QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Harvey v Simon Blackwood (Workers' Compensation Regulator) and Qantas Airways Limited* [2015] QIRC 211
PARTIES:	**Harvey, Colin** (Appellant) **v** **Simon Blackwood (Workers' Compensation Regulator)** (First Respondent) and **Qantas Airways Limited** (Second Respondent)
CASE NO:	WC/2015/126
PROCEEDING:	Appeal against a decision of Simon Blackwood (Workers' Compensation Regulator)
DELIVERED ON:	7 December 2015
HEARING DATES:	28 September 2015
HEARD AT:	Brisbane
MEMBER:	Industrial Commissioner Thompson
ORDERS:	**1. The Appeal is dismissed.** **2. The decision of Simon Blackwood (Workers' Compensation Regulator) dated 17 April 2015 is confirmed.** **3. The claim is not one for acceptance.** **4. The Appellant is to pay the Regulator's costs of and incidental to this Appeal to be agreed or failing agreement to be the subject of a further application to the Commission.**
CATCHWORDS:	WORKERS' COMPENSATION - APPEAL AGAINST DECISION - Decision of Simon Blackwood (Workers' Compensation Regulator) - Appellant bears onus of proof - Standard of proof - Balance of probabilities - Appellant was a "worker" - Appellant had suffered a psychiatric/psychological injury - Agreed Statement of Facts - Statement of Stressors - Whether the personal injury arose out

of or in the course of employment and if employment was a significant contributing factor to the injury - Authorities - Appeal dismissed - Decision of Regulator confirmed - Claim is not one for acceptance - Appellant is to pay the Regulator's costs of and incidental to this Appeal or failing agreement to be the subject of a further application to the Commission.

CASES:

Workers' Compensation and Rehabilitation Act 2003 s 11, s 32, s 550
Comcare v PVYW (2013) 250 CLR 246
Hatzimanolis v ANI Corporation Limited [1992] HCA 21
Whittingham v The Commissioner of Railways (WA) [1931] HCA 49
Popovski v Ericsson Australia Pty Ltd [1998] VSC 61
Huhu v Simon Blackwood (Workers' Compensation Regulator) [2015] ICQ 021
Smith v Australia Woollen Mills Limited (1933) 50 CLR 504
Badawi v Nexon Asia Pacific Pty Ltd [2009] NSWCA 324
Avis v WorkCover Queensland (2000) 165 QGIG 788
WorkCover Queensland v Curragh Queensland Mining Pty Ltd (2003) 172 QGIG 6
Comcare v McCallum [1994] FCA 975
Comcare v Mather and Mitchell [1995] FCA 1216
Danvers v Commissioner for Railways (NSW) [1969] HCA 64
Balderson v Simon Blackwood (Workers' Compensation Regulator) [2014] QIRC 051
Australian Leisure & Hospitality Group Pty Ltd v Simon Blackwood (Workers' Compensation Regulator) & Campbell [2014] QRIC 105
Campbell v Australian Leisure & Hospitality Group Pty Ltd & Anor [2015] ICQ 016
Chattin v WorkCover Queensland (1999) 161 QGIG 531
Croning v Workers' Compensation Board of Queensland (1997) 156 QGIG 100
Qantas Airways Limited v Q-COMP (2009) 191 QGIG 115
Newberry v Suncorp Metway Insurance Ltd [2006] 1 QdR 519
Thiess Pty Ltd AND Q-COMP (WC/2009/74) - Decision <http://www.qirc.qld.gov.au>
Q-COMP and John Kennerley and Qantas Airways Limited (C/2012/16) John Kennerley and Q-COMP and Qantas Airways Limited (C/2012/18) - Decision

	<http://www.qirc.qld.gov.au> *Oaks Hotels and Resorts (Qld) Pty Ltd v Blackwood and Anor* [2014] ICQ 023 *State of Queensland (Queensland Health) v Q-COMP and Coyne* [2003] QIC 118
APPEARANCES:	Mr R. Green, Counsel instructed by LHD Lawyers. Mr S. Gray, Counsel directly instructed by Simon Blackwood (Workers' Compensation Regulator), the First Respondent. Mr M. O'Sullivan , Counsel instructed by HWL Ebsworth, for the Second Respondent.

Decision

[1] A Notice of Appeal was lodged with the Industrial Registrar on 15 May 2015 by Colin Harvey (Appellant) pursuant to s 550 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act) against a decision of Simon Blackwood (Workers' Compensation Regulator) (Regulator) dated 17 April 2015.

[2] The decision of the Regulator was to confirm the decision of Qantas Airways Limited (Qantas) to reject an application for compensation by the Appellant in accordance with s 32 of the Act.

[3] On 27 May 2015 Vice President Linnane issued an Order that Qantas be given leave to appear and be heard in the Appeal.

Relevant Legislation

[4] The Legislation pertinent to this Appeal is 32 of the Act:

> "**32 Meaning of *injury***
>
> (1) An ***injury*** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury."

Nature of Appeal

[5] The Appeal to the Commission is by way of a hearing *de novo* in which the onus of proof falls upon the Appellant.

Standard of Proof

[6] The standard of proof upon which an Appeal of this nature must be determined is that of "on the balance of probabilities".

Evidence

[7] In the course of the proceedings by agreement there was no evidence adduced by the Appellant or either of the Respondents however by further agreement the following material was tendered:

- Statement of Agreed Facts;
- Report of Dr Andrews - Consultant Psychiatrist; and
- Statement of Stressors.

