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Comcare v Simmons [2014] FCAFC *4*

Key Points

- Calculation of the "*normal weekly earnings"* of the employee for the purpose of sections 8(10)(a), 8(10)(b) and 19 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

- Whether the personal choices of an applicant are a relevant consideration when calculating "*normal weekly earnings"*.

Background

Mr Michael Simmons was employed by the Commonwealth in the Operational Response Group (ORG) of the Australian Federal Police (AFP). In addition to his base salary, he was in receipt of and an annual ORG allowance of $20,000. On 15 May 2009, Mr Simmons injured his right shoulder in the course of his employment with the ORG base in Canberra. In 2010, Mr. Simmons transferred to the Counter Terrorism Unit in Sydney. In 2011, he left the AFP and commenced employment with the New South Wales Police Service.

The initial determination as to Mr Simmons' entitlements was that the calculation of his *"normal weekly earnings"* should be reduced by the amount payable to him by ORG in February 2010 when he decided not to return to Canberra and instead decided to stay in Sydney. That decision was affirmed by the AAT and concluded that the ORG allowance was not payable to Mr Simmons because he chose to leave the ORG for personal reasons and not because of his compensable injury.

An appeal from the decision of the Tribunal was allowed. The single judge concluded that for the purpose of section 8(10)(a) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the **SRC Act**) the calculation of Mr Simmons' normal weekly earnings was not to include ORG allowance. His Honour further concluded that for the purpose of section 8(10)(b)(i) the calculation was to include the ORG allowance, but that for the purpose of section 8(10)(b) (ii) the calculation was not to include the ORG allowance.

Comcare and Mr. Simmons appealed the decision of the single judge. The appeal was dismissed and it was further concluded that the single Judge's primary conclusion as to the construction of section 8(10)(b)(i) and its applicant to the facts was correct.

The Law

The main issue on appeal and cross-appeal related to the construction of section 8(10), in particular, sections 8(10)(a) and 8(10)(b)(i) of SRC Act.

Section 8(10) of the Act imposes a cap upon the amount of pre-injury NWE of an employee which has been calculated under the preceding subsections in the following terms:

"(10) If the amount of the normal weekly earnings of an employee before an injury, as calculated under the preceding subsections, would exceed:

a) where the employee continues to be employed by the Commonwealth or a licensed corporation—the amount per week of the earnings that the employee would receive if he or she were not incapacitated for work; or

b) where the employee has ceased to be employed by the Commonwealth or a licensed corporation—whichever is the greater of the following amounts:

i. the amount per week of the earnings that the employee would receive if he or she had continued to be employed by the Commonwealth or the licensed corporation in the employment in which he or she was engaged at the date of the injury;

ii. the amount per week of the earnings that the employee would receive if he or she had continued to be employed by the Commonwealth or the licensed corporation in the employment in which he or she was engaged at the date on which the employment by the Commonwealth or the licensed corporation ceased;

the amount so calculated shall be reduced by the amount of the excess."

Comcare submitted that in order to assess the relevant amounts of weekly earning under section 8(10) of the SRC Act, the decision-maker to needed to know the weekly amount that Mr Simmons would likely have earned if he had remained employed on the terms of his pre-injury employment. This construction accords with the full Court's decision in *John Holland Group Pty Ltd v Robertson* (2010)[1]*,* namely, that *'employment'* constitutes the actual duties described in the contract of employment at the relevant time.

Furthermore, section 8(10) (b) of the SRC Act requires an assessment of actual earnings, adjusted to reflect changes in circumstance between the cessation of employment and the date of calculation, having regard to the actual terms of employment.

In response to Comcare's submissions, the Court stated that section 8(1o) is intended to provide a "*last stop 'reality check', or 'audit', on the calculation done under ss 8(6) –(9G)"* by providing a means of testing the outcome achieved by the earlier calculations.

[1] *John Holland Group Pty Ltd v Robertson* (2010) 185 FCR 566

It was further stated that section 8(10) of the SRC Act sets a ceiling which the figure produces by the hypothetical calculations made under the preceding provisions cannot exceed and that personal choices by the employee were irrelevant to undertake the calculation required by section 8(10)(b), where the employee had ceased to be employed by the Commonwealth.

Conclusion

The appeal was dismissed and it was further concluded that the single Judge's primary conclusion as to the construction of s 8 (10)(b)(i) and its application to the facts was correct.

Lessons Learnt

This decision is useful when the applicant's normal weekly earnings is impacted upon by their own personal decisions such as the decision to relocate and the flow on effect of changing their employment due to the relocation. It illustrates that where this is the case, the employer must refer to sections 8(10)(a) and 8(10)(b) of the SRC Act and that personal choices of the employee are irrelevant when calculating amounts under section 8(10)(b).

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