CITATION: *Kenneth Koch v Wimray Pty Ltd* [2004] NTMC 030

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| PARTIES: | Kenneth Koch |
| | v |
| | Wimray Pty Ltd |
| TITLE OF COURT: | Work Health Court |
| JURISDICTION: | Work Health |
| FILE NO(s): | 20305621 |
| DELIVERED ON: | 8 April 2004 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 9-11 February 2004 |
| DECISION OF : | Mr Wallace |

**CATCHWORDS:**

Workers Compensation – Work Health Act (NT) – “normal weekly earnings” – s69(1) – “reduction of compensation”.

**REPRESENTATION:**

*Counsel:*

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| Worker: | J Lewis |
| Employer: | M Grant |

*Solicitors:*

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| Worker: | Priestley Walsh |
| Employer: | Morgan Buckley |

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| Judgment category classification: | C |
| Judgment ID number: | 030 |
| Number of paragraphs: | 54 |

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20305621

BETWEEN:

**KENNETH KOCH**
Worker

AND:

**WIMRAY PTY LTD** (In liquidation)
Employer

REASONS FOR DECISION

(Delivered 8 April 2004)

Mr Richard Wallace SM:

1. This is an action for worker's compensation brought pursuant to the *Work Health Act* ("the Act"). There is no dispute that the Worker ("Mr Koch") suffered an injury at work and no doubt that he is incapacitated as a result of that injury. The matters in issue are: first, the question of Mr Koch's normal weekly earnings ("NWE") at the time of the injury; and, secondly the question of the legitimacy of the means adopted by the Employer to reduce the rate of weekly payments it was making to Mr Koch. The employer has continued to make payments at the reduced rate.

NORMAL WEEKLY EARNINGS

2. By contrast with the run of recent cases, wherein questions to do with a worker's NWE have been located among the baroque outgrowths of superannuation entitlements and fringe benefits, the question about the NWE of Mr Koch was the more classical one: what was he being paid for his work

at the time of the injury? The difficulties posed in attempting to answer the question were not legal, nor actuarial, but evidentiary.

3. The accident which gave rise to the claim happened on 12 July 1989. Mr Koch, who was then working as a pilot for the Employer ("Wimray") which ran an airline among other business activities, had flown a plane to Alice Springs. In the process of getting out of the plane he had to walk on its wing. From there he slipped and fell a metre or so to the tarmac. He broke his left ankle. He received prompt medical attention – one of his passengers that evening was a surgeon – went to Alice Springs Hospital, was operated on in Royal Darwin Hospital, recovered to a degree and went back to work as a pilot, for Wimray.

4. His subsequent work history had him leaving the employ of Wimray at the end of 1989 and going to work, still in Darwin still as a pilot, for Air North. In about 1995 he left the Territory and returned to live in Adelaide, where he worked as a pilot for at least two airlines. In 2000 he was prosecuted for flying an overloaded aircraft and in consequence of that charge lost his commercial pilot's licence and left the aviation industry. He then went to work as a plant operator driving excavators, bobcats, and trucks. In 2002, on medical advice, he ceased work.

5. His medical history, with regard to his ankle, subsequent to the accident was an unfortunate one, with further damage, further operations, frequent arthroscopic surgeries, and increasing arthritic complications.

6. It is not in dispute that it was deteriorating state of his ankle that caused him to cease work in 2002 at the age of about 51.

7. In taking evidence about events 15 years ago one expects witnesses to have moved on (in one sense or another), the memories of the survivors to be poor and documentation to be incomplete. In this particular case the incompleteness of the documentation was notable. Wimray has gone into

liquidation. What remains of its books are in the hands of the liquidator. It seems that nothing pertinent to Mr Koch's employment has survived there.

8. Mr Koch was able to produce one important document, his pilot's log book. Otherwise he too was unusually bereft of documentation. Even the usual record keeper of last resort, the Australian Taxation Office, was of little use in this case because Mr Koch was not an orthodox PAYE taxpayer. On his evidence, at some point during his employment by Wimray he ceased to be paid in the ordinary fashion. Instead, his services were provided to Wimray by a trustee company on behalf of his family trust, and it was the company that received the fee for Mr Koch's services. Later, no doubt, the trustees divided up the income of the trust among the beneficiaries – Mr Koch, his wife and two children – in a manner calculated to afford the least satisfaction to the Federal revenue.

