Russell Kennedy Lawyers

Christmas parties, pubs, and compensability: A recent ruling on employment nexus in Mason v R&R McClure Excavations Pty Ltd

Share

20 Apr 2023

Published by: Darren Seidl & Audrey Capasso

For those who practice in the no-fault WorkCover jurisdiction, case law pertaining to the question of employment nexus might fairly be characterised as a rather discrete and dedicated line of authority.

Various common law tests have been established to determine whether a claimed injury arose out of or in the course of employment and falls within the ambit of the *Workplace Injury Rehabilitation Compensation Act 2013* (Vic) (WIRC Act) and its predecessor. Injuries sustained during the exercise of actual work, injuries sustained during employment intervals and interludes, and injuries sustained during periods where no actual work is being performed attract differing considerations.

Although it is apposite to stress that every case turns on its own unique facts, each decision on the question of employment nexus carries a significance in its potential to act as a point of distinction or analogy to future factual scenarios.

In this case note, we outline the factual scenario and recent ruling on employment nexus in *Mason v R&R McClure Excavations Pty Ltd*. The ruling serves as a useful reminder of the importance of bearing in mind the terms of the Act and the limit it seeks to place upon an employer's liability for compensation.

Factual background

The plaintiff was employed as a casual Plant Operator. The defendant employer's depot was located in Castlemaine, Victoria (premises). The plaintiff claimed weekly payments of compensation and medical and like expenses for injuries described as "*brain injury; vertigo; hearing; visions; nerve damage; balance [and a] psychological injury"* sustained as a result of being "*violently assaulted at a work function".*

The claims agent rejected the plaintiff's claim for compensation on the basis the worker did not sustain an injury arising out of or in the course of his employment. It relied on evidence suggesting an end-of-year Christmas function had been held on the employer's premises, and, *inter alia*:

a. the on-site function had decidedly concluded by about 5:30pm;
b. the incident causing injury had in fact occurred outside of a pub located on Barker Street, Castlemaine, being a distance of around 5km from the employer's premises; and
c. the employer had not instructed any of its employees to attend Barker Street, Castlemaine after the on-site function.

The plaintiff filed proceedings in the Magistrates' Court of Victoria disputing the claims agent's rejection of his claim for compensation. Russell Kennedy was appointed by the Victorian WorkCover Authority to defend the proceedings on behalf of the employer.

Proceedings

The preliminary issue of employment nexus was agitated before her Honour Magistrate Hoare over the course of two days in March 2023.

The plaintiff submitted any incident that occurred on Barker Street, Castlemaine was compensable on a proper application of the relevant test expounded in *Hatzimanolis v ANI Corporation Ltd.*[1]

Specifically, the plaintiff led evidence of the following salient factual matters:

a. The employer had arranged a Christmas party at its premises which involved a barbecue and free alcohol on site. A number of employees in attendance at the on-site Christmas function attended a pub on Barker Street, Castlemaine (first pub) for drinks after the on-site function had concluded. A number of those attendees then left to have further drinks at a neighbouring pub (second pub). The plaintiff attended both the first and second pubs.
b. A few days prior to the on-site Christmas function, the plaintiff was engaged in a conversation with a co-Director (co-Director) of the employer and two of the plaintiff's non-managerial co-workers. In that conversation, they had suggested the plaintiff attend Barker Street, Castlemaine after the employer's on-site function.
c. The co-Director attended Barker Street, Castlemaine. On the plaintiff's evidence, the co-Director purchased alcoholic beverages for employees whilst there.
d. Whilst inside the second pub, the plaintiff introduced a non-employee friend to one of his co-workers. That non-employee friend was the brother of another co-worker. A scuffle broke out between the non-employee friend and the first co-worker.
e. The first co-worker walked out of the second pub and along Barker Street to calm himself down. The plaintiff followed the co-worker, with the intention of "*warning him*" that he would be imminently attacked by other co-workers for having scuffled with the non-employee friend. The first co-worker then hit the plaintiff, unprovoked.

The plaintiff contended the resulting injury occurred due to the employer having induced or encouraged the plaintiff's attendance at the first and second pubs, which formed a continuation of the on-site Christmas function.

