
Flexible working arrangements – bringing work, health and safety risks a little closer to home

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In brief

- An employee's 'place of work' is an evolving concept, particularly as there is a continuing trend to permit employees to work from home and other convenient locations. What is clear is that these locations are still a 'workplace' and an employer may be liable for injuries arising at home or when the employee is temporarily absent from their home during an 'ordinary recess' from work.
 - An employer with informal work from home arrangements should consider whether a more formal approach is appropriate to minimise risk. Formal arrangements should also be reviewed and employers should consider auditing home work environments or requiring employees to self-audit before work from home is approved.
 - It is also essential that as the workplace evolves, employers understand that working from home does not mean the same thing to each employee. The employer needs to adapt to the way work is performed when working from home to ensure that they meet all of their obligations to employees who are engaging in flexible work practices.
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In detail

Background

- The decision in *Demasi and Comcare (Compensation) [2016] AATA 644* considered whether Maryanne Demasi, a producer and presenter for the Australian Broadcasting Corporation (ABC), had sustained an injury which arose out of, or in the course of, her employment, when she fell and broke her hip during a run at 9.45am on a day that she was working from home.
- Ms Demasi claimed workers' compensation for her injury, however initially and on review, Comcare denied any such liability. Ms Demasi appealed to the Administrative Appeals Tribunal.

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- The Demasi decision concerned the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the SRC Act), which applies generally to Commonwealth government employers. However, as the concepts contained in the SRC Act are similar to those contained in State and Territory legislation, the principles are relevant to all employers.
 - In particular, the concept that an employee will be entitled to compensation for injuries arising out of, or in connection with, their employment, is the same across all applicable legislation. The injury must also be sustained while the employee was at their place of work or was temporarily absent from work during an ordinary or authorised recess, depending on the jurisdiction.

Policy vs Practice

- Ms Demasi's role as a producer and presenter for the ABC involved her performing duties that required her to work at the ABC's offices and on location for interviews. The nature of other duties meant that they were able to be performed at ABC's offices or Ms Demasi's home.
- It was an accepted practice at the ABC for reporters and presenters, like Ms Demasi, to work from home occasionally when they were undertaking work that may benefit from a quieter location and could be performed by simply using a laptop and phone; such as performing research, scripting stories, etc.
- On 15 January 2014, Ms Demasi decided to work from home. Ms Demasi had previously informed her manager of her intention to do so and her manager did not take issue with it. The ABC's formal policies for an employee to be approved to work from home required that there be a written agreement in place, that a work-station self-assessment be completed and that a work, health and safety risk assessment be performed.
- This had not occurred in Ms Demasi's case. The Tribunal held that the issue was not whether Ms Demasi had complied with the ABC's formal procedures to allow her to work from home, but rather what the practical reality was:

*'The simple fact is that the employer and employee had an arrangement in place that was well understood by both of them, even if it was not strictly in compliance with the formal requirements.'*¹

- In taking this view, the Tribunal has signalled that non-compliance with formal flexibility policies will not be a defence for employers to avoid liability. Rather, the accepted practice, even if it is established through a culture of tolerance or tacit approval, will be the determinative factor.
- As such, employers with informal work from home arrangements need to consider whether a more formal approach is appropriate. This is important given the employer will be liable for an injury that occurs during the course of the employment when working from home.
- Meanwhile, employers with formal work from home policies in place should proactively assess the scope of their policy as well as employee and manager understanding of that policy.
- In doing this, employers will need to strike a balance between offering genuine flexibility and prescribing mandatory safeguards against work, health and safety risks. This may include auditing the home work environment or requiring the employee to complete a self-audit. It may also require more prescriptive differentiation between work time and personal time when working from home.

Place of Work

- Whether a particular location will amount to the employee's place of work or employment is a factual issue that will be determined on a case-by-case basis.

¹ *Demasi and Comcare (Compensation)* [2016] AATA 644 at [36].

- In the Demasi case, on the day that Ms Demasi worked from home, she began checking her work emails at around 7.30am and received an email shortly before 9am from a colleague regarding an interview that day. Ms Demasi was scheduled to conduct a phone interview at 9.30am. However, after the interviewee rescheduled to a later time that day, Ms Demasi decided to take an early break and go for a run at 9.45am. It was during this run that she tripped and broke her hip.
- The Tribunal accepted that Ms Demasi had an approved, although irregular, practice of working from home. Further, the Tribunal accepted that on the day Ms Demasi was injured, she had carried out work duties at her home. Further, Ms Demasi's manager was both aware of and had approved her working in that way.
- The Tribunal was satisfied that on the day in question, Ms Demasi's home was her 'place of work' for the purposes of the SRC Act.

Outcome

- The key question in this case was whether Ms Demasi going for a run at 9.45am was a temporary absence during an ordinary recess from work. Ms Demasi's claim was that her manager was aware that recess breaks needed to be taken at a convenient time during the working day having regard to her work commitments.
- The Tribunal held that a temporary absence for the purpose of an ordinary recess does not cover every absence from the workplace. A lunch break is an example of an ordinary recess and the Tribunal held that if the run took place during Ms Demasi's lunch break the injury would have been compensable. However, taking a break to go for a run at a random time of the day did not. Ms Demasi was not entitled to compensation as the run she went on could not be characterised as occurring during an 'ordinary recess' in her employment.

The takeaway

The Tribunal's decision, and the facts of the case itself, reflect the type of issues that arise as a consequence of the modern concept of work.

Employees working from home have a great deal of flexibility and there will be times when they are working (and covered by workers compensation) and times when they weave their own personal needs into their day. Simply because an injury occurs during the hours of 9am to 5pm is not the relevant test. It is whether the employee was working at the time of the injury or temporarily absent from work on an ordinary recess.

Employers should review their work from home arrangements. Striking the right balance will involve a number of considerations, and, like the Tribunal, the employer needs to apply a modern lens to the concept of the workplace, the needs of employees and the benefits that working from home can deliver.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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