

Publication: Super Review  
Date: September 2009  
Page No: N/A  
Author(s): Jenny Willcocks and Ashley Caren (of Holding Redlich)  
Publisher: LexisNexis

## The pursuit of justice

### Claiming a disability benefit after accepting a voluntary redundancy package NSW Supreme Court case finds double dipping is possible

In the recent New South Wales Supreme Court case of *Tuftevski v Total Risks Management Ltd [2009] NSWSC 315*, the Court set aside the decision of the Trustee of the BHP Billiton Superannuation Fund (Fund) to reject a disablement claim by a member who had accepted a redundancy package in 1998 and who had previously unsuccessfully complained to the Superannuation Complaints Tribunal (SCT). For superannuation trustees the case is a timely reminder that decisions of the SCT do not prevent a member pursuing the same complaint in the courts.

The decision highlights that employers funding a defined benefit fund and a voluntary redundancy program (VRP) can be exposed to “double dipping” if the terms of the VRP are not drafted appropriately and the trust deed does not allow the trustee of the superannuation fund to reduce any disability benefit subsequently claimed to take account of the VRP.

### Implications

The decision is of significance for trustees for a number of reasons:

- 1 the Court confirmed that a member of a superannuation fund who terminates employment to receive a VRP may still be entitled to a disablement benefit from the superannuation fund.
- 2 the decision re-iterates that, in conducting a bona fide inquiry regarding benefit claims, trustees of superannuation funds may need to provide members with the substance of adverse information and with an opportunity to respond to that adverse information before a decision is made.
- 3 the decision confirms trustees must reconsider past decisions regarding disablement claims (subject to applicable limitation periods or restrictions in the governing rules),

where relevant new evidence is produced. This obligation to reconsider decisions arises irrespective of whether the past decision of the Trustee has been affirmed by the SCT.

- 4 the decision demonstrates that trustee decisions affirmed by the SCT, which are not appealed to the Federal Court, may still be susceptible to challenge in the State Supreme Courts years after those decisions were made.
- 5 the decision suggests that, under Victorian law, the limitation period for an action to recover trust property, or in respect of breach of trust, based on a trust deed, is 15 years and not 6 years. In our view this aspect of the decision should be regarded with caution.

The member was employed by BHP from 1976 until ceasing employment on 30 November 1998. He injured his back in a work accident in 1985 and received compensation. He later returned to work with BHP on light duties until he terminated employment in 1998. At that time BHP was conducting a VRP and the member submitted his resignation on the understanding that he would receive the VRP. The member claimed to have retired due to his worsening back injury, but qualified the basis for termination to refer to the VRP claiming that this was done at the suggestion of BHP representatives.

The member applied for a disablement benefit from the Fund on 24 March 1999. His application was considered by the Trustee's Benefits Review Committee (BRC) on three occasions; 15 November 1999, 14 March 2000 and 20 February 2001. On each occasion, the application was rejected because the member did not satisfy the definition of disablement under the Fund rules.

The evidence considered by the BRC included medical reports, surveillance material and information prepared by BHP which was adverse to the member. The Trustee did not inform the member that it held adverse material on which it based its decision to deny the benefit. Nor did it give him the opportunity to comment on matters raised by the adverse material.

### **Review by SCT**

The member complained to the SCT and on 30 September 2002 the SCT affirmed the Trustee's decision. The SCT found that the Trustee's decision could not be said to be unfair or unreasonable in its operation to the member. In the course of the SCT proceedings the member was for the first time provided with the adverse material, including the surveillance film and adverse medical reports, and made submissions to the SCT on that material.

### **New evidence**

More than three years later, on 22 February 2006, the member sought to raise the matter again by lodging a further complaint with the Trustee. That complaint alleged that the Trustee's previous rejection of the member's application for a disablement benefit was unreasonable. The member attached a new medical report with that complaint.

The Trustee refused to consider the complaint, noting that the application had been rejected by the Trustee previously, and that the SCT had affirmed the Trustee's decision.

### **Action in Supreme Court**

Subsequently, the member applied to the New South Wales Supreme Court challenging the earlier decisions of the BRC to deny payment of the disablement benefit and the Trustee's decision of 24 February 2006 to refuse to consider the member's further complaint and new evidence.

### **The Supreme Court judgment**

The Court set aside all three decisions of the BRC on the basis that:

- 1 the Trustee considered the wrong question in concluding that since the member had applied for a VRP the termination of his employment could not be said to be on the ground of disablement. The Court held that disablement and redundancy under the terms of the package offered by BHP were not mutually exclusive;
- 2 the Trustee did not conduct a bona fide inquiry or engage in genuine decision-making regarding the member's application because it had not made the member aware of the "thrust" of the adverse evidence nor had it given the member the opportunity to comment on it.

### **New evidence**

The Court also set aside the Trustee's decision of 24 February 2006 to refuse to consider the further complaint by the member. However, the Court noted that the new medical evidence accompanying the further complaint in 2006 did not address the relevant question, in that it did not focus on the member's condition at the date of termination of employment. Therefore, the Court said that, if it had not set aside the three decisions of the BRC, it would not have set aside the Trustee's decision of 24 February 2006.