9. A copy of one group certificate issued by Wimray to Mr Koch has survived. It became Ex 13. In respect of the period to which it relates, it specifies "From casual to 3.2.89" (a bookkeeper from Wimray having typed in "Casual" and "3.2.89"). It seems to me to be fairly certain that the date, 3 February 1989, marks the moment when Wimray ceased to pay for Mr Koch's services direct and began instead to purchase them from the trustee company. It seems much less certain, though possible, that that date also marked the moment when Mr Koch moved from casual to full-time employment. If it be the case that Mr Koch was employed on a full-time basis at the date of the accident (as I am persuaded he was, see below), Ex 13 is of no use at all in establishing what his pay then was, in July 1989.

THE WITNESSES

10. Mr Koch was the only witness in his case. In respect of matters going to the question of NWE, his memory was poor. This is hardly surprising, given (a) the lapse of time, (b) his changing circumstances while working at Wimray, and (c) the changes in his circumstances that have accompanied his moving

into other employments in the aviation industry. Nor is it surprising that he has come to a lot of self-serving beliefs after patching up the holes in his faded recollections.

11. Three witnesses were called on behalf of Wimray. Noel John Bleakley ("Mr Bleakly") was a director and shareholder of Wimray at the time. He was also a pilot who has had a commercial pilot's licence for more than 20 years. Lynette Bleakley ("Mrs Bleakley"), Mr Bleakley's wife – her address is in the Act so they may now be separated or divorced – then worked in Wimray's office where she did much of the bookkeeping and made up the pays of employees, including pilots. It was, for example, she who signed the Group Certificate Ex 13, on behalf of Wimray. (She had no memory of doing so but was able to recognise her signature and to infer from it that she would have typed up the text of the Certificate.) Philip Desmond Hedger ("Mr Hedger") is an employee of the Territory Insurance Office ("TIO"), usually as a Supervisor in the division of TIO that deals with worker's compensation claims, and, at the time of his giving his evidence, the Acting Manager of that division. Of the documents which had survived the passage of the years, the majority seem to have emerged from the TIO's file. Mr Hedger's evidence bore particularly on the second live question in the case, the question arising about TIO's reduction of the weekly payments to Mr Koch. It is perhaps worth noting that, given that Wimray had gone into liquidation, the conduct of the case for Employer was, to an unusually evident degree, controlled by Wimray's insurer, TIO. Mr and Mrs Bleakley's detailed memories were no better than Mr Koch's, although both were able to give credible descriptions of the way things generally were at Wimray, at about the time Mr Koch worked there. Perhaps because the Employer's case was really TIO's or perhaps for more creditable reasons, neither Mr nor Mrs Bleakley's evidence seemed to be touched by self-serving reconstruction. It seems likely that neither has any interest to serve in the matter.

12. It is perhaps also worth noting that neither party called as a witness a Mr Ray Allwright, ("Mr Allwright") another director and shareholder of Wimray throughout the relevant time. According to Mr Bleakley, Mr Allwright was the person most concerned with the day to day running of the airline side of Wimray's business. This was especially the case during the Dry season when Mr Bleakley was largely engaged on the safari tour side of the business, and consequently away from Darwin and the office for much of the time (although he kept track of what was happening during the times he returned to Darwin between safaris.) This description of the state of things in the management of Wimray fits well with the evidence of Mr Koch, who testified that a number of arrangements and agreements concerning his employment there were worked out between himself and Mr Allwright.

13. It seems to me that one would expect Mr Allwright to be called as a witness by Wimray, if anyone, and it was urged upon me by Mr Lewis, counsel for Mr Koch, that Wimray's failure to call him ought to provide a basis for my drawing inferences adverse to Wimray. I think I ought to infer that Mr Allwright, had he been called, would not have assisted Wimray's case, and I ought to do so not merely as a matter of evidentiary principle, but also because, having seen the effects of time upon the memories of Mr Koch and Mr and Mrs Bleakley, at least in respect of details relevant to the question of NWE, I have no reason to think that Mr Allwright's memory would be any better. I do not draw any adverse inference from his absence.

THE PLEADINGS

14. No doubt anticipating the paucity of documentary evidence available, and recognising the weaknesses of memory after 15 years, Mr Koch's claim in respect of NWE was pleaded from the start in the alternative, and after some changes in detail, came to be, in the Amended Statement of Claim:

> " 9 The Worker's NWE at the date of the injury was $ 1,129.48

**PARTICULARS OF NWE**

9.1 The Worker was remunerated in whole or part other than by reference to the number of hours worked.

9.2 The Worker was remunerated by receiving a base weekly rate of $513.40 gross per week plus $102.68 per day whilst engaged in flying operations.

