

Compensation lump sum: loss of earning capacity, s.1163A(1) not applicable

REID and SECRETARY TO THE DFACS

(No. 2000/549)

Decided: 5 July 2000 by B.H. Burns.

Background

Reid sustained a disability during the course of his employment. He claimed compensation and received weekly payments from 6 November 1990 to 29 March 1995. On 15 March 1995 Workcover decided to make an interim assessment of Reid's loss of future earning capacity represented by a capital loss payment of \$18,636.69 (LOEC payment) for the period 30 March 1995 to 27 March 1996. Weekly payments of compensation were discontinued from 29 March 1995. Four interim LOEC payments were made to Reid on 15 March 1995, 26 March 1996, 19 March 1997 and 4 March 1998.

On 30 January 1998 Reid applied for a disability support pension. A decision was made to treat the interim LOEC payments of 19 March 1997 and 4 March 1998 as periodic compensation payments pursuant to s.1163A of the Act. This decision brought s.1168 of the Act into operation, thus reducing Reid's disability support pension for those periods to nil.

Issues

The issues were whether the pre-December 1995 version of s.1163A or the current amended version of s.1163A should apply to the compensation payments; whether the s.42A LOEC payments or any of them should be considered as instalments; and whether s.1165 of the Act applied to Reid's compensation payments instead of s.1163A.

Legislation

The LOEC payments were made pursuant to s.42A of the *Workers Rehabilitation and Compensation Act 1986* (SA) (WRCA).

Section 1163 of *Social Security Act 1991* sets out the general provision relating to people receiving compensation.

1163(1) If a person ... receives compensation, payments of a compensation affected payment to the person ... might be affected under this Part ...

1163(3) If the compensation is a lump sum compensation payment, the compensation affected payment might cease to be payable

for a period (based on the amount of the lump sum) and some or all of the payments of compensation affected payment might be repayable ...

1163(4) If the compensation is in the form of a series of periodic payments, the rate of the compensation affected payment might be reduced for the period for which the payments are received.

Section 17(1) details disability support pension as a compensation affected payment. Section 1163A provides for certain lump sums to be treated as though they were received as periodic payments. This was amended on 12 December 1995. The version of s.1163A operative as of 12 December 1995 has three major differences from its predecessor (as set out in Reprint No. 2 of 1 July 1995).

- First, subsection (1)(d) was omitted by amending Act No. 143, 1995 and was not substituted. This subsection in the preceding version of the Act read as follows: '(d) the lump sum is to be paid to the person in 2 or more instalments'.
- Second, subsection (1)(e) was substituted by the amending Act. The preceding version read as follows: 'This Part applies to the person as if: (e) the person had not received the instalments'.
- Third, subsection (2) was inserted by the amending Act. The preceding version of s.1163A of the Act made no reference to s.1165.

Section 1165 provides that a compensation affected payment is not payable during a lump sum preclusion period. If s.1163A does not apply then s.1168 becomes operative. This section provides for a rate reduction of a compensation affected payment where periodic payments have been received.

Four payments were lump sum compensation payments

The Tribunal found that Reid satisfied paragraphs (a) and (b) of s.1165(1). In relation to paragraph (c) and deciding whether any of the three LOEC payments prior to 20 March 1997 were 'lump sum' payments, the Tribunal looked at s.17(3) of the Act. The Tribunal found that none of the LOEC payments could be categorised as payments within paragraphs (a) or (ab) of s.17(3).

The four LOEC payments do not have the air of an overall final and complete settlement which is the focus of paragraphs (a) and (ab) of s.17(3). These payments are but steps along the way to a final and complete settlement and only relate to loss of earning capacity.

(Reasons, para. 36).

Considering s.17(3)(b), the Tribunal concluded that the whole of each of the LOEC payments was in respect of lost capacity to earn.

The Tribunal found that each of the four LOEC payments was a *lump sum* compensation payment for the purposes of s.1165

The Tribunal is of the view that the first three LOEC payments being lump sum compensation payments received by the applicant before 20 March 1997 and before he claimed a disability support pension are caught by s.1165(1) of the Act. The remaining LOEC payment, i.e. the one received by the applicant on 4 March 1998, is a lump sum compensation payment to which s.1165(1A) applies. Disability pension is not payable for certain periods, i.e. the old lump sum preclusion period with respect to the first three LOEC payments and for the new lump sum preclusion period regarding the last of the LOEC payments. (s.1065(3) to (4) and s.1065(5) to (8)).

(Reasons, para. 39)

The Tribunal found that because s.1165 applied to each of the four payments, then s.1163A(1) could not apply pursuant to s.1163A(2).

Section 1163A not applicable

Reid submitted that the current version of s.1163A did not operate retrospectively. Reid submitted that the timing of WorkCover's decision meant that the pre-December 1995 version of s.1163A should apply.

Reid submitted that his LOEC compensation payments of 19 March 1997 and 4 March 1998 did not satisfy requirement (d) of s.1163A. He submitted that WorkCover decided on 15 March 1995 to make a single and final assessment of his loss of earning capacity under s.42A of the WRCA. The interim payments of 19 March 1997 and 4 March 1998 should not be construed as separate instalments of LOEC, but rather as components of the final assessment made by WorkCover in which they assumed an irrevocable obligation to pay the applicant a sum of money until retirement age.

Reid referred to the case of *Hill v Workers Rehabilitation and Compensation Corporation* (1997) 191 LSJS 300 to support his submission that interim assessments under the WRCA are not in the form of instalments.