Statement of Facts

[8] An Agreed Statement of Agreed Facts was executed by the Appellant, Regulator and Qantas on 25 September 2015 that amongst other things recorded:

- Appellant was engaged on a Qantas flight from Brisbane to Los Angeles as a long-haul flight attendant on 22 May 2013;
- Appellant following the flight transferred to the Hilton Hotel Costa Mesa in Orange County;
- Appellant:
  (a) signed off 30 minutes after flight arrival in Los Angeles;
  (b) transport to the hotel was provided by Qantas;
  (c) accommodation was provided by Qantas for the duration of the stay in Los Angeles; and
  (d) a meal allowance was supplied on a per day basis in accordance with the Enterprise Bargaining Agreement (EBA).
- Appellant socialised with other flight attendants in the "crew room" at the hotel between 1.00 am and 2.00 am on 23 May 2013;
- during his journey from the crew room to his hotel room the Appellant encountered a crew colleague Seanne Vass (Vass) who was in a state of collapse and without her room key;
- following an unsuccessful approach to the hotel reception to request a key for Vass he returned to his room where Vass had remained and went to bed;
- Vass later ran to the reception in a very distressed state making allegations that the Appellant had indecently dealt with her which lead to the Los Angeles Police being notified of the allegations;
- sometime later the Appellant was woken by two police officers who advised him of Vass' allegation and subsequently arrested, handcuffed and transferred him to a local police station where his DNA was taken through a series of swabs;
- the following morning he was transferred to Orange County Jail where he was processed and placed in a holding cell with 20 to 30 other prisoners. The Appellant felt intimidated and concerned for his safety;
- later that day he was removed from the holding cell, finger printed and after being seen by a female nurse was provided with prison clothing and placed in a solitary cell overnight;
- as it was the "Memorial Weekend" he was advised that he would not be able to see a Judge that day and a court appearance was unlikely before 28 May 2013;

- following a transfer to a different area of the jail he was released some four hours later and boarded a Qantas flight arriving in Sydney on 26 May 2013;
- on 3 July 2013 the Appellant was diagnosed by his General Practitioner (Dr David Hope) as suffering "anxiety/depression" and was issued with a workers' compensation medical certificate;
- in a report dated 21 November 2014 Dr Andrews diagnosed the Appellant as suffering from Post-Traumatic Stress Disorder (PTSD) and a Major Depressive Disorder; and
- the primary events that caused the Appellant's psychological injury as diagnosed by Dr Andrews were his:
    - arrest;
    - incarceration in jail; and
    - accusation he had committed a felony sexual offence.

Report of Dr Andrews

[9] A report was provided by Dr Andrews to the Group Workers' Compensation, Safety Services, Qantas Airways Limited following a request made by them on 20 October 2014. Dr Andrews was requested to consider various documentation which accompanied the request and to answer questions posed by that organisation.

[10] The report (dated 21 November 2014) noted that the Appellant had been referred to Dr Andrews by his General Practitioner on 8 August 2014 due to concerns expressed by the current treating Psychologist that he may warrant further assessment for the possibility of PTSD and had wanted a re-evaluation. Previously the Appellant had been seen by another Psychiatrist on two occasions who had on the second occasion committed to a diagnosis of adjustment disorder with anxious and depressed mood. Prior to issuing the report Dr Andrews had seen the Appellant on 5 and 30 September 2014.

[11] The documentation provided to Dr Andrews for consideration included:

- correspondence exchanged between the Appellant, Qantas, Regulator and LHD Lawyers (Solicitors acting for the Appellant) in the period 25 May 2013 to 24 February 2014;
- emails between Lawyers for the parties in March 2014;
- Statements:
    - Appellant - June, August, October, December 2013;
    - Doris Leung - May 2013;
    - Peter Bills - May 2013;
    - Vass - May - June 2013;
    - John Cashman - June 2013;
    - Ed Everett - June 2013;
    - Andrew Small - August 2013;
    - Tracey Hobi - August 2013;
- Investigation Response Meeting - 7 June 2013;
- Workplace Services Report - 23 August 2013;
- Application for Claim Review - submissions - 20 December 2013;
- Reasons for decision - 21 February 2014;
- Medical Reports:
    - Dr O'Brien - 15 August - 24 October 2014;

- Dr Hope - 19 November 2013;
- Ms Dowel - 3 February 2014.

- Medical certificates - 14 June to 28 November 2013 (inclusive);
- Medical records - Dr Hope;
- Correspondence:
  - Dr Hope - 8 August 2014;
  - Yvette Greenhalgh to Dr Hope - 9 August 2014;
- Email - Kim Woolridge to Dr Andrews - 13 October 2014.

[12] The report detailed a history of events relating to 23 May 2013 based on the various narratives provided by the Appellant and several consistent accounts of those events also from the Appellant. The history included key elements relating to the incident in the early hours of 23 May 2013 which recorded the Appellant and Vass as having both consumed a quantity of alcohol and of the Appellant having found Vass in a state that was suggestive of heavy intoxication, unable to enter her room. There was a dramatic difference in the account of events given by the Appellant and Vass in that he said Vass had exited his room at his request and she was to later claim she had been sexually assaulted by the Appellant.

[13] Upon his return to Australia the Appellant was stood down on full pay and the subject of an internal enquiry which concluded with none of the allegations being substantiated.

[14] The experience of being arrested and taken into custody had an extreme traumatic effect on the Appellant as did the accusation that he had been involved in an aggravated sexual assault or rape upon Vass. The period of incarceration was equally traumatic where he held fears of being bashed or raped in jail.

[15] On his return to Australia he continued to exhibit a high level of mental health symptoms with his distress well documented by clinicians and at the time of assessment by Dr Andrews (on 30 September 2014) was suffering from symptoms that included:

- frequent panic symptoms;
- emotional flashbacks;
- suicidal thoughts;
- loss of motivation; and
- lack of affection towards others.

He was on medication to assist with sleep and was at times irritable and verbally explosive. He had found it difficult to return to work but did so motivated by the fact he was too young to retire.

