CITATION: *[2008] NTMC 075*

| | |
|---|---|
| PARTIES: | PAUL WAKELING |
| | v |
| | QANTAS AIRWAYS LIMITED |
| TITLE OF COURT: | Work Health |
| JURISDICTION: | Workers Rehabilitation and Compensation Act |
| FILE NO(s): | 20808628 |
| DELIVERED ON: | 3 December 2008 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 6 & 7 November 2008 |
| JUDGMENT OF: | Mr Daynor Trigg SM |

**CATCHWORDS:**

*Workers Rehabilitation and Compensation Act – s49(1)*
"Normal Weekly Earnings" – whether includes concessional air travel for worker – whether includes concessional air travel for worker's "beneficiaries"
*Fox v Palumpa Station Pty Ltd [1999] NTMC*
*Murwangi Community Aboriginal Corporation v Caroll [2001] NTSC 85;*
*Murwangi Community Aboriginal Corporation v Caroll [2002] NTCA 9;*
*Normandy NFM Ltd v Turner (2003) 180 FLR 212;*
*Hastings Deering (Australia) Ltd v Smith [2004] NTCA 13;*
*HWE Contracting Pty Ltd v Young,* and *Newmont Australia Limited v Kastelein [2007] NTSC 42*

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Worker: | Mr Morris |
| Employer: | Mr Walsh QC |

*Solicitors:*

| | |
|---|---|
| Worker: | Ward Keller Lawyers |
| Employer: | Hunt & Hunt |

Judgment category classification: A
Judgment ID number: [2008] NTMC 075
Number of paragraphs: 126

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

No. 20808628

*[2008] NTMC 075*

BETWEEN:

**PAUL WAKELING**
Worker

AND:

**QANTAS AIRWAYS LIMITED**
Employer

REASONS FOR DECISION

(Delivered 3 December 2008)

Mr Daynor Trigg SM:

1. This proceeding commenced on 26 March 2008 when the worker filed a Form 5A application in this Court seeking an "order in respect of claim for compensation under Part V or determination of dispute between worker and employer following mediation under Part VIA".

2. A certificate of mediation was filed with the Court stating that a conference was held between the worker and the insurer on 10 March 2008 and the "outcome" was "no change".

3. The first pleading in this matter was filed on 8 May 2008, but was subsequently amended. At the time of hearing the worker had filed an Amended Particulars of Claim (on 15 May 2008) but at the commencement of the hearing I granted leave (without objection) for the worker to file in Court a Further Amended Particulars of Claim. This pleading (including typographical mistakes) was as follows:

    1. The worker's date of birth is 31 January 1951.

2. At all material times the worker was employed by the employer as a airline services operator at Darwin Airport Ramp Services.

3.1 The worker sustained a right knee injury during the course of employment with the employer on or about 20 April 2002 ("the first injury").

3.2 The worker made a Work Health Claim relating to the first injury.

3.3 The employer accepted the worker's first injury Work Health Claim.

4. The worker sustained a left knee injury during the course of the employment with the employer on or about 1 October 2006 ("the second injury").

4.1 The made a Work Health Claim relating to the second injury.

4.2 The employer accepted the worker's second injury Work Health Claim.

5. In relation to the first injury, the worker after a period of total incapacity recommenced light (modified) duties with the employer until the date he sustained the second injury.

6. As a consequence of the first and/or second injury the worker is now totally incapacitated by virtue of section 65(6) of the *Work Health Act* and in the alternative partially incapacitated.

PARTICULARS

- The worker's age is 57.
- The worker's limited skill set which is limited to manual labouring.
- The worker's limited aptitude to be retrained.
- Left and right knee pain and discomfort and instability of both knees.

7. The employer remunerated the worker in whole of in part other than by reference to the number of hours worked.

PARTICULARS OF REMUNERATION

The worker and nominated/authorised beneficiaries/dependants were provided with concessional travel entitlements which the worker availed himself of during the 12 month period commencing immediately before the date of the second injury. Being a non-cash entitlement derived by the worker out of the course of his employment with the employer.

PARTICULARS OF THE VALUE OF THE NON-CASH BENEFIT (NCB)

WORKER

| Date | Ticket Number | Gross NCB | Worker Payment | Net NCB |
|---|---|---|---|---|
| 13/11/05 | 4478648997 | $17,808.94 | $917.91 | $16,891.03 |
| 18/11/05 | 4478649083 | $ 1,423.40 | $109.40 | $ 1,314.00 |
| 13/03/06 | 2447508053 | $ 3,169.39 | $234.45 | $ 2,934.94 |
| 20/03/06 | 2447686155 | $ 3,169.39 | $234.45 | $ 2,934.94 |
| 07/04/06 | 2448218011 | $ 3,169.39 | $234.45 | $ 2,934.94 |
| 22/04/06 | 4479140587 | $ 9,480.86 | $554.82 | $ 8,926.04 |
| 24/04/06 | 2448601830 | $ 1,518.70 | $208.79 | $ 1,309.91 |
| 26/04/06 | 2448672371 | $ 3,169.39 | $236.21 | $ 2,933.18 |
| 16/05/06 | 4478825868 | $ 883.80 | $197.00 | $ 686.80 |
| 16/05/06 | 4478825866 | $ 2,468.80 | $282.60 | $ 2,186.20 |
| 16/05/06 | 4478825881 | $ 541.60 | $ 73.00 | $ 468.60 |
| ~~16/05/06~~ | ~~4478825870~~ | ~~$ 175.30~~ | ~~$ 36.60~~ | ~~$ 138.70~~ |

| | | | | |
|---|---|---|---|---|
| 16/05/06 | 4478825871 | $ 518.60 | $ 73.00 | $ 445.60 |
| 09/07/06 | 2450641531 | $ 3,594.38 | $354.20 | $ 3,240.18 |
| 14/07/06 | 2450787867 | $ 1,797.19 | $183.73 | $ 1,613.46 |
| **TOTAL** | | | | **$48,958.52** |
| | | | | ÷ 52 weeks |
| | | | | **= $ 941.51** |

**BENEFICIARIES**

| Date | Ticket Number | Gross NCB | Worker Payment | Net NCB |
|---|---|---|---|---|
| 19/10/05 | 2443887440 | $16,151.58 | $ 915.24 | $15,236.34 |
| 16/12/05 | 2445369935 | $ 2,535.84 | $ 339.24 | $ 2,196.60 |
| 08/12/06 | 2446610518 | $ 2,444.39 | $ 226.45 | $ 2,217.94 |
| 24/04/06 | 2448601831 | $ 2,164.38 | $ 158.03 | $ 2,006.35 |
| 28/06/06 | 4479274704 | $ 1,569.39 | $ 95.95 | $ 1,473.44 |
| 28/06/06 | 4479274701 | $21,975.15 | $1,315.06 | $20,660.09 |
| TOTAL | | | | **$43,790.76** |
| | | | | ÷ 52 weeks |
| | | | | **= $ 842.13** |

$941.51 + $842.13 = **$1,783.64 NCB per week.**

8. The employer assessed the worker's normal weekly earnings as at the date of the second injury in the amount of $927.35 per week gross.

9. The worker asserts his normal weekly earnings as at the date of the second injury to be $2,780.60 made up of $1,853.25 weekly non-cash remuneration and $927.35 weekly cash remuneration.

10.1 The worker mediated the dispute arising regarding the level of his normal weekly earnings as at the date of the second injury.

10.2 Subsequent to the mediation a Certificate of Mediation issued noting “no change”.

11. And the worker seeks the following remedies:

11.1 A ruling as to the worker’s normal weekly earnings in the employment as at the date of the second injury.

11.2 A ruling that the employer failed to correctly calculate the worker’s NWE at the time of its accepting the claim was unreasonable.

11.3 An order that the employer pay arrears of weekly benefits to the worker from the date of the second injury to date of order in such amounts as this Court may determine.

11.4 And order that the employer pay interest on arrear of weekly benefits pursuant to section 89 of the *Work Health Act* calculated from the date of the second injury to date of payment at 20% per annum.

11.5 An order that the employer pay interest pursuant to subsection 109(1) and (3) of the *Work Health Act* on arrears of weekly benefits calculated from the date of acceptance or the second claim to the date of payment of

such interest at 20% per annum or such other rate of interest as this Court may determine.

11.6 A ruling that the worker has been totally incapacitated for all work as a consequence of the first and/or second injury from the date of this Application or such other date as this Court may determine. 11.7. In the alternative to paragraph 11.6 herein a ruling that the worker is partially incapacitated but deemed to be totally incapacitated pursuant to section 65(6) of the *Work Health Act.*

11.8 In the alternative to paragraph 11.6 and 11.7 herein a ruling that the worker has been partially incapacitated for all work as a consequence of the first and/or second injury from the date of this application or such other date as this Court may determine.

11.9 Costs of and incidental to this Application including preparation for mediation (however excluding attendance at mediation) and this Application at 100% of the Supreme Court Scale to be agreed and in default of agreement taxed.

