CITATION: *Bird v Palazzolo* [2009] NTMC 054

PARTIES: Bird

v

Frank Charles Palazzolo

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: Work Health

FILE NO(s): 20817485

DELIVERED ON: 2 November 2009

DELIVERED AT: Darwin

HEARING DATE(s): 20 October 2009

JUDGMENT OF: R J Wallace

CATCHWORDS:

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REPRESENTATION:

Counsel:
Worker: S Gearin
Employer: P Barr SC

Solicitors:
Worker: Ward Keller
Employer: Cridlands MB Lawyers

Judgment category classification: C
Judgment ID number: [2009] NTMC 054
Number of paragraphs: 12

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

No. 20817485

BETWEEN:

BIRD
Worker

AND:

FRANK CHARLES PALAZZOLO
Employer

REASONS FOR JUDGMENT

(Delivered 2 November 2009)

Mr R J WALLACE SM:

1. This is an application for worker's compensation pursuant to the *Workers Rehabilitation and Compensation Act* ("the Act"). For the time being the only live issue to be determined in relation to that application concerns the normal weekly earnings ("NWE") of the Worker (who, it seems, prefers to be known simply as "Bird" – hence the somewhat unusual title of the proceedings). This issue has been reduced, so far as the Court is concerned, to a pure question of law, owing to the sterling work by the lawyers for both parties, who have produced a Statement of Agreed Facts of Worker and Employer ("the Agreed Facts") set out in full below. Accordingly, a hearing listed for three days was reduced to legal argument of about one hour; my task was greatly simplified (for which I am grateful); the costly use of court time was avoided, and a magistrate made available to expedite other work. The public too, should be grateful.

2. The question of law is not particularly complicated, but I cannot find a way elegantly to state it, so, inelegantly:

A. NWE is defined in s 49(1) of the Act which provides:

““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 or 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;"

B. The Agreed Facts are:

"STATEMENT OF AGREED FACTS OF WORKER AND EMPLOYER

Facts

1. The worker was born on 6 February 1964.

2. The date of injury was 12 October 2007 ("the injury").

3. The relevant period for calculation of NWE is 12 months before the injury, namely 13 October 2006 to 12 October 2007 ("the period").

4. At the date of injury, the worker has entered into three (3) concurrent contracts of service:- for one employer, Northern Guards Security Pty Ltd, he worked full-time; and for two other employers, Millenium Security and Frank Charles Palozzolo trading as JR Security, he worked part-time.

5. The worker's full-time employment with Northern Guards Security Pty Ltd required the worker to work one week on and one week off, although occasionally he worked into his one week off.

   5.1 The worker was paid fortnightly in his employment with Northern Guards Security Pty Ltd.

   5.2 The worker earned $45,158.96 from wages in his employment with Northern Guards Security Pty Ltd for the period.

   5.3 The worker worked 23 fortnights, equivalent to 46 weeks with Northern Guards Security Pty Ltd for the period.

   5.4 The worker's average weekly remuneration paid as wages by Northern Guards Security Pty Ltd for the period was $981.72 and paid as non cash benefits by Northern Guards Security Pty Ltd for the period was

$262.50, a total average weekly remuneration of $1,244.22.

6. The worker's employment with New Millennium Security for the period was casual and part-time.

   6.1 The worker was paid fortnightly in his employment with New Millennium Security.

   6.2 The worker earned $7,427.25 from wages in his employment with New Millennium Security for the period.

   6.3 The worker worked 16 fortnights, equivalent to 32 weeks with New Millennium Security for the period.

   6.4 The worker's average weekly remuneration paid as wages by New Millennium Security for the period was $232.10 per week.

7. The worker's employment with JR Security was casual and part-time.

   7.1 The worker was paid weekly in his employment with JR Security.

   7.2 The worker earned $3,496.00 from wages in his employment with JR Security for the period.

   7.3 The worker worked 12 weeks with JR Security for the period.

   7.4 The worker's average weekly remuneration paid as wages by JR Security for the period was $291.33 per week."

3. The question is, whether the Worker's NEW is to be calculated pursuant to s 4 49(1)(b), or s 49(1)(d)(ii). Ms Gearin appeared for the Worker, Mr Barr SC for the Employer. Ms Gearin introduced two authorities into her argument: first, *Sedco Forex Australia Pty Ltd v Sjoberg* (1997) 7 NTLR 50 ("*Sedco*"); secondly, *HWE Contracting Pty Ltd v Kastelein* (2007) 20 NTLR 83 ("*HWE Contracting*"). Mr Barr brought one more, *Hastings Deering (Australia) Limited v Smith (No. 2)* (2004) 18 NTLR 1 ("*Hastings*

Deering"). All three are judgments of the NT Court of Appeal. The salient facts from the Agreed Facts are: first that the Worker had three employs, one of them full-time, and, secondly, that his full-time employment was rewarded by a combination of money wages, and non-cash benefits.

4. *HWE Contracting* establishes that these non-cash benefits are properly characterised as part of the employee's "remuneration", within the meaning of that word as used in s 49(1) of the Act (which was then and until 1 July 2008 called the *Work Health Act*), and not as "allowances" as the word "allowances" is used in s 42(2) of the Act – many allowances being by that subsection excluded from the employee's remuneration. See the judgment of Riley J (with which Martin (BR) CJ agreed) at pp 89-92.

