



IMPACT OF REDUNDANCY PAYMENTS ON PERSONAL INJURY DAMAGES

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As a result of budgetary constraints the Commonwealth and State Governments in NSW and QLD have announced that they intend to reduce the size of their respective public services by voluntary redundancy or natural attrition.

The Issue

What does this mean for the assessment of economic loss in personal injuries matters? The question arises as to whether any payment received for redundancy payments can be used as an offset against an assessment of economic loss.

In relation to the above, it would appear that two distinct circumstances may arise which need to be considered, namely:

1. Where an injured worker takes a redundancy payment unrelated to the injury; and
2. Where an injured worker takes a redundancy payment as a result of their injury (eg. no position for light duties exists etc.).

How do the Courts treat payments?

How does the Court treat these payments and what is the impact on the assessment of economic loss in personal injury matters?

A review of the judicial decisions on the topic of redundancy payments would appear to suggest that irrespective of the two circumstances outlined above the most common approach the Court has taken as being:

- Genuine redundancy payments should not be offset against economic loss; however
- Payments that relate to accrued annual leave should be offset against economic loss (see *Graham v Baker* (1961) 106 CLR 340 for the general proposition and *Parry v Cleaver* [1970] AC 1, at page 16).

In relation to the former set of circumstances (ie. unrelated to the injury) the Court has taken the approach that as the payment is not casually related to the injury it should not be deducted from any assessment of damages (see the decision of *Jandson Pty Ltd v Welsh* [2008] NSWCA 317).

In relation to circumstances where an injured worker has accepted a redundancy as a result of the injuries sustained in an accident it would appear that the key issue to consider is the character and purposes of the benefit.

In *Clay v Freda* (1988) 144 LSJS 274, King CJ stated the redundancy payment was:

"... not in consequence of the appellant's injuries nor a substitute for earnings which he would have received if uninjured. It was in that sense unrelated to the appellant's injuries and incapacity. It was a payment made on termination of employment by reason of redundancy and in consequence of an entitlement under the award arising from his years of service. The fact that the redundancy was contributed to by the respondent's diminished working capacity in that the employer could not provide work suited to that diminished working capacity ... did not change the character of the entitlement or payment"

Millhouse J with whom Mohr J agreed arrived at a similar reasoning stating (at 279):

"... the respondent having been injured is simply not relevant to his receipt of the redundancy payment. Had he not been injured he would have been entitled to the payment if he decided not to go to Elizabeth. He probably would have been able to find another job in or near Adelaide and paying about the same as the one at GMH. The redundancy payment was not connected with his earning capacity."

In *Wall & Lambe v Wall* [1998] SASC 7017 (23 December 1998) the plaintiff only became entitled to a targeted separation package because he elected not to exercise his earning capacity with his then employer as a result of the psychological injuries sustained an incident. The Full Court of the Supreme Court was of the opinion that:

"It is the character and purpose of the particular financial benefit which must be explored" and

"In this case the voluntary separation package was made up of payments to reflect eight weeks employment into the future and three weeks pay for each year of service. None of the payments, in my opinion, were for the purpose of replacing the earning capacity lost by reason of the respondent's injuries and in that sense they were not payments which could be characterised as being conferred upon him independently of the existence of any right of redress against the appellant. The mere fact that the respondent received the benefit only because he chose not to exercise his earning capacity, which choice was imposed upon him by reason of his injuries, is not enough." and

"It is not enough, however, for a defendant to establish that a plaintiff has received a benefit, which he or she would not have received but for the injuries. The defendant must also establish that the benefit received must have been received for the purpose of replacing the earning capacity lost and in circumstances where the payment can be enjoyed independently of any right of action against the tortfeasor."

See also the decision of *Hall v Cramer* (2004) 40 MVR 477 which would appear to support similar propositions and *Morgan v Conaust Ltd* [2000] QSC 340 in which Wilson J was of the view that failure to accept a redundancy package did not amount to failure to mitigate losses sustained.