Reid also pointed to an opinion of the Commissioner of Taxation that his LOEC payments were intended to compensate for loss of earning capacity and not the loss of actual income, and were therefore non-taxable. Reid used this opinion in support of his submission that

he was not receiving periodical income, and was not double dipping by applying for a disability support pension.

The Department submitted that the current amended version of s.1163A should apply because the relevant law for determining whether Reid was entitled to disability support pension payments was that which was in force at the time he applied for the pension on 30 January 1998. The Department argued that it was irrelevant when WorkCover made its s.42A decision.

The Department contended that the requirements of s.1163A(1)(a) to (c) were satisfied. Reid was entitled to periodic payments under s.35 of the WRCA, the entitlement to periodic payments was converted into an entitlement to a lump sum by virtue of s.42A of the WRCA, and the lump sum LOEC payments were calculated by reference to a period.

The Department also submitted that the s.42A LOEC payments were interim assessment payments, the final quantum of the LOEC payments not yet having been determined by WorkCover. Each interim assessment was in itself a lump sum payment within the meaning of s.1163A(1)(e). The Department referred to *Secretary, Department of Social Security v Banks* (1990) 20 ALD 19 to support its submission.

The Tribunal indicated that it considered s.1163A was not applicable because it considered that 'clear language must be used if it is intended that s.1163A is to draw on events in the past' (Reasons, para. 41). The Tribunal referred to s.1165(1) and (1A) which clearly indicate an intention to draw on events in the past. It noted that no such language was evident in s.1163A(1) and 'accordingly as one of the essential ingredients of s.1163A(1) is missing, it can have no operation in the present case' (Reasons, para. 41).

Formal decision

The decision under review was set aside and the matter remitted to the respondent for calculation of the old and new lump sum preclusion periods in accordance with the Tribunal's reasons.

[M.A.N.]

Newstart allowance debt: settlement of civil action and waiver

SECRETARY TO THE DFaCS and GALATIS

(No. 2000/728)

Decided: 21 August 2000 by J. A. Kiosoglous.

Background:

Galatis received job search and newstart allowance between 1991 and 1993. In this time he failed to provide accurate details about his earnings and income. As a result a debt of \$18,765.17 was raised in June 1994. As a result of the overpayment Galatis was also prosecuted.

There were a number of conversations between Galatis' solicitor and the Commonwealth Director of Public Prosecutions (CDPP), concerning the amount of the overpayment figure. In essence, the discussions centered around a proposal that if Galatis pleaded guilty to the offences then the amount outstanding would be reduced to approximately \$11,000.

In December 1996, Galatis pleaded guilty to the charges and provided a bank cheque for \$10,649.80. When sentencing, the fact that this payment was made was noted by the magistrate as a full repayment of the overpayment.

Legislation

This case turned on the meaning of s.1237 AAB(1) of the *Social Security Act 1991* which states as follows:

1237AAB.(1) If the Commonwealth has agreed to settle a civil action against a debtor for recovery of a debt for less than the full amount of the debt, the Secretary must waive the right to recover the difference between the debt and the amount that is the subject of the settlement.

Submissions

It was submitted on behalf of Galatis that any amount more than the amount paid by Galatis should be waived under s.1237AAB(1). The argument was as follows:

- the CDPP had agreed to the amount paid by Galatis as full restitution. This was confirmed by the prosecution's silence on this matter when Galatis was sentenced.
- the Department was bound by 'their representatives silence'.
- the CDPP acted as an agent for the Commonwealth.

- the Commonwealth had therefore waived that portion of the debt over and above the amount already paid.

It was submitted that the words 'civil action' refers to a 'cause of action' and that 'Commonwealth' includes the CDPP.

The submission of the Department was that there was no 'civil action' in that this term referred to 'civil proceedings'. It was further argued that the CDPP is not the 'Commonwealth' for the purposes of this waiver provision and that there was no delegation to the CDPP. It was submitted that the CDPP was only dealing with the overpayment in relation to the charges, as distinct from the overpayment under the Social Security Act.

Findings

The Tribunal considered the meaning of the words 'Commonwealth' and 'civil action'. In doing so, the Tribunal first distinguished much of the past case law since this concerned the making of reparation orders. In this case, there was no reparation order since the magistrate believed that the entire overpayment had been repaid.

In relation to the meaning of 'Commonwealth' the Tribunal did not accept the argument that the CDPP was acting as an agent for the Commonwealth. The Tribunal found there was no specific instrument or delegation establishing this relationship. The Tribunal also said that the CDPP would be 'very busy people' if they were acting as officers of the CDPP and under the Social Security Act.

The Tribunal also considered case law in relation to the authority of the prosecutor to make binding agreements in relation to civil matters. The Tribunal concluded that there are legislative limits concerning who can exercise the waiver provisions of the Social Security Act. Without delegation and clear evidence that the Secretary agreed to the settlement the Tribunal was not satisfied that the 'Commonwealth' had agreed to the settlement as is required by the waiver section.

In relation to the meaning of 'civil action', the Tribunal considered the definition of these words in the *Magistrates Court Act 1991* (SA). It also considered the dictionary meaning and case law. It concluded:

Applying common sense, and mindful of the various definitions as stated, the Tribunal considers that it is something of a stretch to hold that criminal proceedings in the South Australian Magistrate's Court come within the scope of 'civil action' as that term is