Decision impact statement

Fidge and Commissioner of Taxation

Court citation:	[2023] AATA 4245
Venue:	Administrative Appeals Tribunal
Venue reference no:	2021/10317
Judge:	Senior Member R Olding
Judgment date:	22 December 2023
Appeals on foot:	No
Decision outcome:	Unfavourable to the Commissioner

Summary

This Decision impact statement outlines the ATO's response to this case, which was concerned with whether the termination payment made to the Applicant, who was a colonel in the Australian Regular Army, was a genuine redundancy payment under section 83-175 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Under subsection 83-175(1) of the ITAA 1997, a genuine redundancy payment is so much of a payment received by an employee who is dismissed from employment because the employee's position is made genuinely redundant as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the dismissal.

All legislative references in this Decision impact statement are to the ITAA 1997, unless otherwise indicated.

All judgment references in this Decision impact statement are to the judgment of *Fidge and Commissioner of Taxation* [2023] AATA 4245, unless otherwise indicated.

Brief summary of facts

The Applicant was a member of the Permanent Forces[1] (Regular Army) of the Australian Army (a division of the Australian Defence Force[2] (Defence Force)). He commenced this position on 16 January 1987.[3] In his capacity as a member of the Regular Army, the Applicant was bound to "render continuous full-time service".[4]

The Applicant rendered continuous full-time service over the course of his career with the Regular Army and was eventually promoted to the rank of colonel in 2010.[5]

In March 2016, the Applicant commenced a posting as Defence Attaché-Ankara, International Policy.[6]

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[1] Section 4 of the *Defence Act 1903.*
[2] Section 17 of the *Defence Act 1903.*
[3] At [8a].
[4] At [28].
[5] At [8b].
[6] At [8c].

On 31 July 2018, the Chief of Army wrote to the Applicant, advising the Applicant that he was being considered for Command Initiated Transfer to the Reserves (CITR), should another full-time position not be found.[7]

The 31 July 2018 letter went on to say [8]:

> You have provided exemplary service to the Australian Regular Army throughout your service, which has spanned 31 years, with seven years as a colonel. Every effort is being made to find you further employment; however, it is unlikely there will be a full-time position for you following your appointment as Defence Attaché-Ankara, International Policy.

A CITR is the ability, under section 16 of the *Defence Regulation 2016* (the Regulations), to transfer a member from the Permanent Forces to the Reserves if the transfer is in the interests of the Defence Force. Relevantly, paragraph 6(2)(d) of the Regulations provides that 'workforce planning' is a reason as to why something would be in the interests of the Defence Force.

The Applicant completed his assignment as Defence Attaché-Ankara in February 2019.[9] Between February 2019 and 6 June 2019, the Applicant continued to render, and was remunerated for, full-time service with the Regular Army. During this period he was posted to Canberra to a position designated as 'senior officer awaiting repost'.[10]

On 5 June 2019, the Chief of Army wrote to the Applicant advising[11]:

> All efforts have been made to identify further employment, however, continued workforce planning deliberations have confirmed there will not be a full-time position available for you following your current role. As a result, and in accordance with Section 16 of the Defence Regulation 2016, I have determined that transfer to SERCAT 3 [the Reserves] will occur on 07 June 2019.

The 5 June 2019 letter went on to say[12]:

> As you will be compulsorily transferred from the Permanent Force to the Reserves for reasons of workforce planning within 30 days of receipt of this decision, I advise that you are eligible for a special benefit payment pursuant to a determination under section 58B of the *Defence Act 1903*.