4. The employer relied upon an Amended Notice of Defence (filed on 30 July 2008). I raised with Mr Walsh QC (counsel for the employer) the presence of the word “not” immediately before the word “part” in paragraph 7(a) of this Defence, which had the effect of an admission that “concessional travel entitlements” was part of the worker’s remuneration. Mr Walsh QC indicated that this was a typographical error and sought to delete the word “not”. Mr Morris (counsel for the worker) did not object to this. Accordingly I allowed this amendment. The Amended Notice of Defence now pleaded as follows:

1. The employer admits paragraph 1 of the worker's Statement of Claim.

2. The employer admits paragraph 2 of the worker's Statement of Claim.

3. The employer admits paragraph 3.1, 3.2 and 3.3 of the worker's Statement of Claim.

4. The employer admits paragraph 4, 4.1 and 4.2 of the worker's Statement of Claim.

5. The employer does not admit paragraph 5 of the worker's Statement of Claim.

6. The employer denies paragraph 6 of the worker's Statement of Claim and the particulars set out therein. The employer states that the worker is partially incapacitated for work as a result of the second injury.

7. The employer denies paragraph 7 of the worker's Statement of Claim and the particulars set out therein. The employer states that the worker was remunerated with reference to the number of hours that he worked.

Particulars

(a) Further the employer denies that the said concessional travel entitlements available to the worker and/or his beneficiaries was part of the worker's remuneration; and/or

(b) The said concessional travel entitlements referred to in paragraph 7 of the worker's Statement of Claim are not a non-cash entitlement or benefit that should be included in the worker's normal weekly earnings;

(c) Further and in the alternative, the said concessional travel entitlements referred to in paragraph 7 of the worker's Statement of Claim are subject to various terms and conditions set by the employer and may be withdrawn by the employer to the worker at any time;

(d) Further and in the alternative, the said concessional travel entitlements referred to in paragraph 7 of the

worker's Statement of Claim are not non-cash entitlements or benefits as the worker is required to pay a monetary amount for the said travel.

7A. Further and in the alternative, the employer denies that the worker is entitled to have the value of his concessional travel entitlements to be included into the calculation of the worker's normal weekly earnings as the worker continues to be entitled to and has continued to receive the said concessional travel entitlements from the employer since the second injury.

8. The employer admits paragraph 8 of the worker's Statement of Claim.

9. The employer denies paragraph 9 of the worker's Statement of Claim and refers to the particulars set out in paragraph 7 of the employer's Defence.

10. The employer admits paragraphs 10.1 and 10.2 of the worker's Statement of Claim.

11. The employer denies paragraphs 11, 11.1, 11.2, 11.3, 11.4, 11.5, 11.6, 11.7, 11.8 and 11.9 of the worker's Statement of Claim and denies that the worker is entitled to the relief as sought in the particulars of paragraph 10 or at all.

AND THE EMPLOYER SEEKS:

(a) The worker's claim and application be dismissed.

(b) The worker pay the employer's costs of and incidental to this proceeding.

5. Accordingly, on the pleadings, all of the rulings and relief as sought by the worker in paragraph 11 of his Further Amended Statement of Claim were contested and live issues.

6. However, when the hearing commenced before me on 6 November 2008, I was informed by counsel that a number of matters had been resolved between the parties and were to be the subject of agreed

facts. I was further advised by counsel that the parties were hopeful of resolving the issue of the value (leaving aside the question of whether this was part of the worker's normal weekly earnings [hereinafter referred to as "NWE"] as this was the issue the Court would be asked to decide) of the concessional airfares to the worker and his nominated dependants.

7. Accordingly, I was led to believe that the only live issue before the Court for determination was whether the concessional airfares for the worker and his "beneficiaries" was part of his NWE, and if so the value of the same. I understood that all other matters were resolved between the parties.

8. I was then requested by Mr Morris (with the support of Mr Walsh QC) to put the issue of value aside and hear argument on the legal issue only at this stage. I was told that the parties were close to resolving the issue of quantum. In effect, I was being asked to split the case. I advised both counsel that I was unwilling to split the case, but I was prepared to allow them the morning to resolve the issue of quantum.

9. In my view, splitting the case would only have been the correct course in the event that quantum did in fact become agreed. There was no certainty that this might occur. Accordingly, I decided that I should hear all the evidence on all the issues, so that if there was an eventual appeal from my decision then all issues would be able to be aired. If the case was split (as requested) then the potential existed for an appeal being instituted from any decision that I might hand down on the initial question of what was included in the worker's NWE, whilst the question of quantification still had not been litigated. In my view that was unsatisfactory.

10. Accordingly, I stood the case down until 2pm to afford the parties the opportunity to resolve the question of quantification. In the event that

this was not resolved by this time I indicated that I would then expect the worker to commence his case, including all necessary evidence to enable me to quantify the NWE that the worker was asserting.

11. Prior to adjourning for the morning Mr Morris handed up a bundle of documents that were to be tendered by consent. These documents were as follows:

- ExW1 Transport Workers Union (Qantas Airways Limited) Enterprise Bargaining Agreement VI;
- ExW2 Qantas Policy Manual Volume 2 Human Resources Policies – Concessional Travel (dated 13/9/04);
- ExW3 Worker's claim form number 164670 (dated 5/10/06);
- ExW4 Letter from Allianz to worker (dated 19/10/06);
- ExW5 Letter from Qantas to worker regarding termination (dated 30/11/07);
- ExW6 Letters from Ward Keller to Allianz regarding NWE (dated 22/1/08 and 25/1/08);
- ExW7 Letter from Allianz to worker (dated 9/3/07);
- ExW8 Worker's handwritten notes of travel;
- ExW9 Worker's staff travel since 1 October 2005.

12. When the matter resumed in the afternoon of 6 November 2008 I was advised that agreement had not been reached and accordingly evidence would be required. I was however advised that there were some agreed facts. These had not been committed to writing so were

conveyed orally to me and I attempted to write them down accurately. I trust that I have done so. I recorded the agreed facts as follows:

1) That fringe benefits tax in respect of the concessional travel is paid by the employer.

2) That at the time of his injury superannuation payments were made by the employer.

3) That the worker will continue to receive concessional travel entitlements pursuant to the policy terms until 5 December 2020.

13. I firstly note that none of these agreed facts address the issue of the worker's total or partial incapacity for work at all. These were live issues on the pleadings, and accordingly, absent some other agreement (of which I was not informed) I expected these issues to be the subject of evidence before me. As will appear later they were not.

14. It can be seen that agreed fact 1) was very general and on it's face does not refer to the worker specifically.

15. Agreed fact 2) is also very general. It is no part of the worker's case (as pleaded) that superannuation payments made by the employer need to be taken into account in order to determine his weekly entitlements to compensation.

16. As the argument was later developed by Mr Morris, it appears that agreed facts 1) and 2) are relied upon to try and fit the worker into *paragraph (d)(ii)* of the definition of "normal weekly earnings" in *section 49(1).* I will return to this issue later in these reasons.

17. In the course of Mr Walsh QC's closing submissions I raised some of these difficulties in relation to the agreed facts and the lack of evidence concerning fringe benefits tax. Mr Morris then sought to re-open the evidence to address this difficulty. I adjourned the matter to enable counsel to discuss the matter. Upon resumption a handwritten

document was passed up (signed by both counsel) setting out what the new agreed facts were. I marked this document ExW11. This document stated:

> Agreed Facts
>
> 1) Fringe Benefit Tax in respect of the worker's concessional travel in the 12 months preceeding the date of the worker's injury was paid by the employer.
>
> 2) At the time of his injury, superannuation payments were made by the employer in respect of the worker's employment.
>
> 3) The worker will continue to receive concessional travel entitlements subject to the policy terms in Exhibit W2 until 5 December 2020.

18. It was now agreed that fringe benefits tax was paid by the employer in relation to the worker but no group certificates or other information concerning this matter was sought to be put before me in evidence. I therefore do not know what amount was declared as a fringe benefit in respect to this worker for any concessional travel by him (or anybody else) in respect to the 12 month period before his injury. This is curious given that the worker has (as part of his case) sought to quantify the amount of the alleged benefit, but has sought to do so without any reference to any declared fringe benefit amount.

19. In his written submissions, Mr Morris said:

> "22. …..Significantly, fringe benefits tax is incurred by the employer by reason of the provision of the concessional travel and is included in the tax on the workers group certificate.
>
> 23. Concessional travel is clearly an advantage to a worker and is a benefit provided by the employer to the worker arising from the worker's employment with the employer. It is a benefit which attracts fringe benefits tax and is an indicator leading to the conclusion that the provision of concessional travel is a benefit to the worker."

20. I have no difficulty in accepting that concessional travel is both an advantage and a benefit to the worker. But the issue is whether it is part of his "remuneration", and I will turn to this issue later in these reasons. If the legislature had wished to include any items that attracted fringe benefits tax as part of a worker's remuneration then it could easily have done so. For example, in paragraph (x) of the definition of "worker" in *section 3(1)* of the *Workers Rehabilitation and Compensation Act* the legislature has expressly chosen to include the "PAYG provisions of the *Taxation Administration Act* of the Commonwealth". The same has not been done in relation to the fringe benefits legislation.

