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The High Court clarifies the causal connection between 'administrative action' and a disease that is necessary to potentially exclude liability under the SRC Act

On 9 November 2016, the High Court handed down its decision in [Comcare v Martin](#) [2016] HCA 43 (*Martin*). The decision clarified the causal connection between 'administrative action' and a disease that is necessary to potentially exclude liability under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the SRC Act).

Background

The legislative context

Subsection 5A(1) of the SRC Act excludes liability to compensate an injured employee where the injury (which is usually a psychological condition) was 'a result of' 'reasonable administrative action taken in a reasonable manner in respect of the employee's employment.' By virtue of s 5A(2) 'administrative action' is taken to include:

- (a) a reasonable appraisal of the employee's performance;
- (b) a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;
- (c) a reasonable suspension action in respect of the employee's employment;
- (d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
- (e) anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);
- (f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.

Section 5B provides that a disease means: (a) an ailment suffered by an employee; or (b) an aggravation of such an ailment; that was contributed to, to a significant degree, by the employee's employment.

Facts

Ms Martin worked at the Australian Broadcasting Corporation (ABC) between January 2010 and March 2012 in Renmark, South Australia. Initially, she worked as a producer under the direct supervision of Mr Mellett. Ms Martin and Mr Mellett did not have a good working relationship. Ms Martin alleged Mr Mellett bullied and harassed her and subjected her to 'repeated inappropriate behaviour' between 2010 and 2012. However, an internal investigation by the ABC found these claims unsubstantiated.

In August 2011, Ms Martin was appointed to act, on a temporary basis, in a more senior role of cross-media reporter under a different supervisor. As this role was temporary, she applied for other positions within the ABC. When the permanent position of her cross-media reporter role was advertised Ms Martin applied for the position. She did so to avoid having to return to work under Mr Mellett's supervision. In March 2012, she was advised that her application had been unsuccessful and as a consequence she would be returning to her substantive

position under the supervision of Mr Mellett. She 'broke down' and was subsequently diagnosed as suffering from an adjustment disorder for which she sought compensation.

While Comcare accepted that Ms Martin suffered from an adjustment disorder that was contributed to, to a significant degree, by her employment with the ABC, Comcare denied liability on the basis that Ms Martin's condition was 'a result of' the decision not to appoint her to the position of cross-media reporter and hence liability was excluded under s 5A of the SRC Act.

Ms Martin argued that the worsening of her condition was caused by her realisation that she would be returning to the supervision of Mr Mellett, a prospect she dreaded, and any contribution caused by her disappointment with the loss of an opportunity for career advancement was immaterial.

The Tribunal's decision

The Administrative Appeals Tribunal held that Ms Martin's adjustment disorder resulted from her failure to obtain the position of cross-media reporter. Crucially, it concluded: 'That her reaction to the offending decision was primarily attributable to [her] dread of returning to work under Mr Mellett and not her disappointment with lack of career advancement is irrelevant. In her mind the former was a direct and foreseeable consequence of the decision' (the key finding). However, the Tribunal also concluded that the promotion process relating to that position was not taken in a reasonable manner. Comcare appealed the Tribunal's decision to the Federal Court.

The Federal Court's decision

Comcare's appeal challenged the Tribunal's conclusion that the decision not to appoint Ms Martin to the position of cross-media reporter was not taken in a reasonable manner. By a notice of contention Ms Martin challenged the Tribunal's conclusion that she suffered her disease 'as a result of' that decision. Griffiths J concluded that the Tribunal had made errors of law in finding the decision not to promote Ms Martin to the position of cross-media reporter was not undertaken in a reasonable manner. His Honour upheld Comcare's appeal and remitted that aspect of the matter back to the Tribunal to be heard and re-determined. However, his Honour found no legal error in the Tribunal's conclusion that Ms Martin suffered her disease 'as a result of' that decision.

