**COMCARE v PVYW (S98/2013)**

Court appealed from: Full Court of the Federal Court of Australia [2012] FCAFC 181

Date of judgment: 13 December 2012

Special leave granted: 10 May 2013

In November 2007 the Respondent was injured while having sex, outside normal work hours, on a work trip in rural NSW. She was employed by a Commonwealth Department and she subsequently made a claim for compensation under s 14 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the SRC Act"). Comcare will normally be liable to pay compensation to an employee for an injury arising out of, or in the course of their employment, except when that injury is caused by the serious and wilful misconduct of that employee. Comcare initially accepted, then later revoked its acceptance of the Respondent's claim. The Respondent then sought a review of that decision by the Administrative Appeals Tribunal ("AAT"). On 26 November 2010 the AAT affirmed Comcare's decision, finding that the Respondent's injury was not one suffered in the course of her employment. The Respondent then appealed to the Federal Court pursuant to s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth). On 19 April 2012 Justice Nicholas upheld that appeal, declaring that the Respondent's injuries were suffered in the course of her employment.

On 13 December 2012 the Full Federal Court (Keane CJ, Buchanan & Bromberg JJ) unanimously dismissed the Appellant's appeal. Their Honours found that the Respondent's injury arose out of, or was in the course of her employment, for the purposes of s 14 of the SRC Act. They held that this Court's decision in *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473 ("*Hatzimanolis")* is authority for the proposition 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 had induced or encouraged the employee to spend that interval or interlude at a particular place *or* in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity, unless the employee was guilty of gross misconduct taking him or her outside the course of employment.

The matter before this Court raises the question as to whether the Full Federal Court erred in finding that it was sufficient that the Respondent was injured at accommodation in which her employer induced or encouraged her to stay and that it was unnecessary for her to demonstrate that the employer encouraged or endorsed her actions. This approach is said to be inconsistent with the decision in *Hatzimanolis,* which the Appellant contends has been subject to different interpretations in lower courts.

The grounds of appeal include:

- The Court erred in concluding that the High Court's decision in *Hatzimanolis* should be interpreted and applied so that any injury which

occurs (i) during an interval or interlude within an overall period or episode of work; and (ii) at a place the employer has induced or encouraged the employee to spend that interval or interlude, will be invariably be within the “course of employment” unless the employer shows that the employee’s conduct is such to take it outside the course of employment by virtue of s 14(2) or (3) of the SRC Act.