21. I can see no reason to take meanings and definitions from the *Fringe Benefits Tax Assessment Act* (which is Commonwealth legislation) and somehow import it into the *Workers Rehabilitation and Compensation Act* (which is Northern Territory legislation). I therefore do not accept that whether fringe benefits tax was or was not paid assists me in determining whether concessional travel entitlements was or was not part of the worker's remuneration herein. That decision must be determined based upon the wording of the *Workers Rehabilitation and Compensation Act* and any relevant case law.

22. In my view, in deciding what should or should not attract fringe benefits tax the policy makers are looking to issues which are completely separate from the issue as to whether an amount is or is not a part of a person's "remuneration" under any State or Territory legislation. In the explanatory memorandum "circulated by the authority of the Treasurer, the Hon Wayne Swan MP" to the *Tax Laws Amendment (Budget Measures) Bill* it was noted as follows:

> 1.3 Section 41 of the FBTAA 1986 currently provides an exception for property benefits provided to employees and consumed by them on a

> working day on the employer's business premises. This includes food and drink.
>
> 1.4 The original intent of the legislation was to ensure that a property fringe benefit would be subject to FBT where it was provided free or at a discount. An exception was provided for goods supplied on a working day and consumed on the employer's premises. The limited nature of the intended benefit was illustrated in the explanatory memorandum to the original Bill by the example of "a daily ration of beer consumed at work by brewery workers would not be subject to the tax".

23. In the mine worker scenario, food provided by an employer at the mine site during a working day has been held by the Court to be part of a worker's remuneration (see: *Normandy NFM Ltd v Turner (2003) 180 FLR 212 @ 214)*, whereas it may well not attract fringe benefit tax. The two are, in my view, unrelated.

24. The worker gave sworn evidence before me. He was born in the United Kingdom on the 31st day of January 1951. Accordingly, he is currently 57 years of age.

25. I note that according to agreed fact number 3) he will be entitled to concessional travel entitlements from the employer up to and including when he is 69 years of age. Pursuant to *section 65(1)* of the *Workers Rehabilitation and Compensation Act* a worker's entitlement to compensation only continues until:

> (a) he or she attains the age of 65 years; or
>
> (b) if the normal retiring age for workers in the industry or occupation in which he or she was employed at the time of the injury is more than 65 years – he or she attains that normal retiring age.

26. The worker gave no evidence as to what the normal retirement age was with his employment. I have been unable to find any reference to retirement age in ExW1, and counsel did not take me to any. Accordingly, the worker has failed to satisfy me on the balance of

probabilities that his normal retirement age with the employer was other than 65 years.

27. Accordingly, on the face of it, the worker's entitlement to concessional travel continues beyond the date that he would be allowed to work with this employer. I will return to this aspect when I consider whether the concessional travel entitlement is part of the worker's normal weekly earnings.

28. The worker attended the "Graves" naval college in 1967. He moved into hotel management in London in 1970. He later "held jobs" in the United Kingdom, Papua New Guinea and Sydney. Between 1977 and 1981 he operated his own business with his wife in a hotel in Madang in PNG. What he did between 1981 and 1990 I was not told.

29. The worker told me that in 1990 he became employed by the employer as a leading hand in the Sydney mail section, where he carried an administration job that was in effect shift work. He said that he became employed with the employer because at that stage his wife wanted to retire (but he didn't say where from), so he left the hotel industry and applied for Qantas "because I wanted to keep all our concessions, our benefits".

30. The worker went on to say that when he joined the employer his wages went down by about 50%, but he "did that just to keep the airfares". He went on to say that his wife subsequently ceased employment with Qantas for 2 months (but I do not know when she was first employed there) but then she was re-employed. The worker said later in his evidence that his wife "has 26 years of service with Qantas", but when his wife gave evidence she did not expand on or explain this.

31. The worker said that when he joined the employer he had a 12 month waiting period before he was entitled to concessional fares, but after that he could take as many trips as he liked.

32. The worker said that he came to Darwin in 1994 and worked for the employer as a baggage handler, and his wife obtained employment with the employer as well (saying in cross-examination that she re-joined). He said that he had to go through the waiting period again, before he could access concessional travel airfares.

33. After completing the waiting period he said that he used to go away at least every 6 months.

34. The worker said that through doing shift work he got a 6 day break every month. He said that at the time (although it is not clear as to what particular time he was referring to) he was doing a 40 hour week "so we got a 20th day every month", which worked out to 12 extra days a year. In addition, if a day off fell on a public holiday "you got days in lieu". He went on to say that on top of the 6 weeks holidays he got, it could sometimes work out to at least 12 weeks holidays in a calendar year.

35. The worker said that he was paid weekly.

36. The worker said that he used to go overseas every 6 months. During the other 6 months he said that he had family living in Sydney and Adelaide so and he'd fly down there every 2 weeks for a weekend 2 day break. He said that he travelled business class.

37. The worker said that everyone at Qantas (from the cleaner up) has a staff number and can log onto (or ring) "staff travel" and do bookings.

38. He said that others in his family are also entitled to concessional travel and he can change his "beneficiaries" every 6 months. He said

that he has had his mother (who I understand is now deceased) from England and his brother from England as “beneficiaries”. He did not elaborate on any other “beneficiaries”.

39. The worker said that his employment was terminated on 5 December 2007. This is consistent with ExW5. ExW5 is a letter from the employer to the worker (dated 30/11/07) advising of his termination from employment. This letter states as follows:

> Dear Paul
>
> Your Employment
>
> I refer to my letter sent to you dated 31 October 2007 regarding your ongoing employment with Qantas Airways Limited (the Company).
>
> In the letter you were invited to provide any reasons why your employment should not be terminated on the basis of your medical incapacity, in circumstances where you are unable to perform the inherent requirements of your job as an Airline Services Operator.
>
> Correspondence outlining reasons was received from you on 23 November 2007 by Registered Post.
>
> Whilst you have provided a response that “Qantas has not taken all reasonable steps as is mandated by legislation” as to why the company should not terminate your employment on medical grounds, further medical evidence outlining your current capacity to return to pre-injury duties was not provided.
>
> The medical evidence provided to date does not support a return to your normal full pre-injury duties within a reasonable period of time.
>
> - The report from Dr Phillip Haynes of 30 July 2007 makes it very clear that you would be unable to return to your pre-injury duties.
> - The Physical Work Performance Evaluation Summary dated 06 November 2007 specifically refers to the factors underlying limitations being:
>   - Reduced range of motion in bilateral knees
>   - Observation of poor manual handling skills

- Reported fear of pain

- The Company notes that your medical practitioner Dr Dimitri Andropov has specified in the most recent medical certificate dated 08 November 2007 your capacity for work as "modified/other duties". Dr Dimitri Andropov has specified the following work restrictions:

  - Avoid prolonged walking
  - Avoid kneeling
  - Avoid ladders
  - Avoid lifting over 15kg
  - Avoid repetitive use of affected area
  - Avoid repetitive lifting

The Company has provided you with redeployment opportunities to identify alternative positions to assist you with returning to the workplace.

Based on all of the medical opinion provided to the Company regarding your fitness for work, the Company finds that you are not able to perform the inherent requirements of your role as an Airline Services Operator.

As previously advised, the Company has considered what other suitable employment it has available which you would be able to perform. At this time, there are no positions at the Company that could be offered to you. The Company has also taken steps to assist you find suitable employment, including the provision of vocational assistance to identify work and internal and external employment options.

**Termination of your Employment**

In the circumstances the Company advises that your employment will be terminated effective 05 December 2007. You will be paid 5 weeks' salary in lieu of notice of termination as well as all accrued statutory entitlements.

You are required to return all Qantas property in your possession, including your Qantas identification or ASIC card, locker keys, uniforms

and any other Qantas property in your possession as part of the clearance process. Please note that final payment cannot be made to you until all Qantas property in your possession is returned to us.

You may be eligible to apply for Disability Benefits through Qantas Superannuation. I have attached the relevant documentation for completion if you wish to pursue this option post termination. Further enquiries in relation to Disability Benefits can be directed to Qantas Superannuation.

40. Accordingly, it appears from ExW5 that the worker's employment was terminated (with effect from 5 December 2007) because "the company finds that you are not able to perform the inherent requirements of your role as an Airline Services Operator". As at 5 December 2007 the worker was 56 years of age.

41. Disability termination is dealt with on page 27 of ExW2 which states as follows:

> Employees who are terminated by the Company on account of Total and Permanent Disability or Partial Disability, and who have been approved to receive a benefit through the Qantas Superannuation Plan, will be eligible to one of the following:
>
> <u>TOTAL AND PERMANENT DISABILITY</u>
>
> (ie unable to work)
>
> Qantas retiree benefits as per completed years of service.
>
> <u>PARTIAL DISABILITY</u>
>
> (ie unable to fulfil normal duties)
>
> Qantas retiree benefits for a period of equal to 50% of the completed years of service with the Company. If the employee is 55 years of age, or older, at termination they will then be eligible to the travel benefit equal to normal retiree status.
>
> Employees who are terminated by the Company on account of ILL HEALTH, as determined by the Head of People and approved by Head of Occupational Health Services, will be eligible to Qantas retiree benefits for a period equal to 50% of the completed years of service

> with the Company. If the employee is 55 years of age, or older, at termination then will be eligible to the travel benefit equal to normal retiree status.

