FEDERAL COURT OF AUSTRALIA

Comcare v Heffernan [2011] FCAFC 131

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| Citation: | Comcare v Heffernan [2011] FCAFC 131 |
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| Appeal from: | Heffernan v Comcare [2010] AATA 824 |
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| Parties: | **COMCARE v DANIEL HEFFERNAN** |
|  |  |
| File number: |  |
|  |  |
| Judges: |  |
|  |  |
| Date of judgment: | 27 October 2011 |
|  |  |
| Catchwords: | **WORKERS’ COMPENSATION** – weekly compensation – calculation – meaning of ‘normal weekly hours’ – statutory definition – no contrary intention – ‘normal weekly hours’ refers to hours worked before injury  |
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| Legislation: | *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 4, 8, 9, 19.*NSW Workers Compensation Act 1926 - 1947*  |
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| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27*Bramwell and Repatriation Commission* (1998) 51 ALD 56*Comcare Australia v Pires* (2005) 143 FCR 104 *Deputy Commissioner of Taxation (NSW) v Mutton* (1987) 79 ALR 509*Roberts v Repatriation Commission* (1992) 29 ALD 442*Telstra Corp v Mahon* [2004] FCA 1404*Telstra Corporation Ltd v Peisley* (2006) 151 FCR 275*Theo v Secretary, Department of Families, Community Services and Indigenous Affairs* [2007] FCAFC 72*Re Jebb and Repatriation Commission* (2005) 86 ALD 182*Slazengers (Australia) Pty. Limited v Burnett* [1951] AC 13  |
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| Date of hearing: | 23 August 2011 |
|  |  |
| Date of last submissions: | 8 September 2011 |
|  |  |
| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 54 |
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| Counsel for the Applicant: | Mr T Howe QC |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondent: | Mr P Deakin QC with Mr B McManamey |
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| Solicitor for the Respondent: | Turner Freeman Lawyers |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1608 of 2010 |

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| ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL |

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| BETWEEN: | COMCAREApplicant |
| AND: | DANIEL HEFFERNANRespondent |

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| --- | --- |
| JUDGES: | MARSHALL, downes AND BROMBERG JJ |
| DATE OF ORDER: | 27 October 2011 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The decision of the Administrative Appeals Tribunal made on 26 October 2010 be set aside.
2. The applicant’s decision of 2 April 2010, the subject of the review by the Administrative Appeals Tribunal, be affirmed.
3. The applicant pay the respondent’s costs of the appeal to be taxed in default of agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL |

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| BETWEEN: | COMCAREApplicant |
| AND: | DANIEL HEFFERNANRespondent |

|  |  |
| --- | --- |
| : | MARSHALL, downes AND BROMBERG JJ |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

# MARSHALL AND BROMBERG JJ:

1. Whilst working as a production chemist with the Australian Nuclear Science and Technology Organisation (“ANSTO”), Mr Heffernan injured his lower back in December 2002. He later suffered aggravations to that injury and other ailments. Comcare accepted liability for compensation claims made by Mr Heffernan. After undergoing spinal surgery, Mr Heffernan participated in a return to work program and from 1 January 2007 he was redeployed by ANSTO into the different position of development chemist.
2. This appeal is about the compensation to which Mr Heffernan is entitled whilst redeployed. It raises the issue of whether Mr Heffernan’s compensation payments should be calculated by reference to Mr Heffernan’s pre-injury ‘normal weekly hours’ (as Comcare contends is appropriate) or by reference to the lower ‘normal weekly hours’ applicable to Mr Heffernan’s redeployment (which Mr Heffernan contends to be appropriate).
3. Section 19(3) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (“the Act”) provides a formula (“the formula”) for calculating weekly compensation payments payable to an injured employee during a particular period of an employee’s incapacity. The appeal raises for consideration the proper construction of the expression ‘normal weekly hours’ in the definition of ‘adjustment percentage’ provided by the formula.
4. Mr Heffernan applied to the Administrative Appeals Tribunal (“the Tribunal”) for a merits review of Comcare’s decision to reduce Mr Heffernan’s weekly compensation payments. The Tribunal set aside the decision under review, reversing Comcare’s decision to reduce Mr Heffernan’s weekly compensation payments. Comcare contends that the Tribunal erred in law in so deciding.
5. The issue for determination is the proper meaning of the phrase ‘normal weekly hours’ where it appears in the formula. In particular, as Comcare contends, is ‘normal weekly hours’ to be given its defined s 4 meaning? Or, as Mr Heffernan contends, is a ‘contrary intention’ apparent when the phrase is utilised in the formula, so that the defined meaning is displaced?
6. For the reasons that follow, we consider that ‘normal weekly hours’ in s 19(3) is to be given its defined s 4 meaning.

