



Précis Paper

Statutory Construction in Workers' Compensation Claims

A discussion of the recent decision in *Comcare v Drinkwater* [2018] FCAFC 62.

Discussion Includes

- Key Facts
- Comcare's rejection of the claim
- Grounds of Appeal
- The decision of the Full Federal Court
- Takeaways for Practitioners

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Statutory Construction in Workers' Compensation Claims

1. In this edition of BenchTV, Peter Woulfe (Barrister-Blackburn Chambers, Canberra) and Peter Lehmann (Principal- Lehmann Snell Lawyers, Sydney) discuss the recent decision of *Comcare v Drinkwater* [2018] FCAFC 62.

Key facts

2. Mr Drinkwater, an employee of the Australian Customs Service, was forced to move positions within the organisation.
3. The Australian Customs Service had a general policy which stated that where a person had been in a position for a certain amount of time, the employer could transition them to another position within the organisation.
4. The reasons behind the the policy were security, counter-terrorism, accountability and anti-corruption measures.
5. Mr Drinkwater was found to be in the scope of people required to be moved and ultimately, after Mr Drinkwater was afforded the opportunity to put in his preferences of position, the Australian Customs Service made the decision to move Mr Drinkwater to a position which was not his first preference.
6. Mr Drinkwater was not happy with the decision and that caused him to develop a psychological illness.
7. Mr Drinkwater subsequently lodged an insurance claim with Comcare which it rejected.

Comcare's rejection of the claim

8. Comcare found that Mr Drinkwater's psychological illness was suffered as a result of reasonable administrative action which was taken in a reasonable manner in respect of his employment. That meant that his illness was excluded from the definition of injury found in section 5A of the *Safety Rehabilitation and Compensation Act [1988]* Cth ('the Act').
9. Section 5A applies by first asking whether an employee has an 'injury', being a condition that bears a necessary connection with employment.
10. But, where a person suffers a psychological injury that is a result of reasonable administrative action taken in a reasonable manner in respect of their employment, they will not be entitled to compensation.
11. Mr Drinkwater subsequently exercised his right to appeal to the Administrative Appeals Tribunal.
12. The Tribunal found that Mr Drinkwater had suffered injury as a result of the policy requiring his movement to another position in the organisation.

13. The Tribunal also found that to be reasonable action, taken in a reasonable manner. However, the Tribunal did not consider that the action was taken 'in respect of Mr Drinkwater's employment.
14. Comcare then appealed to the Full Federal Court.

Grounds of Appeal

15. An appeal to the Federal Court of Australia from a decision of the Administrative Appeals Tribunal can only be on a question of law.
16. The matter of *Comcare v Drinkwater*, raised two questions of law.
17. The first was whether the Administrative Appeals Tribunal misconstrued and misapplied the phrase 'in respect of the employee's employment' for the purpose of exclusion from the definition of injury in Section 5A of the Act.
18. The second was whether the Tribunal failed to take into account a relevant consideration, that being whether Mr Drinkwater's illness was suffered as a direct result of his failure to retain a position he wished to work in.
19. The appeal was heard in the Federal Court, constituted as a Full Court because of a process set out in Section 44 of the *Administrative Appeals Tribunal Act [1975]* Cth.
20. Section 44 of the *Administrative Appeals Tribunal Act* stipulates that if the Tribunal is constituted by a Presidential member who is a Judge, the appeal must automatically go to a Full Court.
21. Further, it stipulates that in a case such as in *Comcare v Drinkwater*, where the Tribunal is constituted by a Presidential member who was not a Judge, the Chief Justice of the Federal Court and the President of the Tribunal will decide whether or not the matter will be heard by the Full Federal Court.

Decision of the Full Federal Court

22. The Court conducted a survey of the existing authorities on what is meant by the exclusionary provision of 'injury' in Section 5A of the Act.
23. These authorities included decisions of the Federal Court in *Commonwealth Bank v Reeve [2012]* FCAFC 21, *Comcare v Long [2016]* FCA 737, *Comcare v Drenth [2012]* FCAFC 86; 128 ALD 1 and *Comcare v Peters [2013]* FCA 1361.
24. The Court applied these authorities and took into account the language of the Act, which provides 'in respect of the employee's employment', in its application to Mr Drinkwater's individual circumstances.
25. In arriving at its decision, the Court held that the Tribunal had not correctly appreciated that there were two separate administrative actions in this matter.
26. The first action was the decision to implement the mobility policy that operated across the board within the organisation.

27. In regard to this action, the Court found that whilst that decision did amount to an administrative action, it wasn't taken 'in respect of' Mr Drinkwater's employment.
28. This is because it is a policy at large and therefore affects everyone in the organisation.
29. The second action was the application of the mobility policy to Mr Drinkwater's individual circumstances.
30. The policy was applied by a process involving Mr Drinkwater submitting his preferences for him to transfer pursuant to the mobility policy. These preferences were then considered by the department but a decision was made which was contrary to his first preference.
31. The Court concluded that the decision to transfer Mr Drinkwater individually from one position to another was administrative action 'in respect of' his employment. That decision in part led to Mr Drinkwater's illness, and therefore he was excluded from compensation.
32. Ultimately the Court found an error of law in that the Tribunal had misconstrued the phrase 'in respect of the employee's employment' for the purpose of exclusion from the definition of injury.
33. The Court concluded that, on the basis of this error of law, the matter did not need to be remitted back to the Tribunal for reconsideration because there was only one outcome that could occur based on a correct interpretation and application of the law in Mr Drinkwater's circumstances.
34. This is because the Tribunal had already made an unchallenged finding of fact that Mr Drinkwater's illness was a result of administrative action which was reasonable taken in a reasonable manner.
35. Once the Court found that the action was taken 'in respect of' Mr Drinkwater's employment, based on the Tribunal's above findings of fact, there could only be one result and that was to affirm Comcare's decision that Mr Drinkwater was not entitled to compensation.
36. The Court set aside the Tribunal's decision and made a decision affirming Comcare's denial of liability.

Takeaways for Practitioners

37. The Full Court's decision provides some clear guidance as to the ambit of the phrase of 'in respect of the employee's employment'.
38. A decision to transfer an employee from one position to another is an administrative action 'in respect of' that particular employee's employment.
39. Administrative action can be taken 'in respect of' a particular employee's employment even if it involves the application of a policy that pertains to more than one employee.

BIOGRAPHY

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Peter Woulfe is a barrister from Blackburn Chambers in Canberra. He is the Deputy Chair of the Federal Litigation and Dispute Resolution Section of the Law Council of Australia. He is the Chair of the Law Council's Commonwealth Compensation and Employment Law Committee and its Administrative Appeals Tribunal Liaison Committee. Peter is also the Treasurer of the ACT Bar Council. The majority of Peter's practice is in Commonwealth compensation law acting for Comcare and licensed corporations in matters under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

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Peter Lehmann is principal of Lehmann Snell Lawyers, a law firm specialising in administrative law and in particular workers' compensation. Peter is a graduate of the Australian National University and commenced practice in-house in insurance in Canberra before relocating to Sydney and opening his firm with former Sparke Helmore partner and counsel, Michael Snell.

BIBLIOGRAPHY

Focus Case

Comcare v Drinkwater [2018] FCAFC 62

Cases

Commonwealth Bank v Reeve [2012] FCAFC 21

Comcare v Long [2016] FCA 737

Comcare v Drenth [2012] FCAFC 86; 128 ALD 1

Comcare v Peters [2013] FCA 1361

Legislation

Safety Rehabilitation and Compensation Act 1988 (Cth)

Administrative Appeals Tribunal Act 1975 (Cth)