42. "Disability termination" also appears in the definitions in ExW2 at page 5 as follows:

> Partial Disability – means an employee who has been terminated by the Company based on health reasons and is unable to fulfil normal work duties.
>
> Total and Permanent Disability – means an employee who has been terminated by the Company and is deemed by the Qantas Medical Department, Aviation Health Services, to be unable to perform any work.

43. The worker said that based upon his age and years of service he was still entitled to concessional travel for the next 13 years. This is in accord with agreed fact 3). He said he still had the same staff number as he had when he was working, and agreed that the employer has never withdrawn his right to reduced price airfares.

44. In evidence in chief the following question was asked of the worker, and he replied as follows:

> Q--- Now, staff are entitled to how much discount, are you able to say on airfares?
>
> A--- 10%.

45. The worker gave some evidence in relation to the preparation of ExW8 and ExW10 (which were two hand-written documents relating to alleged air fares used and forming part of the claim for NWE). But as both ExW8 and ExW10 were in the hand of his wife and apparently prepared by her, I will wait until I consider her evidence before dealing with these documents.

46. In cross-examination the worker agreed that he knew that if his wife worked at Qantas he could get access to concessional airfares even if

he chose to work elsewhere. It follows, that as his wife is still working for the employer that that continues to be the situation, and his termination with the employer appears to have no effect on that. He also agreed that he knew that, in relation to concessional airfares:

- It was discretionary;
- It was subject to the availability of a seat;
- He could be off-loaded; and
- He had to make a contribution in money terms.

47. The worker also agreed in cross-examination that his travel since termination (as disclosed on the exhibits) is also correct. ExW9 discloses that since he was terminated (on 5/12/07) until 8/9/08 the worker had undertaken the following trips, and paid the following amounts:

| | | |
|---|---|---|
| 27/12/07 | ADL –DRW | $45 |
| 26/1/08 | DRW – ADL | $45 |
| 6/2/08 | ADL – DRW | $45 |
| 5/3/08 | DRW – SYD – ADL –DRW | $120 |
| 30/5/08 | DRW – SYD | $45 |
| 31/5/08 | SYD – DRW | $45 |
| 14/7/08 | DRW – BNE – ADL | $75 |
| 26/7/08 | DRW – ADL | $90 |

There were other entries in the worker's name during this period that referred to various "itineries" being "refunded". However, the itinerary numbers relating to the "refunded" entries do not match any of the itinerary numbers for the entries that were "travelled" according to

ExW9. This was not explained in evidence. In addition, somebody named “Kirk Wakeling” (I was not told in evidence who this person was) travelled using the worker’s staff number as follows during this same period:

| | | |
|---|---|---|
| 26/3/08 | DRW – ADL | $45 |
| 8/9/08 | DRW – ADL – DRW | $90 |

48. Accordingly, since the worker’s termination from employment it is clear (and I find) that the worker has continued to avail himself of, and benefit from concessional travel airfares, and at least one other person has also continued to benefit from them also.

49. The worker’s wife, Carolyn Wakeling (hereinafter referred to as “Ms Wakeling”) also gave sworn evidence before me. She prepared ExW8 and ExW10. She said that she works for the employer at the airport. She said that she was multi-skilled but she did work on the ticketing counter at times. She processes tickets, does E-tickets and gives fare quotes.

50. Ms Wakeling said that she used ExW9 to assist her in preparing ExW10. In the first column of ExW10 were various dates, and in the second column were ticket numbers, apparently taken from ExW9. In the third column of ExW10 she has inserted the amount disclosed on the ExW9. In the fifth column headed “ticket I paid” she has a different amount and said that’s what they paid (although no documents to verify this assertion made their way into evidence). The fourth column has the difference between the two figures and is noted as “taxes ??”. In her evidence she said “I’d say the difference is taxes” but it is clear that she is unsure of this and may be speculating.

51. In the sixth column she has put in various amounts to allegedly represent the “commercial fare”. She said that she accessed the

Qantas computer using what she called the “amadeus system” to ascertain the commercial fare for each flight that the worker (or one of his dependants) utilised. She said that by doing a “dummy booking” she could get a fare quote (for the actual date that the flight was taken) in order to arrive at the figure she put into the sixth column of ExW10. She went on to say that she then deducted what they actually paid from the commercial fare to arrive at the figures in the last (seventh) column.

52. In cross-examination she said that the fares were the full business class fares and therefore there was no room to negotiate with those (but she did concede that “what happened in the market place might be something else”).

53. Ms Wakeling agreed that paragraph 7 of the Further Amended Statement of Claim was a translation of the latest figures that she had put together. She said she changed the figures to reflect if they had any refunds. For example, she said sometimes they may have purchased tickets for different places but then decided not to go. This was the only explanation that she offered as to the reason for the changes in the amounts.

54. When Ms Wakeling was giving her evidence she had the various exhibits in front of her, so I had no documents with me to assist me in following her evidence. Accordingly, it is only now that I can look at her evidence in reference to the actual exhibits. I note that ExW10 is a photocopy, and on some pages part of the figures in the last column are missing, but since this is a calculation rather than a “prime” figure I can do the required mathematics myself to check the amounts (but this should not have been necessary).

55. When I compare Paragraph 7 of the Further Amended Statement of Claim with ExW10 the two don’t match up, but ExW8 does match up

with the pleading. Accordingly, I assume (and this was not made clear on the evidence) that ExW8 reflects the amounts after Ms Wakeling had changed the figures. The date in the third entry of the table in paragraph 7 appears as “13/03/06”, yet on ExW10 the date corresponding to that ticket number is said to be “20-3-06”. A perusal of ExW9 would suggest that the pleading is correct and ExW10 is in error. This error is corrected in ExW8. I set out hereunder (firstly relating to the worker’s travel and then in relation to the “beneficiaries” travel) the changes that Ms Wakeling has made to the figures by way of comparison:

WORKER

| ExW10 | PARAGRAPH 7 | ExW8 |
|---|---|---|
| $819.91 | $917.91 | $917.91 |
| $109.40 | $109.40 | $109.40 |
| $234.45 | $234.45 | $234.45 |
| $234.45 | $234.45 | $234.45 |
| $234.63 | $234.45 | $234.45 |
| $554.82 | $554.82 | $554.82 |
| $141.62 | $208.79 | $208.79 |
| $236.21 | $236.21 | $236.21 |
| $ 78.80 | $197.00 | $197.00 |
| $188.40 | $282.60 | $282.60 |
| $ 73.00 | $ 73.00 | $ 73.00 |

| | | |
|---|---|---|
| $ 73.00 | $ 73.00 | $ 73.00 |
| $170.47 | $354.20 | $354.20 |
| $183.73 | $183.73 | $183.73 |

Accordingly, six of the fourteen amounts are different between ExW10 and ExW8. In relation to the amounts for beneficiaries (as set out next) all six amounts are different between ExW10 and ExW8:

BENEFICIARIES

| ExW10 | PARAGRAPH 7 | ExW8 |
|---|---|---|
| $710.00 | $ 915.24 | $ 915.24 |
| $346.92 | $ 339.24 | $ 339.24 |
| $222.44 | $ 226.45 | $ 226.45 |
| $158.35 | $ 158.03 | $158.03 |
| $111.60 | $ 95.95 | $ 95.95 |
| $1,105.65 | $1,315.06 | $1,315.06 |

56. The figures in paragraph 7 (as set out above) relating to "beneficiaries" appear under the heading "worker payment", but there was no direct evidence from the worker that he in fact personally paid for any of these discounted airfares. If he did pay anything (and I am unable to find that he did) then there is no evidence as to what arrangement (if any) existed between the worker and any of his

"beneficiaries" about him being possibly re-imbursed, or paid any (and what) amount.

57. As noted earlier, the only explanation that Ms Wakeling offered for the changes that she made to ExW10 was that she had done the original figures off the worker's staff benefits originally and that had the whole figure paid for. But at times they had amounts refunded for tickets they had purchased and not used (for example if they decided not to go to Stockholm from London) and therefore that was not honest. She said that's why it's reduced. A few things flow from this evidence.

58. Firstly, the explanation only refers to those items where the amount paid for the ticket has been "reduced" from what was claimed in ExW10. A perusal of the above table makes it clear that of the twelve amended amounts there are only four that have been "reduced" downwards. These are:

| | | |
|---|---|---|
| 7/4/06 | reduced by | $ 0.18 |
| 16/12/05 | reduced by | $ 7.68 |
| 24/4/06 | reduced by | $ 0.32 |
| 28/6/06 | reduced by | $15.65 |

59. It is difficult to accept that the worker would have paid only 18 cents or 32 cents for a flight, or any portion of a flight. I am unable to accept Ms Wakeling's explanation.

