CITATION: *Suich v Northern Territory of Australia* [2009] NTMC 056

PARTIES:	KALIKAMURTI SUICH
	V
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20730437
DELIVERED ON:	5 November 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	25 September 2009
JUDGMENT OF:	Relieving Magistrate Bradley

CATCHWORDS:

WORKERS COMPENSATION

Workers Rehabilitation and Compensation Act 1986 (NT) – whether earnings from self employment are to be included in "Normal Weekly Earnings" – s49(1) and s65(2)

Hastings Deering (Australia) Ltd v Smith [2004] NTCA 13
Sedco Forex Australia Pty Ltd v Sjoberg 7 NTLR 50 considered

REPRESENTATION:

Counsel:

Worker:	B O'Lochlan
Employer:	G Macdonald

Solicitors:

Worker:	Preistlys
Employer:	Collier

Judgment category classification:	A
Judgment ID number:	[2009] NTMC 056
Number of paragraphs:	35

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

No. 20730437

BETWEEN:

KALIKAMURTI SUICH

Worker

AND:

NORTHERN TERRITORY OF AUSTRALIA

Employer

REASONS FOR JUDGMENT

(Delivered 5 November 2009)

Mr BRADLEY R/SM:

1. In this case the Worker Ms Suich has made a claim for compensation under the provisions of the *Workers Rehabilitation and Compensation Act* as it is now named.

2. The history of the claim is set out in the facts handed to the Court and agreed to by both parties. Those agreed facts are as follows:-

> "1. The Worker was born on 30 January 1959.
>
> 2. At all material times the Worker was employed as a casual P2 or P3 counsellor for the Central Australian Mental Health Services, an agency of the Employer ("Government Employment") which employment commenced 22 February 2006.

3. On or about 21 February 2007 the worker suffered an injury at work when she was punched by a client and suffered face and neck pain, and subsequently neuralgia ("the injury").

4. At the time of the injury the worker was a worker under the *Work Health Act* now known as the *Workers Rehabilitation and Compensation Act* ("the Act").

5. The injury arose out of or in the course of the worker's employment with the Government Employer.

6. As a result of the injury the worker is entitled to compensation under the Act including compensation for loss of earning capacity pursuant to ss. 64 and 65 of the Act.

7. In her Government Employment, the worker

   7.1 worked varying hours per week.

   7.2 was paid a gross hourly rate.

   7.3 In the 12 months prior to the injury the worker worked for 34 weeks and received $25,719.15 giving a weekly average earnings of $756.45 for that employment.

8. At all material times the Worker also conducted a business independently of the Government Employer ("Other Employment") where:

   8.1 the worker provided services as a counsellor, yoga instructor, trainer and facilitator for various clients;

   8.2 all income earned by the business was paid to the Kalikamurti Enterprises Trust ("the Trust");

   8.3 On most occasions the income received by the business in respect of the services provided by the worker was paid by reference to the hours she worked but on some occasions income was received:

      8.3.1 By reference to a daily rate or lump sum;

      8.3.2 As a lump sum for writing assessment reports; and

      8.3.3 Paid per student (in relation to yoga classes);

8.4 all expenses of the business were paid by the Trust;

8.5 the worker received distributions from the Trust and paid income tax on those distributions, at the relevant marginal rates;

8.6 the distributions made to the worker from the Trust comprised the whole of the Trust's net income in each taxation year.

9. In her Other Employment, in the 12 months prior to the injury, the worker received an average net income of $436.31 per week.

10. Worker has been paid benefits and in assessing entitlements Employer has not taken into account her earnings from The Trust."

3. The fact is that whilst the Worker has been paid benefits pursuant to the Act a difference of opinion has occurred as to the means by which the amount of compensation should be calculated. The Worker contends that for the purpose of calculating normal weekly earnings ("N.W.E.") as defined in s.49(1) the remuneration received by the Worker from her self employment ought to be included in the calculation. The Employer contends that the proceeds of self employment should not be included in the calculations of N.W.E.

