

Spaul and Comcare [2013] AATA 107 (28 February 2013)

Key Points

- The Tribunal was required to consider whether a pay increase constituted an increment for the purposes of section 8(6) of the SRC Act, and therefore whether the increase should be included in the calculation of an employee's NWE.

Background

Mr Spaul was employed by Medicare Australia (**Medicare**) from 1988 until Medicare terminated his employment on 7 September 2004. At the time of his termination, Mr Spaul was employed as a Manager Physical Security.

In 2003, Mr Spaul suffered from an adjustment disorder which resulted in total incapacity for work. He lodged a claim for workers' compensation, which was heard by the Tribunal in 2006. In its decision, the Tribunal held that the action to terminate Mr Spaul's employment did not constitute *reasonable administrative action* that would disentitle him from receiving compensation.

Comcare accepted liability for Mr Spaul's injury pursuant to section 14 of the SRC Act.

Following the Tribunal's decision, the parties agreed that Mr Spaul would receive compensation for incapacity for the period 8 September 2004 to 2 December 2007 (being the day before his 65th birthday), in respect of Mr Spaul's new injury, being an aggravation of the adjustment disorder on 7 September 2004.

On 1 October 2004, Medicare issued a 4.25% increase in salary for the third pay point of the position of Principal Executive Officer Class B (**the pay increase**). Mr Spaul considered that his NWE should be recalculated to take into account the effects of the pay increase.

On 3 November 2010, Comcare issued a reviewable decision affirming a determination dated 13 August 2010, which calculated Mr Spaul's normal weekly earnings (**NWE**) without taking into account the pay increase. Mr Spaul sought review of this decision at the AAT and on 23 June 2011, the Tribunal determined that the figures used in the NWE calculation were correct.

Mr Spaul appealed this decision to the Federal Court of Australia, where it was set aside and remitted the matter to the Tribunal for re-hearing.

In the re-hearing, the Tribunal was required to determine the correct approach to calculating Mr Spaul's NWE. This involved a consideration as to whether the pay increase constituted an *increment* for the purposes of section 8(6) of the SRC Act.

It is accepted that Mr Spaul was incapacitated for work as a result of that injury, and that Comcare was liable to pay compensation pursuant to section 19 of the SRC Act. The formula for the calculation of Mr Spaul's Normal Weekly Earnings (**NWE**) is set out in detail in section 8.

The Law

In calculating Mr Spaul's NWE, section 8(6) of the SRC Act provides:

- (6) *"Subject to this section, if the minimum amount per week payable to an employee in respect of his or her employment by the Commonwealth or a licensed corporation at the date of the injury is increased, or would have been increased if the employee had continued in that employment, because of:*
- (c) *The receipt by the employee of an increase in salary, wages or pay by way of an increment in a range of salary, wages or pay applicable to the employee or to his or her office, position or appointment;*

The normal weekly earnings of the employee before the injury, as calculated under the preceding subsections, shall be increased by the same percentage as the percentage by which that minimum amount per week is increased, or would have been increased, as the case may be."

Section 8(9) provides:

- (9) *"The normal weekly earnings of an employee before the date of the employee's injury, as calculated under the preceding subsections, must, while the employee continues to be employed by the Commonwealth or a licensed corporation, be increased or reduced by the relevant percentage.*
- (9A) *For the purposes of subsection (9), **relevant percentage** means the same percentage as the percentage of increase or reduction in the minimum amount per week payable in respect of employees included in a class of employees of which the employee was a member at the date of the injury as a result of:*
- (a) *the operation of a law of the Commonwealth or of a State or Territory; or*
- (b) *the making, alteration or operation of an award, order, determination or industrial agreement or the doing of any other act or thing, under such a law.*
- (9B) *The normal weekly earnings of an employee before injury, as calculated under subsections (1) to (8) and as increased or reduced under subsection (9) must, if the employee has ceased, or ceases, to be employed by the Commonwealth or a licensed corporation, be further increased, with effect from each indexation date in relation to that cessation, by reference to the percentage of increase (if any) of an index that is prescribed for the purposes of this subsection over the year ending on the 31 December preceding each such indexation date.*
- (9C) *For the purposes of subsection (9B), the **indexation** date, in relation to a cessation of employment, is:*
- (a) *the 1 July next following:*
- (i) *the date on which this Act receives the Royal Assent; or*
- (ii) *the date of that cessation of employment;*
- whichever last occurs; and*

(b) each subsequent 1 July.”

In *Military Rehabilitation and Compensation Commission v Perry*¹, Bennet J stated:

“Section 8(6) is directed to increments in remuneration payable to an employee by reason of the attainment of a level of seniority or the passage of time, including actual increments and hypothetical increments. Section 8(6) applies to injured employees who continue to be employed by the Commonwealth and, as is apparent from ‘would have been increased if the employee had continued in that employment’, continues to operate in respect of employees after employment has ended.”

Conclusion

Mr Spaul contended that the pay increase was properly described as an *increment in a range of salary* falling within the scope of section 8(6)(c) of the SRC Act, and therefore an allowance for the pay increase should be included in the calculation of his NWE. He submitted that the pay increase was an *increase in salary* which fits within a range and was applicable to the *office, position or appointment* held and became payable under the *HIC Managing Change Certified Agreement 2003-2005 (the Agreement)* as a result of the passing of a *passage of time*. Mr Spaul argued that, if he had continued to be employed by Medicare, he would have received the pay increase, and that if there was any doubt surrounding his entitlement to the pay increase, the SRC Act should be interpreted in his favour.

Comcare contended that there were two clear and distinct purposes within section 8 which provided for increases of NWE: one which refers to circumstances covered by section 8(6) which is directed to a particular employee (such as age or service), and the other is the system of increments. It submitted that the pay increase in this matter fell within the scope of section 8(9) and section 8(9A), being an increase payable to a class of employees as a result of the *making, alteration or operation of an award, order, determination or industrial agreement*. Comcare further submitted that if the pay increase were to be considered an increment for the purposes of section 8(6), then this would leave no purpose to be achieved by section 8(9A) because Parliament could not have intended a situation where there was an opportunity for two increases in NWE arising from one actual salary rise.

The Tribunal accepted the submissions made by Comcare, and determined that *increment* should be given its ordinary meaning, being a progression within a fixed scale. It accepted that Parliament did not intend that the legislation would provide an opportunity for two NWE increases arising out of the Agreement. Based on the terms of the Agreement, that the pay increase was an across-the-board pay rise for a class of employee, the Tribunal found that the pay increase fell within sections 8(9) and 8(9A) of the SRC Act.

Accordingly, the Tribunal determined that the pay increase was not to be included within the calculation of Mr Spaul’s NWE.

¹ *Military Rehabilitation and Compensation Commission v Perry* [2007] FCA 1586, 277.

Lessons Learnt

The decision of the Tribunal provides guidance on the calculation of an employee's NWE. In circumstances of an across the board pay increase, section 8(6) is unlikely to apply as it is intended to govern pay increases which are specific to an employee, for example, by reason of their age or time of service.

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