Defences to Commonwealth Injury Claims

By David Richards*

A Commonwealth employee who has been injured at work may not be entitled to compensation under the *Safety Rehabilitation and Compensation* Act 1988 (the SRC Act) due to an exclusionary provision under the SRC Act in certain circumstances. This type of 'defence' to a claim may prohibit an injured employee from receiving entitlements under both the SRC Act and in common law.

There are five types of exclusionary provisions in the SRC Act:

1. An injury arising out of reasonable disciplinary action s.4(1);
2. An injury arising out of the failure to obtain a promotion, transfer or benefit s.4(1);
3. Intentionally self-inflicted injuries s.14(2);
4. Injury caused by Serious and Willful Misconduct s.14(3);
5. Willful and False Representation s.7(7) - Disease

If an injured employee does fall within one of the exclusionary provisions the employee's claim will fail as the defence is absolute.

Notwithstanding this, an employee may succeed with a claim if there is more than one contributing factor and at least one contributing factor is separate and distinct from the exclusionary provisions (see *Trewin v Comcare* (1998) FCR 171 and *Hart v Comcare* (2005) FCAFC 16 below).

First Part of Section 4(1) - Reasonable Disciplinary Action

Section 4(1) defines the term injury but then goes on to state that injury does not include any such disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.

The first part of s. 4(1) applies to an injury suffered by an employee as a result of reasonable disciplinary action.

THE REQUIREMENTS TO PROVE

A leading authority on what constitutes reasonable disciplinary action is the Federal Court decision *Comcare v Chenhall* (1992) 37 FCR at 75. In *Chenhall* Cooper J held that the only matters which fall to be determined under the definition are:

a. "Was the action which resulted in the injury disciplinary action?
b. If "yes", was it reasonable?"

DISTINCTION BETWEEN DISCIPLINARY ACTION AND THE PROCESS OF THE DISCIPLINARY ACTION

Cooper J in *Chenhall* found that action taken to determine whether or not disciplinary action will be taken against an employee, although it may be characterised as part of a system or process to maintain discipline, is not action within the meaning of the definition.

However, in the more recent decision of *Hart* the Full Court of the Federal Court appears to challenge this proposition. In *Hart,* Branson, Conti and Allsop JJ accepted the single Judge decision of Whitlam J in the first instance, finding that the Tribunal drawing a distinction between the process behind a promotion, and the promotion itself, was spurious.

Although the *Hart* decision related to a failure to obtain a promotion, it is likely that the principle in *Hart* will apply equally to other exclusionary provisions such as reasonable disciplinary action.

Following *Hart,* the exclusionary provisions will likely apply to the process behind reasonable disciplinary action. Having said this, for the process behind the disciplinary action to be exclusionary, the contributing factors must form part of disciplinary action and not be determined by a Tribunal or Court to be something other than disciplinary action (see *Chenhall* above and *Telstra Corporation Limited v Warren* (1997) FCA 102).

Second Part of Section 4(1) - Failure to Obtain Promotion, Transfer, Benefit

The second part of s. 4(1) of the SRC Act applies to an injury suffered by an employee as a result of the failure to obtain a promotion transfer or benefit in connection with employment. Section 4(1) provides that an injured employee has not suffered an injury pursuant to s. 4 if the injury arose out of the failure to obtain a promotion, transfer or benefit.

DISTINCTION BETWEEN THE PROMOTION, TRANSFER, BENEFIT AND THE PROCESS BEHIND THE PROMOTION, TRANSFER, BENEFIT

Following *Hart* there is no distinction between promotion, transfer and benefit and the process leading to promotion, transfer and benefit. An employee who suffers an injury as a

* David Richards is a Barrister at Blackburn Chambers in Canberra.

result of the process behind the reasonable disciplinary action will likely be excluded from an entitlement to compensation under the SRC Act.

OBTAIN/RETAIN

Historically, the Courts have read the word 'obtain' strictly. The Federal Court in *Comcare v Ross* (1996) FCA 680 did not set aside a Tribunal decision where the Tribunal found that the word obtain did not also mean retain.

