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| CITATION: | *Sandeep Kumar v Jassal Enterprises Pty Ltd* [2024] NTWHC 1 |
| PARTIES: | Sandeep KUMAR<br>Worker<br><br>v<br><br>JASSAL ENTERPRISES PTY LTD<br>Employer |
| TITLE OF COURT: | WORK HEALTH COURT |
| JURISDICTION: | CIVIL |
| FILE NO: | 2023-01321-LC |
| DELIVERED ON: | 3 July 2024 |
| DELIVERED AT: | Darwin |
| HEARING DATE: | 14 May 2024 |
| DECISION OF: | Judge O'Loughlin |

**CATCHWORDS:**

WORK HEALTH – calculation of Normal Weekly Earnings – two employers – section 109 (1) interest

*Return to Work Act* (1986) ss 49A, 109 (1)

*AAT v Kings* (1994) 4 NTLR 185
*Alcan (NT) Alumina Pty Ltd v Territory Revenue* (2009) 239 CLR 27
*Chaffey v Santos Ltd* [2006] NTSCFC 67

**REPRESENTATION:**

Counsel:

| | |
|---|---|
| Worker: | T Moses |
| Employer: | M A Roberts KC |

Solicitor:

| | |
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| Worker: | Piper Grimster Jones |
| Employer: | Finlaysons |

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| Decision category classification: | B |
| Decision ID number: | [2024] NTWHC 1 |
| Number of paragraphs: | 50 |

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

No. 2023-01321-LC

BETWEEN:

SANDEEP KUMAR
Worker

AND:

JASSAL ENTERPRISES PTY LTD
Employer

REASONS FOR DECISION
(Delivered 3 July 2024)

JUDGE O'LOUGHLIN

**Introduction**

1. The Worker had two employers in the year before his work injury and the parties cannot agree on how to calculate his normal weekly earnings ("NWE").

**Background**

2. The Worker commenced work with the Employer on 1 March 2022 and suffered a compensable work injury on 2 August 2022. The Employer has accepted the claim and is paying compensation.

3. A complication arises as the Worker was also working for a second employer and had done so since July 2021. His remuneration from both employers varied from week to week.

4. Section 49A of the *Return to Work Act (1986)* states how to calculate NWE for two or more employers but there is a dispute as to how this provision operates. The Employer is resisting a literal interpretation, perhaps because it results in the NWE being above the average weekly remuneration paid to the Worker in the year prior to the injury.

5. I have attached a schedule showing the earnings from both employers and the competing calculations by the parties. The schedule was prepared by the Worker but the Employer

agreed with the remuneration figures. I have added some further calculations, and my comments, to help identify the issues raised by competing interpretations.

**Statutory Interpretation**

6. Both parties referred to *Alcan (NT) Alumina Pty Ltd v Territory Revenue* (2009) 239 CLR 27 at [45] where Hayne, Heydon, Crennan and Kiefel JJ stated:

> *"This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."*

7. I have endeavoured to apply the above approach to find the meaning of section 49A.

**Section 49A - Normal Weekly Earnings**

8. Earlier versions of the Act required NWE to be calculated by the normal weekly hours worked multiplied by the ordinary time rate of pay. Subsequent amendments did away with reference hours and rates, such that NWE is now calculated by reference to remuneration:

> ***49A Calculation of worker's normal weekly earnings***
>
> *(1) This section applies when normal weekly earnings are to be calculated for a worker who is entitled to compensation under this Act.*
>
> *(2) Subject to this section, the worker's normal weekly earnings immediately before the first compensation date are the gross remuneration paid to the worker by:*
>
> *(a) the employer liable to compensate the worker; and*
>
> *(b) any other employer for whom the worker ordinarily works.*

9. Subsection (2) clearly applies in this matter as the Worker had two employers at the time of the injury.

10. Subsections (3) and (4) identify what components of remuneration are to be included or excluded in the calculation, and I have not reproduced these as they are not relevant.