# THE STATUTORY PROVISIONS

1. Sections 19(2) to (3) together with ss 8(1) and (2) and 9(1) and the relevant s 4 definitions are long and detailed. For that reason, we have included the provisions in an annexure to these reasons. The following explanation of those provisions is sufficient to identify those matters germane to our consideration.
2. Section 19(2) includes a formula for calculating what Comcare must pay an injured employee in a ‘maximum rate compensation week’. Section 19(3) contains the formula for weekly payments to be made during an employee’s incapacity for a week which is not a ‘maximum rate compensation week’. Broadly speaking the scheme provides that, pursuant to s 19(2), full compensation is paid for a capped period of 45 weeks after injury and thereafter, pursuant to s 19(3), compensation is paid at an adjusted rate of between 75% - 100% of the injured employee’s pre-injury earnings. The cap for ‘maximum rate compensation’ weeks is provided by s 19(2A). The cap is 45 times the employee’s ‘normal weekly hours’ (which will usually be 45 working weeks).
3. Sections 19(2C) and 19(2D) specify what an employee is to be paid if part of a working week falls within the cap and part outside of it. Each subsection includes a payment formula which uses the expression ‘normal weekly hours’ as a factor in the formula.
4. The formula for weekly payments is ‘NWE-AE’ during the capped period (the first 45 weeks) and ‘(Adjustment percentage x NWE) – AE’ thereafter. Where: ‘NWE’ means normal weekly earnings; ‘AE’ addresses any deductions to be made for what the employee has earned or is able to earn in other employment and ‘Adjustment percentage’ provides the adjusted post-cap percentage of the full weekly compensation payment. The adjustment percentage is calibrated to take into account (in a scaled manner) the number of ‘normal weekly hours’ worked by the injured employee during the post-cap week in which the compensation is to be paid. Thus, if the employee does no work in the week in question, only 75% of the compensation (NWE-AE) will be paid. But if the injured employee does return to work, more than 75% will be paid. The actual payment will depend upon the percentage of the employee’s ‘normal weekly hours’ which are worked in the week in which the compensation is payable. For instance, an employee who worked in the range of 75% and 99% of ‘normal weekly hours’, will be paid 95% of the full compensation payment (NWE-AE).
5. Section 4(1) is the definitions section. It opens with the customary instruction that ‘unless the contrary intention appears’, the Act intends that the words or expressions there defined be given their defined meanings. Of relevance are:
* ‘normal weekly earnings’ which refers the reader to s 8 where a formula for calculating normal weekly earnings is provided;
* ‘normal weekly hours’ which provides:

in relation to an employee, means the average number of hours (including hours of overtime) worked in each week by the employee in his or her employment during the relevant period as calculated for the purpose of applying the formula in subsection 8(1) or (2);

 and

* ‘relevant period’ which merely refers the reader to s 9 and which in turn relevantly provides that for the purposes of calculating ‘normal weekly earnings’ the two weeks prior to injury is the relevant period.

# COMCARE’S POLICY

1. Mr Heffernan’s case has been described by Comcare as a ‘test case’ in which Comcare seeks affirmation by an authoritative judicial ruling of its changed position on the proper interpretation of s 19(3) of the Act. Comcare sought legal advice in or about November 2009. As a consequence of that advice, Comcare changed its view as to how s 19(3) is to be interpreted. For some 20 years until November 2009, Comcare regarded the phrase ‘normal weekly hours’ in s 19(3) as a reference to the ‘normal weekly hours’ of the position into which an incapacitated employee had been redeployed, rather than the pre-injury hours referred to in the s 4 definition of ‘normal weekly hours’. Contrary to its position on this appeal, Comcare had, until November 2009, interpreted s 19(3) in a manner which resulted in the following policy:

(a) employees who were redeployed into positions that limited them to working fewer hours than they worked in their pre-injury employment had their compensation for incapacity paid at the maximum compensation rate payable to them under the SRC Act when working the maximum of their redeployment hours; and

(b) in contrast to (a), employees who were redeployed into positions that required them to work more hours than they worked in their pre-injury employment, would then have to work the maximum additional hours in the redeployed position before they could be paid the maximum compensation leave amount payable to them under the SRC Act.