9.3 The Worker was engaged in flying operations 6 days per week.

9.4 The Workers NWE indexed for 2002 is $1,870.87

9.5 The Workers NWE indexed for 2002 is $1,949.48

10. In the alternative to paragraph 9 hereof, the Worker's NWE at the date of injury was $1036.63.

10.1 The Worker was remunerated in whole or in part other than by reference to the number of hours worked.

10.2 The Worker was remunerated by reference to aircraft classification and pilot qualification rates specified in the pilots *(General Aviation Award 1984)*

10.3 The Workers annual entitlement determined in accordance with sub-paragraph 10.2 hereof was $31,339.64

10.4 The Worker was entitled to 1/1800 of that amount, or $39.17 for each hour flown plus 25%, or $9.79 for each hour flown, a total of $48.96 for each hour flown.

10.5 The worker flew 1,101 in the 12 months immediately preceding the date of the relevant injuries.

10.6 The Workers NWE at the date of injury was $1,036.63"

15. Both of these alternatives were denied in paragraphs 9 and 10 of the Defence. In paragraph 2 of its Counterclaim, Wimray asserted that Mr Koch's NWE at the time of injury was $513.40 per week.

THE EVIDENCE (a) "Permanent" or "Casual"?

16. It will be recalled that there was a time when Mr Koch was employed on a part-time basis by Wimray, what the Pilots (General Aviation) Award 1984 (Ex 5) calls a "casual" basis. Later there was a time when he was employed on a full-time, what the Award calls "permanent" basis. The terms appear in Pt A: 36 of Ex 5. No witness, not Mr Koch nor either of the Bleakleys, was able to state when the basis of Mr Koch's employment had changed, and no document among the exhibits touched directly on that question.

17. Mr Koch's forgetfulness on the point seemed entirely genuine. His only point of reference was his Pilot's log book, Ex 4. The Log Book records every flight he made, and includes details of, among other things, the registration of each plane he flew. Mr Koch's method was to trace through the months of his employment with Wimray looking for planes not operated by Wimray. His assumption was that, as long as he was occasionally piloting non-Wimray aircraft, he would have been working on a casual basis, and would thus have been free to pick up bits and pieces of piloting work for other operators. The assumption was, in my opinion, a reasonable one. The difficulty arose in its application, because there was some uncertainty as to which flights were Wimray's. This uncertainty was caused only in a minor way by fading memories – both of Mr Koch and Mr Bleakley appeared to have very clear recollections of the registration numbers (call signs) of the planes comprising the core of Wimray's fleet: a bit of doubt may have arisen because of lack of exact knowledge of the date of the acquisition or disposal of a plane. The larger part of the uncertainty arose, if I understood the evidence correctly, from the fact that Wimray occasionally "borrowed" planes from other operators, and Mr Koch may have occasionally flown, for Wimray, such a borrowed plane.

18. Mr Koch thought he could identify non-Wimray flights, in the months up to and including April 1989. Mr Bleakley's evidence tended to make me less

than certain, perhaps rather uncertain, as to whether they were, in fact all non-Wimray flights, with the result that it would have been extremely difficult to decide on the evidence before me whether Mr Koch was permanently or casually employed in March or April 1989. Fortunately I do not have to decide that: the date matters to me is 12 July 1989. By that time non-Wimray flights, even on Mr Koch's account, seem to have vanished from his Log Book, a disappearance which by itself would suggest that the basis of his employment had changed.

19. More to the point, there was the evidence of Mr Bleakley and, with far less force but to the same effect, of Mrs Bleakley. Mr Bleakley's was that the terms of the employment of permanent and casual pilots meant that, once a casual pilot began to work to an extent that approached the hours expected of a permanent pilot, it cost Wimray more to keep the pilot on a casual basis. At about that point it was therefore in Wimray's interest to change the basis of the pilot's employment, and this is what Wimray habitually did. Mr Bleakley inspected Ex 4, Mr Koch's log book, and gave as his opinion that by about February 1989 Mr Koch was doing enough piloting for Wimray to be made permanent, and that he would have been made permanent then or in March, or stretching it a bit, in April: there was, it seemed, no chance, in Mr Bleakley's opinion, that Wimray would have gone on paying so busy a pilot as Mr Koch was at casual rates. Wimray's economising in this respect was not actuated by meanness alone; in another context Mr Bleakley spoke of the extreme and constant competition characterising the General Aviation industry, necessitating close attention to costs.

