

Employer found liable for psychological injury

- Employers may be held liable for psychological injuries sustained by employees as a result of harassment even where injuries manifest themselves some years after the events giving rise to the injury.
- In the context of Comcare claims, even where an employee is particularly sensitive or vulnerable to a type of injury, if the employee's workplace materially contributes to their injury it will be compensable.

In a recent [decision](#) of the Administrative Appeals Tribunal (Tribunal), an employee who was predisposed to psychological injury was able to be compensated for fibromyalgia—a chronic syndrome manifesting in generalised pain and fatigue—which was materially contributed to by the workplace harassment she suffered.

Background

Angela Brice was employed by the Australian Electoral Commission (AEC) from 1992 to 1996. During that period, Ms Brice, along with several other female employees, made a complaint of harassment against her supervisor, the Assistant Commissioner.

Ms Brice's complaint involved her perceptions of the Assistant Commissioner's conduct towards her. She said aspects of his behaviour and his intimidating manner, his remarks about her appearance and his standing uncomfortably close to her made her feel intimidated, anxious and upset. Ms Brice's claim did not involve any allegations of physical contact.

Following the events giving rise to her complaint, in 1994 Ms Brice made a compensation claim against Comcare and went on stress leave. Despite efforts by the insurer to manage her return to work, in 1996 Ms Brice resigned. She has not worked since leaving the AEC.

During the period between 1996 and 2004, Ms Brice developed fibromyalgia, a condition which develops from psychological stress that causes chronic and often generalised body pain and fatigue. In 2004 she made an application to Comcare for compensation for her condition, claiming that the illness was work-related and a result of the incident of harassment in 1994. Comcare rejected her application and Ms Brice appealed that decision to the Tribunal.

The Tribunal's decision

The Tribunal set aside Comcare's decision and held that the harassment had materially contributed to her fibromyalgia.

In coming to its conclusion, the Tribunal noted that Ms Brice was particularly vulnerable to the stress caused by the harassment. It considered evidence that Ms Brice had been sexually abused as a child and that she had repressed memories of the abuse which resurfaced as a result of the workplace harassment. Also, not long before starting work with the Commission, Ms Brice sustained serious physical injuries in a car accident which resulted in a degree of permanent impairment.

Despite a range of factors such as:

- the fact that a 'more robust' person may not have been bothered by the Assistant Commissioner's behaviour
- there was evidence that Ms Brice had a pre-existing psychological disorder or at least a pre-disposition to her particular injury before commencing her employment with the AEC

- the fibromyalgia was attributable to traumatic childhood events—but the stress of the harassment caused Ms Brice to recall repressed memories of those events
- her chronic pain already existed to some degree as a result of the injuries she sustained in the car accident, and
- Ms Brice had used illegal drugs since developing fibromyalgia which may have had a negative impact on her condition

the Tribunal found that the workplace harassment was a contributing factor to her impairment. It was also no obstacle that Ms Brice brought her claim some eight years since the end of her employment and 10 years since the harassment occurred.

Implications for employers

Employers need to be aware that liability for workplace injuries may arise, even in circumstances where an employee has a pre-existing disposition for the type of injury which occurs due to their personal circumstances. In some cases, this may involve claims being pursued some years after the events which are said to have caused the workplace injury. This may have particular relevance in the context of the acquisition or sale of business where it is important to identify contingent liabilities.

In the context of sexual harassment, it is useful to keep in mind that the definition of sexual harassment under Commonwealth legislation (and also in a number of the states) is an objective and a subjective test—it also takes into account the subjective circumstances of the ‘victim’. The harassing conduct will amount to harassment if it occurs in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

Employers should ensure that:

- where appropriate for the duties of a role, they obtain a pre-employment medical examination in order to assess an applicant’s capacity to perform the role
- they implement comprehensive workplace policies which require a standard of workplace conduct consistent with equal opportunity legislation and the organisation’s values
- all employees, including senior managers, are aware of the workplace policy and are provided with appropriate training regarding their obligations under the policy and equal opportunity legislation
- they are alert to the possibility of an employee having a pre-existing psychological disorder or a pre-disposition to particular workplace injuries, and
- they monitor workplace behaviour and complaints and take immediate action to deal with complaints in a timely way to minimise the risks of long-term psychological injury to employees.

This article was written by Chris Barton, Partner, and Danielle King, Solicitor, of the Sydney Employee Relations group.