60. Secondly, as the explanation only purports to explain "reductions" between the two sets of figures that she prepared, there is simply no explanation or evidence to explain the eight figures that were changed to actually increase the amounts. I am unable to find that any of these eight changes are supported or justified on the evidence.

61. Thirdly, if there were flights (such as from London to Stockholm) that were subsequently not used and re-credited then I would have thought that the figures for the commercial rate of the fare would also have to be reduced to reflect this fact also. It may be that Ms Wakeling had already taken these flights off before she arrived at her "commercial rate" but her evidence is silent in this regard. I simply don't know.

62. As it appears that Ms Wakeling used the employer's own computer system to arrive at the figures she has relied upon, I would have thought it would have been easy for the employer to have contradicted this evidence if it was in fact not correct. The employer called no evidence. But clearly the worker bears the onus of proof on the balance of probabilities to establish his claim. The employer bears no legal onus in this case.

63. I am unable to accept the figures in ExW8 as being correct on the balance of probabilities.

64. In cross-examination Ms Wakeling agreed that the general rule of thumb was that an employee would pay about 10% of the best fare available. When it was put to her that when the worker paid $624 this would suggest that the best fare available was $6,240 she said "yes, but that's not right". She went on to say that it was "not proven as 10%".

65. In his closing address Mr Walsh QC handed up (as an aide memoire) a document recalculating the worker's figures based upon what the worker paid as 10% of the actual fare. I am unable to find that there is any proper evidentiary basis for relying upon this aide memoire.

66. The starting point to an entitlement to compensation under the Act is *section 53(1)*, which states:

(1) Subject to this Part, if a Territory worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her –

(a) death;

(b) impairment; or

(c) incapacity,

there is payable by his or her employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed.

67. *Sections 64* and *65* of the Act then deal with the compensation payable for the first 26 weeks after incapacity from injury arises, for the next 78 weeks, and for any period thereafter. The amount of compensation payable is calculated (differently depending upon the period that is under consideration) based upon the worker's "loss of earning capacity". This term is defined in *section 65(2)* of the Act as follows:

> For the purposes of this section, loss of earning capacity in relation to a worker is the difference between –
>
> (a) his or her normal weekly earnings indexed in accordance with subsection (3); and
>
> (b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if –
>
> (i) in respect of the period to the end of the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment (including self-employment), if any, reasonably available to him or her; and
>
> (ii) in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her,
>
> and having regard to the matters referred to in section 68.

68. Accordingly, it follows from this that a persons “loss of earning capacity” is to be assessed (in accordance with the Act) on a week by week basis. The “loss” in any given week may change depending upon what work (if any) the worker may be able to engage in. As Martin (BR) CJ said in *Hastings Deering (Australia) Ltd v Smith [2004] NTCA 13* at paragraph 50 “the scheme of the Act may generally be described as an “income maintenance” scheme, the Act does not establish a scheme that provides for compensatory damages”. I consider that to be an important consideration to bear in mind in determining the matter at issue in this case.

69. The concept of NWE is dealt with in *section 49(1)* of the Act which states as follows:

> normal weekly earnings, in relation to a worker, means –
>
> (a) subject to paragraphs (b), (c) and (d), remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay;
>
> (b) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he or she worked full-time at one time for one employer and part-time at another time for one or more other employers – the gross remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay in respect of his or her full-time employment;
>
> (c) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he or she worked part-time at one time for one employer and part-time at another time for one or more other employers –
>
> (i) the gross remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay in respect of both or all of his or her part-time employments; or
>
> (ii) the gross remuneration that would have been payable to the worker if he or she had been engaged full-time in the part-time employment in

which he or she usually was engaged for the more or most hours of employment per week at the date of the relevant injury,

whichever is the lesser; or

(d) where –

(i) by reason of the shortness of time during which the worker has been in the employment of his or her employer, it is impracticable at the date of the relevant injury to calculate the rate of relevant remuneration in accordance with paragraph (a), (b) or (c); or

(ii) subject to paragraph (b) or (c), the worker is remunerated in whole or in part other than by reference to the number of hours worked,

the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he or she was engaged in paid employment.

70. The focus of the Act is on “weekly” periods.

71. *Section 49(2)* of the Act goes on to state:

> For the purposes of the definition of normal weekly earnings and ordinary time rate of pay in subsection (1), a worker's remuneration includes an over-award payment, climate allowance, district allowance, leading hand allowance, qualification allowance, shift allowance (where shift work is worked in accordance with a regular and established pattern) and service grant, but does not include any other allowance.

72. It was not submitted by either counsel that the concessional travel herein was or might be an “allowance”, and accordingly, I do not need to consider that aspect. However, in my view, it is relevant to considering one of the worker’s submissions.

73. Mr Morris in his written closing submissions stated (paragraph 17.1):

> Although the worker’s entitlement to any superannuation payments cannot be included in the calculation of the NWE figure (*section 49(1A) & (1B))* the fact that the worker received superannuation payments at the time of his injury is sufficient to demonstrate that *section 49(1)(d)(ii)* is the appropriate manner for the calculation of NWE because the

> worker was paid other than by reference to the hours worked by him in that he received a superannuation allowance.

74. I am unable to accept this submission. *Section 49(1A)* of the Act states:

> For the purposes of the definition of "normal weekly earnings" in subsection (1), a worker's remuneration does not include superannuation contributions made by the employer.

Accordingly, superannuation contributions do not and cannot form part of the worker's remuneration for the purposes of the definition of NWE. In my view, if it forms no part of the worker's remuneration for the purposes of the definition then it should also be excluded from the consideration of whether a particular worker is "remunerated" (in the same definition) other than by reference to the number of hours worked. If it is not part of a worker's "remuneration" then, in my view, it is not part of how a worker is "remunerated". *Section 49(1A)* has expressly removed these payments from any consideration of what forms part of a worker's remuneration under the Act.

75. In my view, an analogous argument would be to suggest that an allowance (such as a "dirt" allowance) not included into a worker's remuneration by *section 49(2)* (and therefore excluded from it) could by itself invoke paragraph (d)(ii) of the definition. I am unable to accept this.

76. It is settled law in the Northern Territory that a worker may receive non-cash benefits from his or her employer, the value of which ought to be included in the calculation of the worker's "remuneration" under *section 49* of the Act (*Murwangi Community Aboriginal Corporation v Carroll (2002) 12 NTLR 121; Hastings Deering (Australia) Ltd v Smith [2004] NTCA 13).* The first issue herein is whether the concessional travel that the worker accessed (and others accessed through him) was part of his remuneration for the purposes of his NWE. If it is part

of his remuneration then the next question is what is the value (in dollar terms) that should be added to his NWE.

77. The Act is not a general compensation scheme. It does not seek to compensate persons for any injury sustained out of or in the course of their employment. *Section 53* (set out above) makes it clear that it is only where an injury results in or materially contributes to a worker's death, impairment or incapacity that there is payable such compensation as is prescribed in the Act.

78. On the pleadings (set out in full above) it is admitted that the worker suffered his first injury on 20 April 2002, and his second injury on 1 October 2006. It is further admitted (paragraph 8) on the pleadings that the employer assessed the worker's NWE as at the date of the second injury (namely 1 October 2006) as $927.35.

79. In *Fox v Palumpa Station Pty Ltd [1999] NTMC* I had cause to consider the meaning of "remuneration". At paragraphs 68 to 76 I noted:

> "68. Remuneration is defined in the *Concise Oxford Dictionary of Current English (eighth edition)* to mean: "1. reward; pay for services rendered. 2. serve as or provide recompense for (toil etc) or to (a person)."
>
> 69. In *Chalmers v. the Commonwealth of Australia (1946)73CLR 19 @ 37* Williams J confirmed that:
>
> "The ordinary meaning of remuneration is pay for services rendered."
>
> 70. The English Court of Appeal considered the meaning of remuneration in the context of their worker's compensation legislation in the case of *Dothie and others v. Robert Macandrew & Co (1908)1 KB 803*. The definition there under consideration was "workman does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250l. a year." At page 806 Cozens-Hardy MR said:

“His pay was 216l. a year in cash…….he lived on board his ship. He got his food on board there, whether he was actually at sea or not; and it is not disputed, and it could not be disputed, on behalf of the respondent’s that, in considering whether he is a “workman”, you must have regard to the fact that his remuneration was nor merely 216l. in cash, but also board and lodging on board ship.”

And at page 808:

“The true test is not, therefore, what Captain Dothie actually saved by his allowance, but what was the actual value to the workman of the reasonable board which was provided for him by the shipowners.”

In the same case Fletcher Moulton LJ said at page 809:

“Now let us suppose that the workman is within the Act and claims compensation. He is in receipt of certain monetary payments, but he is also in receipt of his food. Now it is incontestable that you must reckon the value of the food as part of the remuneration he gets. It is remuneration in the sense that it is something which he receives for his labour; it is remuneration in the sense that it is something the expense of which has to be borne by his master in order to procure that labour. But of course we cannot give compensation in food; we must turn it into money.”

