

Comcare v Nicolas [2014] FCAFC 122 (22 September 2014)

Key Points

- Comcare appealed a decision of the AAT in relation to the calculation of an employee's normal weekly earnings.
- The judgment focusses on the interpretation of section 8(5) and section 9 of the SRC Act.

Background

Ms Nicolas commenced working for Centrelink full time in April 2001. In March 2007, she was off work for the birth of her first child. She returned to work in January 2008 on a part time basis for 30 hours per week with some regular overtime.

On 8 December 2008, Ms Nicolas was involved in a motor vehicle accident and further reduced her hours of work. She had a second child in April 2009, spinal surgery in May 2009 and only worked for two days between 29 February 2009 and 1 May 2011. On 2 May 2011, Ms Nicolas returned to work on an agreed graduated return to work program commencing at 12 hours per week, with an intention to increase to 22.5 hours per week over a period. She had only worked two weeks of the program (at 12 hours per week) before she sustained her psychological injury on 13 May 2011.

It is relevant to note that on 24 May 2011, Ms Nicolas settled her insurance claim arising out of the motor vehicle incident and received a lump sum of compensation. During those proceedings it was claimed on her behalf that, as a result of the injuries sustained in the motor vehicle incident, she had lost 50% of her pre-accident earning capacity.

Ms Nicolas sought review of a decision of Comcare which calculated her normal weekly earnings on the basis of 12 hours per week.

The Law

Section 19 of the SRC Act requires compensation to be paid to an injured employee if the injury results in incapacity for work.

Section 4 defines "*normal weekly earnings*" as the normal weekly earnings of an employee calculated under section 8.

Section 8 provides a formula for calculating normal weekly earnings. Relevant to this case is section 8(5), which states that where, because of the shortness of the relevant period, the normal weekly earnings would not fairly represent the weekly rate at which the employee was being paid in respect of his or her employment before the injury, such other period as Comcare considers reasonable may be used to fairly represent the weekly rate at which the employee was being paid.

"*Relevant period*" is defined in section 9 to mean the latest period of two weeks before the date of injury during which the employee was continuously employed by the Commonwealth.

Further provisions of section 9 are also relevant to this matter. In particular, section 9(4) states that if, during any part of the period calculated under the proceeding subsections, the employees

earnings were reduced, or the employee did not receive any earnings, because of the absence from his or her employment for any reason, that part of that period shall be disregarded for the purposes of calculating a relevant period.

Conclusion

AAT decision

The AAT rejected the proposition that 12 hours per week should be adopted for the calculation of Ms Nicolas' normal weekly earnings. The AAT found that Ms Nicolas' average working week should be regarded as 20 hours and directed that compensation be calculated on this basis.

The AAT took the view that it should exercise its discretion under section 8(5) to identify a period different to the two weeks immediately before Ms Nicolas' injury. The AAT considered that reliance on the nine working days prior to her injury on 13 May 2011 for the purposes of calculating her normal weekly earnings did not permit the calculation of an amount that would fairly represent her normal weekly earnings before the injury. It relied on the fact that the return to work program prepared for Ms Nicolas had a goal to lift her working hours from 12 hours per week to 22.5 hours per week, and considered this was evidence that the 12 hours per week should not be regarded as her normal weekly hours.

Federal Court decision

The Federal Court did not consider that the AAT's conclusion accorded with the statutory scheme. It stated that Ms Nicolas' earnings during the period prior to her injury could not reduce just because there was an expectation that she might subsequently work longer hours and earn a higher weekly pay. At the date of her injury, the Federal Court said that the possibility of her working longer hours had not been realised.

The Federal Court was concerned that the AAT appeared to have reasoned towards the final figure of notional weekly hours, rather than identifying a period which, when applied together with the actual rate of pay, would give a fair basis for the calculation required by section 8. It stated that the task of the AAT was to examine whether the two week period before the injury was a fair representative of normal weekly earnings pre-injury, not assess whether those earnings might be expected to increase in the future. In respect of the application of sections 8(5) and 9(4), the Federal Court stated that it was important to emphasise that the judgment to be made under section 9(4) is to be made before, not after, the engagement of 8(5), because it must be made only in relation to the period directed by section 9, and not some alternative period selected under section 8(5).

The Federal Court upheld Comcare's appeal, and found that Ms Nicolas' normal weekly earnings should be 12 hours per week.

Lessons Learnt

The decision emphasises the importance of taking a prescriptive approach to the calculation of normal weekly earnings, rather than reasoning a figure and attempting to make the legislative scheme work towards that outcome. The Federal Court was critical of the AAT's reasoning in this case, and emphasised that the calculation of normal weekly earnings must have regard to the past earnings of an employee, and not the potential for increased future earnings.

The logo for hba legal. features a 2x2 grid of squares in the top left corner: light blue, grey, light grey, and light grey. Below this grid is a white rectangular box with a black border containing the text "hba legal." in a black serif font.

hba legal.

For more information on this article, please contact:

Claire Tota
Solicitor
Email: claire.tota@hbalegal.com
Direct Line: (08) 9265 6011

Brett Ablong
Partner
Email: brett.ablong@hbalegal.com
Direct Line: (08) 9265 6001

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.



hba *legal.*