[16] The Appellant prior to 23 May 2013 had no history suggestive of an anxiety disorder or depressed mood or any formal psychiatric history at all. There were no other stressors identified beyond the consequences of his arrest and subsequent dealings with his employer.

[17] The Mental State Examination conducted by Dr Andrews on the first visit found that the appellant had a DASS profile of an extremely severe range for depression and anxiety and a severe range of stress which indicated a high probability of a severe mental illness.

Note: The DASS is a 42 question, validated, self-report questionnaire that measures depression, anxiety and stress.

[18] Dr Andrews made a diagnosis with reference to the diagnostic criteria from the Diagnostic and Statistical Manual 5th Edition published by the American Psychiatric Association. He found the Appellant had met the criteria in DSM-IV for:

Axis 1: Post-traumatic stress disorder major depressive disorder

The diagnosis of PTSD was reliant on a number of Domains which the Appellant met in respect of Domains A, B, C, D, F and G which equated to the Appellant meeting all the diagnostic criteria for diagnosing a PTSD. The Appellant further met the criteria for major depressive disorder.

[19] Based on the evidence the correct diagnosis was that of PTSD with Major Depressive Disorder which superseded a diagnosis of adjustment disorder.

[20] The questions requiring the responses from Dr Andrews were:

- *Having perused the information available, what stressors or events caused the Appellant to decompensate?*

  The primary events which caused the Appellant's psychological injury were:
  - his unexpected arrest;
  - two to three days detention in jail;
  - accusation he had committed a felony sexual offence.

- *When do you consider that the Appellant decompensated?*

  The Appellant had exhibited extreme stress from very early on which did not settle on his return to Australia or over the next many months. In the case of healthy individuals subjected to extreme stress the response of those around them can mitigate or aggravate their emotional reaction and the subsequent course of the illness.

  The Appellant did not see his General Practitioner until 12 June 2013.

- *Did management action or lack of management action cause or contribute to the Appellant's decompensation or was this compounding or irritating the symptoms/injury?*

  The Appellant believed that he had been falsely accused and that Qantas in their early response were unsupportive and perhaps had formed a presumption of guilt. Qantas had failed in the Appellant's view to provide him and his partner with a duty of care and no assertive procedures to support an employee who had been arrested without charge. Whilst he had not provided human resources with a nominated contact person the company was aware who his partner had been for several years. The efforts to contact or support him whilst he was in jail were thought by the Appellant to be inadequate and the failure to offer him support through the Employee Assistance Plan (EAP) whilst offering that assistance to Vass and his partner was inappropriate and

unfair. The rejection of his WorkCover claim also was regarded as unfair.

Dr Andrews recorded his position regarding this question on page 13 of the Report:

> "I make no comment on whether the processes followed by Qantas procedurally correct or not as I have no expertise in their internal processes. I simply make the comment that Mr Harvey felt poorly supported and victimized and that this exacerbated his condition. While all of this is important, especially to Mr Harvey, on the balance of probabilities he would still have developed PTSD and depression given the circumstances of his arrest and detention, i.e. the primary cause of his problem."

Statement of Stressors

[21] The Statement of Stressors identified 11 stressors all said to have occurred on 23 May 2013 and in abridged terms were:

- *Stressor 1* - being awoken by Police in his hotel room.
- *Stressor 2* - being accused by Police Officers that he had put his penis into the mouth of Vass.
- *Stressor 3* - being told that in putting his penis into Vass' mouth he had committed a felony.
- *Stressor 4* - his denial of putting his penis into Vass' mouth being rejected by the Police Officers.
- *Stressor 5* - being given difficult instructions when being handcuffed by Police and being handcuffed in an aggressive manner.
- *Stressor 6* - having to submit to DNA testing whilst handcuffed.
- *Stressor 7* - having his passport taken by Police in the course of his arrest.
- *Stressor 8* - being forcibly removed from his hotel dressed only in a pair of shorts and escorted through the hotel lobby in handcuffs and in fear of being seen by a colleague.
- *Stressor 9* - being placed in a Police car and left alone for several minutes without explanation.
- *Stressor 10* - being repeatedly accused of putting his penis into Vass' mouth.
- *Stressor 11* - detention by Police and subsequent processing as a detainee in prison and a penitentiary.

Submissions

[22] Written submissions were handed up in the course of the proceedings with each of the parties electing to provide additional information through oral submissions.

Appellant

[23] The Appellant's application for compensation for psychological injuries allegedly arose out of events that occurred on 23 May 2013 was rejected on the employer's notice with that decision being later reaffirmed in an internal review. The Appellant then sought a review by the Regulator which confirmed the decision to reject the application for compensation.

[24] The Statement of Agreed Facts set out the occurrence of the injuries sustained by the Appellant which were diagnosed by Dr Andrews as PTSD with Major Depressive Disorder. There is no dispute regarding the nature of the injuries sustained by the Appellant nor the circumstances that gave rise to the occurrence of the psychological injury. The dispute in relation to the Appeal concerns the application of s 32(1) of the Act with the primary issue to be determined is whether or not the injury sustained by the Appellant occurred in the course of his employment.

[25] Dr Andrews in his report included a recount of the relevant facts narrated to him by the Appellant regarding the relevant occurrence leading to his imprisonment and the imprisonment itself, stating that the Appellant "supplied several consistent accounts of the events of that evening and the following days" which were said to differ in important ways from the version offered by Vass. Dr Andrews further recounted the history of the symptomatology following the incident and in his report noted:

> "At the time of Mr Harvey's arrest and incarceration he suffered a severely traumatic event. His situation was very precarious and he had no way of knowing that he would be released in a short period of time. He was aware that he had been accused of a serious crime and that it was possible, should he be convicted, that he might be incarcerated in an American penitentiary, perhaps for years."