And Buckley LJ added at page 810:

“Here the workman was the master of a ship, and the remuneration payable in kind was his board on board the vessel. What we have to ascertain, I think, is the value of the board as in fact supplied to him, being, as it appears it was, reasonable according to the nature of his employment. The next question is how are we to ascertain that value, because the value to one person and the value to another person is often a different thing. I think that the value that we ought to arrive at is the value to the workman reasonably ascertained. It is not necessarily the cost to the employer, it is the value to the workman.”

The Court of Appeal again considered the matter in *Skailes v. Blue Anchor Line, Limited (1911) 1 KB 360*. At pages 363-4 the Master of the Rolls Cozens-Hardy said:

“Now “remuneration” is not the same thing as salary or cash payment by the employer. The word “remuneration” is only found in s.13 of the Act and in Sched. I., par.2(a), and this latter paragraph satisfies me that remuneration involves precisely the same considerations as earnings. I do not think it is open to this court, after our decision in

*Dothie v. Robert Macandrew & Co* to take any other view. We there held that the value of board and lodging must be brought into account in considering whether the remuneration of a deceased man exceeded 250l, and that the mere cash salary was not to be solely regarded."

In the same case Lord Justice Fletcher Moulton said at page 367:

"This "remuneration" is the remuneration under the contract, and therefore is not identical with the "earnings" or "average weekly earnings" of Sched. I., Pars. 1 and 2."

He went on to add at page 369:

"If in addition to wages there is remuneration in kind, such as gratuitous board and lodging, it must take a fair estimate of the annual value of such remuneration to the workman. And even where part of the remuneration is in the form of gratuities so customary ans so capable of being estimated as to justify their inclusion in "earnings" (as in the case of waiter's tips), I think it probable that they also must be taken into consideration in deciding whether the contract of service comes within the exception."

The majority of the Court of Appeal in that case held that "earnings" was synonymous with "remuneration". Fletcher Moulton LJ was in dissent on this point.

71. The Full Court of the Supreme Court of Victoria also had cause to consider the word "remuneration" in *Connally v. The Victorian Railways Commissioners (1957) VR 466*.In a joint judgment by Herring CJ and Gavan Duffy J their honours said at page 467:

"The question we have to answer appears to us therefore to depend on the meaning to be given to the word "remuneration" in the definition of "worker" in s.3(1). Does it mean the sum the worker actually receives from his employer under their contract, or that sum less sums which because of the contract between employer and workman are to be deducted in calculating the worker's remuneration, or does it mean the sum by which the worker is richer after deducting from what he receives from his employer what he has had to expend, or has lost, in performing his obligations under the contract, or if it has none of these meanings what other meaning has it?

For ourselves, apart from authority, we would see no reason for giving to the word "remuneration" other than what we take to be its ordinary meaning "pay for services rendered or work done".

Their Honours concluded at page 472:

"We may conclude by saying that in our opinion "remuneration" in s.3 is not to be construed by considering the meaning to be given "average weekly earnings", "earnings", or any other word or phrase. It should be given its natural meaning unless there is reason to do otherwise. In our judgment that natural meaning is the full sum for which the worker is engaged to do the work in question and does not mean the sum found by balancing his gains and losses or by deducting from the moneys received by him for his services the expenses he had to incur for the purpose of putting himself in a condition to earn his remuneration."

Following upon this decision Sholl J considered the matter in *Dawson v. Bankers and Traders Insurance Co Ltd (1957) VR 491*. At page 497 he held:

"Board and lodging are properly included in remuneration, - at any rate where they are not provided solely for the benefit of the employer, *Dothie v. Robert Macandrew and Co*, supra; *Skailes v. Blue Anchor Line Ltd,* supra. And they are to be included, not at a figure representing the actual saving to the employee which they represent, but at their value to him, *Dothie's case*. In calculating that value, the test is not necessarily the cost to the employer."

In the end result Sholl J in that case calculated the worker's remuneration by adding up his cash salary, plus the value of his board and lodging, plus the value of the transport provided by the employer.

72. In the case of *Rofin Australia Pty Ltd v. Newton (1997) 78 IR 78* the Australian Industrial Relations Commission considered the meaning of remuneration. In a joint decision the Commission (comprising Williams SDP, Acton DP, Eames C) said at page 81:

"The term now used is "remuneration", a term which denotes a broader concept than salary or wages. "Remuneration", in our view, is properly defined as the reward payable by an employer to an employee for the work done by that employee in the course of his or her employment with that employer. It is a term that is confined neither to cash payments nor, necessarily, to payments actually made to the employee. It would include non-pecuniary benefits and payments made on behalf of and at the direction of the employee to another person out of monies otherwise due to that employee as salary and wages."

73. Hence, in the case of *Bell v. McArthur River Mining Pty Ltd (1998) 81 IR 436* the Commission accepted (at page 449) "that the provision of board and meals while on site at McArthur River Mining

may be a component in the assessed rate of remuneration applicable to Mr Bell."

74. I also note the following passage in the work by Hill and Bingeman: "*Principles of Worker's Compensation*" at page 122:

"In all cases the calculation of average weekly earnings is concerned not only with money wages but also with what the worker receives in kind from the employer (*Simmonds v Stourbridge Glazed Brick & Co (1910) 2 KB 269; Great Northern Railway Co v Dawson (1905) 1 KB 331*). In the Australian countryside, rural workers are commonly provided with housing, meat, wood, milk etc, as part of their remuneration."

75. From my limited researches I have not been able to locate any authority which goes against, or seriously doubts, any of these authorities. Mr Bryant did not take me to any authorities to support his contention that remuneration was limited to wages paid only.

76. I therefore find that for the purposes of the definition of "normal weekly earnings" in assessing what the worker's gross weekly remuneration was that he earned the Court is not limited to the actual wages received but may look at all the benefits of the employment. The onus would be upon the worker to establish that any particular benefit was in fact part of his remuneration, and then to introduce sufficient evidence to enable the Court to quantify it."

80. I do not understand that the Supreme Court is in disagreement with anything in those paragraphs.

81. In *Fox v Palumpa Station Pty Ltd* there was a written document which set out the terms of Mr Fox's "remuneration package". That document stated:

"The remuneration package is as follows:-

Salary: $30,000 per annum, gross before tax.

Housing: An unfurnished residence will be provided and the station will pay the rent to the community.

> Meat: Meat for your personal consumption and that of your guests on Palumpa will be provided.
>
> Electricity: These items will be met by the station.
>
> and Gas
>
> Telephone: The residence has a telephone which is funded by the station. This will be free of charge for personal calls while these are at an acceptable level. If Maureen takes over the store, then calls made from the store will have to be recorded and charged back to the community."

82. It can be seen from this document that Mr Fox's remuneration package included items in addition to cash, and also extended the benefit of those items to others including "your guests on Palumpa". Accordingly, remuneration does not have to always be personal to the worker. It can go to others. As noted above in the case of *Rofin Australia Pty Ltd v Newton*: "It is a term that is confined neither to cash payments nor, necessarily, to payments actually made to the employee. It would include non-pecuniary benefits and payments made on behalf of and at the direction of the employee to another person out of monies otherwise due to that employee as salary and wages." (emphasis added)

83. There was no evidence before me to suggest that the worker had foregone, or in any way reduced, the amount of salary and wages due to him in order to obtain a benefit to any of his "beneficiaries" by way of concessional travel. Sometimes (for taxation or other reasons) a person might reduce his taxable income by diverting pre-tax income to other sources (such as partner superannuation, housing rent, car repayments etc). Clearly, in my view, this would still form a part of a worker's remuneration. But that is not what occurred here.

84. There is in fact no evidence that the worker received any benefit at all from any of his nominated "beneficiaries" being able to access

discounted airfares. More importantly, there is no evidence that the worker received anything less than he would otherwise have been entitled to for his labour, as a consequence of any "beneficiary" having access to concessional airfares.

85. In the instant case the worker's employment agreement is covered by ExW1. It is a comprehensive document that is 59 pages long. It sets out how employment may be terminated and the notice required (clause 19); the entitlements to various types of leave; the types of employment (full time etc) and the conditions that attach to each; hours and days of work; shift work conditions; the applicable wages for various level and types of workers; the frequency of paying wages (clause 22.1); extra allowances payable in certain cases; penalty rates and when applicable. On the face of it ExW1 purports to cover all situations that may arise during the employment and make provision for it.

86. It does not appear that concessional travel forms any part of the Enterprise Bargaining Agreement (ExW1). Mr Morris did not suggest that it did. Accordingly, it does not appear to be any part of the worker's contract of service.

87. How does it arise? It is referred to as "subject 2" of ExW2. This is a detailed 57 page document. This document appears to have been downloaded from the internet. It appears to be a part of some larger document. Each page of the document has the date "13/09/2004" on the bottom right hand corner, but I do not know if this is the actual date of the document, or the date that it was downloaded. The document was tendered by consent as part of a large bundle of documents (referred to above). I assume therefore that the parties contend that the document is relevant to this matter. Presumably

therefore ExW2 relates to the policy that was in force at the time of the worker's injuries as pleaded.

88. No direct evidence was called as to the history of "concessional travel" within the employer's organisation. I know nothing of it's history, rationale, or changes (if any). I do not know what the situation was during the worker's whole time with the employer, other than the brief account that the worker gave in his evidence.