20. Similarly, in another context he mentioned there then being an oversupply of pilots eager for work; from which evidence I infer that a casual pilot offered a job on a permanent basis might be delighted, or might not, by the change in the basis of employment but that he or she would not have much choice

about accepting it, if he or she wanted to go on doing that amount of work for that airline.

21. I found Mr Bleakley's evidence entirely persuasive and I am satisfied that Mr Koch would have been employed on a permanent basis for at least a couple of months before his accident. I reach that conclusion without needing to consider the effect of another item of evidence, Pt A: 36 (h)(i)(iii) of the Award (Ex 5) which states:

> "An employer may utilise pilots engaged on casual hire to fly up to an absolute maximum of 300 flying hours in the aggregate in any period of one year except in ANR 201/2 03 or SAL operations where an absolute maximum of 100 flying hours in the aggregate in any period of one year shall apply."

22. The amount of flying that Mr Koch was doing would have impelled Wimray to change the basis of his employment, if terms of the Award were followed. Wimray, although a signatory to the Award, seems not to have applied it in slavish fashion to its employment of pilots, so the existence of this condition is a substantial straw in the wind, rather that a conclusive consideration.

(b) Salary

23. Mr Koch's evidence was that he had no actual recall of his rate of remuneration at the time of the accident. He had looked at the few documents to hand and done his best to reconstruct what it must have been. His reconstruction of things was evidently self-serving. Most people's are. There were also some objective factors which may have imbued any memory he had of his time at Wimray with a rosy hue. One was the pilot's strike, which commenced later in 1989 (after Mr Koch's injury, that is). The strike by most pilots of the major airlines created a temporary bonanza for the general aviation industry, and the benefits of that bonanza no doubt trickled down to pilots although I have before me no evidence as to exactly how this may have been. A second may have been the terms and conditions he enjoyed when working for Airnorth. I have no evidence as to what they

were, but I assume Airnorth had something to offer Mr Koch, in order for him to have left Wimray to work there. A third seems to have been some of the conditions of the other, later employments. For example Ex16 is a letter to TIO from a Mr Lance McKean, managing director of Emu Airways, a South Australian operator which employed Mr Koch in the nineties. Ex 16 sets out his rates of pay as at December 1995. He was then being paid on the basis of "Management Fee" of $300 per week, plus a rate of $60 per "trip" flown. (This pay structure may have provided the seed for an idea about the pay structure at Wimray, expressed in par 9.2 of the Statement of Claim.) A fourth may have been the effect of time, experience and position. According to the Award (and here I rely on Ex 5.1 and Ex 7 a 1988 variation of Ex 5, setting out various rates of pay in relation to a National Wage Case Decision of August 1988) pilots of multi-engine aircraft - and there is no doubt Mr Koch was qualified as such - would receive a salary increase with every year of service until they reached the summit in their eighth year of service. Mr Koch was in his first year of service when he started at Wimray, and still in that year at the time of the accident. As for position, he was Chief Pilot at Emu Airways, see Ex 16, and had at some earlier time and with some earlier employer (whether it was Wimray is in dispute) received a pay loading as a "check and training Pilot". A fifth may have been comparatively rapid inflation of wages and salaries (and prices of course) that was still going on into the early nineties. It is difficult for any of us to believe that we received so few dollars in earlier times, and the fifteen years between injury and trial in this case is perhaps long enough to raise that difficulty.

24. There may have been other factors operating through these years to confuse Mr Koch's recollection and impressions of the past, and again it may not be irrelevant to note that, because of his trustee company arrangement and because the basis of his employment was changing at around the time that arrangement was brought into play, Mr Koch may have had a keen less grip

of what his salary was than would a worker paid cash money into the hand, to be carefully counted each fortnight.