[26] Notwithstanding the investigation Dr Andrews importantly also considered that the Appellant on the balance of probabilities would still have developed PTSD with Depression given the circumstances of his arrest and detention as being the primary cause of his problem.

[27] Whilst the critical determination is whether or not the employment of the Appellant was a significant contributing factor to the injuries sustained by him, it is evident that the diagnosed injury did not occur in circumstances where the Appellant was engaged in the duties of his employment but had occurred in a period intervening between two periods of engagement in relation to his relevant employment. Circumstances regarding these factors were said to have invoked considerations in a number of recently considered matters.

[28] In the matter of *Comcare v PVYW*[1] (*PVYW*) the High Court of Australia had considered whether or not an injury fell within the terms of s 32 of the Act in circumstances where there was an interval or interlude in an overall work period.

[1] *Comcare v PVYW* (2013) 250 CLR 246

The decision of the High Court which was a majority decision with two Justices dissenting essentially found that:

> "The principle in Hatzimanolis requires a connection between the circumstances in which an employee sustains an injury, and his or her employment. He creates a temporal element but also creates a factual association or connection with the employee's employment by means of the fact of the employer's inducement or encouragement. The relevant connection is between the employee's activity and the employer's encouragement of it, or the presence of the employee at a place and the employer's encouragement of that."

[29] In applying this proposition, the High Court had found the employer had not encouraged *PVYW* to engage in the activity during which she was injured. In the Joint Judgement their Honours had indicated the intention of the tests outlaid in *Hatzimanolis v ANI Corporation Limited*[2] (*Hatzimanolis*) namely that a satisfactory line of demarcation could be drawn between injuries that are work-related and those injuries which are so remote from the notion of the workers' employment as not to call for compensation. They went on to cite Dickson J in *Whittingham v The Commissioner of Railways (WA)*[3] (*Whittingham*) in respect of the notion that in order for a particular course of conduct to be within the course of employment, the acts of the workman must be part of his service to the employer. Their Honours had highlighted the importance of considering the statement of principle in *Hatzimanolis* with the overall objective or the relevant legislation. It was accepted by the High Court that the course of employment covered not only the actual work undertaken by the employee but what was incidental to it.

[30] Further considered by the High Court was the "Henderson Test" which provided that an employee who was doing something which was reasonably required, expected or authorised to do "in order to carry out his actual duties" fell within the relevant term. With the High Court having properly recognised that the term "in order to carry out his duties" had been given strained interpretations which was instructive in identifying the general perspective relating to the legal propositions.

[31] The broad proposition accepted by the High Court as the notion arising from *Hatzimanolis* was that an interval or interlude within an overall period of work or episode of work which occurs within the "course of employment if, expressly or impliedly, the employer has included or encouraged the employee to spend that interval or interlude at a particular place or in a particular way" and the employee does so.

[32] In the circumstances of this case it should be accepted that the attendance of the Appellant in his room at the Hilton between flights falls within the notion of "in the course of his employment" as described in *Hatzimanolis* and interpreted by the High Court in *PVYW*. An injury sustained in such a period would be regarded as within the course of employment if it occurred at that place or while the employee was engaged in that activity, absent gross misconduct. The High Court had said in applying *Hatzimanolis* correctly for the 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. The essential enquiry is how was the injury brought about? Was the activity engaged in at the time of the injury being sustained, within

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[2] *Hatzimanolis v ANI Corporation Limited* [1992] HCA 21

[3] *Whittingham v The Commissioner of Railways (WA)* [1931] HCA 49

the terms of the tests set out above by reference to a place or activity? In the present case the Appellant in sleeping in his hotel room when he sustained his injury had been encouraged to do so by the employer. The medical evidence clearly indicates the decompensation commenced on or about the time the Police commenced the arrest of the Appellant in his room.

[33] On the matter of gross misconduct there was no evidence to support any such finding against the Appellant as was the case in *PVYW* where it was found that an employer may not be liable in respect of an injury sustained in circumstances where the employee engaged in an activity that was not encouraged by the employer. The exclusory test referred to in *PVYW* was that of misconduct which was entirely understandable that if an employee sustained an injury in the context of gross misconduct engaged in over an intervening period between work duties, that the injury would generally fall outside the terms of employment.

[34] The employment was a major or dominant factor with regards to the Appellant's injury with the matter of *Popovski v Ericsson Australia Pty Ltd*[4] cited as supportive of this argument.

[35] The submission at paragraph 22 identified the connection between the employment and the occurrence of the Appellant's injury in the following terms:

- "The events which precipitated the psychological decompensation occurred in a layover at the Los Angeles slip port between the Brisbane to Los Angeles and Los Angeles to Brisbane return flight;
- The injury occurred in the room provided for the Appellant's accommodation whilst he was in the layover in the Los Angeles slip port;
- The Appellant was in the hotel room for because of nothing other than his employment as a Qantas Steward;
- The purpose for the accommodation was to provide a place for the Appellant to rest between his arrival and departure and any engagement on each of those flights;
- When the arrest of the Appellant occurred, he was asleep in the room provided by his employer undertaking an activity entirely consistent with and necessary to his attention to his employment duties."

[36] In oral submissions Counsel for the Appellant provided commentary in respect of the following decisions said to be relevant to the considerations with regards to the Appeal before the Commission that included:

- *Hatzimanolis;*
- *PVYW;*
- *Whittingham; and*
- *Huhu v Simon Blackwood (Workers' Compensation Regulator)*[5].

[37] Three likely steps in the determination were identified as:

- to identify the conduct that was engaged in at the time the injury was suffered;

[4] *Popovski v Ericsson Australia Pty Ltd* [1998] VSC 61
[5] *Huhu v Simon Blackwood (Workers' Compensation Regulator)* [2015] ICQ 021

- the intentionality of the conduct; and
- the consistency with the employer's intentions for the employee during that interval.