11. Subsections 49A (5) (a) and (b) are particularly relevant and I have emphasised some parts:

> *(5) The following applies for the calculation of the worker's normal weekly earnings:*
>
> *(a) if, immediately before the first compensation date, the remuneration paid to a worker by a particular employer did not vary from week to week – the **portion** of the normal weekly earnings provided by **that employer must** be calculated as being equal to the amount of the weekly remuneration;*

*(b) if, immediately before the first compensation date, the remuneration paid to the worker by a particular employer varied from week to week – the **portion** of the normal weekly earnings provided by **that employer must** be calculated as equal to **the relevant average remuneration from that employer**;*

*(c) the normal weekly earnings in respect of the worker's employment with the employer liable to compensate the worker must be calculated under this paragraph instead of under paragraph (a) or (b) and are equal to the all-employer average remuneration if:*

*(i) the worker had been in employment with that employer for less than 4 weeks immediately before the first compensation date; and*

*(ii) it is impracticable to calculate the normal weekly earnings of the worker, having regard both to the worker's period of employment with the employer and the period during which the worker likely would have continued to work for the employer had the injury not occurred;*

*…*

*(e) if there is doubt about the **method** to be used for the calculation of the worker's normal weekly earnings – the method of calculation that results in the greatest amount being calculated as the worker's normal weekly earnings must be used.*

12. Subsection 49A (7) provides the definitions of the terms in subsection (5) (b) and (c) for those workers employed for only a short period:

*(7) all-employer average remuneration, in relation to remuneration paid to a worker immediately before the first compensation date, means the average of the worker's total remuneration from all employers for all weeks of paid employment during the period of 12 months that ends immediately before the first compensation date.*

*relevant average remuneration, in relation to remuneration paid to a worker by an employer immediately before the first compensation date, means the average of the worker's total remuneration from the employer for all weeks of paid employment during the period of 12 months that ends immediately before the first compensation date.*

13. I emphasised "must" in (5) (b) as it mandates that if the remuneration varied (as it did for the Worker) the Court is *required* to calculate NWE by using the relevant average remuneration defined in subsection (7).

14. The "portion" of NWE for "that employer" are emphasised in subsections (5) (a) and (b), as it confirms that where a worker has more than one employer, the NWE is going to be made up of two or more "portions". How those portions are to be combined, whether by simple addition or by using a weighted average, is discussed below.

15. "For all weeks of paid employment" simply confirms that the average is only calculated for weeks where the Worker is paid for work. Usually, if one is calculating an average of a range of values, the occasions where the value is zero is included in the calculation. But here Parliament has directed that the average is calculated for only those weeks where the

worker is in paid employment, and weeks where the worker may be studying, or taking unpaid leave, will not be counted. This will have effect of increasing the average NWE and thereby increasing the compensation payable to the Worker. The Employer does not object to a literal interpretation of this phrase.

16. A literal reading of section 49A suggests that in this circumstance, where a worker with two employers with variable remuneration, NWE is calculated by:

- Ignoring the weeks where the worker is not in paid employment;
- Calculating the average remuneration for each employer separately;
- Including all employment in the 12 months before the injury; and
- Adding the two averages together.

17. Interestingly, the all-employer average calculation provides a reasonably accurate calculation of average earnings over the year before the injury. However, subsection (5) (c) is clear that this method is only to be used if the worker had been with the liable employer for less than 4 weeks and it is impractical to calculate NWE given the period employment or likely employment.

**Context**

18. Having considered the text, I will now turn to the context of the *Return to Work Act 1986* as the Employer argued the context requires an interpretation that is other than literal.

19. Prior to the commencement of the Act, an injured worker could sue the employer in tort and, provided they could prove negligence, they would usually be awarded damages (which often included damages for loss of earning capacity). The plaintiff would have to prove an earning capacity which would be based on reference to previous years' earnings, current earnings, and/or likely future earnings.

20. Damages would not be paid until the court made orders, meaning the worker could be waiting for years before receiving compensation. Many believed the common law was too slow, complex, risky and expensive.

21. The Act abolished negligence claims and replaced them with a no-fault scheme. The objects of the Act are listed in section 2 and include:

*"(c) to ensure that the scheme for the rehabilitation and compensation of injured workers in the Territory:*

*(i) is fair, affordable, efficient and effective; and*

*(ii) provides adequate and just compensation to injured workers; and*

*(iii) is balanced to ensure that the costs of workers compensation are contained to*

*reasonable levels for employers."*

22. In *Chaffey v Santos Ltd* [2006] NTSCFC 67 Angel J. said at [12]:

> "*The Act abolishes common law rights of workers. It substitutes therefore a statutory "no fault" scheme which manifestly balances the rights of the worker to proper compensation for work injury irrespective of fault against the employer's ability to pay that compensation. It is a compromise between payer and payee, on the one hand providing an adequate level of compensation to injured workers, on the other containing that level to one which is affordable by employers, and, ultimately, by society at large."*

