Evidentiary onus and prejudice at the AAT

By David Richards*

Onus of proof, as applied in the common law courts, does not apply to proceedings under the Safety Rehabilitation and Compensation Act 1988 (the SRC Act) in the Administrative Appeals Tribunal (the AAT).

In the AAT, there is an evidentiary onus, as distinct from an onus of proof. The evidentiary onus, or the onus of proving the necessary facts, lies on the employee where the employee is seeking an entitlement to compensation. Where the decision-maker is considering ceasing an existing entitlement to compensation, compensation can not be ceased unless one of the entitling circumstances has changed. The evidentiary onus in establishing a change in circumstances lies with the employer.

Evidentiary onus was discussed in *Telstra Corporation Limited v Arden* Unreported No. SG52 of 1993 15 October 1993. Burchett JJ in Arden referred to *McDonald v. Director-General of Social Security* (1984) 1 FCR 354. Burchett JJ found that on the question of onus of proof the decision-maker should not make a determination ceasing the entitlement of compensation unless one of the entitling circumstances had changed.

Burchett JJ referred to the High Court decisions of *Phillips v. The Commonwealth* (1964) 110 CLR 347 and *The Commonwealth v. Muratore* (1978) 141 CLR 296 for the proposition that it was right to require "that the burden of persuasion be borne by the arguments against the existing entitlement of the applicant (worker)".

Heerey J in *Comcare v Nichols* (1999) FCA 209 also referred to *McDonald v Director-General of Social Security* and noted that in McDonald once a pension had been granted there is an evidential onus on the Director-General to satisfy himself or the AAT of changed circumstances before cancelling the pension.

Heerey J in Nichols went on to refer to *Phillips v. The Commonwealth* (1964) 110 CLR. 347 where the High Court held:

> *"... upon any such review it is, we think, for the Court to pronounce anew upon the rights of the parties as disclosed by the evidence before it. That being so the application of the ordinary principles relating to the determination of disputed questions of fact by judicial tribunals requires the conclusion that if a claim for compensation be rejected by the Commissioner or his delegate the onus of proving the necessary facts to entitle the applicant to what is virtually an award of compensation will be upon the claimant in later proceedings before the County Court. Likewise, the application of the same principles may well mean that in some cases the onus of proving critical facts may rest upon the Commonwealth. Such a case would be where the Commissioner has purported to terminate an employee's right to compensation under an antecedently existing determination by reason of a material change of circumstances.*

It appears to be settled law that the party seeking to "claim" the benefit, or the party seeking to "disturb" the benefit, has the evidentiary onus. And, where an employee has been receiving benefits, the evidentiary onus is on the employer to prove that one of the entitling circumstances has changed.

PREJUDICE IN PROVING THAT A CIRCUMSTANCE HAS CHANGED

When a Determining Authority is attempting to establish that there has been a change in circumstance, consideration of any prejudice must be taken into account.

If there has been a recent change in circumstance, and the original entitlement to compensation was also recent, there may be no prejudice. Prejudice will depend on the amount of time between the original decision to accept the claim and the change in circumstance. The difficulty in proving that a circumstance has changed is not proving the more recent "change", but with proving what the 'changed" circumstance was originally.

The effect of delay in the quality of evidence was

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Dates for your diary

Friday 21 July - Retirement dinner for Chief Magistrate Hugh Bradley combined with the Law Society's Annual Dinner from 6.30pm at Pee Wees on the Point.

Wednesday 5 July - CPD seminar with Tony Young on "Zen and the profession of law" from 5.30-6.30pm.

Wednesday 12 July - CPD seminar with Des Crowe on "Transfer of Liquor Licence Applications/Gaming Applications" from 5.30-6.30pm

Tuesday 18 July - CPD seminar with Dr John Lowndes SM on "Youth Justice Act" from 5.30-6.30pm.

Monday 31 July - CPD seminar with Stephen Mason on "Digital Evidence: Issues for Lawyers, Judges & Scholars and What is Coming up over the Horizon" 5.30-6.30pm

Friday 11 August - OH&S seminar with AMPLA and ACLA from 9am-3pm at the Crowne Plaza, Darwin

Wednesday 16 August - CPD seminar with Justice Dean Mildren from 5.30-6.30pm - topic to be advised

Wednesday 23 August - CPD seminar with Peter Tiffin on "Plain English in Documents: Drafting Tips and Conventions for Maximum Clarity" from 5.30-6.30pm

NT adopts stronger police powers in the fight against terrorism

cont...

However, Minister Henderson disagrees, claiming: "These new measures are designed to strike the balance between ensuring the freedom of Territorians and the need for law enforcement to counter terrorism and will be strictly controlled.

"The amendments, along with existing counter-terrorism laws, will equip police with special investigative and preventative tools to help protect Territorians in the fight against terrorism."

The President of the Law Council, John North, said, "We remain vehemently opposed to the new laws because, as we've been saying for some time, they threaten our fundamental freedoms while not necessarily making Australia a safer place."

Mr North said the recent anti-terror raids by police demonstrated that existing laws and intelligence-gathering procedures are effective.

Late last year, the Law Council promised that the Australian legal profession will keep a watchful eye on new counter-terrorism laws, to ensure they are not abused or misused by those in power.

"We want governments to know that almost 50,000 lawyers will be watching closely to make sure the new laws are not implemented at the expense of our civil liberties."

"When that happens, we want to assure the Prime Minister and the premiers that lawyers across the country will be watching. Because these are very bad laws indeed," Mr North said.

Evidentiary onus and prejudice at the AAT cont...

discussed by the High Court in *Brisbane South Regional Health Authority v Taylor* (1996) HCA 25. The High Court held that, with delay, the quality of justice deteriorates. The High Court found that the deterioration of quality of evidence may not be ascertainable or even recognized by the parties.

Deterioration of justice may include:

- Where witnesses are no longer available;
- Where important evidence or documents have been destroyed;
- Where evidence may have disappeared without anyone knowing that it ever existed;
- That with time, the significance of a known fact or circumstance, because of its relationship to the cause of action, may no longer be apparent;
- That the longer the delay the more likely the case will be decided on less evidence than was available at the time;
- That delay will effect the quality of the evidence.

If, through the passage of time there is a deterioration of justice such that a Tribunal is unable to satisfy itself that there is sufficient evidence to determine there has been a change in circumstances, then a Tribunal must set aside any decision purporting to re-determine an entitlement. See The Commonwealth v Muratore (1978) 141 CLR 296.

It follows that a Determining Authority proposing to cease entitlements where the employee's original claim dates back more than a few years, should consider prejudice when making its decision.

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