# IS A “CONTRARY INTENTION” APPARENT?

1. In construing whether a contrary intention is apparent so as to displace the s 4 definition of ‘normal weekly hours’ from application to s 19(3), the Court’s function involves identifying what Parliament intended. In *Deputy Commissioner of Taxation (NSW) v Mutton* (1987) 79 ALR 509 at 512, Mahoney JA said:

A contrary intention may be inferred from a particular provision if, were the definition to be applied, the provisions of or the procedure established by the section would not appropriately work: see *Brown v Brook* (1971) 125 CLR 275 at 276, 292 …It is, I think, not necessary that what is laid down by the section in question be impossible of operation; it is sufficient if the result of the application of the definition to a section results in the operation of the section in a way which clearly the legislature did not intend.

1. A contrary intention “may appear from context or legislative purpose: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [6] per French CJ. As Hayne, Heydon, Crennan and Kiefel JJ said in that case at [47]:

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.

(Footnotes omitted.)

1. Unlike its use in s 19(2C) and (2D), the phrase ‘normal weekly hours’ when used in s 19(3) is not associated with the measurement of pre-injury earnings, but instead has a role in the measurement of the post-injury work effort of an injured employee who has returned to work. The phrase’s function in s 19(3) is to help to measure (in terms of hours of work and on a scale of 0 to 100) the extent of work effort relative to full capacity (100%) that an injured employee who has returned to work is providing. ‘Normal weekly hours’ describes full capacity.
2. It seems logical that the work effort of a redeployed employee should be measured against the hours available for work in the redeployed position. In Mr Heffernan’s case, he is working at full capacity in his redeployed position. The normal working hours of that position are 36.75 hours per week. Mr Heffernan is working all the available hours and thus at a 100% of the available capacity for work. But if the construction of s 19(3) for which Comcare contends is correct, Mr Heffernan will not be paid 100% of the compensation available under the formula in s 19(3), because Mr Heffernan is working less than 100% of his pre-injury normal working hours. In an Act which has the objective of encouraging incapacitated employees to return to work to the maximum extent possible, it seems appropriate that, having done exactly that, Mr Heffernan should be paid full compensation. Conversely, in an Act with that objective, it seems counterintuitive that employees who are redeployed into positions that require them to work more normal weekly hours than they worked in their pre-injury employment will have no incentive to work the additional hours of the redeployed position because those employees are able to receive maximum compensation for working the number of hours they worked in their pre-injury employment.
3. For over 20 years, Comcare seems to have recognised the logic of compensation payable under s 19(3) to a redeployed employee, being calculated by reference to the normal weekly hours of the redeployed position.
4. The rationale behind what we have described as the logical approach which Comcare have applied for over 20 years provides a basis for thinking that Parliament had a legislative purpose consistent with that rationale. Ascribing to Parliament that rationale tends to support the proposition that Parliament intended that the defined meaning of ‘normal weekly hours’ be displaced when that phrase is used in s 19(3). However, there are contrary indications which seem to us to outweigh the attraction of ascribing to Parliament that intent.
5. Those contrary indications flow from both textual and historical considerations. There is nothing in the text of s 19(3) that indicates an intention to displace the s 4 definition of ‘normal weekly hours’. There is a textual difficulty created if the defined meaning was to be displaced. If ‘normal weekly hours’ does not bear it’s defined meaning, there is difficulty in determining what meaning it was intended to have. The phrase is not a phrase with an apparent and well understood meaning. It is, for instance, not a phrase found in the CCH Macquarie Dictionary of *Employment and Industrial Relations* (1992, CCH Australia Limited).
6. The draftsperson has taken some care to explain what is meant by ‘normal weekly hours’ in the s 4 definition. The explanation is quite specific. Overtime hours are to be included and the means for calculating what is to be regarded as ‘normal’ is set out and (including by reference to s 9) specified to be the average number of hours over the two weeks of work prior to injury. It would be surprising if, having carefully set out a peculiar meaning for the ordinary use of the phrase in the Act, the draftsperson intended that, when utilised in s 19(3), the phrase ‘normal weekly hours’ should have an unexplained or unspecified meaning in the context of the phrase having no well understood meaning.
7. Our point may be made by reference to a simple example which demonstrates the ambiguity which would be created if the defined meaning is displaced. Would in that circumstance the phrase ‘normal weekly hours’ include or exclude overtime hours worked in a normal week? The answer to that question is uncertain.
8. Furthermore, the legislative predecessor of s 19(3) was s 19(3) of the *Commonwealth Employees’ Rehabilitation and Compensation Act 1988* (“the Original Act”). That provision was in materially the same form as the current s 19(3). ‘Normal weekly hours’ was an element of the original s 19(3) and served the same purpose as it does currently of measuring post-injury work effort. In 1988 the expression ‘normal weekly hours’ was only found in s 19(3) of the Act. There could have been no basis for any submission in 1988 that ‘normal weekly hours’ in s 19(3) carried any meaning other than its defined meaning because, if that were so, the defined meaning would have had no work to do at all. There is no indication that any legislative change thereafter was intended to alter that status quo.
9. Consequently, we are compelled to reach the view that the Tribunal erred in its interpretation of s 19(3) in the meaning it gave to the expression ‘normal weekly hours’ in s 19(3).
10. The construction which we consider to be correct will, on the evidence provided by Comcare, lead to a less generous result for most incapacitated employees than the construction which Comcare applied for over 20 years and which has the logical attraction that we earlier described. But, as Downes J says in his reasons for judgment, it is for the government and Parliament to consider whether a regime which has operated for over 20 years with no apparent adverse effects should now be effectively changed to the detriment of most incapacitated employees.
11. Further, given the long standing application of s 19(3) consistently with the decision of the Tribunal (and the current number of recipients of compensation who depend on their current rate of payment), Comcare (as a model litigant) should give urgent consideration to not giving effect to its new interpretation of s 19(3), albeit as endorsed by this Full Court, until the expiry of the allowable appeal period to the High Court or the hearing and determination of any appeal to that Court.
12. Finally, we reject the contention of counsel for Mr Heffernan that Comcare is estopped by its conduct from submitting that s 19(3) has the effect contended for by its counsel. It is well established that estoppel cannot operate to preclude a statutory authority performing its public duties according to law: *Theo v Secretary, Department of Families, Community Services and Indigenous Affairs* [2007] FCAFC 72 (Kiefel, Sundberg and Gyles JJ).