4. The parties have indicated to the Court that they are in sufficient agreement as to the facts, matters and circumstances of the employment to be able to calculate the correct amount of compensation payable if the Court determines the way in which N.W.E. is to be calculated.

5. Section 94 of the Act as amended relevantly provides:-

94 Powers of Court

(1) The Court has power to hear and determine:

(a) claims for compensation under Part 5 and all matters and questions incidental to or arising out of such claims; and

(b) all other matters required or permitted by this Act to be referred to the Court for determination,

and such other powers as are conferred on it by or under this or any other Act.

6. It seems to me that given the parties advice that they will be able to calculate and agree on the weekly amount to be paid to the Worker that the Court has the power to determine the question which has arisen and which is incidental or arising out of the claim for compensation.

7. In addition to the agreed facts the Court has received evidence relating to the calculation of income for the various years and a copy of the Trust Deed under which the Worker conducted her own self employment arrangements. Those documents form part of Exhibit 1 in the case. Exhibit 2 is a copy of an employment contract entered into between the Employer and the Worker in July 2007. There is no specific evidence of the terms of the contract during the period when the Worker was employed in 2006 although the Court was told that it is likely that the terms of the contract were in precisely the same terms. It seems to me that given there is the agreed fact that she was paid a gross hourly rate it is not necessary for the Court to further enquire into the precise terms of the Workers employment with the Northern Territory of Australia.

8. The Trust Deed appears to me to be setting up the terms of a bare trust. There is no corporate trustee and the Worker is both trustee and sole beneficiary under the terms of the Deed. It seems to me that the Trust therefore has no separate personality. Given that a person cannot contract with ones self the arrangement seems to be one for the purpose of taxation rather than of contract of employment. In such circumstances it is appropriate for me to approach the matter on the basis that Ms Suich

operated her own business purely on her own account and that she can be regarded to have worked in that business as a self employer.

9. The heart of the dispute surrounds the proper interpretation of N.W.E. pursuant to the definition set out in s 49(1) of the Act. That section defines "normal weekly earnings" and "normal weekly number of hours worked" 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. (emphasis mine)

normal weekly number of hours of work means:

(a) in the case of a worker who is required by the terms of his or her employment to work a fixed number of hours, not being hours of overtime other than where the overtime is worked in accordance with a regular and established pattern, in each week – the number of hours so fixed and worked; or

(b) in the case of a worker who is not required by the terms of his or her employment to work a fixed number of hours in each week – the average weekly number of hours, not being hours of overtime other than where the overtime is worked in accordance with a regular and established pattern, worked by him or her during the period actually worked by him or her in the service of his or her employer during the 12 months immediately preceding the date of the relevant injury.

10. The Worker says she earned her total taxable income which she would say is her "gross weekly remuneration" within the meaning of the definition from both the Northern Territory Government and from her self employment. Further, since her self employment involved remuneration by means other that by the number of hours worked she must have her N.W.E. calculated pursuant to sub clause (d)(ii) of the definition of N.W.E. in s 49(1). It is argued that pursuant to (d)(ii), her N.W.E. is the sum of her earnings from both of her occupations during the twelve months preceding her injury. Coincidently such a calculation appears to be easy in respect of her Government employment since she was employed in that capacity for precisely twelve months at the time of her injury.

11. The Courts have taken a broad and beneficial view of the Act and the meaning of N.W.E. In *Hastings Deering (Australia) Ltd v Smith* [2004] NTCA 13 His Honour Martin (BR) CJ with whom other members of the Court agreed said at para 50:-

> "As to the general approach to be taken to the construction of s 49(1), I discussed the general purposes and construction of the Act in *Thompson v Primary Producers Improvers Pty Ltd* [2004] NTCA 12. I will not repeat that discussion. A purposive construction is required and, as the Act is beneficial in character, it should be construed liberally in favour of the employee. Bearing in mind the context in which the relevant provisions appear, together with the purposes of the Act and the beneficial nature of its character, the Court must determine "the meaning the relevant words used require" (*Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260 at [33]). Although the general purpose and policy underlying the Act seeks to avoid or ameliorate the adverse impact that injury and incapacity would otherwise have upon an employee's income, and to that extent 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."

