the ATO by the time of the

hearing, and was not called to give evidence. The Tribunal also noted the ATO's lack of documentary evidence in relation to Mr Ting's claims.

Notwithstanding the lack of evidence, the Tribunal considered that the action taken by Mr Ting's supervisor was reasonable, but was not taken in a reasonable manner. The Tribunal stated that it ought to have been apparent to the supervisor that Mr Ting was sensitive to criticism of his performance, and that the supervisor should have taken this into account in the way that he approached his management responsibilities. The Tribunal confirmed that it had not been provided with any actual evidence of bullying or harassment, but stated that the supervisor's conduct as insensitive at the very least, or more likely, intimidatory to Mr Ting. Accordingly, the decision denying liability was set aside.

## Lessons Learnt

The most important lesson from this matter is the significance of taking into account an employee's history when undertaking administrative action. If, as in this case, an employee has a history of reacting badly to criticism, it is clear that the Tribunal expects an employer to deal with the employee accordingly in order for those dealings to be considered reasonable.

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