In the plaintiff's submission, "*a work break-up that moves to different venues is still a work break-up*". The relevant encouragement or inducement on the employer's behalf was its encouragement of employees to drink and socialise in celebration of the end of the working year. That is the activity in which the plaintiff was engaged at the time of the incident, and by reason of which activity he was injured.

The defendant conceded the incident occurred. The defendant also agreed the *Hatzimanolis* activities/place test was the correct test to apply given the injury was patently sustained whilst no actual work was being performed.

The defendant urged the Court to find the injury did not occur by reason of any activity induced or encouraged by the employer or by reason of any place in which the plaintiff was induced or encouraged to be. The factual

scenario in this matter was fairly distinguished from the facts in cases including *Berryman v Saferoads Pty Ltd*[2] and *Ng v Pharmacor*.[3] In the defendant's submission:

a. There was a complete dearth of corroborating evidence supporting the plaintiff's contention the employer encouraged or induced the plaintiff to attend Barker Street, Castlemaine or to otherwise continue drinking/socialising after 5:30pm.
b. The employer's evidence, and the evidence of many co-workers in attendance on Barker Street, Castlemaine, was that the employer had no specific knowledge of a formal post-function event or gathering on Barker Street and that the co-Director, despite his attendance, neither led the charge for their attendance nor otherwise paid for anybody's drinks or food whilst in attendance.
c. Rather, employees' attendance on Barker Street, Castlemaine was an informal gathering in which they partook at their own free will. The employer did not plan, facilitate, ordain, induce, or otherwise encourage the attendance of its employees at Barker Street or their continuation of drinking/celebrating for end-of-year purposes.
d. Even if her Honour made a factual finding the plaintiff's attendance on Barker Street, Castlemaine was induced or encouraged by the employer, the injury was not sustained by reason of the 'activity' or 'place' the subject of the alleged inducement or encouragement. The specific activity in which the plaintiff was engaged at the time of (and causal of) the incident was, on his own evidence, more particularly one of warning the first co-worker that his fellow attendees were about to retaliate in response to his scuffle with the plaintiff's non-employer friend. On no interpretation of the evidence was this an activity encouraged or induced by the employer.

Decision

By way of a written Ruling delivered on 29 March 2023, her Honour found the plaintiff failed to discharge his onus in establishing the claimed injury was sustained in or arose out of the course of his employment as a Plant Operator. Her Honour determined:

a. The employer hosted a barbeque lunch at its Castlemaine yard, which function commenced at around 12:30 pm. The same had been arranged in previous years. This was to mark the end of the working year. Attendance was not mandatory.
b. Employees were aware the barbeque would be held based on word of mouth and functions held in the years previous. Employees who chose to attend the on-site function were free to depart at any time.
c. It was likely there was indeed a discussion in the co-Director's office a few days prior to the on-site Christmas function, in which discussion the plaintiff was persuaded by others (mostly likely by his non-managerial co-worker friend) to attend the function. It is likely that discussion extended to the topic of some employees attending local pubs after the barbeque, given that was something that had occurred in previous years (an admitted fact). However, the co-Director's mere involvement in that discussion did not amount to an invitation from him to the plaintiff to attend Barker Street.
d. The co-Director only went along to the Barker Street pubs because he was invited or included in the informal plans made by employees, with whom he himself was friends. He did not "*take the lead*" in inviting or encouraging others to do so.
e. Unlike the on-site barbeque at which food and beverages were supplied by the employer, the employer made no bookings for tables nor made any arrangements with either pub for staff to attend. There were no funds provided by the employer for food or beverages and no money 'put on the bar' at either pub.
f. There was no evidence of arrangements made by the employer for staff to travel or be conveyed to the first and/or second pubs on Barker Street. Some staff arranged for their partners to pick them up from the yard. Some staff drove and some walked.

from the yard. Some staff drove and some walked.

g. There was no evidence of anything more than "*rather nebulous socialising of people in local pubs*". Some were employees and some were not.