### **Rules of natural justice**

Citing with approval the comments of Byrne J and Callaway JA in *Flegeltaub v Telstra Super Pty Ltd* (3 April 2000) BC 2000 01407, the Court noted that while the rules of natural justice did not apply to the Trustee's consideration of the member's application, the Trustee must still engage in a bona fide inquiry and in genuine decision-making regarding the beneficiary's application. It noted that in many cases, this will require inquiry with the beneficiary as to adverse material before the trustee.

### **Application of trust law to superannuation**

Acting-Justice Smart also took the opportunity to call for law reform, concurring with earlier comments of various superior court judges that it is unsatisfactory that principles of review developed for discretionary trusts are still applied by the courts to superannuation funds, given the fundamental differences between discretionary trusts and superannuation funds.

### **Statute of limitations**

In defending the proceedings by the member, the Trustee raised the statutory limitation period. Since the trust deed of the Fund was expressed to be governed by the laws of Victoria, the Court determined that the Victorian *Limitations of Actions Act 1958 (Vic)* applied. The Court held that the member's action was based on the trust deed and therefore it was based on a "specialty" (a

“specialty” is a bond, contract under seal or covenant). This led the Court to conclude that the applicable limitation period is that prescribed under section 5(3) of the *Limitations of Actions Act*, being 15 years and not section 21(2), six years. However, it should be noted that the Court misquoted the relevant section of the *Limitation of Actions Act*. The Court’s judgment states that section 5(3) of the *Limitation of Actions Act* reads as follows:

“5(3) An action upon a bond or other specialty shall not be brought after the expiration of fifteen years from the date on which the cause of action accrued.”

In fact, section 5(3) of the *Limitation of Actions Act* reads as follows (the details omitted are in bold type):

“An action upon a bond or other specialty shall not be brought after the expiration of fifteen years from the date on which the cause of action accrued:

**Provided that this sub-section shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.”**

Section 21(2) of the *Limitation of Actions Act* provides as follows:

“Subject as aforesaid,<sup>1</sup> an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.”

Since the Court omitted to quote the second paragraph of section 5(3) of the *Limitation of Actions Act*, it is unclear whether it properly considered the interaction between section 5(3) and section 21(2) of the *Limitation of Actions Act*. Therefore, in our view, the Court’s conclusion regarding the limitation period should be regarded with caution.

## **REDUNDANCY VERSUS DISABLEMENT**

The Court held that the member could retire because of disablement and also seek to take advantage of the redundancy package being offered by BHP because they were not mutually exclusive. This is an issue that often arises in employer sponsored funds. The trustee of a superannuation fund must assess the member’s application for a disablement benefit on its merits. If the member meets the criteria for payment of a disablement benefit the trustee must pay that benefit in full unless the trust deed provides otherwise.

If the employer is adamant that employees accepting payments under a VRP should not be able to also claim a disablement benefit from the employer sponsored superannuation fund, the employer

---

<sup>1</sup> Section 21(1) of the *Limitation of Actions Act* states no period of limitation applies to an action based on fraud involving the Trustee or where a trustee misappropriates trust property to its own use.

must ensure the terms and conditions and acceptance forms concerning the VRP clearly state this. This assumes that the structuring of VRPs in this way does not breach anti-discrimination law.

Even if the terms and conditions of the VRP are drafted in this way, it is not binding on the Trustee who must administer the Fund in accordance with the Trust Deed. If the employee breaches the conditions of the VRP the employer would have to seek to recover the part of the termination payment relating to redundancy from the employee.

The only way the Trustee could refuse payment of a disablement benefit if the member qualifies under the governing rules of the Fund would be a set off clause in the Trust Deed that would allow reduction of the disablement benefit where the member has received a payment under a VRP.

## **SCT DECISION**

Members who complain to the SCT are not prevented from pursuing their rights in the Courts if they are dissatisfied with the outcome. The form the SCT uses when a settlement is reached at Conciliation only prevents further complaints to the SCT on the matter which is the subject of the particular settlement. By signing that form the complaint before the SCT is resolved but this does not protect the trustee from further claims in the Courts. To protect against further claims the Trustee should ensure that any settlement is in full and final settlement of all claims of any kind against the Fund, and this should be clearly documented and accepted by the parties to the complaint.

This decision highlights the need for trustees of superannuation funds to consider relevant new evidence provided by members, even if previous decisions have been reviewed internally and by the SCT. This is, of course, subject to any restrictions in the governing rules and statutes of limitations.

Employers should review the terms of any VRP they offer and where they contribute to a defined benefit fund they should also consider whether it is possible for a member to claim both the disablement benefit and the payment under the VRP.

While Trustees are not required to give reasons for their decisions this case makes it clear that they can not withhold information adverse to the interests of a potential beneficiary of a death benefit. The case does not specify release of the information given but as a minimum the Trustee must provide sufficient information to allow a competing beneficiary to respond. Failure to do so may result in a finding that the Trustee has failed to make a bona fide inquiry into the claim and has not made a genuine decision concerning the application for the benefit.

Jenny Willcocks is a partner and Ashley Caren a senior associate in Holding Redlich's superannuation and financial services practice.