23. And in *AAT v Kings* (1994) 4 NTLR 185 at 194 the Court of Appeal stated:

> *"The intention appears to be to provide to the worker during disability amounts by way of compensation calculated by reference to the normal weekly earnings which he could have counted upon receiving if there had been no disability. To that extent it reflects an "income maintenance" approach."*

24. The Act created a system where workers, employers and insurers could relatively easily calculate the earning capacity of the worker such that accepted claims could be paid without requiring a hearing.

25. For the first 6 months the worker is initially entitled to compensation equating 100% of their normal weekly earnings, and this dropped to 75%[1] after 6 months.

**Maths**

26. Generally, the arithmetic mean or average is a simple and reasonably accurate way to use a single value to represent a range of values. The Act could have simply stated NWE is the average remuneration that the worker received from all employers in the 12 months prior to the injury - but it doesn't. Subsections (5) (c) and (7) required an average of all earnings but, as stated above, this simple method applies only to short term employment and where it is impractical to calculate NWE.

27. In the schedule attached I have calculated the average remuneration of all employers for weeks worked to be $1,430 ($71,149 divided by 50).

28. If a worker is employed by more than one employer, the Act requires the average remuneration[2] for each employer to be calculated separately and the language of sub-section 49A (2) suggests that the two calculations of for each employer are simply added:

> "*the worker's normal weekly earnings …. are the gross remuneration paid to the worker by:*
>
> *(a) the employer liable to compensate the worker; **and***

[1] This percentage amount can increase if the worker has a low income - section 65 (12).

[2] I am assuming the remuneration varies week to week.

*(b) any other employer for whom the worker ordinarily works*".

29. If an amount is made up of two parts they are normally added together. However, averages should only be added together if each average is calculated in respect of the same number of values. If a worker earned an average of $500 over 52 weeks with one employer and $1000 over 52 weeks with the second employer, the average earnings for the year will be $1500. But if the employment with the second employer was only 13 weeks, but with the earnings, the average is much lower ($750).

30. However, as we have here, section 49A appears to require NWE to be the sum of an average calculated over 21 weeks with the Employer together with the average calculated over 50 weeks with the other employer. Simple addition of the two averages means the average from the shorter period has a disproportionate contribution to the total.

31. A weighted average would give an accurate average for the NWE but there is no suggestion in section 49A that such a method is to be applied. I have calculated the weighted average in the schedule and, unsurprisingly, it returns the same value as the all-employer average for weeks worked ($1,430).

**No Doubt as to Methodology**

32. Subsection 49A (5) (e) was raised but not really pressed by the Worker:

> *(e) if there is doubt **about the method** to be used for the calculation of the worker's normal weekly earnings – the method of calculation that results in the greatest amount being calculated as the worker's normal weekly earnings must be used.*

33. I added the emphasis to "method" as here we have a dispute as to the *construction* of section 49A, not the *method* to be applied. Subsection 49A (5) provides three different methods for three different circumstances: (a) non-varying weekly remuneration (b) varying weekly remuneration and (c) short term employment.

34. In this matter both parties agreed that the (3) (b) method applied and subsection (5) (e) has no application.

**Employer's Argument**

35. The Employer complains that a literal interpretation of section 49A produces an inflated NWE and therefore excess compensation. This is true if parliament intended NWE to be the average remuneration, but this is not stated in the text of the provision. But rather than argue for a weighted average, or all-employer average, the Employer pressed for an average based only on those weeks where the Worker was employed by the liable employer and another employer. The Employer's submissions included the following:

> *"it is necessary to focus attention on the period 12 months prior to the first compensation date during which the worker was in receipt of remuneration from the primary employer.*

*The error in approach by the worker is to merely focus on the period of 12 months and to search for any remuneration received by the worker in that window regardless of the source of the remuneration and its relationship to the primary employer."*

36. There is no suggestion in the text of section 49A that the calculation should focus or be confined on the period of employment with the liable employer, in fact subsection 49A (7) clearly requires the calculation to be made over the 12 months before the injury.