Issue decided by the Tribunal

The Tribunal considered that the sole issue for determination in this case was whether the Applicant was dismissed because his position was made genuinely redundant. If answered in the affirmative, the special benefit payment received by the Applicant as a result of his being compulsorily transferred to the Reserves would be a genuine redundancy payment under section 83-175 and would attract concessional income tax treatment.[13]

The position in which the Applicant was engaged

The Tribunal accepted that the Applicant was not an employee but the holder of an office[14] under the relevant legislation governing military service. However, the

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[7] At [8d].
[8] At [8e].
[9] At [8f].
[10] At [8g].
[11] At [8h].
[12] At [8i].
[13] At [2]. The other statutory eligibility criteria for concessional treatment of the payment under section 83-175 were not considered by the Tribunal in this decision.
[14] Section 4 of the *Defence Act 1903.*

Tribunal further accepted that through the application of section 80-5, which treats a person as if they were an employee for the purposes of Part 2-40 if they hold an office, that subsection 83-175(1) was applicable.[15]

The Tribunal found that the Applicant's position was as a 'colonel in the Regular Army'.[16] In doing so, the Tribunal stated that in military service, it is somewhat unrealistic to search for a specified set of specific duties and responsibilities. The Tribunal acknowledged this position differed from ordinary civilian employment, where it is commonplace for an employee to have a designated role in which the duties and responsibilities are clearly set out in a duty statement or similar document, or at least clearly understood by employer and employee.[17]

The Tribunal concluded that the duties of the Applicant's role were characterised as a collection of duties for a colonel required to render full-time service as and where directed.[18]

Characterisation of the compulsory transfer

The Tribunal concluded that it was this position, as a colonel in the Regular Army, from which the Applicant was dismissed when the CITR was effected.[19]

Specifically, the Tribunal concluded that the CITR was engaged because the Applicant's position was excess to the requirements of the Regular Army, in that there was no longer a collection of duties to be carried out in that position.[20]

The Tribunal did not consider that in forming its conclusion, it was conflating the Applicant's redundancy with the redundancy of his position. The Tribunal found no evidence that another officer had taken over the Applicant's position as a colonel of the Regular Army and concluded the position formerly held by Mr Fidge was excess to the Army's requirements.[21]

Application of relevant authorities

In making their submission, the Applicant argued that subsection 83-175(1) was intended to have the same effect as former section 27F of the *Income Tax Assessment Act 1936* (ITAA 1936). In doing so, the Applicant relied upon the judgment of the Full Federal Court in *Dibb v Commissioner of Taxation* [2004] FCAFC 126 (*Dibb*), which concerned former section 27F of the ITAA 1936.[22]

Specifically, the Applicant sought to draw upon comments in *Dibb*, that former section 27F of the ITAA 1936 applied if the employee's job was no longer to be performed by any employee or there was no available job for which the employee was suited so that the employee was surplus to the employer's needs, to establish that the Applicant was made genuinely redundant under subsection 83-175(1). In *Dibb*, the Court observed at [43] that:

> The difficulty in this case has been caused by the aphorism which appears in both pars 12 and 42 of TD 94/12 to the effect that the job, not the employee, becomes redundant. However s 27F speaks of the '*bona fide redundancy of the taxpayer*'. We consider that it is more accurate to say that an employee becomes redundant when his or her job (described by reference to the duties attached to it) is no longer to be performed by any employee of the employer, though this may not be the only circumstance where it could be said that the employee becomes redundant. Re-

[15] At [6].
[16] At [38–43].
[17] At [47].
[18] At [43].
[19] At [43].
[20] At [52–53].
[21] At [51–53].
[22] At [11].

> allocation of duties within an organization will often lead the employer to consider whether an employee, previously employed to perform specific functions assigned to a particular "job", will be able to perform any available "job" existing after such re-allocation. Even if the employee's job, defined by reference to its duties, has disappeared, he or she may be able to perform some other available job to the satisfaction of the employer. In that case, no question of redundancy arises. It is only if the employer considers that there is no available job for which the employee is suited, and that he or she must therefore be dismissed, that the question of redundancy arises. If, in good faith, the employer:
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> - has re-allocated duties;
> - considers that the employee is not suitable to perform any available job, defined by reference to those re-allocated duties, existing after the re-allocation; and;
> - for that reason, dismisses the employee,
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> then, for the purposes of s 27F, the employee is dismissed by reason of his or her bona fide redundancy.