In addition there would need to be consideration of gross misconduct.

[38] With regards to the authorities cited, the Commission was taken to issues to be considered that included:

- encouragement of the employee by the employer regarding the activities undertaken;
- factors relevant to "in the course of employment";
- injuries occurring in an interval at a particular place;
- where accommodation is provided by the employer; and
- whether the activity engaged in could be regarded within the notions of "in the course of employment".

[39] The Commission should have regard to the fact that Appellant was asleep in his room at the time he was arrested and subsequently incarcerated with there being a connection between the arrest and the occurrence of a psychological injury having been clearly identified in the report of Dr Andrews. The Appellant was at a place where he was induced or encouraged to be by the employer.

[40] There was no evidence of any gross misbehaviour by the Appellant that would be considered to have occurred in the course of his employment. The evidence supported that the arrest of the Appellant had a causal connection with his employment.

[41] The material before the Commission established the injuries sustained by the Appellant occurred in the course of his employment therefore the application should be allowed.

Regulator

[42] It was not disputed that the Appellant had been diagnosed as having suffered a PTSD with Major Depressive Disorder and that the "primary events" causing this injury were his arrest, incarceration in jail and accusation he committed a felony sexual offence.

[43] The issue for determination by the Commission is whether or not he had sustained an injury in accordance with the provisions of the Act because of these events. The provisions in the Act pertaining to reasonable management action do not require consideration in this case.

Arising out of, or in the course of, employment and is employment a significant contributing factor to the injury

Arising out of

[44] For a finding to be reached it must be that an injury arising out of employment requires a causative relationship between the employment and the injury. There were a number of authorities relied upon that included:

- *Smith v Australia Woollen Mills Limited*[6];
- *Badawi v Nexon Asia Pacific Pty Ltd*[7];
- *Avis v WorkCover Queensland*[8]:

> "…is wider than that posited by the words 'caused by' and that the phrase 'arising out of' whilst involving some causal or consequential relationship between the employment and the injury, does not require that direct or proximate relationship would be necessary if the phrase used were 'caused by'."; and

- *WorkCover Queensland v Curragh Queensland Mining Pty Ltd*[9].

In the course of employment

[45] The approach by the Court historically has been it was not enough to show that the injury had something to do with employment or had the worker not been employed by the particular employer in question they would not have received the injury.

[46] To prove that an injury occurred in the course of employment a worker had to show:

- he or she was doing something which he or she was employed to do; or
- he or she was doing something which is incidental to that which he or she is employed to do; or
- that the activity was reasonably required, expected or authorised in order to carry out his or her duties.

[47] There was no dispute that the Appellant sustained his injury in an interval between periods of employment, with the interval commencing 30 minutes after his arrival in Los Angeles and in those circumstances his claim had to be determined by reference to those cases which relate to injuries sustained because of events occurring during an interval in employment.

[48] The authorities cited in relation to "in the course of employment" included:

- *Hatzimanolis*;
- *Comcare v McCallum*[10];
- *Comcare v Mather and Mitchell*[11];
- *PVYW*;
- *Danvers v Commissioner for Railways (NSW)*[12] (*Danvers*);
- *Balderson v Simon Blackwood (Workers' Compensation Regulator)*[13];
- *Australian Leisure & Hospitality Group Pty Ltd v Simon Blackwood (Workers' Compensation Regulator) & Campbell*[14];

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[6] *Smith v Australia Woollen Mills Limited* (1933) 50 CLR 504
[7] *Badawi v Nexon Asia Pacific Pty Ltd* [2009] NSWCA 324
[8] *Avis v WorkCover Queensland* (2000) 165 QGIG 788
[9] *WorkCover Queensland v Curragh Queensland Mining Pty Ltd* (2003) 172 QGIG 6
[10] *Comcare v McCallum* [1994] FCA 975
[11] *Comcare v Mather and Mitchell* [1995] FCA 1216
[12] *Danvers v Commissioner for Railways (NSW)* [1969] HCA 64
[13] *Balderson v Simon Blackwood (Workers' Compensation Regulator)* [2014] QIRC 051
[14] *Australian Leisure & Hospitality Group Pty Ltd v Simon Blackwood (Workers' Compensation Regulator) & Campbell* [2014] QRIC 105

- *Campbell v Australian Leisure & Hospitality Group Pty Ltd & Anor*[15] (Campbell) where Martin P, in dismissing the Appeal, stated:

"**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.* That decision was comprehensively examined in *Comcare v PVYW.*

[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.

…

[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?

[15] *Campbell v Australian Leisure & Hospitality Group Pty Ltd & Anor* [2015] ICQ 016

[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."

Significant contributing factor

[49] The question of whether or not employment is a significant contributing factor to injury is a question of mixed law and fact to be determined by the Commission. Authorities relied upon by the Regulator included:

- *Chattin v WorkCover Queensland*[16];
- *Croning v Workers' Compensation Board of Queensland*[17];
- *Qantas Airways Limited v Q-COMP*[18];
- *Newberry v Suncorp Metway Insurance Ltd*[19];
- *Thiess Pty Ltd AND Q-COMP*[20];
- *Q-COMP and John Kennerley and Qantas Airways Limited AND John Kennerley and Q-COMP and Qantas Airways Limited*[21];
- *Oaks Hotels and Resorts (Qld) Pty Ltd v Blackwood and Anor*[22] (*Oaks*); and
- *PVYW.*

[50] In the matter of *Oaks*, Martin P at paragraph 11 stated the following:

"[11] With that in mind, I turn to the principles which were considered in *Comcare v PVYW* - a case in which a Commonwealth employee was injured by a falling light fitting whilst engaged in sexual intercourse. French CJ and Hayne, Crennan and Kiefel JJ considered that the question of whether or not an injury arose from a person's employment was to be determined according to the principles set out in *Hatzimanolis v ANI Ltd*. In *PVWY*, their Honours stated:

'[38] The starting point in applying what was said in *Hatzimanolis*, in order to determine whether an injury was suffered in the course of employment, is the factual finding that **an employee suffered injury, but not while engaged in actual work**. The next inquiry is what the employee was doing when injured. For the principle in *Hatzimanolis* to apply, the employee must have been either engaged in an

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[16] *Chattin v WorkCover Queensland* (1999) 161 QGIG 531
[17] *Croning v Workers' Compensation Board of Queensland* (1997) 156 QGIG 100
[18] *Qantas Airways Limited v Q-COMP* (2009) 191 QGIG 115
[19] *Newberry v Suncorp Metway Insurance Ltd* [2006] 1 QdR 519
[20] *Thiess Pty Ltd AND Q-COMP (WC/2009/74) - Decision <http://www.qirc.qld.gov.au>*
[21] *Q-COMP and John Kennerley and Qantas Airways Limited (C/2012/16) John Kennerley and Q-COMP and Qantas Airways Limited (C/2012/18) - Decision <http://www.qirc.qld.gov.au>*
[22] *Oaks Hotels and Resorts (Qld) Pty Ltd v Blackwood and Anor* [2014] ICQ 023

> activity or present at a place when the injury occurred. 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'."

How should those enquiries be answered in this Appeal?

[51] The Appellant's injury had not arisen because of the place where it occurred with nothing related to the hotel instrumental in the injury other than being the setting where it occurred.

[52] The injury in this case arose from the interactions with Vass, leading to the allegations that had been made by her.

[53] It was accepted that the Appellant's presence in the crew room was either induced or encouraged by Qantas however the events that led to Vass' complaint to Police occurred after they had both left the crew room. Those events did not occur because of any activity that was either induced or encouraged by Qantas. Accordingly the appropriate finding to be made is that the Appellant's personal injury did not arise because of him being engaged in an activity that was induced or encouraged by Qantas.

[54] In his oral address, Counsel for the Regulator acknowledged the Appellant's presence in the crew room was either induced or encouraged and that would be a difficult concept to argue against. Further that if the Appellant had sustained an injury travelling from the crew room back to his hotel room then one might expect there would be a connection with his employment in those circumstances.

[55] In this case the injury suffered by the Appellant had nothing to do with him sleeping in his room with the primary events causing his injury being his arrest, incarceration and accusation he committed a sexual office. There was no connection to the Appellant's employment.

[56] In conclusion it was stated:

- the Appeal be dismissed;
- the Regulator's review decision (dated 17 April 2015) be confirmed; and
- the Appellant pay the Regulator's costs of and incidental to the hearing.

Qantas

[57] Qantas sought that the Appeal be dismissed and the Appellant's application for workers' compensation be rejected as he had not suffered an injury within the meaning of s 32 of the Act.

[58] The onus of proof relies on the Appellant to establish that the decision appealed against was wrongly made - see *State of Queensland (Queensland Health) v Q-COMP and Coyne*[23].

[59] The Appellant, it was argued had not suffered any injury as a consequence of his employment with Qantas and the employment was not a significant contributing factor to any psychological injury.

[60] There was reliance by the Appellant on the High Court decision in *PVYW*, asserting that the "something to do with place" was Qantas' placement of Vass in the same hotel as the Appellant but it was not the case that he suffered an injury because Vass had been placed in the same hotel in Los Angeles. He had suffered an injury as a consequence of her complaint against him and his consequential arrest and incarceration.

[61] In *PVYW* the High Court (by majority) had concluded for an injury occurring in a period of work to be in the course of employment, the circumstance in which an employee is injured must be connected to the inducement or encouragement of the employer. An inducement or encouragement to be at a particular place does not provide the necessary connection to employment merely because the employee is injured whilst engaged in an activity at that place. The High Court determined in *PVYW* that the employer had not induced or encouraged the respondent in that matter to engage in the relevant activity which had been sexual activity which through the actions of her or her partner had pulled a light fitting causing her facial injuries and consequential psychiatric injury.

[62] There was reliance on the *PVYW* matter at paragraphs 34, 38 and (in particular) 39 of that judgement which stated:

> "It follows that 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. An employer's inducement or encouragement to be present at a place is not relevant in such a case."

[63] There was also reference to the decision in *Campbell* where Martin P had relied upon the principles enunciated in *PVYW*.

[64] The Appellant in the present case was not engaged in actual work but in an interval between work periods making it necessary to consider whether the particular activity which gave rise to his psychiatric injury was one encouraged or induced by Qantas. The answer to that question was an emphatic no.

[65] Whilst the injury cannot be explained by reference to an activity, the fact he was at a place, a hotel in Los Angeles, that Qantas required him to stay at, is irrelevant and the reliance on the "place" test, as espoused in *PVYW* is misguided and ought not be accepted.

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[23] *State of Queensland (Queensland Health) v Q-COMP and Coyne* [2003] QIC 118

[66] In oral submissions references were made to the complaint by Vass that the Appellant had indecently dealt with her having led to his arrest a short time later and subsequent incarceration. This was not a "place case" as the place was not causative of any injury and in respect of an "activity case" it has to be determined whether there was an activity induced or encouraged by Qantas that gave rise to the psychiatric injury.

[67] It was put that had the Appellant suffered an injury whilst he was in the crew room such as a lamp falling on him and causing him physical injury then that would be a compensatable claim. In the present case there was a claim, as set out in the Statement of Agreed Facts, that he had indecently assaulted the other co-worker which one could hardly suggest was an activity included or encouraged by Qantas. There could be no suggestion in these circumstances that the place was a relevant factor in any subsequent psychiatric injury merely because the activity occurred within the confines of the hotel where the Appellant was encouraged and required to stay.