37. The Employer argues that a different interpretation should be adopted to take the context into account. I explored the context of the Act above, and I do not see sufficient basis to move away from the clear meaning of the text of section 49A.

38. The context is an income maintenance system but one which is affordable to employers[3]. If a worker had high earnings with another employer, but low earnings with the liable employer, the liable employer (or its insurer) is expected to maintain that high combined income. This might surprise an employer and its insurer, but that is the meaning of the text of the provision, and it is consistent with the object of income maintenance.

39. The Employer seeks a strained interpretation because the literal interpretation arguably over-compensates a worker. The Worker could similarly argue that the section 65, in providing for only compensation at only 75% of NWE[4] undercompensates the actual loss and courts should read in some higher percentage. This is a more extreme argument, but both propositions are seeking to rely on context to find an interpretation that is markedly different from the clear meaning of the text.

40. Section 49A clearly requires the calculation to begin 12 months before the injury and I cannot find a basis to conclude the calculation should only begin at the time of employment with the liable employer.

41. Neither the text, nor the context, supports the interpretation proposed by the Employer.

**Conclusion on NWE**

42. As the worker had two employers with varying remuneration, section 49A requires average remuneration from each employer to be calculated separately and then added together. This does not produce an average of the earnings over the 12 months before the injury, but this is the clear meaning of the text. The fact that it results in an NWE which is above the average is presumably the intention of parliament.

43. The NWE in this matter is $1,980.06.

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[3] *Chaffey* [12] and *AAT v Kings* at p 194

[4] That rate can increase in certain circumstances depending on the worker's NWE and the number of children, see s. 65 (7)

**Interest**

44. The Worker is entitled to interest on those arrears pursuant to section 89.

45. The Employer has mostly paid compensation for a NWE of $1340. It continued to pay compensation for this amount even though it was arguing that NWE was actually higher ($1,423 and then $1,704).

46. The Worker also seeks section 109 (1) interest as this provides:

> *"(1) If, in a proceeding before it, the Court is satisfied that the employer has caused unreasonable delay in accepting a claim for or paying compensation, it must:*
> *(a) where it awards an amount of compensation against the employer – order that interest on that amount at a rate specified by it be paid by the employer to the person to whom compensation is awarded;"*

47. There has been an unreasonable delay as the Employer paid the Worker an amount less than what it claimed was the correct compensation. The Employer did not begin to pay what it claimed was the correct amount until after the date of hearing.

48. It was unreasonable for the Employer not to at least pay compensation on an NWE of $1,704. Although the Employer lost the argument on the correct calculation of NWE, I do not conclude that the Employer was unreasonable in arguing the NWE figure of $1,980.

49. I will order interest pursuant to section 109 (1). But this provision states the Court can only order interest on "that amount" being the award of arrears of compensation. I have in effect found that part of the delay was unreasonable, and part was due to an arguable point. I have taken this into account and ordered a slightly lower simple interest rate of 12% per annum over all the arrears.

50. My preliminary view is to award costs to the Worker at 100% of the Supreme Court scale, with certification for counsel, but I will hear from the parties if necessary. I will also give leave for the parties to apply for any consequential orders if calculations cannot be agreed.

**Orders**

1. The Employer is to pay the Worker arrears in compensation calculated on normal weekly earnings of $1,980.06;
2. In addition to section 89 interest, the Employer is to pay the Worker simple interest on the arrears at 12% per annum pursuant to section 109(1);
3. Any applications for costs or consequential orders are to be made within 28 days.

