INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Campbell v Australian Leisure & Hospitality Group Pty Ltd & Anor* [2015] ICQ 016
PARTIES:	**JONATHON CAMPBELL** (appellant) **v** **AUSTRALIAN LEISURE & HOSPITALITY GROUP PTY LTD** (first respondent) **SIMON BLACKWOOD (WORKERS' COMPENSATION REGULATOR)** (second respondent)
CASE NO/S:	C/2014/33
PROCEEDING:	Appeal
DELIVERED ON:	29 May 2015
HEARING DATE:	7 November 2014
MEMBER:	Martin J, President
ORDER/S:	**Appeal dismissed**
CATCHWORDS:	WORKERS' COMPENSATION – ENTITLEMENT TO COMPENSATION – EMPLOYMENT RELATED INJURY, DISABILITY OR DISEASE – ARISING IN THE COURSE OF EMPLOYMENT – where the appellant is the husband of the deceased – where the deceased was attending a work Christmas party at the time of the injury causing death – where the deceased ran and dived into the Noosa River – whether the activity the deceased was taking part in was attending the Christmas party or diving into the river – whether the deceased was encouraged or induced to dive into the river by her employer – whether her employment was a significant contributing factor to causing her injury *Workers' Compensation and Rehabilitation Act* 2003, s 32, Ch 3, Pt 11
CASES:	*Comcare v PVYW* (2013) 250 CLR 246 *Croning v The Workers' Compensation Board of Queensland* (1997) 156 QGIG 100 *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473 *Lee v Transpacific Industries Pty Ltd* [2013] FCA 1322 *Newberry v Suncorp Metway Insurance Limited* [2006] 1 Qd R 519

APPEARANCES: G Mullins and M Black for the appellant
R Douglas QC and P Rashleigh for the first respondent
The Regulator did not take part in the appeal

Maurice Blackburn for the appellant
McInnes Wilson Lawyers for the first respondent

[1] On 29 March 2013 Jukes Campbell suffered serious head and neck injuries sustained as a result of diving into the Noosa River while attending a function organised by her work social club. Mrs Campbell died of those injuries two days later. Her husband, the appellant, successfully brought a claim as a dependent pursuant to Chapter 3 Part 11 of the *Workers' Compensation and Rehabilitation Act* 2003, ('the Act')[1]. An appeal by the Australian Leisure and Hospitality Group Pty Ltd ('ALH') against the payment of compensation was successful in the Commission. Mr Campbell appeals from that decision.

[2] The principles applicable in an appeal of this nature are as set out in *Davidson v Blackwood*.[2] An appellant must demonstrate that there is some legal, factual or discretionary error before the court can exercise its appellate powers.

Findings of fact

[3] ALH traded as Dan Murphy's Noosaville. The following findings made by the Deputy President are not controversial:

> "[8] Michael Smith was the manager of the Dan Murphy's Noosaville liquor outlet, a position he had held since March 2012.
>
> [9] The Dan Murphy's store was open all year round with the exception of Christmas Day and Good Friday. It was the practice to hold an annual staff social event ("Christmas Party"), but no such event was held in 2012.
>
> [10] Smith had previously been the manager at the Dan Murphy's at Hervey Bay and had seen the collegiate benefit of having some form of social get together. The evidence suggests that Smith supported the event as it was "likely to improve staff cohesion and staff moral".
>
> [11] Whilst no formalised social club was in existence, a small working group was established which included Sue-Ellen Giacca, the assistant store manager at the Dan Murphy's Noosaville. An honour system was established to sell confectionary and soft drinks to staff with the proceeds of the sales going to fund a Christmas party.
>
> [12] A notice was prepared by Giacca and placed in the staff room setting out various options for a staff event and staff were asked to indicate their preference. One of the options on the notice was a "BBQ at The Woods".

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1 The relevant version of the Act is current as at 14 August 2012.

2 [2014] ICQ 008.

[13] It was decided to hold a "Christmas Party" at The Woods - located at the end of Hastings Street at Noosa and adjoining the Noosa River - on Good Friday, 29 March 2013.