12. This Court and the Supreme Court have considered the concept of remuneration over a period of years and the cases and now established clearly that all or most of the aspects of remuneration or benefit to an employee should be included when calculating N.W.E. The recent decision in *Hastings* case has been overruled by legislative enactment but the principles established there and in other cases such as *Murwangi Community Aboriginal Corporation v Carroll* (2002) 171 FLR 116 are still pertinent.

13. The Worker says further that, if earnings from self employment are to be taken into account in calculating loss of earning capacity under s 65, then they should also be included for calculating N.W.E. If it is "on one side of the ledger" then it should also be included on the other.

14. The Employer argues that, for the purposes of calculating N.W.E., no account is to be taken of earnings from self employment and that this is so notwithstanding that self employment is to be taken into account when

calculating a loss of earning capacity for the purposes of s 65. The Employer says that the Act, when taken as a whole, establishes an insurance scheme to provide cover to employers to meet the obligations for rehabilitation and compensation of workers who are injured during the course of their employment **for and with an Employer**. The Employer says further that the Act makes a clear distinction between those persons who are workers for the purpose of the Act and other persons who are self employed in professional work or on a contractual basis. The self employed must themselves take out personal insurance to cover the prospect of injury causing an inability to continue to earn an income.

15. As far as counsel and I are aware all of the previous court considerations of the calculation of N.W.E. have been in the context of a worker employed by one or two employers. We are unable to find any precedent for this issue namely, whether or not the income from self employment should be included in N.W.E. where a person is also employed by an employer.

16. Looking at the Act as a whole it seems that it provides for the establishment and administration of a scheme to rehabilitate and compensate certain workers. The framework of the Act appears to be that Parts 1 to 3 set up the naming and administrative divisions, Part 5 deals with compensation and rehabilitation, Part 6 and 6A deals with the Court and the mediation processes to resolve claims, Part 7 deals with insurance and Part 8 is miscellaneous provision.

17. The starting point seems to be in the definition of "worker". Section 3 defines "worker" differently depending on whether the purpose of the definition is for ascertaining a person's entitlement to the provisions of occupational health and safety or for the purposes of establishing his

entitlement to rehabilitation and compensation. The relevant definition is as follows:-

> ***"worker*** means:
>
> (a) for the purposes of the provisions of this Act relating to occupational health and safety – a natural person who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person; and
>
> (b) for the purposes of the provisions of this Act relating to compensation and rehabilitation – a natural person:
>
> (i) who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person unless and until the person notifies the other person, in writing, of a number that is, or purports to be, the ABN of that person for the purposes of the work or service; or
>
> (ii) who is a person, or a member of a class of persons, prescribed for the purposes of this definition;
>
> but does not include a person:
>
> (iii) who is employed in the service of the Commonwealth;
>
> (iv) subject to subsection (2), who is a member of the immediate family of the employer;
>
> (v) subject to subsection (3), who is a director (by whatever name called) of a body corporate;
>
> (vi) subject to subparagraph (b)(ii) of this definition and to subsections (7), (8) and (9), who is employed in voluntary work and who receives in relation to that work, if anything, nothing more than reasonable travelling, accommodation or other out-of-pocket expenses;
>
> (vii) who is a person, or a member of a class of persons prescribed for the purposes of this definition;

(viii) in relation to the work or service under consideration – who is an employer of another person engaged in the performance of the work or server;

(ix) subject to subsection (5) – who is employed or engaged by a householder; or

(x) who is employed or engaged otherwise than for the purposes of the employer's trade, business or enterprise and in respect of whom the employer does not make any withholding payments under the PAYG provisions."