What are Redundancy Payments and Other Lump Sum Payments

The proceeding discussion has centred on how the Courts would appear to treat of any lump sum payments resulting from a redundancy.

In our experience, practitioners may have difficulties in identifying and distinguishing such payments. In the main these difficulties are as a result of how such payments are subject to taxation and recorded in an injured worker's Income Tax return.

Redundancy Payments

Generally speaking the Australian Taxation Office (ATO) deems a bona fide redundancy payment must comprise of one or several of the following:

- payment in lieu of notice;
- severance payment of a number of weeks' pay for each year of service; and
- a gratuity or 'golden handshake'.

The taxable amounts will be recorded in a person's Employment Termination Statement (see example attached).

Lump Sum Payments

In contrast, payments for the following items are not considered bona fide redundancy payments and instead will be classified as an eligible termination payments (ETP):

- salary, wages or allowances owing to the employee, for work done or leave already taken for work completed (eg. time in lieu and timing of pay periods); and
- lump sum payments of unused annual leave or leave loading paid on termination of employment.

The amounts will normally be recorded in the person's PAYG summary as Lump Sum "A" (see example attached).

How does the ATO treat these payments?

Bona fide redundancy payments

Bona fide redundancy payments, are generally speaking, tax free up to a limit based on the number of years the employee has worked for their employer. Any amount exceeding the tax free limit is treated as an ETP for taxation purposes.

The current thresholds are \$8,806 plus \$4,404 for each completed year of service.

Lump Sum Payments and Eligible Termination Payments

Lump Sum Payments and Eligible Termination Payments are, generally speaking, taxed at concessional rates of up to 31.5%.

Case Studies – Taxation Treatment of Payments

Case Study 1

Worker 1 has been working for 25 years and accepts a redundancy payment of \$90,000. They also receive a payment of \$20,000 for unused annual leave.

Case Study 2

Worker 2 has been working for 1 ½ years and accepts a redundancy payment of \$15,000. They have no annual leave entitlements.

Case Study 3

Worker 3 has been working for 4 ½ years and accepts a redundancy payment of \$35,000. They also receive a payment of \$20,000 for unused annual leave.

Workings – Taxation Perspective

Description	Worker 1	Worker 2	Worker 3
Redundancy Payment	\$ 90,000	\$ 15,000	\$ 35,000
Accrued / Unused Leave	<u>\$ 20,000</u>	<u>\$ 0</u>	<u>\$ 20,000</u>
Total Payments	<u>\$ 110,000</u>	<u>\$ 15,000</u>	<u>\$ 55,000</u>
Tax Free Component of Redundancy (Based on thresholds and years of <u>completed</u> service noted above)	\$ 118,906	\$ 15,412	\$ 26,422
Taxable Component of ETP (Redundancy)	\$ 0	\$ 0	\$ 8,578
Taxable Lump Sum	<u>\$ 20,000</u>	<u>\$ 0</u>	<u>\$ 20,000</u>
Total Taxable Payments (included in ITR)	<u>\$ 20,000</u>	<u>\$ 0</u>	<u>\$ 28,578</u>

Table 1

What document(s) should I ask for?

As can be noted from the examples above, the simple reliance on amounts contained within an Income Tax return will not necessarily reflect (i) the true nature of the payment; and (ii) the actual amount paid to a redundant worker.

We suggest that in circumstances where a worker has been made redundant, the appropriate action would be to request a copy of any separation certificate or correspondence from the worker’s former employer on cessation of their employment.

In our experience, employers will ordinarily provide a redundant worker with a statement that outlines the various components of their lump sum payment and how each amount was ascertained.

Conclusion

From a legal point of view it would appear that the general rule is that payments received for a bona fide redundancy should not be offset against economic loss, however payments that relate to accrued annual leave should be offset against economic loss.

In determining whether or not any amount a redundant worker receives need to be taken into account we suggest that a simple reliance on a claimant’s Income Tax return is not sufficient and that additional documentation should be sought from the redundant worker’s former employer.

