'SEXY TIME' – NOT ON THE EMPLOYER'S CLOCK. COMCARE v PVYW [2013] HCA 41

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In [2012] TLQ 283 we published an article on one of the more interesting hazards of business travel, 'Is Sex on a Business Trip 'In the Course of Employment'?' This article provides the sequel.

In the Federal Court of Australia's decision in *PVYW v Comcare (No 2)* [2012] FCA 395 it was determined that a worker of an Australian Commonwealth Government Agency who was injured while having sex on a business trip sustained her injuries in the course of her employment. The matter was appealed to the High Court of Australia (High Court) by Comcare and the decision has now been handed down.

To recap on the facts, the worker was in her late thirties and employed in the human relations section of a Commonwealth Government Agency. She was required by her employer to travel with a fellow employee to a country town in New South Wales, a state of Australia. Her co-worker was to conduct budget reviews and provide training. She was to observe the budgeting process and meet local staff. She stayed in a motel booked by her employer and her co-worker stayed at a different motel.

The claimant was injured while having sex on a business trip

The worker had a male friend who had moved to the country town a few weeks before the relevant events occurred. The worker spoke with her friend on the telephone several times and when she learned she would be visiting the country town, she made arrangements to meet up with him at her motel. On 26 November 2007, the worker and her friend met, they went to a restaurant for a meal, and around 10pm or 11pm they returned to her motel room where they had sex. The worker sustained injuries to her nose and mouth while having sex on the bed in the motel room with her friend when the glass fitting above the bed was pulled from its mount.

The worker made an application for workers' compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (Act). Section 68 of the Act establishes Comcare, a body corporate responsible for workplace safety, rehabilitation and compensation in the jurisdiction of Australian Commonwealth Government. Section 14 of the Act states:

"(1) Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.
(2) Compensation is not payable in respect of an injury that is intentionally self-inflicted.
(3) Compensation is not payable in respect of an injury that is caused by the serious and willful misconduct of the employee but is not intentionally self-inflicted, unless the injury results in death, or serious and permanent impairment."

Section 4 of the Act states 'injury' has the meaning given by section 5A of the Act. Section 5A defines injury to include, relevantly, 'an injury … suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment'.

Section 6 of the Act specifies various circumstances in which an injury to an employee may be treated as having arisen out of, or in the course of, his or her employment. Importantly, it does so without limiting the circumstances in which an employee's injury might otherwise be taken to have arisen out of, or in the course of, his or her employment.

Section 6(1)(c) relevantly provides an employee's injury may be treated as having arisen out of, or in the course of, his or her employment, if it was sustained while the employee was temporarily absent from the employee's place of work undertaking an activity associated with the employee's employment or at the direction or request of the Commonwealth.

The worker did not sustain her injuries in the course of her employment

The question of whether the worker was injured in the course of her employment initially went before the Administrative Appeals Tribunal (Tribunal). It decided in the negative. The worker appealed against the Tribunal's decision to the Federal Court of Australia (Federal Court). As noted, the Federal Court found in favour of the worker and decided she was injured in the course of her employment and Comcare appealed that decision to the High Court of Australia.

Before the High Court, in a joint decision of French CJ, Hayne, Crennan and Kiefel JJ, it was decided in the circumstances of this matter, the worker did not sustain her injuries in the course of her employment.

In each step of the appeal process, the Tribunal and the Federal Court and High Court have been referred to the decision in *Hatzimanolis v ANI Corporation Limited* [1992] HCA21; (1992) 173 CLR 473. Before the High Court, the worker argued the employer had directed her to be at a location away from her permanent place of work and away from her residence and while at that location she is therefore seen as carrying out an overall period of work. Her presence in particular at the motel creates an interval in that period while she is at that place. An injury occurring in that interval therefore occurs in the course of employment.

