Compensation: lost earnings or capacity to earn

GENTLEY and SECRETARY TO THE DFaCS (No. 20000066)

Decided: 4 February 2000 by S.A. Forgie.

Background

Gentley was injured in a motor vehicle accident in the course of his employment on 26 February 1996, and he was incapacitated for work from 29 July 1996. He had been insured under a Group Income Protection Policy with the Australian Family Assurance Ltd (AFA).

Gentley was paid sickness allowance (SA) from 30 June 1996, and newstart allowance (NSA) from 3 June 1997 when he was no longer considered to be totally disabled. AFA also made some, irregular, periodic payments to Gentley under the policy, for the period from 29 July 1996 to 14 January 1998. The SA and NSA payments had been recovered by the former DSS and Centrelink.

On or about 2 April 1998 the claim with AFA was settled for $55,000 with Gentley receiving a minimum of $28,760. As a component was for economic loss, Centrelink decided that compensation affected payments, including NSA, could not be paid during a preclusion period beginning on 15 January 1998 and ending on 28 April 1999. That decision was affirmed by the SSAT, and Gentley sought a further review by the AAT. It seems he did not challenge the application of the compensation provisions of the *Social Security Act 1991* (the Act) but, rather, sought to have the preclusion period reduced by an exercise of the discretion in s.1184 of the Act which allows it in special circumstances.

The AFA policy

The Tribunal noted the policy provided that in consideration of the premium payments the AFA would pay the insured the benefit referred to in a schedule on the happening of an event in the schedule. The schedule set out 17 specific events and prescribed a percentage of the 'Capital Benefit' payable for each. It also specified the weekly benefits payable as a result of an injury for temporary total disablement and temporary partial disablement.

Paragraph 5(i) of the policy set out, in part, that the weekly benefit for temporary total or temporary partial disablement would be reduced by:

(a) the amount of any worker's compensation payment or any other statutory benefits which the Insured receives or is entitled to receive;

(b) any salary, wage or other payment receivable from any employer or principal;

(c) any entitlement under any policy of insurance, cover for which includes contingencies relating to any form of disability, permanent and total or partial disablement, injury, accident, sickness or absence from work rendering the Insured unable to carry out duties normally undertaken in connection with an Insured's usual occupation or business;

(d) amounts to the value an Insured receives or is due to receive as a consequence of letting out, hiring or sub contracting the business and/or plant and equipment of the business.

Not damages

The issue in this case was whether payments made by the AFA to Gentley were 'compensation' within the meaning of sub-section 17(2) of the *Social Security Act 1991* (the Act) which provides:

> **17.(2)** For the purposes of this Act, compensation means:
>
> (a) a payment of damages; or
>
> (b a payment under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme; or
>
> (c) a payment (with or without admission of liability) in settlement of a claim for damages or a claim under such an insurance scheme; or
>
> (d) any other compensation or damages payment;
>
> (whether the payment is in the form of a lump sum or in the form of a series of periodic payments) that is:
>
> (e) made wholly or partly in respect of lost earnings or lost capacity to earn; and
>
> (f) made either within or outside Australia.

The Tribunal held that the payments were 'not "a payment of damages" within the meaning of para. (a) of the definition of "compensation" in sub-section 17(2).' This was because they were prescribed as to their amount and payment; were not 'at large' requiring assessment and determination by a court; and were made in respect of the specific losses referred to in the policy. Nor was it a payment made under a scheme of insurance or compensation under a Commonwealth, State or Territory law, and therefore did not come under para. (b) of sub-section (17(2). As the payments neither came within that paragraph nor had the character of damages, they did not came within para. (c) (Reasons, para. 62).

However, the payments were caught by para. (d) as compensation to make up, at least in part, for the loss of salary or wages.

The Tribunal next considered s.17(2A) which provides:

> **17.(2A)** Paragraph (2)(d) does not apply to a compensation payment if:
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> (a) the recipient has made contributions (for example, by way of insurance premiums) towards the payment; and
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> (b) the agreement under which the contributions are made does not provide for the amounts that would otherwise be payable under the agreement being reduced or not payable because the recipient is eligible for or receives payments under this Act that are compensation affected payments.

It was agreed by the parties that Gentley had paid the premiums for the policy, so he satisfied para. (a). The Tribunal then observed that when regard is had to the purpose of the provisions relating to compensation as set out by Von Doussa J in *Secretary, Department of Social Security v Banks* (1990) 20 ALD 19, s.17(2A) should be read as not requiring that the agreement not provide for payments to be reduced because the recipient is eligible for, or receives payments specifically described as compensation-affected payments under the Act. It is enough that the agreement not make such provision for payments that may be identified as compensation-affected payments under the Act, however those payments are described.