25. Additional to these more or less historical influences, possibly, on Mr Koch's memory, came a more recent one soon after 4 March 2002, the date on which Mr Koch ceased work. He informed the TIO of this cessation. (It appears that he had properly kept in touch with the TIO down through the years, as he would have needed to so that the medical expenses regularly arising from treatment to his ankle could be paid pursuant to the Act.) TIO commenced to make weekly payments of compensation to him. These payments, as is clear from the correspondence tendered – see, for example Ex 3 – were based upon the premise that Mr Koch's NWE at the time of injury was $1080 per week. It is clear from the evidence of Mr Hedger that the premise was mistaken. It appears that, at the time Mr Koch's claim was being considered in 2002, the employee at TIO charged with establishing the quantum of compensation to which Mr Koch was entitled, happened upon the letter from Emu Airways, Ex 16, and took the figure therein $1080, as representing Mr Koch's salary at the date of the injury. Ex 16 relates to a time, 1995, when Mr Koch was in his seventh or eighth years of service, for a different airline, employed as Chief Pilot. Plainly the figure is not applicable to July 1989 when Mr Koch was a line pilot in his first year of service. Still, the mistake was made, the poisonous $1080 figure was taken as NWE at the date of injury, and that figure was indexed and payments calculated, of $1226.40 per week (see Ex 2 and Ex3). In December 2002 TIO informed Mr Koch that for the year 2003 (the error being then undiscovered) a further indexation would give rise to weekly payments of $ 1278.00 to him.

26. In February 2003 TIO discovered its mistake, instantly stopped payments at that rate, recalculated Mr Koch's entitlements and informed him by letter that he would receive $665.04 per week thereafter. The legality of that action - the stopping the larger payments and substituting for them the

smaller - is the subject of the second live question in this matter and I shall deal with it below. For present purposes I have recited the history of this error as constituting, from Mr Koch's point of view, another factor capable of creating an impression in his mind that he may have been earning a more substantial salary at Wimray than was the case.

27. Any or all of these factors could operate on the optimistic side of an honest but almost blank memory. It is, of course possible also that Mr Koch might have, with conscious dishonesty, have cherry-picked from the sparse documentation those figures which were capable of being combined to arrive at an NWE he was happy to live with. There were in my opinion two areas of Mr Koch's evidence where I was left not believing that he had told the truth. The first was his evidence in relation to the whereabouts of his tax records, that is, the accounts of the trustee company. I found his account of his searching for his then accountants to be unbelievable – as Mr Grant's cross-examination on the topic proceeded Mr Koch, appeared to be making up answers on the spot. (As it turned out, after the accountants were easily found during the course of the hearing, no relevant records had been retained by them after all this time, so the topic went only to the question of Mr Koch's credit.) The second was in relation to Ex 12, a document prepared at some time by Mr Koch as a sort of aide memoire of his reckoning of his 1989 salary, worked out in two different ways. Mr Grant cross-examined Mr Koch on this document putting to him that he, Koch, had used inappropriate inputs in this reckoning, eg. starting from a <u>third</u> year captain's salary (when in 1989 Koch was a first year captain), and a salary for flying planes 5660 – 8500kg in weight, when Mr Koch never flew such large planes for Wimray. Koch's responses to this cross-examination were evasive and in my opinion untruthful.

28. [Mr Grant had obviously been looking forward to getting his teeth into a third item, originating in par 12 of the Statement of Claim which recited that "In or about August 2000 the Worker ceased working as a commercial pilot

as a result of the injuries ...", when it was his conviction and disqualification which was the more immediate cause. Mr Koch defused that item by bringing out the conviction etc. in his evidence in chief.]

29. Given that Mr Koch had, or claimed to have, no real memory of what his salary had been, and given that his credit-worthiness was not perfect, one would not expect his opinion as to NWE to carry much weight, unless founded upon compelling documentation. Mr Koch's opinion, according to his own evidence, was based upon a single document, Ex 9, and a peculiar and non-compelling interpretation of it.

30. Ex 9 is a copy of a letter from Wimray to TIO dated 15August 1989 setting out the amounts Wimray has paid out to Mr Koch during presumably, time he had been off work immediately following his injury. These are

" Interim Account for Wages paid to K Kosh[sic]

| | | |
|---|---|---|
| 13.7.89 to period ending | 21.7.89 | $718.76 |
| Period ending | 4.5.89 | $1026.80 |
| Period ending | 18.8.89 | $1026.80 |
| Period ending | 25.8.89 | $513.40" |

31. Mr Koch has managed to take the view that the last three lines establish a basic weekly rate of pay, which he called an "allowance", of $513.40. Others might call it a retainer, since, on his evidence, he did not have to do any flying to earn it: he just had to be there, available, holding the licences and qualifications that he had. He has further managed to persuade himself that the first line is different, that it, represents payment at a daily rate of $102.68 for 7 days flying. It will be recalled that the terms of his employment with Emu Airways were so structured; a basic retainer plus payment per flight, so such payment structure is clearly not inconceivable in the industry. But even at Emu Airways, as chief pilot in 1995, the retainer (or "Management Fee" as Ex 16 has it) was only $300 per week and other

payment was by the “trip” ($60 per trip), not by the day and Mr Koch did no flying between 13 July 1989 and 21 July 1989 – the accident happened on the 12th.