89. On page 1 of ExW2 there is an "overview" where it is stated beside the heading "policy" the following:

> Rebate travel benefits are a privilege extended by the Company and where applicable, by the Company's wholly owned Subsidiary Companies. This policy may be altered, suspended or withdrawn at the discretion of the Company at any time. References to travel policies for current and retired staff covered under 'previous' Qantas and Airlines policies are not contained in this policy. Information and copies of these policies may be obtained from the Staff Travel Policy Manager.

The "overview" then goes on to say next to the heading "who is eligible?" the following:

> Subject to overriding commercial considerations, travel at rebated rates on the Company's services may be available to employees, retirees, and their nominated eligible beneficiaries. This policy also relates to former employees who have terminated under various retrenchment packages. Travel by nominated eligible beneficiaries is at the discretion of the relevant employee, retiree or other eligible former employee.

90. ExW2 is a very detailed document and would appear to attempt to cover all eventualities. On pages 3-4 it sets out what may occur in the event of an infringement of the "policy". I set these provisions out in full:

> Travel benefits are provided on the basis that any breach of the policies and procedures set out within may result in disciplinary action. Where an employee or retiree (or any person receiving a staff travel

benefit under a redundancy package) **and/or any eligible beneficiary** infringes the Company's staff travel policy, this may lead to disciplinary action being taken against the employee/retiree and/or travel beneficiary and may include the suspension or termination of travel benefits. The application of full commercial charges for travel provided, termination of employment and, where applicable, the application of criminal charges. Where travel benefits have been suspended for any current/retired staff and/or any eligible travel beneficiary, then for the term of such suspension the current/retired staff and/or eligible travel beneficiary cannot access any travel benefit from any other current/retired staff.

A summary of infringements, however not exclusive to, are:-

- The use of rebated travel for commercial/business purposes is strictly forbidden.

- Wilful deception/defrauding of the Company in relation to staff travel including misrepresentation of a third party as an eligible beneficiary and staff and/or eligible beneficiaries using, or with the intent to use, staff rebated tickets against commercial bookings/tickets or claiming any commercial benefit such as frequent flyer points or access to Qantas Clubs.

- Soliciting rebated travel tickets from other Carriers, without the explicit authority of the appropriate Group General Mgr or Regional General Mgr.

- Failure to return to work on time, without a reasonable excuse.

- Disregard of laws or customary practices whether or not such resulted in financial loss or embarrassment to Qantas or the Australian Government (this includes violation of visa/customs regulations).

- Misbehaviour or misconduct will not be tolerated, whether it be in person or by telephone, at a Staff Travel office, Travel Centre, Airport Terminal, abroad an aircraft or anywhere else where the employee/beneficiary is receiving rebate travel or airline discount privileges.

- Any act or omission by an employee/beneficiary which delays an aircraft's departure.

- Dishonour of any form of payment for staff travel tickets will result in an automatic temporary suspension of all travel benefits until the matter is finalised.

- Using or attempting to use staff travel tickets for a travel beneficiary who is no longer eligible to travel.

**Note:** Notwithstanding the above, any breach by any employee may be dealt with according to the Company disciplinary procedures.

Rebated travel benefits are provided on the basis that any breach of the policies and procedures referred to in this manual will result in disciplinary action being taken against the employee (and/or his/her eligible travel beneficiaries) responsible. Such action may include the withdrawal of travel concessions, the application of full commercial charges for travel provided (including reimbursement to the company of visa infringement fines), termination of employment and, where applicable, the application of criminal charges.

An employee summarily dismissed or terminated for misconduct, may not benefit from Rebated Travel privileges available to another employee, viz Brother, Sister, Spouse, Parents or Companion etc. Additionally, a current employee may not nominate a former employee, who has had their travel benefits terminated, as a travel beneficiary.

Travel concessions are only to be used for tourism, leave and recreational purposes. These concessions may not be used for private business or services for third parties.

Travel concessions are personal and not transferable.

91. Mr Morris submitted that because the policy envisaged employees being “disciplined” it was an indication that the policy was part of the worker’s conditions of employment. Mr Walsh QC submitted that on the contrary, as the policy envisaged the right to “discipline” persons who were no longer employed (retirees etc) it clearly was not related to conditions of employment but directly to the individuals who sought to use the travel benefit. I prefer the submission of Mr Walsh QC on this point.

92. In the instant case the ability to use “rebate travel benefits” is not an automatic entitlement. It appears to be dependent upon continuity of employment (a 12 month qualifying period). Then the type of benefit available is dependent upon the duration of that employment (for example, entitlement to travel business class on international flights only commences [for some employees] after the person has worked for at least 7 years: see pages 9 and 10 of ExW2). The longer an employee remains with the employer the more generous the benefits potentially are. Accordingly, the “policy” appears to be a type of reward scheme. It would reward employees for their loyalty and also encourage them to remain so that they can get better benefits into the future. It is presumably mutually beneficial otherwise it is unlikely that the employer would be operating it.

93. There was no evidence before me to suggest that the existence of ExW2 had any influence upon the creation of ExW1. There was no evidence before me to suggest that any of the terms or conditions (including wages) in ExW1 were in any way less than what they might reasonably be because of the existence of ExW2. This was no part of the worker’s case.

94. Historically (this is no longer the case) for example, public servants were traditionally paid less than they might receive in the general workplace, but this was counter-balanced by the security offered by the position and the other conditions. Accordingly, an employee accepted a lesser benefit in one area to gain a greater benefit in another.

95. There is nothing to suggest that anything like this has occurred here. There is no evidence to suggest that ExW1 by itself does anything other than provide a fair and reasonable remuneration to the worker for the work that he did with the employer.

96. Accordingly ExW2, in my view, stands alone. It is an additional benefit that the employer affords to it's employees. There was no evidence to suggest that ExW2 was a negotiated document. On it's face it purports to be a unilateral reward system that the employer generously makes available to employees who have remained for over 12 months. It is subject to unilateral variation, change, suspension or even termination by the employer (although some of these steps might be unpopular). It is a reward for accumulated service, not a reward for work done in any particular week.

97. Society has long acknowledged the benefits of loyalty to employment. Legislation has long existed (since 1955 in New South Wales and since 1981 in the Northern Territory) to provide minimum benefits in relation to long service leave. This is, in my view, an example of a benefit that accrues as a reward over time. It is not part of a person's weekly remuneration. If a person is injured and unable to work (and they have accumulated long service leave entitlements) long service leave is not factored in to calculate an employee's NWE as at the date of injury. Long service leave is a separate and distinct matter which is outside of the jurisdiction of a worker's compensation court, such as the Work Health Court.

98. Many employers provide gratuitous benefits to their employees outside of any employment contract and in addition to any weekly remuneration. These vary widely, and it is in the interest of employees not to discourage their use. Examples would include end of year functions or Christmas parties for staff, or staff and family; special events like a marquis at the races or the V8 supercars etc. The possible examples are endless. In each of these cases, even if the employees come to expect it, they remain as gratuitous and the employer is always at liberty to cease or modify the practice. If a particular employee did not wish to avail him or herself of any

particular benefit (for example a person who was a non-believer in Christmas, or opposed to racing or gambling) would they be able to demand that the value of the opportunity that they did not wish to use be calculated and added to their weekly salary? I think not. So why would it now become part of their remuneration for the purposes of determining their NWE under the Act. In my view, it would not.

99. In the instant case it is clear from ExW8, ExW9 and ExW10 that the worker (and other persons whose names appear on the exhibits) availed themselves of the benefits of the policy in ExW2 extensively in the 12 months before the date of the worker's second injury (and continuing even after the worker's employment was terminated). If a fellow employee was unwilling or unable to avail themselves of the policy (say because they were afraid of flying, or had some condition that made them unable to fly) would they be able to demand that the value of the opportunity that they did not wish (or were unable) to use be calculated and added to their weekly salary? I think not. So why should it now become part of their remuneration for the purposes of determining their NWE under the Act. In my view, it does not.

100. Interestingly, given the clear evidence that the benefit of the policy in ExW2 continues to be available to the worker (and used by him) and his nominated beneficiaries (and used by them), the worker gave no evidence to suggest that he (and his nominated beneficiaries) would cease availing themselves of the benefit of ExW2 in the event that the decision herein was in his favour and the value of the benefit was added to his NWE. Absent any such evidence (if accepted) there would be the clear potential for "double dipping" and in a very significant way.

101. There is no evidence before me to suggest that the worker has returned to any form of employment since the date of the second

injury, or that any such return to work is imminent. The worker's evidence was silent in this regard. If the worker is not working then his availability to utilise concessional travel entitlements would be fettered only by his desire, other plans and finances.

102. In my view, if a practice is truly gratuitous, then even if it is of long standing, it does not become part of a person's weekly remuneration. It is not something upon which this worker or any other employee might be able to sue on the evidence before me.

103. The Act is focussed on compensating a worker for his or her inability to earn their NWE in any given week as the result of an injury (arising out of or in the course of their employment) which results in or materially contributes to an incapacity (or limited capacity) to undertake paid work in that week.

