IS SEX ON A BUSINESS TRIP 'IN THE COURSE OF EMPLOYMENT'?

Danielle Natoli and Laoise O'Connor

Travel throws up a range of interesting legal scenarios. This article examines one of the more novel aspects.

In *PVYW v Comcare* (No 2) [2012] FCA 395 the Federal Court of Australia (the 'Court') was asked to consider whether a worker of an Australian Commonwealth Government Agency injured while having sex on a business trip sustained her injuries in the course of her employment.

The worker was in her late thirties and employed in the human relations section of the 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 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 was injured while having sex on the bed in the motel room with her friend.

She stayed in a motel booked by her employer

The worker made an application for workers' compensation under the Safety, Rehabilitation and Compensation Act 1988 (Cth). Section 68 of the Act establishes Comcare, a body corporate responsible for workplace safety, rehabilitation and compensation in the jurisdiction of the 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 question of whether the worker was injured in the course of her employment went before the Administrative Appeals Tribunal. It decided in the negative. The worker appealed against the Tribunal's decision to the Court.

The agreed facts were that the room was dark at the time, a glass light fitting located above the bed was pulled from its mount and the worker injured her nose and mouth and was later taken to hospital. The agreed facts did not specify whether it was the worker or her companion who pulled the light fitting from the wall. The agreed facts recorded the worker had not advised her employer how she intended to spend her time while she was at the motel or who she intended to associate with while staying there. There was no dispute she had suffered both a physical injury and a psychological injury for the purposes of the Act.

The worker appealed against the Tribunal's decision to the Court

The Tribunal concluded having sex was not an activity 'associated with [the worker's] employment' and secondly, the activity had not been engaged in 'at the direction or request of her employer'.

The Tribunal referred to the Australian High Court's decision in *Hatzimanolis v ANI Corporation Limited* [1992] HCA 21; (1992) 173 CLR 473. *Hatzimanolis* was concerned with a New South Wales legislative provision rather than section 5A of the Act but the Tribunal considered the language used in the New South Wales provision to be "sufficiently analogous for the same principles to apply" to the interpretation of section 5A. Referring to the "organising principle" developed in the joint judgment of Mason CJ, Deane, Dawson and McHugh JJ in *Hatzimanolis*, the Tribunal observed that the test for determining whether an injury was sustained 'in the course of employment' follows a two-step process. The first step involves characterising the period or periods of work, and the second step involves a consideration of how the period or periods between actual performance of work were spent.

In relation to the first step, the Tribunal found the worker's injury occurred during an "interval or interlude" consisting of "the evening of the two days the applicant was away for work". It observed that although the applicant was not expected to work during the evening of 26 November 2007, it was to be regarded as an interval or interlude between periods of work.

In relation to the second step, the Tribunal observed that not all injuries suffered during an 'interval or interlude' are compensable. The Tribunal again referred to the 'organising principle' which states that in determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment "and not merely to the circumstances of the particular occasion out of which the injury has arisen".

The Tribunal went on to consider whether the activity in which the worker was engaged was "sufficiently connected with her employment" to constitute an activity undertaken in the course of her employment. The Tribunal found it was insufficient for the employee simply to be at a particular location during an interval or interlude

in an overall period or episode of work for liability for the injury to arise and stated the activities engaged in during the interval which lead to the employee's injury must be expressly or impliedly induced or encouraged by the employer. In this matter, the Tribunal found the employer had not expressly or impliedly induced or encouraged the applicant's sexual conduct that evening. It also found the employer did not know or could not reasonably have expected that such an activity was contemplated by the worker. Her sexual activity was not an ordinary incident of an overnight stay like showering, sleeping, eating or returning to the place of residence. She was involved in a recreational activity which her employer had not induced, encouraged or countenanced. Her injuries were said to be unrelated to her employment and took place during her leisure time and were of a private nature.

The worker appealed the Tribunal's decision to the Court on two grounds. The worker firstly objected to the Tribunal's finding that the sexual activity was not countenanced by her employer and secondly, objected to the Tribunal's findings that sexual activity was not an ordinary incident of an overnight stay in a motel room on a business trip.

The employer had not expressly or impliedly induced or encouraged the applicant's sexual conduct

On the first ground of appeal, the Court agreed and stated the word 'countenance' means to 'support or approve' but may also mean to 'tolerate or permit'. It said there was no evidence to make a positive finding the sexual activity was not countenanced by the employer. It was accepted between the parties the employer did not encourage the worker to engage in sexual activity while in the motel room but the Court said this did not mean it disapproved of her doing so. The agreed facts said only the worker did not advise her employer how she intended to spend her time while at the motel or with who, if anyone, she would be associating with while there. There was nothing before the Tribunal to indicate whether the employer approved or disapproved of employees engaging in sexual activity during an overnight stay arranged by the employer.

On the second ground of appeal, the Court found that if the Tribunal's finding was understood as meaning that an employer would have no reason to expect an employee might engage in lawful sexual activity during the course of a business trip on the basis that it rarely occurred or was seen as "out of the ordinary", it doubted whether the Tribunal could make such a finding. The Court stated that absent serious and willful misconduct or an intentionally self-inflicted injury, an employee who is at a particular place at which he or she is induced or encouraged to be by his or her employer during an interval or interlude in an overall period or episode of work will ordinarily be in the course of employment.

The Court stated the underlying question the Tribunal was required to determine was whether there was sufficient connection or nexus between the injuries suffered by the worker and her employment. The Court was satisfied there was a sufficient connection by virtue of the fact the worker's injuries were sustained while she was in the motel room in which her employer had encouraged her to stay. Therefore, the Court found the Tribunal was incorrect in finding it was necessary for the worker to show the particular activity which led to her injury was one that had been expressly or impliedly induced or encouraged by her employer and stated the fact the worker was engaged in sexual activity rather than some other lawful recreational activity, such as playing cards, does not lead to a different result.

The Court concluded the injuries sustained by the worker while having sex in her motel room during a business trip fell within the course of her employment. An order was granted to set

aside the Tribunal's decision and a declaration was made confirming the worker's injuries sustained on 27 November 2007 were suffered in the course of her employment. The employer was ordered to pay the worker's costs of the appeal and her costs of the proceedings before the Tribunal.

The decision indicates the Australian courts are willing to adopt a very expansive view

The decision indicates the Australian courts are willing to adopt a very expansive view of 'in the course of employment' and it is likely to include any conduct that is not unlawful or serious and willful misconduct or conduct amounting to the intentional self-infliction of injury unless there is evidence of a policy by the employer indicating the activity is disapproved of. The decision is a reminder for employers to review and perhaps expand on misconduct policies applying to their workforce.

Danielle Natoli is a Senior Associate with McInnes Wilson Lawyers, Queensland. She can be contacted at dnatoli@mcw.com.au

Laoise O'Connor is a Paralegal with McInnes Wilson Lawyers, Queensland. She can be contacted at loconnor@mcw.com.au