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How to elevate economic loss claims to an equitable level

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How to elevate economic loss claims to an equitable level

- A scenario
- The collective view
- Some employment law perspectives

NOTE: This presentation focuses on non-public sector employees in QLD, although similar considerations will apply to those employees



Scenario

Sally is 27 and works as a barista at Coffees Are Us (CAU), which operates a largely outdoor café where patrons can dine/drink in or order takeaway items (or order via Menulog etc.).

Sally is employed on a permanent part-time basis. She interviewed well when she first sought work and the owners offered her the job on the spot. A promised letter of offer, however, never materialized.

Sally is a good worker and has been at CAU for a 6 years, against the trend of steady staff turnover. As she is trusted and knows the systems, Sally generally assists the owners to train and provide guidance to new staff in their duties.

There is no real scope for promotion, as there is no level of staff between Sally and the owners, who also work in the business.

Scenario cont'd

As the café is always slow on Mondays, the owners take the day off and only run the takeaway coffee section, which Sally runs by herself.

Sally is paid in accordance with the Restaurant Industry Award 2020 as a Food and beverage Attendant grade 1 at the pro-rata for hours worked of the minimum full time weekly rate of 834.80.

For her 30 rostered hours per week, Sally is accordingly paid \$659.05 gross per week.

Arrangements are fairly casual, and when business is slow or it is raining, Sally may only work part of her rostered shift before being sent home, sometimes after only 1 or 2 hours.

Scenario cont'd



Despite the work areas being potentially slippery, Sally is encouraged to wear heels as part of her work attire in order to “look more presentable” to customers when serving to the tables.

One day Sally slips on a behind the counter spill that was not cleaned up by a co-worker and suffers a severe ankle fracture and a significant head injury from striking the back of her head on a stainless-steel counter in her fall. Sally is unlikely to work again.

Sally makes a statutory workers’ compensation claim and wishes to progress with a common law claim.

Audience consensus

Let's talk about Sally's economic loss claim?

Show of hands please (*excluding TSP colleagues – no false flags here!*):

Who thinks assessment of past and future economic loss worked out on her average pay of \$659.05 / week is fair and reasonable?

Who thinks assessment of past loss at \$659.05 is fair and future at \$675 / week?

Future at \$700 / week?

Future at \$750 / week?

More?



Some employment law perspectives....

1. The terms of Sally's employment

- Based on the High Court decisions in *Workpac Pty Ltd v Rossato & ors* [2021] HCA 23 and *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, the black letter law of contract appears to be well and truly back, as far as employment is concerned.
- As PI lawyers, we ought to be looking at the interaction between Sally's employment terms and those imposed by the *Fair Work Act 2009* (Cth) (**FW Act**).
- It takes a bit of explanation (which we do not have time for today) **HOWEVER**, despite Sally working in a café in the everyday sense, Sally is actually covered by the *Fast Food Industry Award* (**FFIA**) and not the *Restaurant Industry Award* (**RIA**).

Some employment law perspectives....

2. Consequences of review of Sally's employment terms

- CAU was paying Sally under the incorrect Modern Award and any reliance a PI lawyer places on pay rates from CAU would be flawed.
- Once you examine the FFIA further, it is clear that Sally was being underpaid due to a raft of issues (classification, minimum engagement periods and undocumented shift/roster changes amongst them).

Some employment law perspectives....

3. Consequences for a common law damages claim (past loss)

- So from the previous, a bit of IR leg work may result in assessing past economic loss **not from a starting position of Sally's averaged past payments of \$659.05 per week, but from a corrected earnings figure of over \$900 per week.**
- Obviously, that could make a huge difference to the overall size of Sally's claim for past economic loss and interest, if WorkCover paid benefits based on CAU wage payments.



Some employment law perspectives....

4. Consequences for a common law damages claim (future loss)

- When we then talk about the appropriate rate for future economic loss, it is also worth considering the year-on-year increase of Modern Award rates of pay, which occur effective 1 July each year.
- For the 2022/23 year, the Fair Work Commission made an Award increase of 5.2% (although it was less in previous years). If wage growth is to effectively track inflation and cost of living, a similar rise in 2023/24 is not out of the question. Indeed, many recently bargained EBAs are incorporating annual increases of about 3.5% across the 3 or 4 year nominal life of the agreements.
- So after only a few years, a current rate of pay being used as a basis for calculation of future economic loss of an Award covered employee could be “out” by 10% and progressively ever-increasing amounts.

Some employment law perspectives....

- In my submission:
 - Consideration of allowances for future economic loss should better account for these inevitable increases in applicable Award based pay rates; and
 - Discounting for vicissitudes further penalizes claimants where calculations are already discounting claims by using a present wage value (which, as you can see, are rapidly outdated) and an actuarial multiplier.
- By way of example, if I personally had experienced a career ending compensable injury in my first year as a solicitor, in the absence of assessment for loss of opportunity (handing baton to fellow speaker Chau Donnan of Counsel here), my economic loss claim would have potentially been based on \$24K / year or \$460 / week!!!!

Oh, and by the way....

- The straight difference between \$659 / week and \$900 / week (without addressing my above submissions) over a 40 year period for total economic loss (given that Sally is 27) is \$604,698 versus \$825,840 or **a difference of \$221,142.**
- *Over to Chau!!!*



Thanks!

Any questions?

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