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High Court refines notion of injury suffered 'in the course of employment'

In [Comcare v PVYW \[2013\] HCA 41](#) (PVYW), the High Court held, by a 4:2 majority, that the respondent's injury did not occur 'in the course of employment' and she was therefore not entitled to compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act).

In doing so, they extrapolated upon the principles established in *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 (*Hatzimanolis*) for determining when an employee is 'in the course of employment' for the purposes of workers' compensation legislation.

Facts

The respondent's employer (a Commonwealth department) sent her on an overnight work-related trip to a regional town. It booked and paid for her motel room. The respondent had sexual intercourse with an acquaintance in her motel room. During this activity the glass light fitting above the bed was pulled from its mount and struck the respondent on the face, injuring her. She claimed workers' compensation for her resulting physical and psychological injuries.

The High Court's decision

The relevant legislation

To be covered by workers' compensation, the respondent needed to show her injury occurred 'in the course of employment' (SRC Act, ss 14(1), 4(1) and 5A(1)(b)).

An 'interval' in the 'overall period of employment'

In *Hatzimanolis* the High Court held (at 483) that an injury will more readily be seen as occurring in the course of employment when it is sustained in an interval or interlude within an overall period of work than when it is sustained in an interval between 2 discrete periods of work. It was the principles relevant to determining what constituted 'the course of employment' in an interval or interlude within an overall period of work that PVYW was concerned with (see [6], [61], [99]).

Extrapolating on *Hatzimanolis*

The High Court examined the principles set out in *Hatzimanolis*, which has stood as the leading authority on what is meant by 'in the course of employment', especially in relation to such 'interval cases', for over 20 years ([110]). In *Hatzimanolis* the High Court had said (at 484):

it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment.

The majority in *PVYW* (French CJ, Hayne, Crennan and Kiefel JJ) held that when considered in proper context *Hatzimanolis* did not lay down an inflexible rule of universal application that ‘absent gross misconduct on the part of a particular employee, an employer who requires an employee to be present at a particular place away from their usual place of work will be liable for any injury which the employee suffers whilst present there’ (at [9] and [11]).

The majority concluded that the essential inquiry is ‘how was the injury brought about’. They held that an injury will have been suffered in the course of employment if either:

1. it ‘was suffered by an employee *whilst engaged in an activity* in which the employer has induced or encouraged¹ the employee to engage’
2. ‘where an injury was suffered at and *by reference to a place* where the employer had induced or encouraged the employee to be’ (at [38], [40], [61]).

The majority stated that, where the injury was brought about by an activity, the employer’s inducement or encouragement to be present at a place is not relevant (at [39]).

Application of principle in this case

The respondent did not contend that her employer had expressly or implicitly induced or encouraged her to engage in the sexual activity that led to her injury. Nor could it be said that her injury was suffered at and by reference to a place – as would have been the case if, for example, the light fitting had merely fallen on her. Therefore, the majority concluded, her injury was not sustained in the course of her employment and she was not entitled to compensation (at [40], [62]).

‘Grey areas’ remain

Whilst the High Court’s decision has significantly clarified the applicable legal principles, their application will not always be straightforward. Difficulty remains in deciding what constitutes an injury that occurs at and by reference to a place and what will constitute the ‘place’ for the purposes of the High Court’s test.² Fine distinctions will still need to be drawn on occasions as is often the case in this area of the law.

Implication for agencies

This case has clarified when an employee will be considered to be injured in the course of employment whilst on work trips or during other intervals or interludes within an overall period of work, such as working from home. It is likely to limit the amount of compensable claims in such circumstances by preventing compensation for injuries suffered whilst engaged in an activity unless the employer had expressly or implicitly induced or encouraged the activity.

Agencies may wish to review their travel guidelines or policies in order to ensure they do not give rise to uncertainty about what activities they could be said to have induced or encouraged their employees to participate in whilst travelling.

For further information please contact:

¹ In *Comcare v Mather* (1995) 56 FCR 456 Kiefel J expressed the view, whilst a judge of the Federal Court, that ‘encouragement’ in this context ‘is not to be taken as of narrow meaning and limited to some positive action and in specific terms which might lead the employee to undertake a particular activity or attend at a particular place. The High Court’s decision in *PVYW* does not cast doubt on such a view or the High Court’s suggestion in *Hatzimanolis* that inducement or encouragement can be implicit as well as explicit (at 462).

² For example, if an employer asked an employee to travel to Sydney to attend a conference in the CBD, a question could arise as to whether the ‘place’ the employer had induced or encouraged the employee to be was Sydney, the Sydney CBD, the place where the conference was taking place and the hotel the employee was staying or some other variant.

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