In *Ross* Finn J said, by way of obiter dictum, that it is wholly reasonable to ascribe the ordinary meaning to the word "obtain". That is, for the word **obtain** to mean acquire, maintain, hold or keep.

Tribunals have since accepted the obiter in *Ross* and held that the failure to **retain** a promotion, transfer of benefit does not come within the exclusionary provision (See the decision of Deputy President Jarvis in *Albanese and Comcare* (2004) AATA 768).

PROMOTION TRANSFER BENEFIT

The question of whether an employee is the subject of a promotion, transfer or benefit will turn on its facts. In the Administrative Appeals Tribunal decision of *Albanese,* Deputy President Jarvis found that the transfer of Mr Albanese did not constitute a promotion or a benefit as Mr Albanese remained a Level 3 employee. The Tribunal in *Albanese* also found that the obtaining by Mr Albanese of a security clearance was not a benefit to him as it was simply a necessary incident of his work.

Unlike the interpretation of the word 'obtain' where the Federal Court has read the term strictly, the Federal Court in *Trewin* interpreted the word 'benefit' broadly.

In *Trewin,* Heerey J stated that the failure to obtain a 'benefit' in s.4 is not restricted to something which is a matter of charity or gratuity. Heerey J went on to quote from the Macquarie Dictionary and referred to two relevant meanings for the word 'benefit' in the dictionary;

1. An act of kindness;
2. anything that is for the good of a person or thing.

Heerey J in Trewin clearly adopted a wide interpretation of the word benefit under s.4(1).

Intentionally Self-Inflicted Injuries s.14(2)

Section 14(2) of the SRC Act provides that compensation is not payable where the injury is intentionally self-inflicted. There is little authority to assist in interpreting s.14(2). Having said this, there is a line of authority in the Administrative Appeals Tribunal which suggests that where an employee is not capable of forming an intention as a result of the persons mental state, the exclusionary provision in s.14(2) does not apply (See *Pearce v Comcare* (1998) AATA 13572).

Injury Caused by Serious and Willful Misconduct s.14(3)

Section 14(3) of the SRC Act provides that compensation is not payable where the injury is caused by serious and willful misconduct unless the employee suffers from serious and permanent impairment.

SERIOUS

Finn J in *Comcare v Calipari* (2001) FCA 1534 held that the word 'serious' in s.14(3) describes the misconduct in question and not the actual consequences of it. Finn J noted that because the s.14(3) disentitlement arises where the injury is caused by the misconduct it is well accepted that the seriousness of the misconduct is to be evaluated having regard to whether that conduct would be attended by the risk of non-trivial injury (See *Johnson v Marshall, Sons & Co Ltd* (1906) AC 409).

In *Calipari,* Finn J found that the Tribunal in the original hearing had erred in law by following the reasoning in *Hills v Brambles Holdings Ltd* (1987) 4 which found that the exclusionary provision required a 'serious' risk of injury. The correct interpretation of s.14(3) is the requirement of 'serious' misconduct, **not** 'serious' injury.

It should be noted that s.4(13) of the SRC Act deems an employee who is under the influence of alcohol or a drug to be guilty of serious and willful misconduct.

SERIOUS AND PERMANENT IMPAIRMENT

Where an employee suffers from serious and permanent impairment the exclusionary provision under s.14(3) does not apply. This in effect is a defence to the defence, or in other words a defence to the exclusionary provision.

Unlike the exclusionary provision itself, the defence to the exclusionary provision relates to the requirement for a 'serious' permanent impairment. Here the misconduct issue is irrelevant as it only relates to the exclusionary provision itself, not the defence to the exclusionary provision. The question of whether the injured employee suffers from serious and permanent impairment is a question of fact.

The High Court in *Fleming v Hutchinson* (1991) 66 ALJR 211, when considering the term 'serious', relative to a range of possible impairments and losses of functions under the *Victorian Transport Accident* Act 1986, found that it was not possible to give a general principle of statutory interpretation.

The High Court found that the determination of whether a person suffers a serious impairment is a question of fact in the circumstances dependant on the elements of fact, the degree and value judgments by a Court.