18. The definition is clearly more limited for the purposes of payment of compensation and presumes the presence of a person in the nature of an employer. It is therefore apparent that for the purposes of this Act a person is not intended to benefit if he is an independent contractor or other self employed person who may contract to others or provide services direct to the public. Whilst insurance will be discussed further later it is to be noted that certain persons such as family members and directors are only regarded as workers if estimates of the proposed remuneration has been advised to the insurer when cover is sought (see s 3(3) and (4)).

19. When looking at s 49(1) and the definition of N.W.E. it is clear that sub paragraphs (a), (b) and (c) directly or by necessary implication require a relationship of employer and worker. So too does sub clause (d)(i). Sub clause (d)(ii) is relied upon by the Worker here who says that this clause is designed to cover all situations where someone is remunerated on some basis other than the hours worked. She says that because in her self employment she is remunerated on a basis other than by the hours worked she is entitled to have her N.W.E. calculated in accordance with this clause and it should include her self employment as well as her employment with the Northern Territory Government.

20. As I have said this cause has been broadly interpreted by the courts and is designed to incorporate those benefits an employee receives by way of cash or other benefits not included in an hourly rate. As a result allowances and

the value of accommodation, meals, transport, electricity etc. have been included in the concept of N.W.E. The question now put is whether (d)(ii) is taken literally in relation to total earnings and can and should be read to include earnings from self employment. In my view the proper interpretation of this clause needs careful consideration since it could, if read in its broadest terms, apply to the exclusion of almost all the other definitions. If it were so interpreted that would allow not only self employment income to be added to an employers responsibility but also allows the inclusion of certain items that the Act otherwise has been careful to exclude such as certain allowances [see s 49(2)] and overtime except where worked in accordance with the regular established pattern [see s 49(3)].

21. If (d)(ii) were to be applied to any worker who received any compensation other than on an hourly basis then it could have some unexpected results. For example take a labourer who from 1 January in any year is paid at the going rate of say $600 per week. That person might then move to a remote mining site or drilling rig in December of the same year and receive the going rate for such work of say $1,500 per week plus benefits. If that person was then injured at the end of December he would, if (d)(ii) were applicable only be entitled to compensation based upon a N.W.E. pretty close to the $600 per week instead of the $1,500 plus per week that he would have continued to earn if he had not been injured. Obviously this situation could operate in reverse. In my view this is not the intention of the Act and the whole purpose of the Act is to fairly and affordably compensate for a loss of earning capacity or as the Attorney General said when introducing amendments to the Act in 2004:-

> "Workers compensation benefits represent a balance between what is fair for the injured worker and what is affordable to the community".

22. Also if sub clause (d)(ii) were to operate in respect of a person who earned part of his income from investments and shares then it could be argued that,

since the old concept of earnings from personal exertion no longer has application, the remuneration from investments also could be added to employment remuneration for the purpose of calculating N.W.E. Even a person full time in one job and part time at home or for another employer might seek to benefit from subclause (d)(ii). This has been rejected by Mr Wallace SM in *Bird v Palazzolo* [2009] NTMC 054. It seems to me also this is not the intention of the Act.

23. It is worth noting also that if the Worker had self employment which was rewarded only on the basis of the number of hours worked then he/she could not claim the benefit of (d)(ii) as this Worker seeks to do.

24. What then is the purpose of sub clause (d)(ii) of the definition of N.W.E. It seems to me to have been originally designed to cover people in employment (other than self employment) who are paid on some basis other than an hourly rate; peace workers, commission agents and persons remunerated on multiple bases seem to me to be those intended to be covered. In my view, however the clause is to apply to other situations, the sub clause is not intended to extend the rewards of self employment to those of the paid employment in which the worker was injured as claimed in this case.