[14] A further notice was placed on the staff notice board seeking an indication from staff as to whether they were attending the event at The Woods and, if so, their preference as to food and drink. Smith maintained an "Excel" spreadsheet of staff preferences for food and drink and to monitor the budget.

[15] It is common ground that Smith and Giacca purchased food, drinks and ice from the $800 raised from the honour system. The ice tubs and decorations were supplied by Dan Murphy's and the set-up at The Woods was primarily undertaken by Smith and Giacca with the assistance of a junior member of staff.

[16] The Christmas party started at around 11am and all but two of the approximately 20 to 30 staff members attended with their families.

[17] The deceased arrived at The Woods sometime after midday. In his evidence, Campbell said that his wife went to everything and "she felt it was her duty" to attend the Christmas party.

[18] At around 3pm the deceased and Nicole Perry asked Smith if he would take photographs of them running into the Noosa river. Smith's evidence was:

> "And I was standing at a table that was closest to the water and I remember Jigs asking me could I take some photos of them running into the water.
> But you were asked to take some photos of Ms Campbell and Ms Perry running into the water?
> Yes. So I took a series of photos of them running in.And more or less as soon as they both dove in the water, Nicky started screaming and I ran straight into the water and pulled Jigs out of the water."

[19] Smith recalls hearing Nicole Perry calling for help. In response, Smith ran into the Noosa River to assist. He was joined by an off-duty lifesaver and members of the Noosa Surf Club. An ambulance was called and the deceased was transported to the Noosa Hospital. The deceased died on 31 March 2013.

[4] The reasoning of the Deputy President is revealed in the following:

"[31] It was submitted by Counsel for the Regulator that the evidence of Smith supports a conclusion that he had induced or encouraged Campbell to engage in the activity that she did, namely, to dive into the Noosa River. It was submitted that by the taking of photographs he had encouraged the deceased to dive into the Noosa River.

[32] The evidence does not, in my view, support a conclusion that Smith induced or encouraged the deceased to dive into the Noosa River. The evidence of Smith was that he was asked to take photos of the deceased and Perry running into the water. It was never suggested

to him by the deceased that she proposed to dive head first into the Noosa River.

[33] The submission of the Regulator also ignores the evidence of Giacca which was as follows:

> "Did she have any discussion with you about going into the water? She certainly did.
> All right. Are you able to recall what she said? She was trying to convince myself and another staff member to run in and dive into the water with her, and I told her it was a stupid idea."

[34] I do not accept the submission that the employer had induced or encourage (sic) the employee either expressly or impliedly to engage in the activity. The evidence of Smith was as follows:

> "Now, an incident happened at around 3 o'clock that afternoon. Can you just explain to the Commission what happened, or what you saw happening? So there was Dukes and another girl, Nicky, who was working at the store at the time
> What was her last name? Nicky Perry. And I was standing at a table that was closest to the water and I remember Jigs asking me could I take some photos of them running into the water. For that reason, I don't really know to be honest, other than maybe just to take the
> Well, if you don't know, don't speculate? Yes.
> But you were asked to take some photos of Ms Campbell and Ms Perry running into the water? Yes. So I took a series of photos of them running in. And more or less as soon as they both dove in the water, Nicky started screaming and I ran straight into the water and pulled Jigs out of the water."

[35] In cross-examination, Smith gave the following evidence:

> "People that had attended the Christmas function, including some of the children of staff members, had gone swimming in the Noosa River? Correct.
> You had observed that to occur? Correct.
> You had taken no step to speak to any of those people to direct them not to swim? No.
> And indeed, prior to Ms Campbell going into the water, she had approached you to tell you that she and Ms Perry intended to run into the water. That's correct? Correct.
> And she in fact asked you to take some photographs? Correct. You agreed with that proposal? Yes.
> And indeed, we can take it from that that you gave no direction or instruction to Ms Campbell or Ms Perry that they weren't to go into the water? No.
> Correct. All right. And you subsequently then took the photographs, which are part of exhibit 1, as Ms