#  CONCLUSION AND ORDERS

1. Comcare has agreed to pay Mr Heffernan’s costs of this appeal irrespective of the result. For the foregoing reasons the appeal should be upheld and the following orders made:
2. The decision of the Administrative Appeals Tribunal made on 26 October 2010 be set aside.
3. The applicant’s decision of 2 April 2010, the subject of the review by the Administrative Appeals Tribunal, be affirmed.
4. The applicant pay the respondent’s costs of the appeal to be taxed in default of agreement.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Marshall and Bromberg. |

Associate:

Dated: 27 October 2011

**ANNEXURE**

**PROVISIONS OF THE SAFETY, REHABILITATION**

**AND COMPENSATION ACT 1988 (CTH)**

**S 19(2) to (3) of the Act provides:**

(2) Subject to this Part, Comcare is liable to pay to the employee in respect of the injury, for each week that is a maximum rate compensation week during which the employee is incapacitated, an amount of compensation worked out using the formula:

NWE – AE

where:

“**AE**” is the greater of the following amounts:

(a) the amount per week (if any) that the employee is able to earn in suitable employment;

(b) the amount per week (if any) that the employee earns from any employment (including self-employment) that is undertaken by the employee during that week.

“**NWE**” is the amount of the employee’s normal weekly earnings.

(2A) For the purposes of subsection (2), a week is a maximum rate compensation week, in relation to an employee to whom this section applies, if:

(a) it is a week during which the employee’s incapacity prevents the employee working the employee’s normal weekly hours because the employee is unable to work or unable to work at the level at which the employee worked before the injury; and

(b) the total number of hours that the employee has been prevented from working, or working at that level, during that incapacity, in that week and in all previous weeks, if any, to which paragraph (1) applies, does not exceed 45 times the employee’s normal weekly hours.

(2B) If, before the end of a particular week, the total of the hours that the employee has been prevented from working, or working at that level, in that week and in previous weeks, will exceed the total number of hours worked out in accordance with paragraph (2A)(b), then;

(a) subsection (2) applies in respect of the part of the week before that total number of hours is exceeded in accordance with subsection (2C); and

(b) subsection (3) applies in respect of the remainder of the week in accordance with subsection (2D).

(2C) For the purposes of paragraph (2B)(a), the compensation payable in respect of the part of the week to which that paragraph refers is an amount worked out using the formula:

X  x [NWE – AE]

NWH

where:

“AE” applies in relation to the whole of that particular week and has the same meaning as in subsection (2).

“**NWE**” is the amount of the employee’s normal weekly earnings.

“**NWH**” means the number of normal weekly hours worked by the employee before his or her injury.

“**X**” is the total of the hours in that particular week:

(a) that would have counted towards the employee’s normal weekly hours (whether those hours are worked or not); and

(b) that elapse before the total number of hours worked out in accordance with paragraph (2A)(b) exceeds 45 times the employee’s normal weekly hours.