Willful and False Representation s.7(7) - Disease

The defence of willful and false representation applies more often than not to questionnaires completed by the employee at the time of their recruitment. If an employee with a history of a psychiatric condition intentionally omits to answer yes to a question in a questionnaire about previous psychiatric conditions, and the employee later claims compensation for a psychiatric condition, it is likely that

continued page 35...

Defences to Commonwealth Injury Claims cont...

the employees claim will fail pursuant to s.7(7).

APPLICATION TO DISEASE NOT INJURY

The exclusionary provision of willful and false representation applies to employment related diseases, not to an injury simpliciter, as the provision falls within s.7, diseases.

The practical affect of this is where an employee suffers a frank injury the exclusionary provision under s.7(7) will not apply unless the injury can also be regarded as a disease.

WILLFUL AND FALSE

It has been held in *Newhman v Australian Telecommunications Corporation* (1990) 22 ALD 783 that an incorrect statement is not willfully false. However the failure to disclose a symptom in response to a specific question may be found to be both willful and false (See *Schofield v Comcare* (1995) 38 ALD 124). The Federal Court in *Comcare v Porter* (1996) held that for a misrepresentation to be caught by s.7(7) the representation must be objectively false and made without any belief that it is untrue.

More than one contributing factor

An injured employee may suffer an injury which was materially contributed by more than one event.

Following from this, an employee may suffer an injury which was materially contributed by an exclusionary provision event and which was also materially contributed to by a non-exclusionary provision event.

An example of this is where an employee suffers from a psychological condition which was materially contributed to by the failure to obtain a promotion and which was materially contributed to by an abusive telephone call from a client.

In these circumstances the employee will satisfy the requirement of injury from the abusive telephone call notwithstanding that the employee's condition was also contributed to by the exclusionary provision of failure to obtain a promotion.

The authority for this proposition can be found in *Trewin*. Heerey J in *Trewin,* citing Drummond J from *Mooi v Comcare* (1995) 37 ALD 559 with approval, states:

> "It is implicit in Drummond J's reasoning that if there were four contributing and employment-related factors, of which three were exclusionary and one was not, and if the requirement of "injury" were satisfied, the claim would succeed".

It should be noted however, that following the recent Full Court of Federal Court decision of *Hart* this proposition in *Trewin* must be qualified.

Following *Hart*, it is likely that in order to establish a compensable injury, the second non-contributing factor will have to arise from a separate and distinct set of facts and not be related in any way to the contributing factor the subject of the exclusionary provision.

Common Law

To enable a claim in common law made under s.45 of the SRC Act for non-economic loss, the injured employee must first be entitled to compensation under s.24. It follows that if the employee's injury/ disease is caught by one of the exclusionary provisions the employee will not have an entitlement to compensation under the SRC Act and therefore will not have an entitlement to compensation at common law.

Conclusion

In certain circumstances the SRC Act provides an absolute defence to a claim by an employee that he or she was injured at work. If an exclusionary provision under ss.4(1), 14(2), 14(3) or 7(7) can be proved, the employee will not succeed with his or her claim even if the employee clearly suffered an injury/disease at work which on the face of it would be compensable. However, the injured employee may succeed where there is a further set of separate events, which has also materially contributed to the employees injury, and which is not the subject of an exclusionary provision. ①

ALRC inquiry into the sentencing of federal offenders cont...

board be established?

The pathway to reform

The ALRC has established an expert Advisory Committee to assist with the Inquiry. The Advisory Committee consists of prosecutors, criminal defence lawyers, judicial officers, academics and government officers. In February 2005, the ALRC released an Issues Paper entitled *Sentencing of Federal Offenders* (IP 29), which identifies the issues to be examined during the course of the Inquiry.

Following the release of IP 29, the ALRC called for submissions from interested individuals and organisations by April 2005. The ALRC has recently conducted nationwide consultations with stakeholders including those in the Northern Territory.

The next stage of the inquiry involves the release of a Discussion Paper in October 2005, which will contain draft proposals for reform. The ALRC's final report is due in January 2006.

The Issues Paper is available online at www.alrc.gov.au. ①