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## Schedule

**Kumar v Jassal Enterprise Pty Ltd - Calculation of NWE**

Date of injury 2/08/2022

| | Other Employer | | Employer | | Both |
|---|---|---|---|---|---|
| 1 | 02/08/2021 - 08/08/2021 | $1,609 | | | $1,609 |
| 5* | 30/08/2021 - 05/09/2021 | $511 | | | $511 |
| 6 | 06/09/2021 - 12/09/2021 | $0 | | | $0 |
| 7 | 13/09/2021 - 19/09/2021 | $635 | | | $635 |
| 8 | 20/09/2021 - 26/09/2021 | $878 | | | $878 |
| 9 | 27/09/2021 - 03/10/2021 | $561 | | | $561 |
| 10 | 04/10/2021 - 10/10/2021 | $928 | | | $928 |
| 11 | 11/10/2021 - 17/10/2021 | $1,166 | | | $1,166 |
| 12 | 18/10/2021 - 24/10/2021 | $1,349 | | | $1,349 |
| 13 | 25/10/2021 - 31/10/2021 | $1,341 | | | $1,341 |
| 14 | 01/11/2021 - 07/11/2021 | $1,455 | | | $1,455 |
| 15 | 08/11/2021 - 14/11/2021 | $2,411 | | | $2,411 |
| 29* | 14/02/2022 - 20/02/2022 | $1,137 | | | $1,137 |
| 30 | 21/02/2022 - 27/02/2022 | $1,128 | | | $1,128 |
| 31 | 28/02/2022 - 06/03/2022 | $1,230 | 1 | $120 | $1,350 |
| 32 | 07/03/2022 - 13/03/2022 | $1,166 | 2 | $160 | $1,326 |
| 33 | 14/03/2022 - 20/03/2022 | $1,148 | 3 | $560 | $1,708 |
| 34 | 21/03/2022 - 27/03/2022 | $566 | 4 | $680 | $1,246 |
| 35 | 28/03/2022 - 03/04/2022 | $1,094 | 5 | $1,000 | $2,094 |
| 36 | 04/04/2022 - 10/04/2022 | $859 | 6 | $360 | $1,219 |
| 37 | 11/04/2022 - 17/04/2022 | $0 | 7 | $0 | $0 |
| 38 | 18/04/2022 - 24/04/2022 | $535 | 8 | $1,320 | $1,855 |
| 39 | 25/04/2022 - 01/05/2022 | $1,033 | 9 | $1,120 | $2,153 |
| 40 | 02/05/2022 - 08/05/2022 | $1,011 | 10 | $920 | $1,931 |
| 41 | 09/05/2022 - 15/05/2022 | $594 | 11 | $1,200 | $1,794 |
| 42 | 16/05/2022 - 22/05/2022 | $558 | 12 | $1,320 | $1,878 |
| 43 | 23/05/2022 - 29/05/2022 | $600 | 13 | $1,120 | $1,720 |
| 50* | 11/07/2022 - 17/07/2022 | $132 | 20* | $1,160 | $1,292 |
| 51 | 18/07/2022 - 24/07/2022 | $831 | 21 | $960 | $1,791 |
| 52 | 25/07/2022 - 31/07/2022 | $791 | 22 | $1,020 | $1,811 |
| | Total | $50,979 | | $20,170 | $71,149 |

*Some weeks are not displayed

| Average | | Comment |
|---|---|---|
| Sum of Earnings | $71,149 | *Sum of all the earnings from both employers.* |
| Average all earnings over 52 Wks | $1,368 | *Arithmetic mean of weekly earnings over 52 weeks.* |
| Average all earnings over 50 Wks | $1,423 | *Both employer earnings averaged over the 50 weeks worked ($71,149/50). If the legislation is put aside for now, this is the most accurate measure of the average earnings of the worker over weeks worked. The Employer adopted this calculation in an earlier defence.* |
| **Worker's (Literal) Calculation** | | |
| Average for Emp over 21 wks | $960 | *This is the NWE applying the literal interpretation of s 49A and is adopted by Worker. Mathematically it is distorted average as it is the sum of one average calculated over 50 weeks, and another average calculated over 21 weeks (without any weighting).* |
| Average for Oth Emp over 50 wks | $1,020 | |
| Total of Both Averages | $1,980 | |
| **Employer's (Purposive) Calc.** | | |
| All 21 weeks with Employer | $20,170 | *Employer's "purposive" approach where it argues averages should only be calculated while the Worker has two employers.* |
| Last 21 weeks with other Emp | $15,612 | |
| Total earnings with 2 Employers | $35,782 | *The Employer contends this method in its submissions,* |
| Average over 21 weeks | $1,704 | |
| **Weighted Average** | | |
| Proportion of time Emp v Other E | 42% | *21 weeks Emp divided by 50 weeks with other emp is the "weight" that (mathematically) should be attributed to av for Emp if it is to be added to average for other emp.* |
| Average weekly remun Emp | $960 | |
| Weighted Average | $403 | 42% x $960 |
| Plus Av for other emp over 50 wks | $1,020 | |
| Weighted av. Both employers | $1,423 | *$403 + Emp 2 Av of $1020. Note this is the same value as the Av. Of all earnings over 50 weeks* |