PAGE SEAGER
LAWYERS

Workers Rehabilitation & Compensation Tribunal

CASE COMMENTARY · October 2019

Administrative action decision

(Click here to view case)

M v Allianz Australia Services Pty Ltd (No 2) [2019] TASWRCT 35

1 BACKGROUND

1.1 M was employed by Allianz as its Tasmanian Workers Compensation Claims Manager.

1.2 On 7 March 2018, the Worker received a telephone call from Mr R, who was the Manager of the ACT, but part of his role involved the oversight of the Tasmanian Workers Compensation Team. As such he was the Worker's Manager.

1.3 In that telephone call, Mr R told the Worker that he wanted to arrange a meeting the next day and the purpose of the meeting was to discuss with her, changes to the Employer's structure and how that would affect her role.

1.4 A meeting took place the next day. M was told that her role as Claims Manager would likely close and that there were no redeployment opportunities within Tasmania. If she could not be redeployed, she would be made redundant.

1.5 The Worker was told that she should take the rest of that day and the next day off, however, she stayed at work both that afternoon and the next day.

1.6 On that same day, the Launceston and Hobart teams were advised of proposed changes and that the Worker's role would be "closed".

1.7 She made a claim for compensation that was successfully disputed pursuant to Section 81A. The employer relied on the defences in Section 25(1A)(a) relating to bringing about the end of someone's

employment, and 25(1A)(c) reasonable administrative action. In this commentary I will simply refer to administrative action cases which includes all of the possible defences in Section 25(1A).

1.8 This decision is the result of the Section 42 Referral made by the Worker. The matter proceeded to a full hearing.

2 ISSUES

Date of Injury

2.1 There was a dispute about the date of injury. The Employer claimed that the Worker had been incapacitated for work since 7 March, that is the day that she received Mr R's telephone call. The Worker, however, said that as she had continued working on 7, 8 and 9 March, her initial date of incapacity was 10 March. That became important as discussed below.

2.2 The Employer conceded that the Worker's employment contributed to her injury, an Adjustment Disorder, to a substantial degree, in that her employment was the major or most significant factor. However, the Employer relied upon the reasonable administrative action defence.

Onus of Proof

2.3 Who has the onus of proof under Section 25(1A)? Not surprisingly, the Chief Commissioner found that the onus of proof lay on the Employer to bring itself within the reasonable administrative action defence.

"Arises Substantially From"

2.4 The next issue was what was meant by the opening words to Section 25(1A) that compensation is not payable in respect of a disease which is an illness of the mind or a disorder of the mind "*which arises substantially from…*".

2.5 Although this Section refers to something which "*arises substantially from*", it does not have the same meaning as Section 25(1)(b), which as you know tells us that a worker suffers an injury which is a disease when their employment contributed to a substantial degree. "*Substantial degree*", according to Section 3(2A) tells us that means that employment must be "*the major or most significant factor*".

2.6 That is not the case in relation to an administrative action type case. It is enough that the administrative action was a substantial contributing factor. That phrase connotes something of "*weight, size or importance*". It does not need to be the major or most significant factor.

2.7 In other words, if an employer can show that an administrative action was a substantial contributing factor or was found to be an operative cause, then a worker is not entitled to compensation.

2.8 So, in a section 25(1A) case, the administrative action must still contribute to the development of a disease and the contribution must be real or of substance and not insubstantial or nominal. But it does not need to be the most significant factor in the way that Section 3(2A) speaks of.

What is Administrative Action?

2.9 There are two lines of authority about administrative action. There is a South Australian line of authority which says that "*administrative action should be given its ordinary meaning. It could include a course of conduct or general instruction by an employer or a general approach by an employer to a particular job or particular situation.*" That can be regarded as the wider interpretation of administrative action.

2.10 There is, however, an alternative narrower interpretation as a result of a Commonwealth Decision – Reeve. The Reeve decision says that "*the section is not speaking of operational matters such as for example an instruction to perform work at a particular location or perform particular duties, but rather it is action with respect to the employee as employee and his or her employment relationship with the employer.*"

2.11 There is an earlier Tasmanian Supreme Court decision of **Burrage** where the Judge did not need to decide which was the correct test.

2.12 Chief Commissioner Webster did not need to make a decision because he said even on the stricter view, the discussion between Mr R and M specifically related to changes to the employment structure and how that would affect her role, or I suppose her employment. Accordingly, on any view, that was administrative action.

Were Allianz's Actions Reasonable?

2.13 In relation to reasonableness, the Tribunal accepted that Allianz had acted reasonably and interestingly, Allianz' insurers had called an HR expert in relation to appropriate processes where this type of situation needs to be dealt with.

2.14 It was also clear that although the Worker attempted to refer to other stressful matters between her and her Employer, the Tribunal found that it was the conversation between Mr R and the Worker which was the substantial cause of her injury, indeed there was really no other cause in any event.

Date of Injury

2.15 The Tribunal also found that even though the Worker had continued at work and indeed had not been certified as incapacitated for work until 10 March, she had been incapacitated for work as a matter of fact after having a conversation with Mr R. This set the date of injury.

3 PRACTICAL CONSEQUENCES

3.1 It is important to bear in mind in an administrative action case that an employer needs to show that the worker's injury arises substantially from that administrative action. That employment is a substantial contributing factor, but it does not need to be the most significant.

3.2 In any Section 25(1A) case, it is important to bear in mind what is meant by "*administrative action*". I

think it is fair to say that the Tribunal to date, certainly on a Section 81A Referral, are happy to work with what I've referred to as the South Australian line of authority. Not because they necessarily think ultimately that the Supreme Court will say that that is the correct view, but there is really no need for them to decide which test applies in a Section 81A Referral. It is essential, however, that we closely consider what is administrative action.

3.3 You will also note the importance of identifying the date of injury; in this case that was done not by reference to the first medical certificate but by the effects upon the Worker of what she was told by Mr R. She was partially incapacitated as a matter of fact. In this regard, we almost invariably look to find the first certificate of incapacity, however, Section 3(5) tells us that an injury should be deemed to have occurred on the day on which the Worker became totally or partially incapacitated by reason of the injury, or by certification.

3.4 It was also interesting in relation to the issue of reasonableness that the Employer called an HR expert in relation to processes.
