Federal Court Decisions

Compensation debt: waiver; sole administrative error

SECRETARY TO THE DFaCS v SEKHON
(Full Federal Court of Australia)

Decided: 3 September 2003 by Heerey, Nicholson and Selway JJ (Heerey J dissenting).

Background

In May 1989, Sekhon was injured in a car accident. She returned to work, but ceased on 23 October 1992 and applied for social security assistance. She received job search allowance payments from 17 February 1993 and disability support pension payments from 5 May 1994. Sekhon also made a claim for compensation, and in 1998 judgment was made in her favour for the sum of $469,568.

The insurer, GIO, advised Centrelink of the judgment. On 1 October 1998, Centrelink replied to GIO by facsimile, advising that there was no compensation charge to be deducted from the compensation funds, and that they could be released to Sekhon. This was confirmed in two letters sent the next day to GIO and Sekhon's solicitors.

As a result GIO made no deduction from the compensation funds on account of Centrelink and paid the balance of the verdict moneys to Sekhon's solicitors. After making other deductions, the solicitors paid to Sekhon the balance ($370,818.74) in three instalments in early 1999.

On 13 April 1999, Sekhon advised Centrelink of her receipt of the compensation moneys and her social security payments ceased. After calculating $245,020.82 as the relevant amount, Centrelink fixed the preclusion period as 593 weeks, from 14 September 1990 to 24 January 2002. Centrelink then attempted to raise a compensation charge of $50,681.95 and to recover this from GIO. After being notified by GIO that the settlement moneys had already been paid to Sekhon relying on Centrelink's nil charge advice, Centrelink instead sent Sekhon a notice dated 8 November 2000 indicating that the debt would be recovered from her. By that time Sekhon had expended the compensation funds.

Sekhon unsuccessfully sought review by an Authorised Review Officer. Both the SSAT and the AAT determined that the debt should be waived under s.1237A of the *Social Security Act 1991* ('the Act') on the basis that it arose solely through administrative error. This decision was set aside by the primary judge at the Federal Court, on the basis that the debt could not be regarded as having been attributable solely to administrative error. Sekhon appealed to the Full Court of the Federal Court.

The legislation

Section 1166 of the Act provides:
If:

> (a) a person receives a lump sum compensation payment; and
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> (b) the person receives payments of a compensation affected payment for the lump sum preclusion period;
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> the Secretary may, by written notice to the person, determine that the person is liable to pay to the Commonwealth the amount specified in the notice.

Section 1225(1) reads:

> If a person is liable to pay a compensation debt, that debt is a debt to the Commonwealth.

Section 23 defines 'compensation debt' as 'an amount that a person is liable to pay to the Commonwealth because of a notice by the Secretary under s.1166 or s.1170 of this Act ...'

Section 1237A(1) of the Act relevantly provides:

> Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.

The issue

The AAT determined that the debt arose solely though administrative error. The sole reason Centrelink sought to make Sekhon liable for the debt was its error in releasing the insurer from liability and therefore s.1237A applied so that the debt must be waived. Heerey J, at first instance, considered that the AAT had fallen into error, and that s.1237A did not apply in Sekhon's circumstances. The giving of the notice itself under s.1166 was not an error. The failure to recover the funds from the insurer may have contributed to he creation of the debt under such a notice, but other factors also contributed, namely that the receipt of a lump sum compensation amount as well as compensation-affected social security payments exposed Sekhon to potential liability. These were the prerequisites for the exercise of the discretion to issue a notice under s.1166.

Submissions

Sekhon submitted that instead of considering the causes of the exercise of the discretion to issue the notice under s.1166, the appropriate inquiry was to identify all of the factual circumstances that led to the issue of that notice. In order to determine if the debt was 'attributable to' a preceding act or event the Court should apply the 'but for' test. Having done so, a number of potential causes could be identified. In this case they might include that the appellant had an accident; that the appellant made a civil claim; that the appellant received a benefit and so on. The decision to issue the notice could properly be said to be attributable to each of these causes. However, it was submitted that all causes but one must be excluded, because those other causes could be seen as pre-conditions to the issue of a notice under s.1166 of the Act. The one cause that was not a pre-condition was the administrative error not to seek to recover the payment from the insurer. This being the one remaining cause for the purpose of the Act, the issue of the notice was 'attributable solely' to that cause.

It was also argued that in considering whether a debt is 'attributable solely to administrative error' it is not permissible to look merely to the reasons for the exercise of the discretion to issue the notice under s.1166 of the Act. If there was any administrative error involved in the exercise of the discretion to give the notice under s.1166 of the Act then the notice was ultra vires and the resultant debt was invalid. Consequently, to read s.1237A as permitting consideration of the reasons for the exercise of the discretion when, if administrative error was involved, the debt would not exist, was to give the section no meaning.

> The ordinary or usual interpretation of the phrase 'attributable solely to' is that it refers to the single or sole cause of the relevant act or event. The word 'attributable' means 'capable of being attributed'. It involves an objective assessment of causation. The words 'a debt attributable solely to an administrative error' can be paraphrased as meaning that the only cause that objectively can be ascribed to the relevant debt is an administrative error ...
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> This is the meaning of the phrase which the primary judge purported to adopt and apply. He drew attention to the fact that the decision to issue the notice was a discretionary decision. This necessarily means that there was more involved in that decision than merely identifying that the pre-conditions for making it had been met. Although there was no evidence before either the Tribunal or the primary judge identifying the reasons for that discretionary decision, nevertheless the primary judge was correct to conclude that 'the giving of the notice was not itself an administrative error', or at least there was no evidence that it was. Implicit within this conclusion is an acceptance by the primary judge not only that the legal pre-conditions for the issue of the notice were present, but also that there was no administrative error in respect of the policy considerations involved in that discretionary decision. Plainly enough the respondents have concluded not only that the pre-conditions specified in s.1166 of the Act have been met, but also that as a matter of policy the debt should be recovered from the appellant.

(Reasons, paras 35, 36)

Thus the mere creation of a debt could not be a relevant cause and it was necessary to consider the reasons and basis for the creation of the debt. In this case one of the considerations for issuing a notice under s.1166 was that the debt could no longer be received from the insurer because of Centrelink error, but there were other policy considerations, including whether it was fair and reasonable that the person to whom such a notice was directed should pay.

It was not appropriate to use a 'but for' test to determine sole cause. Such a test would only determine 'a' cause, not the sole cause.

Decision of Heerey J dissenting

Heerey J noted that s.1237A requires waiver where a particular circumstance exists, viz, error. 'The field of operation of the section is valid, but error-created, debt where the payments which would otherwise be recoverable have been received by the debtor in good faith' (Reasons, para.14). That error must have certain characteristics:

- it must be an administrative error;
- it must be made by the Commonwealth; and
- the debt (a valid debt) must be solely attributable to the error.

In Sekhon's case all of these criteria were satisfied:

- there was an error, viz, releasing GIO;
- it was an administrative error; and
- it was an error of the Commonwealth.

Heerey J concluded that nobody else's error played any part in the creation of this debt. 'Centrelink's error was an error which was the *sole* cause because it was the *only error* which was a cause' (Reasons, para. 17).

Formal decision

The appeal was dismissed and each party was ordered to bear their own costs.

[A.T.]

INDEX: Vol 5, Nos 7–12, 2003

AAT and Federal Court Review of decisions

Age pension

Assets test

Compensation