

GIRLS NIGHT OUT NOT "IN THE COURSE OF EMPLOYMENT"

DRING v TELSTRA CORPORATION LIMITED [2020] FCA 699

The Appellant, Ms Dring was employed by Telstra. During the week of 13 April 2016, she was in Melbourne attending a series of workshops as part of her employment. On one evening during the week, Ms Dring met a colleague and spent the night socialising –

- sharing “a bottle (or a good part of a bottle) of champagne”;
- sharing “a bottle of white wine” with dinner at a restaurant; and
- going to a cocktail bar,

before arriving back at Ms Dring’s hotel “at approximately 2:30am” the following morning.

When the pair arrived back at the hotel, “Ms Dring found herself in urgent need of a bathroom.” Unable to wait until she got back to her hotel room, Ms Dring “visited the public restrooms”. While she was in the bathroom, the “tiled floor area outside of them was mopped”. When Ms Dring emerged from the bathroom, she slipped and “suffered a contusion to her left hip”.

Was Ms Dring’s injury in the course of employment?

Justice Snaden (Federal Court of Australia) affirmed the decision of the Administrative Appeals Tribunal, in that the injury was not in the course of Ms Dring’s employment.

The question was whether, given that:

- Ms Dring was in Melbourne for work, having attended a workshop as part of her employment duties, and was due to attend another work-related workshop the following day; and
- the injury occurred at the hotel paid for by her employer,

did her injury have a sufficient connection to her employment to be “in the course of her employment” and compensable under the ComCare scheme.

His Honour noted that an injury outside of work hours can be in the course of employment if it occurs within an overall episode of work. He said:

“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 a particular way”.

Given that Ms Dring was in Melbourne for work, attended work that day and was due to attend work the following day, Snaden J concluded:

“There is no doubt that the injury that Ms Dring sustained can ... be thought to have arisen in the course of her employment more readily than would be the case had it arisen during an interval separating two typical work days”.

He said this does not mean she suffered a compensable injury. The test is “somewhat more complex” than merely (a) whether the injury occurred “during an interval or interlude in an overall period or episode of work” and (b) “at a place at which the employer induced or encouraged the employee to be”.

He said if the injury is connected to the employment by a place, the cause of the injury must be connected to the place. Similarly if the injury was connected to the employment by an activity. He said:

*“The essential inquiry is then: how was the injury brought about? In some cases, the injury will have occurred at and by reference to the place. More commonly, it will have occurred while the employee was engaged in an activity. It is only if and when one of those circumstances is present that the question arising from the **Hatzimanolis** principle becomes relevant. 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 and 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”: **Comcare v PVYW** [2013] HCA 41; 250 CLR 246 [38] (the ‘sex in a motel’ case) (emphasis added).*

He said it is also essential to consider:

“the association which must necessarily exist ... between the circumstances in which the employee was injured and the employment”. “[I]t will always be necessary to have regard to the ‘general nature, terms and circumstances of the employment’ in determining the overall question [and a]ttention is not to be focused just upon the occasion giving rise to the injury.” (emphasis added).

In relation to Ms Dring's circumstances, His Honour held –

- Ms Dring's injuries were a result of the activities in which she had been engaged and that those injuries did not occur merely by reference to a place;
- notwithstanding that an injury was associated with a particular place, circumstances might nonetheless not be sufficient to bring that injury within the course of the employment. The employee's own conduct might indicate a lack of connection with employment;
- as the Tribunal found:

"common sense would dictate an employee required to be at work the following day would be expected at this hour of the night [2.30am] to be securely in her hotel room, which had a serviceable bathroom which she could have utilised, placing her at no risk of falling on a recently cleaned floor". Again, no disapproving undertones should be read into that. The import of that observation is simply this: by reason of the fact that her injury occurred at the time that it did, after the extensive socialising that preceded it and in the context of the work to which she was to attend later that morning, the circumstances that gave rise to Ms Dring's injury lacked a connection with her employment sufficient to constitute it as one that arose out of, or in the course of, her employment" (emphasis added): [59];

- the line is not easily drawn:

"If Ms Dring had slipped over after returning to her hotel room at 10:30pm instead of 2:30am, for example, it might well be that a different outcome would have been warranted. Had she returned at 7:30am, the conclusion might have been clearer": [60].

Implications of the decision

This case affirms the long-standing position in workers' compensation, that if there is a supervening reason for the employee's injury, unconnected with the "*place*" or "*activity*" the employer encouraged or induced, the injury may not have been acquired in the course of employment. The factors to consider when determining whether an injury acquired when the employee is "*off the clock*" is compensable under workers' compensation, include:

1. Did the injury occur during an interlude that formed part of an overall episode of work?
2. If the injury is by reference to the "*place*", was the injury caused due to some defect in the place such as a defectively fastened fixture?

3. If the injury was by reference to an "*activity*", was the activity within the scope of the activity that the employer encouraged or induced?
4. Did the injury occur by the employee's own conduct so as to "*sever any connection*" between the injury and employment?
5. Was there a connection between the "*general nature, terms and circumstances of the employment*" and the injury?

If these questions are answered in the negative (except for (4)), insurers and employers may consider denying liability for a claim on the basis that there is no liability for the injury. If some of these questions are answered negatively, a thorough factual investigation should be undertaken before liability is admitted to determine, crucially, whether there is a connection between the general nature, terms and circumstance of the employment and the injury.










DISCLAIMER

This CASE LAW UPDATE is intended for general information only and you should not act upon it or omit to act on the basis of anything contained herein without first obtaining legal advice in relation to any particular matter or issue.

© Copyright 2019, SRB LEGAL - All Rights Reserved

Date: 5 June 2020

Should you require any further information relating to the above decision, please contact one of the following partners on telephone (08) 9221 3110.

 Graeme Richards	Partner	 Justin Dyson	Partner
 David Burton	Partner	 Josephine Courtney	Partner
 Alex Freeman	Partner	 Kathy Melville	Partner
 Tony Basile	Partner	 Kim Hodge	Partner
 Byron Winburn-Clarke	Partner		