32. It is clear to me that the first line of account of Ex 9 is in exactly the same class as the others. It represents a fraction of a fortnight’s pay – seven tenths. The period 13 July to 21 July 1989 comprises nine days: at least two of them must have been a Saturday and Sunday, leaving seven normal working days. The first line therefore represents Mr Koch being paid at the same rate and on the same basis as the next three lines. There is in my judgement nothing in Ex 9 to ground Mr Koch’s assertion that his NWE was the sum of two components. Ex 9 suggests only one thing: that he was paid $513.40 per week ($1026.80 per fortnight.)

33. Ex 9 is in the nature of a claim for reimbursement made by Wimray to TIO. Wimray therefore had every reason to ensure that the amount claimed was complete i.e. that it represented all that had been paid to Mr Koch during the period when he was first recuperating from his injury. If Mr Koch’s theory as to his normal rate of pay were correct, it would follow that he would have received during that period, pay at half the rate he was accustomed to. His evidence was that he had no recollection of the quantum of pay he received in that period, and I can believe that; and also that he had no recollection of his pay during the period being notably less that during the times he was working. It seems to me that, however forgetful one might be apropos of the exact quantum, it is much less likely that a man in Mr Koch’s position would forget such a diminution in his income, if it had occurred, for a period of six and a bit weeks which though not a long period, is not all that short either. Mr Koch’s lack of any memory of such a diminution is in my opinion a good reason to suspect that no diminution had occurred.

34. A further document which has survived in the claim form, Ex 1 which is in the usual form. The first two pages of the form are written in an unknown

hand – Mr Koch says it is not his, and I accept that evidence – and signed by Mr Koch, who said – and I accept this too – that he has no memory of the document or of signing it. The third page, to be completed by the Employer, is largely Mrs Bleakley's work, and is signed by her. She too said – and I believe her too – that she has no recollection of filling in the form. It is only on the third page that a figure appears for the normal pay of the claimant, and there is less certainty that Mr Koch ever saw that page than that he saw pages 1 and 2 (which he had signed.) Ex 1 therefore cannot be put forward as an adoption of that figure by Mr Koch.

35. The figure provided is $513.40. Mrs Bleakley, in her state of having no real memory, testified unsurprisingly that her reason for inserting that figure in that place, would have been that she believed that figure to be the normal weekly pay Mr Koch was receiving at the time. It will be remembered that pay clerk duties were among those Mrs Bleakley had at Wimray in 1989.

36. Furthermore, the evidence of Mr and Mrs Bleakley was that no pilot employed by Wimray had his or her pay structured in the manner put forward by Mr Koch. Casual pilots were paid according to a formula related to the amount of flying they did. Permanent pilots received a salary. Neither Mr nor Mrs Bleakley was able to remember the figures applicable at the time, but Mr Bleakley's recall of approximate figures was fairly persuasive: he had ordinary pilots being paid somewhere below $30,000 per year in about 1989.

37. It was in this context that Mr Bleakley made his comments about the competitive state of the industry and the oversupply of pilots. His evidence was that, whatever the exact figures were, Wimray did not pay over the Award, and could not have stayed in business long had it paid to Mr Koch and other pilots the kind of money Mr Koch says it did, namely, something in excess of $50,000 per annum. Mr Bleakley's evidence on these points was credible and convincing. It brings me to a consideration of the Award.

38. Pilots' rates of pay under the award are affected by many things. Pilots of multi engined aircraft receive base rates of pay higher than pilots of single engined aircraft. It is not in dispute that Mr Koch flew multi-engined (twin-engined) aircraft. As noted earlier, for the first eight years of a pilot's career, there is an annual increment rewarding growing experience. It is not in dispute that Mr Koch was in his first year of service at the time of his accident. In general, the larger the plane, the higher the rate of pay, the size of aircrafts being graded according to their mass. Mr Koch claims, and Mr Bleakley denies, that at least one of Wimray's aircraft flown by Mr Koch was heavier than 33360kg which is the weight dividing the lightest from the second lightest group of aircraft. In this respect I prefer the evidence of Mr Bleakley, and reject that of Mr Koch.