As an alternative submission, the Applicant sought to establish that he was entitled to protection from liability on the basis that he had relied upon Taxation Ruling TR 2009/2 *Income tax: genuine redundancy payments*, for the proposition that the treatment of genuine redundancy payments under the ITAA 1997 to be identical to the treatment of bona fide redundancy payments under the ITAA 1936.[23]

The Commissioner's submissions, however, focused on the requirement in subsection 83-175(1) for the employee's *position* to be redundant, not the employee him or herself, relying on the judgment of the Full Federal Court in *Weeks v Commissioner of Taxation* [2013] FCAFC 2 (*Weeks*).[24] In the matter of *Weeks*, the Court specifically rejected the proposition that, if a person is made redundant, it necessarily follows that the 'employee's position is genuinely redundant'. [25] Subsection 83-175(1) applies, the Court said in *Weeks*, 'only to a limited type of redundancy, being where dismissal from employment is because the employee's position is genuinely redundant'. [26]

The Tribunal noted that while it was not necessary to determine the submissions on this matter because of the conclusion it reached on the treatment of the payment[27], that:

- TR 2009/2 invites reliance on the ruling when applying former section 27F of the ITAA 1936, not subsection 83-175(1).[28]
- The operation of subsection 83-175(1) is different to former section 27F of the ITAA 1936, highlighting the explicit reference to the employee's *position* being redundant in subsection 83-175(1). The Tribunal noted that this aligned with the decision in *Weeks.*[29]
- It would not accept that the Applicant was protected from liability on the basis of reliance on reliance on TR 2009/2.[30]

Further, the Tribunal noted that with respect to the decision in *Dibb*, the Full Court did not rely on Mr Dibb being surplus to the employer's requirements as a stand-alone alternative basis for the conclusion that former section 27F of the ITAA 1936

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[23] At [12]. See also paragraph 4 of TR 2009/2.
[24] At [13].
[25] *Weeks* at [26].
[26] *Weeks* at [18].
[27] At [60].
[28] At [62].
[29] At [63–66]; *Weeks*.
[30] At [60–70].

applied.[31] The Full Court's observations in that regard were in the context of explaining that the question of redundancy would only arise if there were no other suitable duties for the employee to carry out such that the employee would be surplus to requirements.[32] It was because the employer no longer wished to have his job performed by anybody that Mr Dibb was redundant.[33] As such, the Tribunal considered the Full Court's reasoning in *Dibb* is not binding authority for any broader principle.[34]

ATO view of decision

This case was conducted on an agreed set of facts between the parties, rather than through the production of evidence to establish the precise position or roles undertaken by the Applicant in the Army.

We accept this decision was open to the Tribunal on the agreed set of facts. However we do not agree that there is a distinction between Army and civilian occupations in the application of section 83-175. Specifically, we do not agree that it is unrealistic to search for or identify a specified set of specific duties and responsibilities in Army occupations. We consider that the roles and functions related to a position can be identified through the production of evidence.

It is our view that this decision is heavily dependent on the particular agreed facts in this case, and therefore has limited application beyond its own factual circumstances.

It is also our view that this decision does not disturb the fundamental principles set out in the decisions in *Weeks* and *Dibb*, or the ATO view in TR 2009/2, as outlined in the section on the application of these authorities. We will continue to apply subsection 83-175(1) consistent with these authorities, with reference to the specific facts of each case.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued: 21 August 2024

Due date: 20 September 2024

Contact officer details have been removed as the comments period has ended.

[31] At [67].
[32] At [67].
[33] At [69].
[34] At [69].

Legislative references

ITAA 1997
Pt 2-40
section 80-5
section 83-175
subsection 83-175(1)

ITAA 1936
former section 27F

Defence Act 1903
section 4
section 17
section 58B

Defence Regulation 2016
paragraph 6(2)(d)
section 16

Case references

Dibb v Commissioner of Taxation [2004] FCAFC 126; 136 FCR 388; 2004 ATC 4555; 55 ATR 786; 207 ALR 151

Weeks v Commissioner of Taxation [2013] FCAFC 2; 209 FCR 264; 2013 ATC 20-366; 88 ATR 368; [2013] ALMD 1798

Relevant rulings

TR 2009/2; TD 94/12

ATO references
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