(2D) For the purposes of paragraph (2B)(b), the compensation payable in respect of the part of the week to which that paragraph refers is worked out using the formula:

NWH – X x Reduced rate compensation entitlement

 NWH

where;

“**NWH**” means the number of normal weekly hours worked by the employee before his or her incapacity.

“reduced rate compensation entitlement” is the rate of compensation that would have been applicable for the whole week had subsection (3) applied throughout the whole week.

“**X**” is the total of the hours in that particular week:

(a) that would have counted towards the employee’s normal weekly hours (whether those hours are worked or not); and

(b) that elapse before the total number of hours worked out in accordance with paragraph (2A)(b) exceeds 45 times the employee’s normal weekly hours.

(3) Subject to this Part, Comcare is liable to pay compensation to the employee, in respect of the injury, for each week during which the employee is incapacitated, other than a week referred to in subsection (2), of an amount calculated using the formula:

[Adjustment percentage x NWE] - AE

where:

“**adjustment percentage**” is a percentage equal to:

(a) if the employee is not employed during that week-75%; or

(b) if the employee is employed for 25% or less of his or her normal weekly hours during that week-80%; or

(c) if the employee is employed for more than 25% but not more than 50% of his or her normal weekly hours during that week-85%; or

(d) if the employee is employed for more than 50% but not more than 75% of his or her normal weekly hours during that week-90%; or

(e) if the employee is employed for more than 75% but less than 100% of his or her normal weekly hours during that week-95%; or

(f) if the employee is employed for 100% of his or her normal weekly hours during that week-100%.

“**AE**” applies in relation to the whole of that particular week and has the same meaning as in subsection (2).

“**NWE**” is the amount of the employee’s normal weekly earnings.

**Section 4(1) relevantly provides**

(1) In this Act, unless the contrary intention appears:

…

“**normal weekly earnings**” means the normal weekly earnings of an employee calculated under section 8.

“**normal weekly hours**”, in relation to an employee, means the average number of hours (including hours of overtime) worked in each week by the employee in his or her employment during the relevant period as calculated for the purpose of applying the formula in subsection 8(1) or (2).

…

“relevant period” means the period calculated under section 9.

**Section 8(1) and (2) provides:**

(1) For the purposes of this Act, the normal weekly earnings of an employee (other than an employee referred to in subsection (2)) before an injury shall be calculated in relation to the relevant period under the formula:

(NH x RP) + A

where:

“**NH**” is the average number of hours worked in each week by the employee in his or her employment during the relevant period;

“**RP**” is the employee’s average hourly ordinary time rate of pay during that period; and

“**A**” is the average amount of any allowance payable to the employee in each week in respect of his or her employment during the relevant period, other than an allowance payable in respect of special expenses incurred, or likely to be incurred, by the employee in respect of that employment.

(2) Where an employee is required to work overtime on a regular basis, the normal weekly earnings of the employee before an injury shall be the amount calculated in accordance with subsection (1) plus an additional amount calculated in relation to the relevant period under the formula:

NH x OR

where:

“**NH**” is the average number of hours of overtime worked in each week by the employee in his or her employment during the relevant period; and

“**OR**” is the employee’s average hourly overtime rate of pay during that period.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL |

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| BETWEEN: | COMCAREAppellant |
| AND: | DANIEL HEFFERNANRespondent |

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| S: | MARSHALL, downes AND BROMBERG JJ |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