5. Ms Gearin argues that that makes the s 49(1)(b) definition of NWE inappropriate. On its face s 49(1)(b) arrives at NWE from the full-time employment of a worker like Bird (and disregarding entirely the additional part-time jobs) by the simple multiplication of hours per week by pay per hour, or, rather "the worker's <u>normal weekly number of hours of work</u> calculated at his or her <u>ordinary time rate of pay</u>…[my emphasis]". *HWE Contracting* makes it clear that this simple multiplication is inadequate; that there must be a further term in the equation, namely, the addition of non-cash benefits. For this reason, Ms Gearin argues that Bird's NWE falls to be defined by s 49(1)(d)(ii). (It is clear that Bird's is not a case to be defined by s 49(1)(a), by reason of his multiple employments; nor by s 49(1)(c), by reason of one of his employments being full-time).

6. *Sedco* the authority Ms Gearin relies upon for this argument, was a case not entirely on all fours with this one. There the worker, Mr Sjoberg, was employed by a single employer, as a casual roustabout on an offshore oil rig, and came by his injury in the course of that employment. A casual reading of s 49(1) would suggest that his NWE would have been defined by s 49(1)(a), and certainly not by s 49(1)(b) or (c).

7. In the event the Court of Appeal, by the judgment of Bailey J with which Gallop ACJ and Mildren J agreed, decided that Sjoberg's NWE was defined by s 49(1)(d)(ii). The terms of his employment, governed by the relevant Award, were held to entail that he was paid not by reference to "the number of hours worked", but, rather, the number of days. See *Sedco* at p 56-57. Since s 49(1)(a) is "subject to paragraphs (b), (c) and (d)" - whereas s 49(1)(d)(ii) is subject to paragraph (b) or (c) - in a contest between (a) and (d)(ii), the latter is dominant, and so ruled to define Sjoberg's NWE.

8. In the present case, where the alternatives are (b), on the one hand, and (d)(ii) on the other, Mr Barr points out that (b) is dominant between them, so that if the Worker's circumstances fit that definition that definition prevails over (d)(ii). As for the apparent difficulty posed by a worker whose "gross remuneration" includes not only a wages component but also a non-monetary component. Mr Barr points to the definition of "ordinary time rate of pay", also in s 49(1) of the Act:

> '"ordinary time rate of pay" means –
>
> (a) in the case of a worker who is remunerated in relation to an ordinary time rate of pay fixed by the terms of his or her employment – the time rate of pay so fixed; or
>
> (b) in the case of a worker –
>
> (i) who is remunerated otherwise than in relation to an ordinary time rate of pay so fixed, or partly in relation to an ordinary time rate of pay so fixed and partly in relation to any other manner; or
>
> (ii) where no ordinary time rate of pay is so fixed for a worker's work under the terms of his or her employment,
>
> the average time rate of pay, exclusive of overtime other than where the overtime is worked in accordance with a regular and established pattern, earned by him or her during the period actually worked by him or her in the service of his or her employer during the period of 12 months immediately preceding the date of the relevant injury.'

9. Of that definition, the Full Court in *Hastings Deering* said (judgment of Martin (BR) CJ with which Angel J and Priestley AJ agreed) at p 19-20:

> "[58] Paragraph (a) of the definition reflects the common understanding of the expression in the industrial context as explained by the High Court in *Scott v Sun Alliance*. However, subpara (b)(i) of the definition extends the reach of the expression "ordinary time rate of pay" to circumstances where an employee is "remunerated" otherwise than in relation to an ordinary time rate of pay or "partly in relation to an ordinary time rate of pay … and partly in relation to any other manner". The word "remunerated" is used rather than "paid".
>
> [59] The Legislature has recognised that not all employees are remunerated solely by reference to an "ordinary time rate of pay" as that expression has been understood in the industrial context. Provision is made for the employee who is remunerated wholly or partly in some way other than by reference to such an ordinary time rate of pay. In that situation, for the purposes of s 49(1), "ordinary time rate of pay" means the "average time rate of pay" earned by the employee during the previous twelve months (exclusive of overtime other than where overtime is worked in accordance with a regular and established pattern).
>
> [60] The "average time rate of pay" of an employee whose remuneration is comprised of both cash and non-cash components and employee contributions can readily be calculated. The total remuneration is comprised of three components. First, the cash component that is immediately available to the employee. Secondly, the value to the employee of the non-cash components such as accommodation etc. Thirdly, the amount of employer superannuation contributions. Having arrived at the total remuneration by the addition of those three components, that total is placed against the number of hours worked to give an "average time rate of pay" for the purposes of calculating the normal weekly earnings of employees who fall within paras (b) and (c) of the definition of "normal weekly earnings"."

10. In my opinion that judgment is, as Mr Barr argues, directly applicable to the facts of this case. That is, there is authority of the Full Court to the effect that a worker like Bird, receiving monetary and non-monetary components

of remuneration, is not thereby taken out of the realm of s 49(1)(b)'s definition of NWE.

11. That being so, I propose respectfully to follow that authority. I find that the Workers NWE, defined by s 49(1)(b), is as set out in paragraph 5.4 of the Agreed Facts. (I assume the figures therein are correct, but, if not, I do not preclude amendment of them.)

12. The matter may be listed again before me at any convenient time on any other questions arising.

Dated this 2nd day of November 2009

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R J Wallace
STIPENDIARY MAGISTRATE