

“Yes” to using summonsed documents for claims management *LMFP and Comcare* [2017] AATA 1512 (15 September 2017)

Key Points

- In appropriate cases, the Tribunal will release Licensees from implied undertakings preventing them from using summonsed documents for claims management purposes.

Background

The applicant had accepted claims for psychological and physical injuries sustained as a result of workplace bullying. The substantive matters before the Tribunal concerned the reasonableness of medical treatment sought for the accepted conditions. As part of those proceedings, Comcare summonsed the records of the applicant’s treating practitioners.

Documents which are produced as part of Tribunal proceedings are subject to an implied undertaking, meaning that they can generally only be used for the purpose of those proceedings and not for any “collateral or ulterior purpose”. The respondent sought to be released from the implied undertaking over the summonsed documents and two medical reports, so that they could be used in the claims management process.

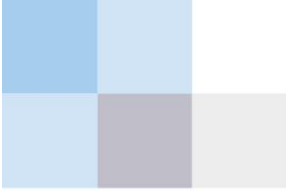
The Decision

The Tribunal’s *General Practice Direction* states that parties to Tribunal proceedings are subject to an implied undertaking over any documents produced as part of the proceedings. However, the Tribunal determined that claims management was not a collateral or ulterior purpose to the substantive proceedings, and therefore found that no release was required.

Conclusion

Deputy President Rayment concluded that Comcare was permitted to use the documents for claims management for the following reasons:

1. Claims management is a proper purpose;
2. The documents would be available to be summonsed in the event that Comcare made an adverse decision against LMFP in future anyway;

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3. When making claims against Comcare, LMFP had authorised Comcare to collect and retain information in handling claims, and it was likely that Comcare would have been able to obtain the documents produced under summons from the producing parties anyway.

Comcare was therefore released from the implied undertaking as it related to the documents.

This conclusion is different from the decision in *Chin and Comcare* [2017] AATA 634, in which Senior Member Popple decided that no implied undertaking applied to the documents, and therefore no release was required. In this decision Deputy President Rayment considered that the implied undertaking did apply. However he considered that claims management purposes were proper purposes to warrant release from the implied undertaking.

Lessons Learnt

In order to be able to use material produced under summons for claims management, an employer must establish that the documents will be used for a proper purpose, being a purpose that is not collateral or ulterior to the substantive proceedings. The current authority is that the Tribunal will accept claims management as a proper purpose to allow for release.

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