Turning to the terms of the AFA policy the Tribunal went on:

> Sub-paragraphs 5(i)(b)–(d), when read together indicate an intention that the insured person not benefit from both AFA and from money payable by the employer or from money from another source of income available to him or her as a result of the happening of the event for which he or she is insured. Both aspects of that intention are not evident in each paragraph, however, for each deals with payments of a specific character. Paragraph 5(i)(a), for example, is limited to any payment by the person's employer while paragraph 5(i)(b) is concerned with an entitlement under another policy of insurance.
>
> In view of the structure and intention of the policy, I have concluded that each paragraph is intended to deal with payments of a particular type. In view of that, the words 'any other statutory benefits which the Insured receives or is entitled to receive' in sub-paragraph 5(i)(a) must be read in the context of both the worker's compensation to which specific reference is made and the policy's intention as I have identified it in the previous paragraph. They must, therefore, be limited to those statutory benefits

which the insured person receives as compensation for the loss which he or she has incurred as a result of the happening of the event prescribed in the schedule to the policy. They cannot be extended to any statutory benefits regardless of the reason for their being paid to the insured person.

(Reasons, paras 71, 72)

From a review of the relevant qualification and payability provisions in the Act, the Tribunal noted that whilst to receive SA it is essential that a person's incapacity be wholly caused by a medical condition arising from sickness or accident, there is no requirement that the sickness or accident arose out of, or in the course of a person's employment. Furthermore, NSA is predicated upon a person's being unemployed and not upon any incapacity. It follows that both NSA and SA fall outside para. 5(i) of the policy, and sub-para. (a) in particular. This meant that both the periodic payments and the lump sum payments of compensation were made under a policy coming within s.17(2A) of the Act, and thus excluded from the operation of s.17(2)(d), and hence were not compensation for the purposes of s.17(2).

In view of this conclusion, the Tribunal was of the view that it was not relevant to consider whether s.1184 could apply. As the decision under review was limited to the imposition of a preclusion period because of the lump sum payment, it did not have the power to review the earlier decisions to recover SA and NSA paid during periods for which Gentley received periodic compensation payments under the policy.

Formal decision

The AAT decided to set aside the decision, and substituted a new decision that the lump sum payment under the AFA policy was not a payment of compensation and not subject to the compensation provisions in Part 3.14 of the Act.

[K.deH.]

[**Contributor's note**: The Secretary to the DFaCS has appealed this decision to the Federal Court.]

Compensation recovery: notice given to insurer; drafting error in legislation

VENESS and SECRETARY TO THE DFaCS (No. 20000006)

Decided: 12 January 2000 by S.D. Hotop.

Veness was involved in a motor vehicle accident. His claim for damages was settled by consent judgment in the District Court. After the accident Veness had received social security payments for a time. When the action was settled, a notice was sent to the third party insurer, the Insurance Commission of Western Australia, setting out that the Department intended to recover from the Commission the sum of social security payments received by Veness in the period after the accident. It was this notice that became a crucial issue in the case before the AAT. Indeed it appears that the question of validity of the notice was one raised by the AAT and written submissions were invited upon it.

The notice to the insurer was one issued under s.1179 *Social Security Act 1991* (the Act) to ensure that funds that are about to be paid out are not paid without notice of the Secretary's interest in the matter.

Veness was not disputing that the sum settled was 'compensation' within the meaning of the legislation and did not dispute that the period calculated under the legislation as the period during which Veness was precluded from receiving social security payments had been correctly calculated as 199 weeks. Veness asked that the discretion available under the legislation to disregard a part or whole of the settlement moneys — discretion available if there are 'special circumstances' — be exercised in his case so that the length of the period would be reduced.

The issues

The issues in the case were twofold. Firstly, there was the issue raised by Veness, namely whether 'special circumstances' were present in his case. Secondly, there was the issue raised by the Tribunal namely whether the recovery notice issued to the Insurance Commission was valid.

The legislation

On the first issue the Act provides for a discretion in s.1184 of the Act in the following terms:

> For the purposes of this Part, the Secretary may treat the whole or part of a compensation payment as:
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> (a) not having been made; or
>
> (b) not liable to be made;
>
> if the Secretary thinks it is appropriate to do so in the special circumstances of the case.

On the second issue, the question of validity of the notice issued to the Insurance Commission under s.1179 of the Act, the AAT was required to interpret a legislative provision which contained clear drafting errors. These had been the source of comment in two earlier cases decided by the AAT. Sub-section 1179(4) provides:

> If the person claiming compensation is not a member of a couple, the recoverable amount is equal to the smallest of the following amounts:
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> (a) the sum of the payments of the compensation affected payments payable to the person for:
>
> (i) the periodic payments period; or
>
> (ii) if a lump sum compensation payment is received before 20 March 1997 — the old lump sum preclusion period; or
>
> (iii) if a lump sum compensation affected payment is received before 20 March 1997 — the new lump sum preclusion period;
>
> (b) the compensation part of the lump sum payment or the sum of the amounts of the periodic compensation payments;
>
> (c) the maximum amount for which the insurer is liable to indemnify the compensation payer in relation to the matter at any time after receiving:
>
> (i) a preliminary notice under section 1177 in relation to the matter; or
>
> (ii) if the insurer has not received a preliminary notice — the recovery notice under this section in relation to the matter.

The drafting errors were the two phrases 'lump sum compensation affected payment' and 'received before 20 March 1997' in ss.1179(4)(a)(iii).

Special circumstances

The AAT dealt with this issue quite briefly. Veness' evidence about his circumstances was that he had used part of the settlement moneys in the purchase of a house and a four-wheel drive vehicle which he still retained, along with other assets and had some $19,000 in the bank at the time of the hearing. Other circumstances which he raised were wrong advice from Centrelink about which payments he would have to repay from