



## Précis Paper

### **Employer's duty of care to an employee injured at work premises while not rostered on: does it exist?**

#### **Introduction**

In this edition of BenchTV, Hugh Marshall (SC) and David Baran (Barrister) discuss the interesting and novel case of *Tran v Vo* [2017] NSWCA (*Tran v Vo*). *Tran v Vo* was a case which raised important issues concerning workers compensation, specifically whether a worker suffered an injury *in the course of or arising out of* her employment. The facts of *Tran v Vo*, described and discussed in the presentation, were as follows: a worker, who was the appellant's casual employee, attended the place of her employment on her day off, to visit her friend and buy a drink. While she was at the shop, the worker's friend asked the worker to assist her in closing the shop. The worker, while assisting her friend, had slipped on a mopped floor behind the counter and in doing so her hand came into contact with a juicer, causing injuries to hand and psychiatric injuries. The worker was paid worker's compensation payments in respect of her injuries. The worker then brought proceedings for common law damages against appellants as occupier of the premises. The worker succeeded at trial. On appeal several important issues were raised in respect of workers compensation. The workers compensation issues arose from the appellants' contention that the worker's injury had arisen in the course of employment, or out of employment, with the result that the worker's right to commence common law proceedings was restricted by the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). There was also an

issue of double compensation which arose in respect of the workers compensation payments which had been paid to the worker. The Court of Appeal found that the primary judge had not erred in finding that the worker's injury had not occurred in the course of her employment or arisen out of her employment. The Court of Appeal also found that the worker had not been doubly compensated and was required to repay the workers compensation. It is the discussion and analysis of these issues which form the basis of the presentation.

### **Key areas of discussion**

1. Core discussion of the Court of Appeal's approach to whether the worker's injury arose in the course of worker's employment, or arose out of her employment. Issues on appeal had included: whether there was any basis for the contention that worker's activity at time of injury arose from employment with appellants, adequacy of reasons given by the trial judge for finding that the injury did not arise out of or was not in course employment, whether the proceeding had been commenced in non-compliance with provisions of Workplace Injury Management and Workers Compensation Act 1999 and whether the trial judge was correct on approach to the issue of double compensation..
2. Discussion of the origin of the double compensation issue in the facts of the case, the arguments presented on double compensation and the resolution of the issue with particular attention to the undertaking provided by the worker to repay the workers compensation payments. In addition there is a discussion of the importance of undertakings in general and the Court's own power to order repayment of compensation pursuant to its inherent jurisdiction.
3. Discussion of the 'interruption case' i.e the situation which occurs when a worker is injured in an interval between periods of actual work. An injury which occurs during an interval between normal working hours can be

considered to have arising in course of employment if employer has induced or encouraged the worker to spend time of interval at a place or to perform an activity. However in this case the Court found that the worker had not been induced or encouraged to attend the premises or engage in the activity which led to her injury.

4. Discussion of the situation which occurred on appeal, in which of a new issue, involving ostensible authority and agency, was raised which had not been raised at first instance. The new point consisted in a contention that the worker had been induced to come onto the premises by a representative of the appellants. It was argued that the representative had acted with the authority of the appellant amounting to an inducement. The Court of Appeal had considered and dismissed the argument.
5. Discussion in relation to the issue whether damages in the case needed to be assessed with reference to the *Workers Compensation Act 1987* (NSW) or *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and definition of 'injury' therein.
6. Discussion of the requirement under the *Uniform Civil Procedure Rules 2005* (NSW) of the requirement that you must be prepared to call a witness if you wish to have a document before the Court as an exhibit. The discussion occurred in the context of the appellant's statement being placed in the tender bundle even though the appellant was not called.
7. Discussion of important features to take away from case, including the need for a trial plan to eliminate 'grey areas' in litigation, the critical importance to be careful in respect of case theory, especially in a case which is novel, the need to be familiar with the *Uniform Civil Procedure Rules 2005* (NSW), and to try and reach agreement on issues. It was highlighted that one of the important distinguishing features of the case was that it was a case which had held that there was no duty of care owed to an off duty employee who was not involved in an authorised interval at work.

## **Presenters' Biographies:**

Hugh Marshall SC was called to the Bar in 1983 and appointed Senior Counsel in 2003. He has an extensive common law practice. He was an officer in the Army Reserve Legal Corp for more than 20 years and appeared in many Courts Martial and Appeals. He has also appeared frequently in the Court of Arbitration for Sport. Mr Marshall has held appointments as a NSW District Court and Supreme Court Arbitrator. He has been a member of the NSW Bar Council and has served on professional conduct committees for more than 15 years.

Mr David Baran was called to the Bar in 1991 and since that time has conducted a diverse practice. Mr Baran also appears in criminal trials and the Court of Criminal Appeal.

### **Bibliography:**

*Tran v Vo* [2017] NSWCA 134

*Workers Compensation Act 1987* (NSW)

*Workplace Injury Management and Workers Compensation Act 1998* (NSW)

*Franklins Self Serve Pty Ltd v Wyber* [1999] NSWCA 390

*Jones v Dunkel* (1959) 101 CLR 298

*Comcare v PVYW* [2013] HCA 41

*Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473

*Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7

*Smith v The Australian Woollen Mills Ltd* (1933) 50 CLR 504

*Uniform Civil Procedure Rules 2005* (NSW)

*Hackshaw v Shaw* [1984] HCA 84