# downes j

# introduction

1. Daniel Heffernan is a chemist working for the Australian Nuclear Science and Technology Organisation. In 2002, while working as a production chemist, he suffered a back injury. Comcare accepted liability under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) with respect to the injury. After surgery, Mr Heffernan took part in a rehabilitation program with an object of his returning to work. In 2007 he was re-employed as a development chemist. Mr Heffernan worked on average for 43.52 hours per week prior to his injury. Since his re-employment Mr Heffernan has been working an average 36.75 hours per week.
2. Mr Heffernan is entitled to weekly compensation under the Act. The compensation is calculated on a sliding scale between 75% and 100% of “normal weekly earnings” after deducting actual earnings. The percentage to be applied depends upon the percentage of “normal weekly hours” which Mr Heffernan works. The issue in this case is whether “normal weekly hours” refers to Mr Heffernan’s normal weekly hours before injury or his present normal weekly hours. His compensation will be lower if the calculation should be based on his normal weekly hours before injury.
3. For 20 years prior to November 2009 Comcare administered claims on the basis that the legislation referred to normal weekly hours after injury. After this long period Comcare sought and received legal advice that this practice was wrong. This matter is, in effect, a test case prompted by Comcare’s applying the new method of calculation to Mr Heffernan’s weekly compensation. Employees who were being paid on the more generous basis have apparently continued to be paid on that basis pending the outcome of this case. At present, of course, there is a determination of a deputy president of the Administrative Appeals Tribunal that that is the correct basis for payment. I have decided, however, that, notwithstanding the long period during which compensation has been paid on the more generous basis, the legislation is clear and “normal weekly hours” are the normal weekly hours before injury. The Administrative Appeals Tribunal accordingly made an error of law by misconstruing the legislation. The appeal by Comcare must be allowed.
4. We were informed that Comcare will not seek to recover overpayments. There seems to be a question, however, whether it is appropriate that many persons receiving weekly compensation under the Act should suddenly receive less compensation, particularly where some of them will have been receiving the compensation for a substantial time and up to 20 years. The Act has been administered in this way, apparently without concerns being raised, through seven federal elections and two changes of government. The Act has been amended on a number of occasions. An amendment was made in 2001 to the very section under consideration in this matter. No issue relating to the current practice was apparently then raised in the parliament. There is room for the view that the matters raised in this case should be resolved by the government and the parliament rather than the courts.

# THE legislation

1. Weekly compensation for incapacitated employees is generally paid under s 19 of the Act. Sub-section 19(2) broadly provides for an incapacitated employee to be paid the worker’s normal weekly earnings before injury less any actual earnings for “45 times the employee’s normal weekly hours”. Employees accordingly receive maximum compensation for roughly 45 weeks.
2. After the period of maximum compensation expires, incapacitated employees are compensated under sub-s 19(3). The sub-section is as follows:

(3) Subject to this Part, Comcare is liable to pay compensation to the employee, in respect of the injury, for each week during which the employee is incapacitated, other than a week referred to in subsection (2), of an amount calculated under the formula:

**(Adjustment percentage x NWE) – AE**

Where:

***adjustment percentage*** is a percentage equal to:

* + - 1. If the employee is not employed during that week – 75%; or
			2. If the employee is employed for 25% or less of his or her normal weekly hours during that week – 80%; or
			3. If the employee is employed for more than 25% but not more that 50% of his or her normal weekly hours during that week – 85%; or
			4. If the employee is employed for more than 50% but not more than 75% of his or her normal weekly hours during that week – 90%; or
			5. If the employee is employed for more than 75% but less than 100% of his or her normal weekly hours during that week - 95%; or
			6. If the employee is employed for 100% of his or her normal weekly hours during that week – 100%

***AE*** applies in relation to the whole of that particular week and has the same meaning as in subsection (2).

***NWE*** is the amount of the employee’s normal weekly earnings.

1. It can be seen that an employee who is unable to work is paid 75% of normal weekly earnings. An employee who works for 25% of normal weekly hours is paid 80% less actual earnings. An employee who works for 100% of normal weekly hours receives maximum compensation less actual earnings. The sliding scale provides for different percentages in between these percentages.
2. It is plain that the legislation has a purpose of encouraging incapacitated employees to return to work to the maximum extent possible. The question in this case is whether an incapacitated employee will achieve one hundred per cent by working one hundred per cent of normal working hours which are contemporaneous with the payments of compensation or whether the worker must work one hundred per cent of normal weekly hours prior to injury, even though the work may now be different and the earnings lower.
3. “Normal weekly hours” and “normal weekly earnings” are defined in s 4 of the Act. The definitions apply, however, as do all the definitions in s 4, “unless the contrary intention appears”. The following are the definitions:

***normal weekly earnings*** means the normal weekly earnings of an employee calculated under section 8.

***normal weekly hours*** in relation to an employee, means the average number of hours (including hours of overtime) worked in each week by the employee in his or her employment during the relevant period as calculated for the purpose of applying the formula in subsection 8(1) or (2).

1. Section 8 relevantly provides as follows:

Normal weekly earnings

1. For the purposes of this Act, the normal weekly earnings of an employee (other than an employee referred to in subsection (2)) before an injury shall be calculated in relation to the relevant period under the formula:

**(NH x RP) + A**

Where:

***NH*** is the average number of hours worked in each week by the employee in his or her employment during the relevant period;

***RP***is the employee’s average hourly ordinary time rate of pay during that period; and

***A***is the average amount of any allowance payable to the employee in each week in respect of his or her employment during the relevant period, other than an allowance payable in respect of special expenses incurred, or likely to be incurred, by the employee in respect of that employment.

