

Comcare v Dunstan [2014] FCAFC 21

Key Points

- The Tribunal was required to consider the scope of section 21A of the Act in relation to the calculation of weekly payments in circumstances where an employee is in receipt of both a lump sum and a pension under a superannuation scheme.
- The Tribunal found that, in this instance, the employee in question could not be considered to have "received" a pension pursuant to his superannuation scheme, notwithstanding that he had reached the minimum age at which he could claim.

Background

Mr Dunstan was employed in various positions within various Commonwealth departments from 1975 until May 2001, when his employment was terminated. Following his termination, Mr Dunstan made an election pursuant to the Superannuation Act 1976 to defer his superannuation entitlements. At no time did Mr Dunstan request the release or payment of his deferred benefit.

In January 2013, following some enquiries by ComSuper, Comcare advised Mr Dunstan that it intended to apply section 21A in respect of the calculation of his weekly compensation payments. This calculation was undertaken, and affirmed by reviewable decision dated 27 March 2013.

The Law

Section 21A of the Act relevantly states:

- (1) Compensation payable to an employee who is incapacitated for work as a result of an injury is determined in accordance with this section if:
 - (a) the employee is retired from his or her employment (whether the employee retired voluntarily or was compulsorily retired); and
 - (b) the employee receives:
 - (i) a pension; and
 - (ii) a lump sum benefit;

under a superannuation scheme as a result of the employee's retirement.

Conclusion

Tribunal Decision

Mr Dunstan sought review of the decision with the Administrative Appeals Tribunal.

Comcare argued that Mr Dunstan was entitled to payment of his superannuation benefits on turning 55, and that Mr Dunstan should be taken to have received his benefits at this time for the purposes of section 21A. Comcare further submitted that the purposes of sections 20, 21 and 21A were to prevent double dipping.

In its decision, the Tribunal noted that once Mr Dunstan turned 55, it was open to him to request payment of his superannuation entitlements, however unless he did so, release of the benefits could not occur unless there was some special event such as turning 65, or becoming totally incapacitated. The Tribunal found that the mere fact of him turning 55 did not render any benefits payable to Mr Dunstan.

The Tribunal did not accept Comcare's argument that Mr Dunstan should be considered to have received his benefits upon turning 55. This construction of the word "receives" was considered too broad, and not in line with other relevant superannuation legislation.

In respect of section 21A generally, the Tribunal noted that the provisions were intended to ensure account was taken of payments an injured employee receives other than weekly compensation. The Tribunal broadly accepted Comcare's argument that the provisions were to prevent double-dipping, however noted that this result would not occur where an employee was entitled to a deferred superannuation benefit that was not presently payable.

The Tribunal found that it could not be said that Mr Dunstan had received a superannuation pension for the purposes of section 21A, and therefore his compensation payments should be calculated pursuant to section 19.

Comcare appealed the decision to the Federal Court.

Federal Court Decision

Comcare raised the following issues on appeal:

- (1) that the Tribunal misdirected itself in interpreting the meaning "receives" by reference to legislation other than the SRC Act.

- (2) that the Tribunal erred by not finding that the superannuation benefit was payable to Mr Dunstan.

The Federal Court took the same view of those points as the Tribunal had taken at first instance, and dismissed the appeal with costs.

Lessons Learnt

This decision makes it clear that the word "receives" in section 21A should be interpreted narrowly. An entitlement to a superannuation which has not been acted upon is not sufficient to enliven the provisions of section 21A.



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