The Full Federal Court's decision

Ms Martin appealed Griffiths J's decision to the Full Federal Court. The Full Court was unanimous in rejecting Ms Martin's challenge to the allowing of Comcare's appeal from the decision of the Tribunal. However, the Full Court divided on the outcome of Ms Martin's challenge to the dismissal of her notice of contention. The majority (Murphy J with whom Siopis J agreed) upheld the challenge. Flick J dissented.

The majority construed the phrase 'as a result of' in s 5A(1) as requiring the application of a 'common sense' approach to causation. They held that the Tribunal misconstrued the phrase in a way that led it to fail to apply common sense to the facts as it found them. The majority considered that 'common sense' led to the conclusion that the cause of Ms Martin's condition was not the failure to promote her but rather her realisation that she would be returning to the supervision of Mr Mellett. The majority also found fault with the Tribunal's key finding referred to above.

Following a grant of special leave, Comcare appealed to the High Court.

The High Court's Decision

Approach to resolving the issue – statutory interpretation and the test to apply

In a joint decision the High Court upheld Comcare's appeal 5:0 (per French CJ, Bell, Gageler, Keane, Nettle JJ).

The High Court made it clear that questions of causation in a statutory context must always be determined by reference to the text of the statute and in a manner that best effects its statutory purpose. The High Court stated that the ‘common sense’ approach to causation which the Siopis and Murphy JJ had adopted failed to adequately take account of the statutory text, context and purpose.

The High Court also noted that the purpose of the exclusion contained in s 5A of the SRC Act is to ‘ensure that the wide range of legitimate human resource management actions, when undertaken in a reasonable manner, do not give rise to eligibility for workers’ compensation’ and to prevent claims ‘being used to obstruct legitimate management action by excluding claims where an injury (usually a psychological injury) has arisen as a result of such action. It concluded that this purpose of s 5A would be defeated if the operation of the exclusion was dependent on the subjective reaction of each employee.

The Court held that a disease will be suffered ‘as a result of administrative action’ if the taking of the administrative action is an event without which the employee’s ailment or aggravation would not have been contributed to, to a significant degree, by the employee’s employment.

The High Court also made clear that (i) the administrative action does not need to be the sole cause of the disease and (ii) the reasons for an employee’s perception of the consequence of the administrative action – whether personal or professional, direct or indirect, real or imagined are irrelevant.

Implications

The High Court’s decision has important implications for the compensability of psychological conditions that are suffered by SRC Act employees following the taking of ‘administrative action’.

It is now clear the crucial issue is what the employee’s reaction to the taking of the administrative action was and that the reason for their reaction (whether it be ‘personal or professional, direct or indirect, real or imagined’) is irrelevant.

Previously, it was considered the exclusion in s 5A could apply if ‘administrative action’ was an operative cause of an employee’s psychological condition. The High Court’s decision introduces a more nuanced enquiry. Now, the question will be whether the administrative action made the difference between the employee’s employment failing to contribute to the employee’s ailment or aggravation, to a significant degree, and their employment contributing to their ailment or aggravation, to a significant degree. By virtue of s 5B(3) of the SRC Act, a contribution to a significant degree will be ‘a degree that is substantially more than material.’

To answer this question decision-makers will need to effectively consider a hypothetical ‘counter-factual’ scenario where the administrative action in question had not occurred. This will need to be compared to what did in fact occur in order to determine the role the ‘administrative action’ played in the employment’s significant contribution to the ailment or aggravation.

This will require a somewhat different approach to the way cases involving the potential application of s 5A are prepared and argued. In particular, medico-legal evidence will now need to be directed towards this enquiry.

More broadly, the High Court’s decision should help continue to ensure that compensation claims (or fears of compensation claims) do not obstruct legitimate management action – provided such action is reasonable and taken in a reasonable manner.

Text of the decision is available at: http://www.hcourt.gov.au/cases/case_s142-2016

Tom Howe PSM QC, and Andrew Berger appeared as counsel for Comcare (instructed by Lehmann Snell Lawyers). Andrew Berger also appeared as counsel for Comcare in the Federal Court and Full Federal Court appeals.

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