1. Where an employee is required to work overtime on a regular basis, the normal weekly earnings of the employee before an injury shall be the amount calculated in accordance with subsection (1) plus an additional amount calculated in relation to the relevant period under the formula:

**NH x OR**

Where:

***NH*** is the average number of hours of overtime worked in each week by the employee in his or her employment during the relevant period; and

***OR*** is the employee’s average hourly overtime rate of pay during that period.

1. It can be seen that the time the phrases relate to is to be determined, for both of them, by identifying the “relevant period”. That phrase is defined in s 4, again “unless the contrary intention appears”:

***relevant period*** means the period calculated under section 9.”

The relevant part of s 9 is as follows:

Relevant period

1. For the purposes of calculating the normal weekly earnings of an employee before an injury, a reference in section 8 to the relevant period is, subject to this section, a reference to the latest period of 2 weeks before the date of the injury during which the employee was continuously employed by the Commonwealth or a licensed corporation.
2. It is to be noticed that NWH is used as part of a formula in both sub-ss 19(2C) and (2D) of the Act. In both cases NWH is defined in the sub-section to mean “the number of normal weekly hours worked by the employee before his or her injury” (sub-s 19(2C) or “… incapacity” (sub-s 19(2D)).
3. The issue in this case is to be resolved by reference to two questions. First, is the effect of the sections to define “normal weekly hours” as those hours before the injury? Secondly, if that is the literal effect of the sections, does the context in which the words appear or the circumstances surrounding the relevant provisions lead to the conclusion, that there is to be found, at least for their application to a case such as the present, a contrary intention?
4. The tangle of sections which must be unravelled to expose the thread of legislative reasoning is complicated. The use of a mix of definitions to cope with different circumstances does not lead to clarity in the process. This is not assisted by the fact that the legislation nowhere directly addresses the question which arises in this case, namely whether normal hours or earnings are to be determined before or after injury for the calculation of weekly compensation. In terms, s 9 assumes that what is being addressed is “earnings of an employee before an injury”. It follows that the language in which the concept of “normal weekly hours” is expressed is not a model of clarity. Nevertheless, I find it impossible to read the concatenation of sections and definitions to provide other than that “normal weekly hours” means normal weekly hours before injury.
5. Although s 9 assumes, rather than directs, that the calculation shall be made by reference to before injury hours, that seems to be consistent with the thrust of the legislation. In nearly every case the comparator is earnings or hours before injury. There is a logic behind this. It seems natural that comparisons to provide a benchmark will logically be made with the position before injury rather than with a potentially changing comparator after injury, particularly where the determination of the comparator is, to some extent, within the control of the employee.
6. In the sub-sections of s 19 preceding sub-s 19(3) both normal weekly hours and normal weekly earnings clearly refer to the period before injury or incapacity. It is not immediately clear why that would change when the same language is used in sub-s 19(3).
7. Counsel for Mr Heffernan argue that the phrase in s 19 is used with its own meaning, to be determined from the context in which the words appear, understood in “the light of the purpose and underlying policy of the legislation”. They argue that this approach compels a construction of the phrase to mean current normal weekly hours.
8. They placed significant emphasis on the phrase “normal weekly hours during that week” in sub-s 19(3), suggesting that the legislature has specified contemporary weekly hours. I do not, however, think that the phrase will bear that construction, appearing, as it does, in a longer phrase: “the employee is employed for [x]% of his or her normal weekly hours during that week”. The phrase “during that week” clearly relates to the amount of time worked “during that week” which is to be compared to normal weekly hours.
9. The respondent also drew attention to the different uses of “normal weekly earnings” and “normal weekly hours”. I do not see any significance in this. Normal weekly earnings refers to earnings before injury. There is every reason to expect that normal weekly hours will refer to the same time when both are used in an equation to arrive at an amount for weekly compensation. It would be usual to determine normal weekly hours at the same time as normal weekly earnings.
10. Counsel also relied upon the uncertainties created by the use of normal weekly hours “before injury” in sub-s 19(2C) and “before incapacity” in sub-s 19(2D). Those uncertainties do not, to my mind, carry over to the present issue which is whether the hours are to be measured after the employee’s return to work. Both the alternatives giving rise to uncertainty relate to a period before any return to work.