If you have any questions in relation to the content of this document please do not hesitate to contact either Michael Lee (3228 4091) or Mark Thompson (3228 4023).



PAYG payment summary - employment termination payment



708680408

Both sections of this form must be completed. For help, refer to *How to complete the PAYG payment summary - employment termination payment form* (NAT 70996).

Are you **amending a payment summary** you have already sent? If so, place X in this box.

Payment summary for year ending 30 June 2 0 1 3

Section A: Payee details and payments

Payee's surname or family name

S M I T H

Payee's given name(s)

J O H N

Payee's residential address

[Empty address boxes]

Suburb/town/locality

[Empty suburb boxes]

State/territory

[Empty state boxes]

Postcode

[Empty postcode boxes]

Payee's date of birth (if known) [Day] [Month] [Year]

Date of payment [Day] [Month] [Year]

Payee's tax file number [Empty boxes]

TOTAL TAX WITHHELD \$ [Empty boxes], [Empty boxes] 1, 4 1 5

Taxable component \$ [Empty boxes], [Empty boxes] 8, 5 7 8

Tax free component \$ [Empty boxes], [Empty boxes] 2 6, 4 2 2

Place an in the appropriate box for each field below.

Is this payment a transitional termination payment? No Yes For information, refer to *Employment termination payments - transitional arrangements* (NAT 70644)

Is this payment part of a payment made in an earlier income year for the same termination? No Yes

Is this payment a death benefit? No Yes

Type of death benefit Trustee of deceased estate or Non-dependant or Dependant

Tax Office original

Section B: Payer details

You must also complete this section

Payer's Australian business number (ABN) or withholding payer number (WPN)

[Empty ABN/WPN boxes] Branch number [Empty boxes]

Payer's name (use the same name that appears on your activity statement)

[Empty name boxes]

[Empty name boxes]

DECLARATION

I declare that the information given on this form is complete and correct.

Signature of authorised person

[Empty signature box]

Date [Day] [Month] [Year]



Australian Government
Australian Taxation Office

PAYG payment summary - individual non-business



00460211

All sections of this form must be completed. For help, refer to *How to complete the PAYG payment summary - individual non-business* (NAT 3388).

If you are amending a payment summary you have already sent, place X in this box.

Payment summary for year ending 30 June

Section A: Payee details

Payee's surname or family name

Payee's given name/s

Payee's residential address

Suburb/town/locality

State/territory

Postcode

Date of birth (if known) / /

Section B: Payment details

Period during which payments were made

/ to /

Payee's tax file number

TOTAL TAX WITHHELD \$

Total tax withheld - whole dollars only in words

If the information on this payment summary relates to payments of a pension or annuity, place X in this box.

GROSS PAYMENTS (do not include amounts shown under 'Allowances', 'Lump sum payments', 'Development Employment Projects (DEEP)', 'Community Development Employment Projects (CDEP)' and 'Exempt foreign employment income')

\$

Lump sum A \$

Community Development Employment Projects (CDEP) payments

\$

Lump sum B \$

Reportable fringe benefits amount FBT year 1 April to 31 March

\$

Lump sum D \$

Reportable employer superannuation contributions (do not include compulsory super guarantee amounts. For more information see the back page of this form.)

\$

Lump sum E \$

Deductible amount of the undeducted purchase price of an annuity

\$

Exempt foreign employment income

Amount \$

Allowances (provide details)

\$

\$

Total allowances

\$

Union/Professional association fees - Name of organisation

Amount

\$

\$

Workplace giving - Name of organisation

\$

Section C: Payer details

You must also complete this section

Payer's Australian business number (ABN) or withholding payer number (WPN)

Branch number

Payer's name (use the same name that appears on your activity statement)

DECLARATION - I declare that the information given on this form is complete and correct.

Signature of authorised person

Date

/ /

JS 19166

NAT 0046-02/2011

Tax Office original