39. Pilots receive additions to their base salary in recognition for skills and qualifications. It is not in dispute that Mr Koch had a qualification in relation to instrument flying that earned him such an addition. He also claimed, - and this claim is in dispute, - that he received a further addition on account of being Wimray's "check and training" pilot. If he was, Part B:3 of the Award dictates an addition to salary of 8% (for a group of 10 pilots or less, as I apprehend Wimray's operations to have curtailed).

40. Mr Koch seemed to be pretty convinced that he had held the "check and training" rating at Wimray, Mr Bleakley seemed equally convinced that he had not, asserting that another pilot, whom he named, had that rating in 1989. Mr Bleakley did concede that that pilot took some leave during that year, but was mystified by the suggestion that Mr Koch, or anyone else, would have been elevated to act in that position during the regular man's absence. Mr Bleakley' evidence was that it was not that sort of position: for a shortish time Wimray would cope without a check and training pilot.

41. This was fairly persuasive. It is in my judgement possible, but not more likely than not, that Mr Koch did act in that position at some time in 1989

while working at Wimray. If so there is a chance that he was so acting at the time of the accident, a chance that is even further removed from being more likely than not. I am not persuaded that Mr Koch was being paid a Wimray's "check and training" pilot at the time of his accident.

42. There was a further supplement, "SAL opps" Mr Koch's entitlement at the time, which is not in dispute. Taking the figures from Ex 5, Mr Koch's base rate as a multi-engined pilot was $22,929. His Instrument rating, first class, would have added at least $2,815, or, according to that otherwise dubious document Ex 12, $3,079. "SAL opps" adds a further $770. Had Mr Koch been paid directly in accordance with the Award, his total salary should have been between $26,514 and $26,678 per annum, which is to say between $510 and $513 per week.

43. As mentioned earlier, Mr Bleakley's evidence was that Wimray did not always adhere exactly to the Award. However, his firm evidence was that Wimray did not pay over Award. Mr Koch's evidence was that his recollection was that Wimray did pay over Award, that being one of the features of work there that led to the pilots being such a happy band. Once again I was more impressed with Mr Bleakley's recollections, with their businesslike rationale, than I was with Mr Koch's rose-tinted memories.

44. Every indication is that Mr Koch's pay at the time of the accident was $513.40 per week. In my opinion the evidence bearing on Ex 9 alone is sufficient to establish that, there being nothing in Mr Koch's evidence to contradict the inferences that naturally arise. Considered separately, the evidence of Mrs Bleakley and Ex 1 is likewise sufficient, there being again no respectable contradicting evidence. Mr and Mrs Bleakley's evidence is sufficient to satisfy me that Wimray never paid Mr Koch anything like the sum he claims they did. The evidence arising from a consideration of the Award tends powerfully to confirm the conclusion arising from Ex 9 (and evidence relevant to it), and from Ex 1 (and evidence relevant to it).

45. I can see no reason not to make the declaration sought by the Employer in the counter claim. I declare that the worker is not entitled to compensation calculated other than on the basis that his normal weekly earnings as at 12 July 1989 was $513.40 per week.

46. I have at paragraphs 25 and 26 of these Reasons set out the circumstances that led the TIO to commence making payments in 2002 to Mr Koch based upon the assumption that his NWE at the time of injury had been $1,080 per week. Ex 15 is the form on which compensation payments have been calculated from that NWE and resulted in initial payments of $1,226.40 per week. Ex 3 includes a copy of a letter from the TIO to Mr Koch dated 9 December 2002 advising him that the annual indiscretion would result in his payments increasing to $1,278 from 1 January 2003. Ex 17 is the form on which TIO calculated that NWE rate of compensation. Both Ex 15 and Ex 17 show on their face that the calculator took $1,080 as the NWE at the date of inquiry.