11. The respondent also broadly relies on decisions of the Federal Court in *Comcare Australia v Pires* (2005) 143 FCR 104 and *Telstra Corporation Ltd v Peisley* (2006) 151 FCR 275. In *Pires* Jacobson J certainly said that the definition of “normal weekly hours” in s 4 did not assist, but that was with respect to the issue in that case which was how overtime should be treated. He also said that the concept of “normal weekly hours” and “normal weekly earnings” were different. That cannot be doubted. However, when he said that sub-s 19(2) “prescribes its own formula, which is ‘normal weekly earnings’ less other earnings defined as AE”, I do not think, contrary to counsel’s submission, that he was saying anything of particular relevance to this case. First, again, the literal statement cannot be doubted. Secondly, the phrase does have its own internal definition in sub-ss 19(2C) and (2D), by contrast with sub-s 19(3). Thirdly, the judge’s observation was that sub-ss 19(2C) and (2D) prescribe their own formula, which they do, not what one component in the formula means. Even less does the judge say anything about the meaning of the phrases included in the formula, especially where no internal meaning appears. The limited endorsement which *Pires* received in *Peisley* does not add anything to the respondent’s argument.
12. The respondent sought, late in the argument, to rely upon a claim in estoppel. Reliance on such a claim is problematic, apart from the fact that Mr Heffernan did not give the evidence which would be necessary to support an estoppel, in the proceedings before the Tribunal, or, at the least, that evidence is not in the material before us and was not referred to in argument. This is not a case in which issue estoppel is relied upon, or, indeed any estoppel arising out of a prior proceeding. What is relied upon is estoppel by representation or estoppel by conduct. There can, however, be no estoppel against a statute. Any such estoppel must be limited to areas of discretion (*Roberts v Repatriation Commission* (1992) 29 ALD 442; *Bramwell and Repatriation Commission* (1998) 51 ALD 56; *Telstra Corp v Mahon* [2004] FCA 1404; *Re Jebb and Repatriation Commission* (2005) 86 ALD 182). The Tribunal was bound to address the respondent’s statutory rights, only exercising a discretion within those rights. Because those rights do not extend to an entitlement to have compensation under sub-s 19(3) calculated by reference to current normal weekly hours, there was no room for the Tribunal so to proceed.
13. The above factors compel me to conclude that, assuming the definition of “normal weekly hours” in s 4 to be applicable, on its proper construction the phrase “normal weekly hours” in sub-s 19(3) means normal weekly hours before injury.
14. That takes me to the second question, namely, whether the act demonstrates a contrary intention to the meaning of “normal weekly hours” as defined in s 4. However I look at the Act and the relevant provisions referred to above I cannot find any contrary intention. Indeed, I am unable to generate any doubt that the words were intended to have the meaning I have so far found them to have. That meaning is consistent with the meaning of the words used elsewhere in the Act. It is consistent with the overall object of the compensation provisions to provide compensation by reference to earnings before injury as the relevant comparator. Selecting some standard of the employee’s earnings after the employee has returned to work would seem to me to give rise to anomalies because some incapacitated employees, if not all of them, would seek to arrange their duties and hours so that they were able always to work one hundred per cent of those hours each week. Rather than such a regime encouraging incapacitated workers to maximise their hours, which is undoubtedly an object of the legislation, it seems to me that it would do less to encourage that end than the operation of the legislation that I have found it to have.
15. It should not be forgotten that a contrary intention is not something readily to be inferred. It is not so easily found as a purposive meaning may be found in the face of ambiguity. This case is not one in which, in my opinion, there is any uncertainty. It is nevertheless apt to recall the words of the Privy Council (Lords Simonds, Normand, Morton of Henryton, MacDermott and Reid) in *Slazengers (Australia) Pty. Limited v Burnett* [1951] AC 13 at 21 in dealing with the *NSW Workers Compensation Act 1926 - 1947*:

The improbability of the word “injury” bearing a different meaning in successive paragraphs of the same sub-section is so great that any legitimate interpretation which avoids this result would appear preferable… As a matter of construction it covers the definition of “injury”, but the improbability is great that the draftsman should have left the most important word in the whole Act to the hazard of the statutory definition being excluded and some other meaning or meanings, to which no clue is given, being substituted.

1. The result is that on its proper construction sub-s 19(3) has a meaning different to the construction which has been attributed to it by Comcare for some twenty years. The construction I have found the section to have will, in most cases, be less generous than the construction Comcare gave to it for so long. It will be more difficult for incapacitated employees to receive compensation of one hundred per cent of earnings before accident. This may lead to employees on compensation receiving less for the future than they have in the past.
2. The result in this case is simply the effect of the legislation as I have found it to be. The task of the Court is to determine what the meaning of the legislation is. It will be for the government and the parliament to consider whether a de facto regime which achieved a different result over a long period of time without apparent adverse effect should be changed to the detriment of most incapacitated employees.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Downes. |

Associate:

Dated: 27 October 2011