[68] In circumstances where the allegation made by Vass was untrue and was in fact a false complaint against the Appellant, the place is also irrelevant in this situation because nothing in the place caused the injury. The activity was really the activity of Vass going to the reception, which she was quite entitled to do and make a complaint about an incident she believed had happened to her. There was nothing Qantas could or should have done which would have inhibited her from taking such action. After the complaint was made and the Police were called again there was no circumstance where Qantas could or should have interfered with any of that activity.

[69] The case of *Danvers* was helpful in that where a place was significant and how a place was determinative of the issue as to whether or not any injury occurred in the course of employment. Another authority relied upon was that of *Campbell* where Martin P had enunciated the principles of the *PVYW* case and at paragraph (d) and (e) stated:

> "(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."

[70] There was no justification for taking a wide view of Qantas' liability and circumstances where they could have been seen to have encouraged the Appellant to be at a particular place and therefore everything that happens at that place means there is an entitlement to compensation. The arrest and incarceration of the Appellant would have undoubtedly been stressful for him however the failure to establish that the activity had anything to do with his employment or was encouraged or induced by Qantas then the Appeal must fail.

[71] The parties to make submissions on costs.

Appellant in reply

[72] The Appellant believed the present case and the matter of *Campbell* were distinguishable on the initiative and intentional acts of the relevant person who suffered the injury. In this case there was no clear line of intentional acts on the part of the injured worker that in some sense would have a connection between those acts and the injuries sustained. It was also difficult from a conceptual basis to see the difference between a false accuser and caravan fire (in *Danvers*) as it applies to the place test.

Conclusion

[73] There were a number of matters that as a consequence of agreement by the parties the Commission was not required to determine which included:

- the Appellant at all relevant times was for the purposes of s 11 of the Act a "worker";
- the Appellant had suffered a psychiatric/psychological injury in the form of a PTSD with Major Depressive Disorder as diagnosed by Dr Andrews; and
- the primary events causative of the Appellant's injury were his arrest, incarceration and accusation that he had committed a felony sexual offence on 23 May 2013.

[74] Further matters arrived between the parties in the Agreed Statement of Facts [Exhibit 1] executed on 25 September 2015 by those parties had the purpose of saving the Commission from having to determine (as is generally the case) as to which of the competing evidence should be accepted, on the balance of probabilities, as being truly representative of the events leading to the sustaining of the injury for which compensation is being sought.

[75] The factual circumstances were that the Appellant as a long-haul flight attendant had on 23 May 2013 arrived in Los Angeles where 30 minutes after arrival had been transported by Qantas to a hotel where he was to be accommodated for the period between his arrival and subsequent return flight to Australia.

[76] On the evening of 23 May 2013 he socialised with other flight attendants in a facility identified as a crew room where it is understood that an amount of alcohol was consumed. Counsel for Qantas informed the Commission that the crew room was an area or room provided by the hotel as part of a tender process for the supply to Qantas of accommodation. The facilities of the room included:

- wi-fi;
- computers;
- lounge; and
- kitchen area.

A benefit of the room was that it allowed crew to gather for the purposes of eating and drinking without having to resort to going to a club or some other place for that purpose.

[77] The Appellant in the course of returning to his hotel from the crew room was said to have encountered Vass (a fellow flight attendant) in a "state of collapse" and unable to access her room due to not having her room key. He unsuccessfully sought to provide assistance by obtaining a key for her from reception and returned to his

room where Vass had remained. At an unspecified time Vass was said to have left his room at which time he went to bed.

[78] After an unknown period of sleep the Appellant was awakened by two Police officers knocking on his door who proceeded to inform him there had been serious allegations levelled against him by Vass. He was subsequently arrested, handcuffed and escorted through the hotel lobby to a Police vehicle where he was transferred to the local Police station.

[79] It is not of contention that he spent a period of time in detention which caused him to experience severe levels of angst which he claims led to his decompensation and upon his release returned to Australia on QF108 from Los Angeles to Sydney on 26 May 2013.

[80] The Appellant relies upon 11 Stressors (identified at paragraph 21) all of which relate to the events of 23 May 2013 from the point of being awoken by Police in his hotel room through until his incarceration as a detainee in prison and a penitentiary.

[81] The matter for determination in respect of the Appeal is whether the Appellant's personal injury in the form of a psychiatric/psychological injury arose out of or in the course of employment and if his employment was a significant contributing factor to the injury.

[82] There was a plethora of authorities cited by the parties in the proceedings with direct relevance to decisions emanating from a range of jurisdictions, that had determined cases with respect to injuries sustained in the period of an interval between engagements of employment.

[83] For the purposes of considering the Appeal before the Commission I go firstly to the 2013 matter of *PVYW* in which the High Court in disposing of an Appeal regarding an injury that had been sustained also in an interval period determined that the question of whether or not an injury arose out of a person's employment was to be determined according to the principles set out in *Hatzimanolis* where it is stated at paragraph 38:

> "The starting point in applying what was said in *Hatzimanolis*, in order to determine whether an injury was suffered in the course of employment, is the factual finding that **an employee suffered injury, but not while engaged in actual work**. The next inquiry is what the employee was doing when injured. For the principle in *Hatzimanolis* to apply, the employee must have been either engaged in an activity or present at a place when the injury occurred. 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'."