The joint Justices commented that if this is what *Hatzimanolis* conveys, it means that absent gross misconduct on the part of the employee, an employer who requires an employee to be present at a particular place away from their usual place of work will be liable for an injury which the employee suffers while present there. It means the employer has become the insurer for the employee during the time the employee is that the place. That would be so even though the injury was suffered in the course of an activity which is clearly unrelated to the employment. The joint Justices went on to state the joint reasons set out in *Hatzimanolis* make it plain that this was not intended and that there is a limitation of an employer's liability which is inherent in the expression 'in the course of' the employee's employment.

The High Court then reviewed the reasoning and principle in *Hatzimanolis*. In that case, an employee who resided in New South Wales obtained a job with his employer at Mt Newman in Western Australia. He was told by his supervisor before leaving for Mt Newman that he would be working for three months in the area. He would work some Sundays. While at Mt Newman, he was accommodated in a camp. On the third Sunday, some employees, including the worker, were not required to work and the employer organised a trip to Wittenoom Gorge for anyone who wished to go and provided vehicles. The

employee was injured when the vehicle he was travelling in overturned. It was concluded in joint reasons that the employee sustained injury during an interval occurring within an overall period or episode of work and while engaged, with his employer's encouragement, in an activity which his employer had organised.

In reformulating the principle in matters such as these, in *Hatzimanolis* it was identified that a striking feature of these cases was that where an injury occurred in an interval between periods of actual work, 'the employer has authorised, encouraged or permitted the employee to spend his or her time during that interval at a particular place or in a particular way'.

In the subject matter before the High Court, the joint Justices further stated the principle in *Hatzimanolis* was that it should be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in particular way and the employee does so. Further factual conditions necessary for the application of the principle were stated – an injury sustained in such an interval will be in the course of employment if it occurred at that place or while the employee was engaged in that activity. It will be considered so unless the employee has been guilty of gross misconduct. The circumstances of the injury must correspond with what the employer induced or encouraged the employee to do. For an injury to be in the course of employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurred.

The High Court said the starting point in applying the principles in *Hatzimanolis* is the factual finding that an employee suffered an injury but not whilst engaged in actual work. The next enquiry is what the employee was doing when injured. For the principle in *Hatzimanolis* to apply, the employee must have either engaged in an activity or was present at a place when the injury occurred. The essential enquiry is then: how was the injury brought about? In some cases the injury will have occurred at or by reference to the place. More commonly, it will have occurred while the employee was in engaged in an activity. When an activity was engaged in at the time of injury, the question is: did the employer induce or encourage the employee to engage in that activity? When injury occurs at or by reference to a place, the question is: did the employer induce or encourage the employee to be there? If the answer to the relevant question is affirmative, then the injury will have occurred in the course of employment. It follows that where an activity was engaged in at the time of injury, the relevant question is whether the employer induced or encouraged the employee to engage in that activity.

Did the employer induce or encourage the employee to engage in that activity?

In applying *Hatzimanolis* to the worker's injuries, sustained in the circumstances she did, it was determined the injuries were not sustained during the course of employment, the appeal was allowed and the order of the Federal Court set aside.

Bell J provided separate reasons for decisions and found the Federal Court was correct to conclude the worker's injuries were sustained in the course of her employment and therefore dismissed the appeal.

Gageler J also provided separate reasons and also dismissed the appeal. Gageler J found that the two days the worker was required to visit the country town where an overall period of work and the overnight stay between working hours was an interval within the period of work and the worker was at a place at which the employer had

encouraged her to be. In the absence of her engaging in any misconduct, Gageler J stated those facts were sufficient to conclude her injury was sustained during that interval and at a place and therefore during the course of her employment. He stated the particular activity in the worker was engaged at the time she was injured does not enter into the analysis.

The issue in this matter, whether engaging in sexual activity can be considered as engaged in during course of someone's employment has obviously been a contentious issue for a number of judges of Australia's courts. The High Court's decision in *Comcare v PVYW* [2013] HCA 41 has hopefully brought a settled view on the matter.

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