RECENT DECISIONS

Playing the long game: section 11A success

AS v The State of New South Wales [2019] NSWWCCPD 18 (8 May 2019)

Link to decision

Summary

It is well known that the burden of establishing a section 11A defence to a claim for psychological injury rests with the employer.

It is also well known that section 11A defences are very difficult to make out from an evidentiary perspective, and are rarely upheld by Arbitrators.

In the recent decision of *AS v The State of New South Wales* [2019] NSWCCPD 18 (8 May 2019) (AS) Deputy President Elizabeth Wood upheld Arbitrator Perry's decision at first instance; finding in favour of the employer on its section 11A defence.

Background

Section 11A of the *Workers Compensation Act 1987* provides a complete defence to a claim for psychological injury in circumstances where the worker's injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by the employer with respect to one or more categories including transfer, performance appraisal, discipline and dismissal.

The employer bears the burden of proof in establishing each element of the defence and discharging that burden requires a combination of medical and factual evidence.

Medical evidence is required to establish injury, and particularly since the decision in *Hamad v Q Catering Limited* [2017] NSWCCPD 6, the whole or predominant cause.

Factual evidence is then required to demonstrate that the action taken by the employer falls within one of the categories covered by section 11A (such as discipline) and, that the action taken or proposed to be taken was reasonable.

Gathering the necessary factual and medical evidence takes time and there is often a tension between that process and the timeframes for making a liability decision. Insurers are also often under pressure from employers to apply an early section 11A defence in circumstances where it might be indicated but has not yet been fully explored.

The decision in *AS* is a rare example of a successful section 11A defence; undoubtedly the result of the insurer initially accepting the claim, and taking the time necessary to properly build its case.

Decision

The appellant (AS) was a senior Police officer who, at 1.10am on 10 February 2015 was notified that the Professional Standards Command were investigating allegations of misconduct made against him. Specifically, he was accused of behaving inappropriately towards a female colleague, harassing her in an attempt to discourage her from reporting the behaviour and of generally making inappropriate and offensive comments in the workplace.

AS ceased work on 16 February 2015 and consulted his GP who diagnosed an adjustment disorder and certified that he had no capacity for work. On 25 May 2015 he lodged a NSW Police Incident Notification alleging bullying, harassment, victimisation and being accused of something he did not do. The date of injury was recorded as 10 February 2015 at 1.10am.

Liability for the claim was initially accepted and over the two years that followed, the insurer obtained detailed statements from a number of witnesses. Some witnesses were spoken to on up to four occasions.

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Also during that time, the insurer (and later its legal representative) obtained a series of reports from the qualified medico-legal psychiatrist; asking him to consider the factual and treating medical evidence as it came to hand.

In deciding the matter at first instance, Arbitrator Perry appropriately weighed the evidence provided by the employer's witnesses on the one hand, and AS on the other.

He also carefully considered the parties' respective medico-legal evidence and rejected AS's evidence owing to the inaccurate history relied upon by the doctor.

That process led Arbitrator Perry to uphold the insurer's section 11A defence and his reasons and conclusions were endorsed by Deputy President Wood in rejecting AS's appeal.

Implications

This decision does not create any new law and from that perspective is not particularly significant.

It is very important however, in reinforcing the value in playing a long game. That is, in taking the time to build a strong case, both medically and factually - even if it means paying benefits for an extended period in the meantime.

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