25. Nowhere in s 49 is the concept of self employment considered or included for the purposes of establishing a right to compensation. As is indicated above the Worker with some justification, argues that it is unfair when calculating loss of earning capacity that one should take into account the self employment earnings under s 65 when calculating the amount he/she is reasonably capable of earning, but not under s 49 when calculating N.W.E. The concept of fairness to the Worker has been used by the courts to "balance the ledger" so to speak; see for example in *Sedco Forex Aust P/L v Sjoberg* 7 NTLR 50 at p 59 where His Honour Justice Bailey said with the

approval of other members of the Court in relation to those allowances excluded under s 49(1) that:-

> "I respectfully agree with the conclusions reached by Angel J and the reasons advanced in support of that conclusion in relation to the cross-appeal. Notwithstanding the absence of express reference to the question of allowances in s 65(2) of the Act, it would be quite inequitable for relevant allowances to be excluded for the calculation of a worker's "normal weekly earnings" and "ordinary time rate of pay", but count against him in assessing the amount that he is "reasonably capable of earning" for the purpose of assessing loss of earning capacity."

26. Once again however the application of s 49 and s 65(2) to supplement benefits were then being considered in the light of employment situations not the whole of income from self employment.

27. The Act distinguishes between entitlements for the first twenty six weeks and subsequently. In s 64 the Worker is entitled to the difference between N.W.E. and the amount "actually earned in employment during a week". For periods after the twenty six weeks s 65(2) is the first and only relevant time that the concept of earnings from "self employment" is specifically introduced into the Act to be included in the amount to be deducted from N.W.E. pursuant to the provisions of s 65(2).

28. It seems to me the legislature has designed the scheme to compensate a worker for the loss of capacity in the field of employment in which he was injured and that in respect of which insurance cover exists.

29. It would not suit the intention of Parliament on the otherhand to require an employer to continue to pay a worker compensation when, although he could not continue in the employers employment, he could earn an even greater amount working for himself. It is for this reason that parliament has included earnings from self-employment in s 65(2).

30. Some support for this interpretation of the nature of the scheme of the Act is also contained from consideration of the overall insurance provisions (Part

7). A substantial part of the Act is devoted to ensuring that all employers are covered by an approved insurer or are approved themselves as a self insurer. A nominal insurer is created to cover those cases where an employer fails to meet his obligations in this regard or an approved insurer is unable to meet its obligations.

31. All employers must take out compulsory insurance (see s 126). That insurance is in terms of Schedule 2 of the Act. The policy is issued based on estimates of the amount to be paid by the employer by way of salary and benefits. There is no provision for the employer to include additional private earnings made by part time employees and so obtain extended cover.

32. An insurer is obliged to meet its employers obligations based on the salaries notified and paid to the workers to the year of insurance and I note again the specific provisions for directors and family members to be covered only if an insurance premium is paid in their regard. An insurer has no way of recovering any premium for workers earnings outside of their employment covered by the policy. True, it is said, that where there are two employers involved in establishing N.W.E. there could be two insurers and one may be obliged to meet the obligations of both employers pursuant to the provisions of the Act. Here it seems to me that the policy of the Act is that overall, satisfactory premiums have been received by the industry, and that a sort of "knock for knock" should be applied as a result of the application of the Act.

33. Given all the above I have reached the conclusion that the earnings of the Worker Ms Suich received as a result of the conduct of her personal business should not be included within the amount to be calculated as N.W.E. pursuant to s 49(1) of the Act. This is notwithstanding the fact that such earnings are intended to be included within the meaning of s 65 when calculating the amount to be deducted from N.W.E.

34. I note in passing that I was advised by counsel during the course of the hearing that the Northern Territory has paid compensation to date on the basis that ongoing earnings from the business are ignored in the calculation of compensation payable to s 65. While that may be a generous approach to be taken by the Employer in this situation it is not a way the Act is to be interpreted in my view. It may well be the appropriate approach when calculating entitlements pursuant to s 64, but it is not, in my view the approach to be taken when calculating the benefits pursuant to s 65 where earnings from personal employment are specifically said to be taken into account and deducted from N.W.E.

35. Under the circumstances I don't propose making any orders that specify any amount of compensation to be paid or payable however I will hear the parties as to consequential orders, on the issue of costs and whether it is necessary for the matter to remain on foot in case the parties are unable to reach a final conclusion as to entitlements.

Dated this 5th day of November 2009

_____

Hugh Burton Bradley
RELIEVING STIPENDIARY MAGISTRATE