



## Same but different

This month, the New South Wales Court of Appeal overturned a decision of the President of the Worker's Compensation Commission.

Dr James Gardiner commenced working for Laing O'Rourke Australia Construction Pty Ltd in 2011. His employment was terminated in 2018. Immediately following his termination, Dr Gardiner lodged a complaint under the *Anti-Discrimination Act 1977* citing workplace discrimination and victimisation due to his disability. Dr Gardiner resolved that complaint with Laing O'Rourke. It agreed to pay him almost \$30,000, plus his legal costs. The terms of this agreement were set out in a Deed of Release signed by Dr Gardiner and Laing O'Rourke in September 2018.

In March 2018, and prior to the settlement of Dr Gardiner's discrimination complaint, he brought separate proceedings in the Workers Compensation Commission for a psychological injury caused by discrimination and victimisation in the course of his employment with Laing O'Rourke. Laing O'Rourke argued Dr Gardiner could not bring a separate workers compensation claim and argued that the money paid to resolve the discrimination complaint was "*damages*" awarded "*in respect of*" the same injury.

An Arbitrator of the Workers Compensation Commission agreed with Laing O'Rourke's argument and dismissed Dr Gardiner's claim. Dr Gardiner appealed to the President of the Workers Compensation Commission, and the President upheld the Arbitrator's original decision. The President and the Arbitrator both reasoned Dr Gardiner's discrimination settlement was "*damages*" awarded "*in respect of*" the same injury that was the subject of his workers compensation proceedings.

Dr Gardiner appealed to the Court of Appeal. One of the key issues for determination was whether the intent of the Deed of Release was to also resolve any claim for workers compensation or work injury damages available to Dr Gardiner on a full and final basis. The Deed expressly excluded any claim Dr Gardiner might have "*pursuant to the provisions of any applicable Workers' Compensation legislation, in accordance with the terms of this Deed.*" The Court of Appeal held the intended purpose of the Deed of Release was not to resolve all claims available to Dr Gardiner and found that its purpose was only to resolve Dr Gardiner's discrimination complaint.

The Court of Appeal considered the legislative definition of "*damages*" and determined that "*damages*" do not extend to amounts recoverable under an independent statutory scheme such as the *Anti-Discrimination Act*. The Court of Appeal also noted that it is not possible for a worker nor an employer to "contract out" of the Workers Compensation legislation, ie to agree that a worker has no rights.

The Court of Appeal set aside the decisions of the Workers Compensation Commission and Dr Gardiner's matter was remitted to the Workers Compensation Commission to determine the remaining issues in dispute, properly, in accordance with the law.

Similar circumstances often arise for my clients, for example, where they have an

entitlement to damages arising from both unfair dismissal and workers compensation proceedings. The law does not prevent an injured worker from bringing a claim under workers compensation legislation, and a claim under separate unfair dismissal or anti-discrimination laws.

As an injured worker you are entitled to be advised by Toby Tancred. The Workers Compensation Independent Review Office (WIRO) can assist by providing funding for this legal advice. WIRO provides funding to approved Solicitors to investigate claims, provide advice to you as an injured worker, and deal with employers and insurers on your behalf. Toby Tancred is a WIRO accredited Solicitor, a Law Society Personal Injury Accredited Specialist and has been recognised by Doyle's Guide as a Recommended Work Injury Compensation Lawyer. Toby Tancred and his team have the experience, knowledge and ability to help all injured workers in difficult times.