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

On 24 April 2017, the Full Court of the Federal Court handed down its decision in [Lim v Comcare \[2017\] FCAFC 64 \(Lim\)](#). The decision reiterated 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) following the judgment of the High Court in *Comcare v Martin [2016] HCA 43 (Martin)*.

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 in the nature of a 'disease') was 'a result of' 'reasonable administrative action taken in a reasonable manner in respect of the employee's 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

Dr Lim worked at the Australian Communications and Media Authority (ACMA).

In March 2011, she submitted a claim for workers' compensation for an 'adjustment reaction with depressant anxiety', which she claimed she suffered as a result of workplace bullying and harassment. In July 2011, Comcare rejected the compensation claim. Although Comcare conceded that Dr Lim had sustained a psychological condition that was significantly contributed to by her employment at the ACMA, Comcare concluded that it was not liable to pay her compensation because her condition was a result of reasonable administrative action taken in a reasonable manner in respect of her employment. Accordingly, her injury was not an injury for the purposes of the SRC Act because the exclusion in the definition of 'injury' in s 5A(1) of the SRC Act applied.

Comcare affirmed its determination in August 2013. Subsequently Dr Lim applied to the Administrative Appeals Tribunal for a review of Comcare's decision.

The Tribunal's decision

In its decision, delivered prior to the judgment in *Martin*, the Tribunal held that Dr Lim suffered a psychological condition arising out of her employment at the ACMA. It also found that 'one cause of the condition was reasonable administrative action taken in a reasonable manner by AMCA in respect of [her] employment' with the result that Comcare was not liable to pay compensation: [Re Lim and Comcare \[2015\] AATA 189](#) at [1].

In particular, the Tribunal found that:

- Dr Lim suffered a psychological condition arising out of the dealings of her supervisor with her about the use of template letters, and about the ACMA's response to enquiries under the *Telecommunications Act 1997*
- Dr Lim suffered the condition on, or a few days before, 18 March 2011, when she discussed her work stress with a doctor, and the doctor diagnosed her as suffering a psychiatric condition
- a performance appraisal on 31 January 2011 contributed to the development of Dr Lim's psychological condition.

Further, the Tribunal found that the performance appraisal was conducted in a reasonable manner and, accordingly, it was a reasonable administrative action. The Tribunal did not consider the effect of any other administrative actions on the basis that '[i]f only one cause of a condition satisfied the exclusion in s 5A, the exclusion applies – even if the condition had many separate causes' (at [43]).

The Federal Court's decision

Dr Lim appealed the decision under s 44 of the *Administrative Appeals Tribunal Act 1975*. She submitted that (a) the Tribunal's reasons disclosed an impermissible search for a clinical diagnosis before reaching a finding of 'injury', and (b) the Tribunal's finding that the injury was the result of the performance appraisal involved an error of law.

The primary judge dismissed the appeal on 15 June 2016, prior to the judgment in *Martin*.

The Full Court's Decision

Dr Lim appealed from his Honour's judgment by a notice of appeal dated 5 July 2016. With leave, an amended notice of appeal, dated 2 September 2016, was filed. Dr Lim's amended notice of appeal asserted (amongst other grounds) that the primary judge erred in failing to find that the Tribunal misconstrued the expression 'suffered as a result of' in the exclusion in the definition of injury in s 5A(1) of the SRC Act.

In a unanimous decision, Full Court agreed and allowed the appeal. However, the Full Court ordered that the matter be determined by the Tribunal upon the evidence already given in the proceeding unless the Tribunal considers it appropriate to receive further evidence limited to the question of whether or not Dr Lim would have suffered her adjustment disorder if the performance appraisal on 31 January 2011 had not been made. The Full Court also made no order as to costs.

The Full Court concluded that the Tribunal failed to 'address the statutory question that it was required to address with respect to Dr Lim's claim' – namely, 'that Dr Lim would not have suffered an ailment (or aggravation of an ailment) if the performance appraisal had not been taken'. That failure amounted to an error of law. It is important to note that this conclusion was made in the context of only employment-related factors being identified as contributing to Dr Lim's ailment (see [40]–[42]).

In obiter, the Full Court observed at [45] that, 'in a different case, where both employment and non-employment factors are posited as contributing to an ailment or an aggravation of such an ailment ... in order to determine whether s 5B applies, a finding would need to be made as to whether the ailment or aggravation was contributed to, to a significant degree, by the employee's employment. If there were an affirmative finding, then the further questions would arise as to whether or not there was reasonable administrative action taken in a reasonable manner; and, if so, whether or not the disease would have been suffered by the employee if that action had not been taken. If the Tribunal were so satisfied, then the exclusion to the definition of "injury" in s 5A(1) would apply.'

Implications

The Full Court's decision is uncontroversial. It reiterates what the High Court stated in *Martin* with respect to the degree of causation required of an 'administrative action' before that action can be said to trigger the exclusion in s 5A(1). It also reiterates that an ailment need not only be a result of an excluded cause: see *Hart v Comcare* [2005] 145 FCR 29, and *Martin* at [45].

It should now be considered clearly settled that where only employment-related factors are identified as contributing to an ailment reasonable administrative action taken in a reasonable manner in respect of an employee's employment needs to have made the difference between an ailment (or an aggravation of an ailment) being suffered and not suffered for the exclusion in s 5A(1) to apply. If administrative action merely contributes to and/or was a cause of an applicant's disease this will not be sufficient to enliven the exclusion in s 5A(1) unless it can be concluded that without such a contribution or cause the ailment (or an aggravation of an ailment) would not have occurred. However, as the Full Court observed (at [37]) this is not a substantial departure from the approach to the construction of s 5A (or its predecessor) adopted in other Full Court decisions. Further, the judgment in *Lim* merely re-iterates the approach stipulated by the High Court in *Martin*.

Since the Full Court delivered its judgment in *Lim* there has been [media reporting](#) calling this a 'landmark decision', and quoting a Canberra-based barrister as suggesting that 'disappointed applicants from recent years' might now be in a position to 'pursue cases thought to be lost causes'. If the judgment in *Lim* (or *Martin*) does prompt injured workers (or formerly injured workers) to re-litigate previous cases or claims, complex issues could arise with respect to their ability to do so. AGS is available to advise on such matters.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2017/64.html>

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