[84] In terms of considerations regarding place, the factual circumstances relating to the Appellant's presence in the hotel room in question on 23 May 2013 were that Qantas provided him with accommodation and a meal allowance, requiring him to stay there between engagements of employment. The Appellant argues emphatically that being in the place at the time was a trigger for his decompensation to the extent that in the Statement of Stressors - Stressor 1 - he states:

> "23/05/2013 - Being woken up by police officers whilst asleep in his hotel room where he was staying, awaiting his return trip to Brisbane as an airline steward with Qantas."

[85] This particular case is quite different to that of *Danvers* where a person had been required to reside in a caravan (or such like accommodation) whilst working away from home and unfortunately perished as a result of a fire that destroyed the accommodation. The cause of death was a direct consequence of having utilised the accommodation provided. In the present circumstances there is acceptance that the Appellant sustained an injury as a result of primary events which were his arrest, incarceration and accusation that he had committed a felony sexual offence on 23 May 2013. The Police Officers that attended his room on that night did so for the purposes of responding to a complaint made by Vass that he had attempted to put his penis into her mouth which was clearly related to an alleged activity engaged in by the Appellant and quite distinct from being a place issue.

[86] I am satisfied on the material before the proceedings that the Appellant's requirement by Qantas to be accommodated at the hotel room in question on 23 May 2013 does not justify the claim that his injury arose out of his employment as a direct consequence of him being in that place.

[87] In addressing the matter of an activity in *Campbell* the principles enunciated in *PVYW* were said by Martin P to be relevant regarding an employee engaged in an activity and identified those principles at paragraph 10 of the decision in *Campbell*:

> "(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."

[88] In this particular instance it is necessary to find an activity that was engaged in by the Appellant that warranted the attendance by two Police Officers at his hotel room on 23 May 2013 and his eventual arrest and incarceration. The only activity for

consideration relates to the allegations levelled against him by a fellow flight attendant that he had attempted to place his penis in her mouth thus participating in a felony sexual offence against her.

[89] With regard to the allegations it is of fact that he was subsequently released from detention without charges having been laid against him and allowed to leave the United States of America unencumbered. Upon his return to Australia an investigation was undertaken by Qantas where it was found that the allegations were unsubstantiated. The allegations having been unsubstantiated and with no criminal proceeding ongoing against the Appellant removes in my view any argument that he had engaged in proven gross misbehaviour however it is still the case that the activity in question had brought in to the equation the involvement of Police and the Appellant's eventual arrest and incarceration.

[90] In the matter of *Campbell* the section of the *PVYW* decision relied upon by Martin P was that an employer was not liable for an injury that occurred when an employee undertook a particular activity, if the employer had not encouraged the employee to undertake that activity but merely required the employee to be present at the place where the activity was undertaken. This principle applies "in spades" in respect of the activity the Appellant is alleged to have engaged in with Vass as such an activity was not suggested to have been encouraged by Qantas in any event.

[91] Counsel for the Appellant in submissions in reply made reference to a "false accuser" and when one takes into account the allegations were never tested in a criminal jurisdiction or found to have been substantiated by the investigation undertaken by Qantas, the Appellant's representative is, in the view of the Commission, entitled to at least raise such a comment for consideration.

[92] The Appellant has effectively failed to on the requisite standard of proof satisfy the Commission that principle regarding an activity in *Hatzimanolis* was enlivened to the extent that a finding of the activity engaged in would have his injury having occurred in the course of employment.

[93] Whilst the law contained in the authorities cited in the proceedings and the facts of the case clearly support a position that the injury sustained by the Appellant had not arisen out of or in the course of his employment with Qantas and as a consequence his employment was not a significant contributing factor to the injury I feel compelled to offer comment regarding the actions of Qantas in conducting the investigation into the allegation made by Vass.

[94] Dr Andrews recorded in his report under the heading of "History Relating to the Injury" on page 6 of the Report:

> "Shortly after arriving in Australia Mr Harvey was informed of an internal investigation by Qantas and stood down with full pay. In the end none of the allegations against Mr Harvey were substantiated".

Dr Andrews was not required for cross-examination meaning his evidence by way of his Report was entered into proceedings unchallenged.

[95] At the time of preparing his report Dr Andrews was provided a number of statements taken from persons including the Appellant and Vass in the period 23 May 2013 to 26 August 2013. Whilst not having been provided with the statements

the Commission can only speculate whether they all went to the events of 23 May 2013 at the hotel in Los Angeles or otherwise, however the suspension from employment (on full pay) of the Appellant on his return to Australia would by any reasonable standard imply that Qantas was treating the event at that time as employment related. In the absence of any significant material regarding the Qantas investigation in May/June 2013 and noting that the List of Stressors tendered in the proceeding did not include any reference whatsoever to the investigation as contributing to the Appellant's decompensation such behaviour had no impact on the previously identified conclusions reached by the Commission and made in accordance with relevant case law.

Finding

[96] On consideration of the evidence, material and submissions before the proceedings I make the following finding:

- the psychiatric/psychological injury suffered by the Appellant on 23 May 2013 did not arise out of or in the course of his employment nor as a consequence of that finding was his employment a significant contributing factor to the injury suffered by him.

Orders

[97] The following Orders are therefore made:

- the Appeal is dismissed; and
- the decision of Simon Blackwood (Workers' Compensation Regulator) dated 17 April 2015 to reject the Appellant's application for compensation is confirmed with the claim not one for acceptance.

Costs

[98] The Appellant is to pay the Regulator's costs of and incidental to the Appeal to be agreed or failing agreement to be the subject of a further application to the Commission.

[99] In respect of Qantas' costs, I draw attention to the Order issued by VP Linnane on 27 May 2015 where at point 3 it was stated:

> "Until further order, the Employer is not at liberty to seek costs from the Appellant at the completion of any hearing of the Appeal."

[100] In the absence at this time of a formal application from Qantas for costs to consider, I do not intend to depart from the Vice President's Order.

[101] I order accordingly.