47. I have also set out the means that the TIO chose to inform Mr Koch of, and to institute the reduction. It is evident that TIO's unilateral action was not in accordance with the requirements of s 69 of the Act, and that the TIO made no attempt to comply with those requirements. Section 69(1) provides:

"Cancellation or reduction of compensation

(1) Subject to this Subdivision, an amount of compensation under this Subdivision shall not be cancelled or reduces unless the worker to whom it is payable has been given –

(a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and

(b) a statement in the approved form –

(i) setting out the reasons for the proposed cancellation or reduction;

(ii) to the effect that, if the worker wishes to dispute the decision to cancel or reduce compensation, the worker may apply to the Authority to have the dispute referred to mediation;

(iii) to the effect that, if mediation is unsuccessful in resolving the dispute, the worker may appeal to the Court against the decision to cancel or reduce compensation;

(iv) to the effect that, if the worker wishes to appeal, the worker must lodge the appeal with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2); and

(v) to the effect that the worker may only appeal against the decision if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful."

48. There is a wealth of authority establishing the necessity for strict compliance with s 69's terms: See, for example, *Disability Services of Central Australia v Regan* NT Court of Appeal 31/7/98. The question is whether the principles established in these cases have application to this one.

49. It is in my opinion clear that the effect of the TIO's action "reduced" as that word is meant in s 69, the amount payable to Mr Koch. Nothing could be more obvious. It is far less clear that what was reduced was "an amount of compensation under this Subdivision…."

50. The "Subdivision" spoken of in s 69 is Subdivision B of Division 3 of the Act, and that Subdivision is the part of the Act which lays down the various bases for the continuing payment of workers' compensation in various circumstances. Relevantly to this matter, s 65 within that Subdivision establishes the mathematical relation between, on the one hand, a worker's

NWE, and, on the other, the quantum of his or her compensation. Compensation properly payable to Mr Koch should have been calculated by applying that formula to an NWE of $513.40. The product of that calculation would have been the correct "amount of compensation under this Subdivision". The application of the formula to an incorrect NWE would produce something else.

51. Mistakes can occur in many ways. A decimal point may slip, a zero be carelessly added or lost. Numbers may be incorrectly added up. In terms of whether the product of a calculation produces a figure which is "an amount of compensation under this Subdivision", there is in my opinion no difference between these cases of arithmetical error (on the one hand) and the present case (on the other) which has resulted from arithmetic faultlessly applied to a mistaken premise as to Mr Koch's NWE.

52. That being so, there was, in my view, no need for the TIO to comply with s 69's requirements, and nor should there be. After all, if the overpayment were 10 or 100 times what it should be - as a result, say of a computer malfunction - it would be ridiculous to expect an Employer to continue payment sat a grotesquely incorrect rate until the requirements of s 69 could be complied with. In my opinion, then, although there had been a "reduction", what has been reduced is not "an amount of compensation under this Subdivision". Section 69 has not been breached.

53. In his Amended Statement of Claim the Worker sought:

    20.1 A declaration that the reduction of weekly payments of compensation fails to comply with the provisions of s 69 of the Act and is therefore invalid and of no effect.

    20.2 A declaration that the Worker's NWE at the date of injury was $1,129.48 gross per week.

20.3 In the alternative to sub-paragraph 20.2 hereof, a declaration that the Worker's NWE at the date of injury was $1,036.63.

20.3A In the alternative to sub-paragraph 20.3 hereof, a declaration that the Worker's NWE at the date of injury was $514.96 gross per week.

20.3B In the alternative to sub-paragraph 20.3A hereof, a declaration that the Worker's NWE at the date of injury was $556.16 gross per week.

20.3C In the alternative to sub-paragraph 20.3B hereof, a declaration that the Worker's NWE at the date of injury was $525.36 gross per week.

20.3D In the alternative to sub-paragraph 20.3C hereof, a declaration that the Worker's NWE at the date of injury was $566.56 gross per week.

20.4 Arrears of weekly payments of compensation.

20.5 Resumption of weekly payments of compensation from 4 March 2002 in the amount determined pursuant to sub-paragraph 20.2 or 20.3 hereof.

20.6 Interest.

20.7 Costs.

54. In relation to the relief sought in paragraph 20.1, I am of the opinion that there is no basis to give it. In relation to the various alternatives for the worker put forward as to Mr Koch's NWE, I find none of them made out. Accordingly, in relation to paragraph 20.4 there are no arrears of compensation to order paid, and, there being no compensation payable above that being paid by TIO, nothing to order resumed in terms of paragraph 20.5. The Worker's claim is dismissed.

Dated this 8th day of April 2004.

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**R J WALLACE**
STIPENDIARY MAGISTRATE