> Campbell and Ms Perry ran into the water. Is that so? Correct."
>
> …
>
> [41] Whether or not a worker has embarked on a "frolic of his own" will always be a question of fact and degree.
>
> [42] I accept the submission of the appellant that it was because of the behaviour of the deceased that she suffered her injury. In that regard she was on a frolic of her own. To use the words of the appellant in submissions to the High Court in PVYW, '… the employee makes a wholly private choice to engage in an activity which falls outside the ambit of the employer's requirement that the employee be away from the usual 'place' of work. Such choices will carry their own benefits, risks and consequences which the employer is not required to be an insurer against.'
>
> [43] It was conceded by the appellant that the deceased was, on the evidence before the Commission, encouraged to attend the Christmas party at The Woods on 29 March 2013. However, it was not conceded that the employer induced or encouraged the deceased to engage in the activity that she did, namely the diving into the Noosa River. For the reasons stated above, I cannot conclude that the evidence before the Commission supports a conclusion that the deceased was induced or encouraged, either implicitly or explicitly to undertake the activity she did." (citations omitted)

[5] In dealing with the submissions the Deputy President said that the question to be considered was: Did the employer induce or encourage the employee to engage in that activity? He went on to say that the activity to be considered was the diving into the Noosa River not, as was submitted by the Regulator, the Christmas Party. He said that it was necessary to consider the activity which was being engaged in by the employee at the time of the injury.

Legislative framework

[6] In Chapter 3, Part 11 of the Act, provision is made for compensation to be paid upon the death of a worker. Compensation is payable if "a worker dies because of an injury"[3]. It was not in contention that the deceased was a "worker" within the meaning of the Act. The dispute was about whether or not the deceased had suffered an "injury" as defined in the Act.

[7] Section 32(1) of the Act defines injury to be a "personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury".

[8] Section 32(3) of the Act provides:

> (3) ***Injury*** includes the following—
>
> …

[3] s 194(1) of the Act.

(d) death from injury arising out of, or in the course of, employment if the employment is a significant contributing factor to causing the injury;

…"

The test to be applied

[9] The concepts contained within the Act relating to whether or not an injury arises out of or in the course of employment and whether or not employment is a significant contributing factor have been considered in a number of cases which deal with those concepts contained in similar but not identical legislation. The manner in which an injury which occurs during an interval which itself occurs within an overall period of work was considered in *Hatzimanolis v ANI Corporation Limited*[4]. That decision was comprehensively examined in *Comcare v PVYW*[5].

[10] For the purposes of this appeal the following principles enunciated in *PVYW* are relevant:

(a) 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 occurs.

(b) Where the circumstances of the injury involve the employee engaging in an activity, the question will be whether the employer induced or encouraged the employee to do so.

(c) Where an activity was engaged in at the time of the injury, the relevant question is not whether the employer induced or encouraged the employee to be at a place.

(d) An employer is not liable for an injury which occurs when an employee undertakes a particular activity, if the employer has not in any way encouraged the employee to undertake that activity, but has merely required the employee to be present at the place where the activity is undertaken.

(e) There is no justification for taking a "wide view" of an employer's liability in circumstances where the employer could be seen to have encouraged the employee to be at a particular place.

Grounds of appeal

[11] The appellant identifies what he says are the following errors in the reasoning of the Deputy President:

(a) Finding that the injury did not arise out of, or in the course of, the deceased's employment with ALH;

(b) Finding that the deceased's employment was not a significant contributing factor to the injury;

(c) Failing to find that the deceased's act of running and/or diving into the river was part of, or incidental to, her attendance at the Christmas Party;

(d) Finding that the first respondent did not induce or encourage the deceased to undertake the activity she was engaged in at the time of her injury; and

(e) Finding that the deceased was on a "frolic of her own" at the time of injury.

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4 (1992) 173 CLR 473.

5 (2013) 250 CLR 246.

