

## Time over effort: Salary increases under the SRC Act

*Graham and Comcare [2016] AATA 932 (5 September 2016)*

### Key Points

- The Tribunal considered whether an injured worker would be eligible for performance-based increases in salary in circumstances where he was not working because he was totally unfit.
- The Tribunal found that injured workers who are not working are only eligible for increases which would occur through the passage of time.

### Background

Mr Graham was employed by Australian National Railways (ANR) and his employment related to civil and rail construction. In 1979, Mr Graham suffered an injury to a vertebra in his back. When Mr Graham resigned from ANR in 1994, his salary was approximately \$34,000. He then began employment with the Commonwealth Employment Service (CES). Mr Graham's starting salary was \$26,000 with the CES.

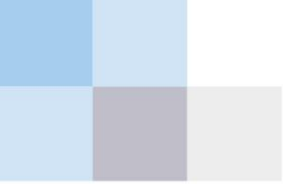
In 1998 or 1999, it was determined that Mr Graham was entitled to compensation payments for the back injury he sustained while working at ANR. In assessing Mr Graham's top up compensation payments (necessary because of the difference between his earnings at CES and his NWE), the decision was made that Mr Graham's former position at ANR could be treated as equivalent to an AS05/ASP5 level position with Centrelink. From 1999 onward, Comcare assessed Mr Graham's compensation by reference to the AS05/ASP5 level in the Australian Public Service.

Under the *Department of Human Services Agreement 2011- 2014* (the Agreement), eligible employees were entitled to a performance-based salary advancement. The Tribunal was required to consider whether Mr Graham, as an injured employee, was eligible for an increase in salary under section 8(6) of the SRC Act.

### The Law

In accordance with section 8(6) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), an employer is required to take into account pay increases applicable to the employee specifically or to the position held by the employee, prior to injury.

Senior Member Manette considered the case of *Re Frew and Comcare [2011] AATA 597*, in which the Tribunal concluded that an employee's progression from a lower level to a higher level did not simply depend on the time spent in a position, and the performance of the employee would also be taken into



account. The Tribunal decided in that case that section 8(6) did not apply to increases related to performance.

## Conclusion

Mr Graham submitted that as an injured employee, he should have his normal weekly earnings (NWE) increased with reference to the Agreement because, while injured, he was prevented from performing normal duties. As a result of this, Mr Graham argued that injured employees would miss out on increases granted to all employees who were “fully effective”.

Senior Member Manette considered the salary advancement provision in the Agreement to be based upon the performance of the employee, rather than resulting from the passage of time. As such, Senior Member Manette concluded that Mr Graham was not entitled to have his NWE calculated with reference to the Agreement.

## Lessons Learnt

The calculation of an employee’s normal weekly earnings should take into account increases in salary occurring through the passage of time which are relevant to the employee or the employee’s position. The calculation is not required to take into account any increases which are based upon an employee’s performance.

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