104. In the usual employment situation "salary or wages are rewards for services rendered. If the service is not rendered, the reward by way of salary ceases": *Hastings Deering (Australia) Limited v Smith* (supra). Clearly, if the service is not rendered because the person is incapacitated for work due to a work injury then the Act provides a remedy. But generally the nexus between remuneration as a reward for services rendered is the fundamental corner stone of the employment contract.

105. Employment contracts generally tend to have a finite end date. There is usually a retirement age that is stipulated by legislation, award or agreement. This is recognised in *section 65(1)(a)* of the Act as I have already referred to. Accordingly, even if a worker's capacity to undertake paid work is reduced by a work injury permanently the Act has stipulated a time at which the person's entitlements cease under the Act.

106. As earlier found herein I am not satisfied that the worker's retirement age in his employment with the employer was more than 65. Accordingly, the worker's entitlements to weekly compensation must end on 31 January 2016, irrespective of whether he has any ongoing incapacity for work or not. Yet under the policy it is an agreed fact that the worker will continue to receive (subject to the employer changing or cancelling the policy at their discretion) concessional travel entitlements until 5 December 2020 (which is almost 5 years after he would have been obliged to cease working with the employer assuming that he was fit to do so and both parties were content for this to occur). Accordingly, even if the worker was fit for work and remained working with the employer he would have to retire on or before 31 January 2016 and there could be no entitlement to remuneration for services rendered after that date. The ability to undertake paid work with the employer would have ceased.

107. It follows, in my view, that the concessional travel entitlements are not (and cannot be) a reward for work performed on a week by week basis, otherwise it should cease by no later than 31 January 2016 also. The fact that under the policy it does continue beyond his working life shows it's true character. It is not remuneration which forms part of the worker's NWE. It is something else, and is therefore not to be taken into account in assessing the worker's NWE.

108. In my view, the concept of NWE is focussed upon what a worker receives in cash or benefits each week as reward for the labour that he or she puts in during that week. It does not look beyond each individual week. It does not incorporate other entitlements that a worker may be entitled to when he or she is in fact not working in a particular week (such as annual leave etc). *Section 65* of the Act makes no allowance for annual leave periods. It doesn't entitle a worker to compensation for 4 weeks a year without regard to what he

or she might be able to earn in other employment, because they would be entitled to 4 weeks paid leave from work each year. It is not factored into the compensation scheme.

109. Annual leave is not taken into account in assessing a worker's NWE. For example, if a worker earns $48,000 per annum with his employer and is entitled to 4 weeks paid leave a year then his NWE are $923.07 per week (being 48,000 divided by 52). It is not $1,000 (being 48,000 divided by 48 (being 52 less the 4 week leave entitlement)). Likewise if a worker works at a mine site and works 2 weeks on and one week off and earns $2,000 a week for each of the weeks that he works and nothing for the week away from work, then his NWE is $1,333.33 per week (being 2,000 divided by the 3 week cycle): see *Sedco Forex Australia Pty Ltd v Sjoberg (1997) 7NTLR 50*. It is not $2,000 per week (ignoring the week he doesn't work or get paid). Even if the worker chose to do some other paid work during the week he had off then this extra money would not form part of his NWE (under paragraph (b) of the definition in *section 49(1)*) as the mine work would be his "full time" employment.

110. The primary way of calculating a persons NWE is by paragraph (a) of the definition in *section 49(1).* If it can't be worked out on this basis, then you look to the other paragraphs of the definition.

111. In the instant case it is an admitted fact that "the employer assessed the worker's normal weekly earnings as at the date of the second injury in the amount of $927.35 per week gross". The worker does not seek to challenge that assessment and hence no evidence was introduced as to how that figure was arrived at. I do not know whether it was calculated by reference to paragraph (a) of *section 49(1)* or paragraph (d)(ii). However, I do note that in paragraph 7 of the Amended Notice of Defence the employer pleads "the employer states

that the worker was remunerated with reference to the number of hours that he worked". This would suggest that paragraph (a) of *section 49(1)* would therefore be applicable.

112. In the case of *Great Northern Railway v Dawson [1905] 1KB 331 @335* Cozens-Hardy LJ said:

> "It cannot be doubted, for instance, that, if a workman is, in addition to his wages in money allowed to occupy a house belonging to his employer, the value of that occupation must generally be considered as part of his earnings, because the necessary inference would be that, but for this privilege, the amount of his wages in money would be higher."

113. If the existing "policy" (ExW2) was cancelled or modified (such that a worker's entitlement to discounted airfares was reduced or capped) would the worker's wages in money be higher? I am unable to see any basis on which they would. ExW1 is a comprehensive document that sets out all the worker's entitlements for his labour in any given week. ExW2 forms no part of ExW1 and is not, in my view part of his entitlements or his remuneration. ExW2 is a very generous and gratuitous benefit that the employer has apparently unilaterally bestowed upon it's employees, when it appears to have no obligation to do so. The worker has sought to take financial advantage of this gratuitous benefit and have it added to his NWE. I find that there is no proper basis for doing so.

114. ExW2 also extends concessional airfare entitlements beyond the actual employees to family or nominated beneficiaries of the employees. I have no idea of the reasoning behind this but it is extremely (if not overly) generous. In my view, (on the evidence before me) it would not be open to suggest that if the employer changed the policy and took away the entitlement for "beneficiaries" then somehow the employee would be entitled to be paid extra wages.

115. In the mine site scenario the provision of accommodation, meals etc is a necessary part of employment because there is usually no other alternatives reasonably available within the area. The whole purpose of the employer providing these amenities is to "refresh the worker to fit him to work his next 12 hour shift": *HWE Contracting Pty Ltd v Young and Newmont Australia Limited v Kastelein [2007] NTSC 42 @ paragraph 4.* In the instant case, the concessional travel entitlements had nothing to do with the worker actually working on any given day. On a daily or weekly basis they were not necessary to "refresh the worker to fit him for work". One could imagine that some trips might be refreshing, but others might have the opposite effect. If the worker was due to start work at say 8am and he returned on a concessional flight at 2am that same morning, he would be unlikely to be "refreshed" for his work that day.

116. On the evidence I find that ExW2 formed no part of the worker's contract of employment. I am unable to find that the worker's remuneration (as set out in ExW1) was in any way reduced because of, or contingent upon the availability of ExW2 to the worker or others. I find that ExW2 formed no part of the worker's remuneration.

117. It therefore follows that paragraphs 11.1 to 11.5 (inclusive) of the worker's Further Amended Particulars of Claim must be dismissed.

118. As noted earlier, no evidence was called in relation to the remedies sought in paragraphs 11.6, 11.7 or 11.8 of the worker's Further Amended Particulars of Claim. Further, the issues identified in these three paragraphs were not addressed in the opening or closing submissions. In his written closing submission (number 1), Mr Morris stated:

> "All aspects of the workers claim are either admitted, or a non-contentious, the purpose of this hearing save the calculation of NWE."

119. However, the employer in it's Amended Notice of Defence has expressly denied paragraphs 11.6, 11.7 and 11.8. That denial has not been withdrawn. Mr Walsh QC in paragraph 1.1 of his written submissions states:

> "The sole issue for determination is the application by the worker of 26 March 2008 for review of his normal weekly earnings previously calculated at $927.35."

120. It therefore appears that both counsel (who are very experienced) are of the same belief. It may be that some agreement (not reflected in the pleadings) has been reached between the parties (as to the various rulings sought) and which the Court has not been informed of. Accordingly, I will hear counsel as to what "rulings" I should make by consent with respect to these aspects of the worker's claim, and on the question of costs and any consequential orders. In the event that no consent rulings are to be made then it would appear that these paragraphs should be dismissed as there was no evidence called in the case in relation to them, and request (or permission) was made to further split the case.

121. If I am wrong in my decision that the worker's concessional travel entitlements are not part of the worker's NWE I will proceed to assess their value on the evidence before me.

122. As noted earlier, I am unable to accept the amounts in ExW8 on the balance of probabilities. However, I am also unable to accept the aide memoire as put forward by the employer. It is clear that the concessional airfares have been a financial benefit to the worker.

123. Clearly, Ms Wakeling has taken (as her starting point) the full business class fare offered by Qantas at each relevant time. I have no evidence as to how this might have compared with what might have been able to be obtained from some other carrier. There may well

have been special deals that were reasonably available. Ms Wakeling conceded that the figures she used might be different to what might be able to be obtained in the market place.

124. Accordingly, I am not satisfied on the balance of probabilities that the starting figures as used in ExW8 and ExW10 were the appropriate figures, but I am also unable to find what would be appropriate figures. On the evidence before me I do not feel comfortable in assessing the proper value of the discounted airfares, and therefore do not do so. I do not consider that I am able to take a broad brush approach either. I would be speculating.

125. On the evidence I find that I am unable to properly assess the value of the concessional airfares to the worker.

126. I will hear counsel on the issue of costs and consequential orders.

Dated this 3rd day of December 2008.

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**Daynor Trigg**
STIPENDIARY MAGISTRATE