The analysis by the Deputy President

[12] The first issue dealt with by the Deputy President was the identification of the activity engaged in at the time of the injury. The Deputy President found this to be the diving, by the deceased, into the Noosa River.

[13] The next enquiry made by the Deputy President was as to whether the deceased had been induced or encouraged by ALH to engage in that activity.

[14] The appellant contended that the Commission should have found that the deceased's injury arose in the course of her employment because running and diving into the river was within the scope of the "activity" constituted by attending the Christmas Party. It was not disputed that ALH had encouraged the deceased to attend the party.

[15] The appellant relied upon a decision of a single judge of the Federal Court in *Lee v Trans Pacific Industries Pty Ltd*[6] in which the decision in *Comcare v PVYW* was applied. In that case the employee had been required to drive from Newman to Port Headland in order to attend a medical appointment which had been organised by his employer. On the return journey he stopped at a roadhouse for a toilet break and, while walking to the toilet, slipped on some liquid and injured his knee. Siopis J referred to *Comcare* and said:

> [48] … [A]s to the activity in which Mr Lee was engaged when the injury occurred, namely, taking a toilet break in the course of a long road trip, that activity was plainly within the scope of the activity which the Tribunal found that the employer had encouraged or induced Mr Lee to undertake. On that basis alone, the inevitable result of the application of the test in *PVYW* is that Mr Lee's injury occurred in the course of his employment with Transpacific."

[16] It should be readily acknowledged that an employer who requires an employee to undertake a long road trip would expect that toilet breaks would occur in the course of that trip. That was sufficient for the court to find that the injury occurred during the course of employment.

[17] Using that reasoning, the appellant submits that the Commission erred by failing to consider whether the deceased, by diving into the Noosa River, was doing something within the scope of the thing that AHL had conceded it had encouraged her to do, namely, attend the Christmas Party.

[18] The function at The Woods was described as a barbecue. There was no reference to water activity or diving and while attendance was voluntary, it was encouraged. Nobody at the function had any capacity to exercise any direction or control over the actions of other persons attending. There was no evidence that anybody who was in a managerial position while at work did or said anything which would have encouraged staff to swim in the river, let alone dive into it.

[19] The Deputy President directed himself correctly as to the question to ask. It was not appropriate to simply describe the activity as the Christmas Party and, therefore, find that any injury which occurred during the party was compensable.

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6 [2013] FCA 1322.

[20] The test as set out in *Comcare v PVYW* is in two parts:

(a) What was the activity being engaged in at the time of the injury? and

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

[21] The decision in *Lee v Transpacific Industries Pty Ltd* is consistent with the reasoning in *PVYW* due, at least, to the inexorable functioning of the human body over a long period. The same cannot be said of the circumstances in this case.

[22] There was nothing in the evidence which would have allowed a finding that there was any encouragement to run and dive into the river or that it was plainly within the scope of anything which had been encouraged by the employer.

[23] The appellant has not demonstrated that the Deputy President misapplied the appropriate test. The characterisation of the activity was correct in the circumstances of this case. Once that characterisation was reached, there was no evidence to support any finding of encouragement to engage in that activity.

Significant contributing factor

[24] Death from an injury arising out of, or in the course of, employment is not compensable unless the employment is a significant contributing factor to causing the injury. As was held in *Croning v The Workers' Compensation Board of Queensland*[7] the employment must be the real or effective cause of the injury, not merely the setting in which it occurred. This requirement was considered in *Newberry v Suncorp Metway Insurance Ltd*[8] where, at [42], Keane JA said:

> "It is clear, as a matter of language, that the words 'if the employment is a significant contributing factor to the injury' are intended to be a requirement of connection between employment and injury additional to each of the requirements that the injury occur in the course of employment or arising out of the employment."

[25] The finding by the Deputy President that the employment was not a "significant contributing factor" was consistent with his finding about the cause of the injury and was open on the evidence.

Conclusion

[26] No appealable error has been demonstrated. The appeal is dismissed.

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7 (1997) 156 QGIG 100.

8 [2006] 1 Qd R 519.