Based on the above, her Honour ruled that employees were expressly or impliedly encouraged and induced to attend the on-site Christmas function, by reason of (a) the work day ending at 12:30pm followed by

provision of free lunch and alcohol; (b) employees not being required to resume work in the afternoon; and (c) cash bonuses being handed out during the function.

The argument that "*a work break-up that moves venues is still a work break-up*" has a "*compelling simplicity*". However, the submission for the plaintiff that the activity of socialising and drinking (surrounding the assault) was the salient feature, rather than the place in which it occurred, in her Honour's view did not grapple with the requisite feature of the *Hatzimanolis* principle.

Rather, her Honour determined the plaintiff was required to establish, on the balance of probabilities, the employer's encouragement or inducement extended to a continuation of the activity into the evening. There was no evidence that the co-Director was present at either pub in a management or supervisory capacity nor that he had acted with any kind of authority at either pub. Some employees, including the plaintiff, had simply opted to meet up at one or other pub after the on-site barbeque ended. Employees, including the plaintiff, did so in order to enjoy each other's company. They did so in the absence of express or implied encouragement by the employer, and in the absence of any implied inducement to do so such as by way of provision of funds for drinks or meals.

Takeaways

As above, it is critical to bear in mind that each case pertaining to the question of employment nexus is to be decided on its own unique facts, although the *Hatzimanolis* principle is appropriately applied in each case where injury is alleged to have occurred outside of the performance of actual work duties.

Nonetheless, this factual scenario demonstrates the importance of defining, with acute particularity, the activity or place alleged to have been the subject of the employer's express or implied encouragement or inducement. It may be analogised with other factual scenarios where:

a. An individual with managerial authority is claimed to have relevantly induced or encouraged an activity or an attendance at a place, but in fact took no active or "*leading role*" in same (similarly to the co-Director in this case and the employer in *Pioneer Studios Pty Ltd v Hill*, and unlike the employer in cases such as *Berryman v Saferoads, Ng v Pharmacor,* and *Davey v VWA).*
b. An activity encouraged or induced by an employer has concluded or shifted venues, and there is evidence to suggest the continuation or transfer of location has not been the subject of a separate encouragement or inducement.
c. There is evidence to suggest plans to attend a subject place or engage in a subject activity are *ad-hoc,* or are purely social in nature and engaged in by employees in the interest of enjoying one another's company (similarly to the employee plaintiff in *Dring v Telstra Corporation Ltd*).
d. Transport and other host-like provisions (such as food and drinks) are not ordained and supplied by the employer (c.f. *Berryman v Saferoads).*

Endnotes

1. (1992) 173 CLR 473; [1992] HCA 21 ('*Hatzimanolis'),* see also *Comcare v PVYW* [2013] HCA 41 (2013) 250 CLR 246. To satisfy the

place test, the injury must be 'by reference to' or 'associated with' the place where the employer expressly or impliedly induced or encouraged the worker to be. As stated by the plurality in *Comcare v PVYW*, it is not sufficient that the injury merely 'occurred at' the place; the injury must have occurred "*because of something to do with [it]*". To satisfy the activities test, a worker must establish they were expressly or impliedly encouraged or induced by the employer to engage in the performance of the activity that ultimately led to the injury.

2. (13 March 2012).
3. [2020] VMC 21.

The views expressed within this case alert are solely those of Russell Kennedy Lawyers.

How we can help

For more guidance on how to manage personal injury and compensation in your workplace, please contact Darren Seidl, Audrey Capasso or a member of Russell Kennedy's Personal Injury & Compensation team.

Darren Seidl

Principal

P: +61 3 8602 7232
E: dseidl@rk.com.au

Audrey Capasso

Associate

P: +61 3 8640 2305
E: acapasso@rk.com.au

View our recent insights

Construction and Infrastructure Alert | Proposed Update to AS 4000-1997

The AS 4000-1997 General Conditions of Contract, is being updated by its publisher, Standards Australia. The AS 4000 - 1997 is a standard form ‘construct only’ agreement and is widely used ...

View

Further enforcement action - Failure to obtain Director Identification Numbers

A pair of Western Australian directors have been convic fined for the same offence. Alexander Henry and Luke D Mason were convicted on 3 May 2024 for failing to obta in accordance w ...

View