NT Drilling Pty Ltd v McFarland [2004] NTSC 23

PARTIES:	NT DRILLING PTY LTD (ACN 090 669 N542) v GARY JOHN McFARLAND
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE WORK HEALTH COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	LA 1 of 2004 (20113035)
DELIVERED:	30 April 2004
HEARING DATE:	15 April 2004
JUDGMENT OF:	RILEY J

CATCHWORDS:

EMPLOYMENT LAW
The contract of service and rights, duties and liabilites as between employer and employee – minimum entitlement of employees – remuneration.

WORKERS COMPENSATION
– Assessment and amount of compensation – calculation of worker's entitlement to compensation for long term incapacity – calculation of "normal weekly earnings" of an employee

WORKERS COMPENSATION
– Assessment and amount of compensation – special payments – superannuation contributions made by employer to the worker – whether superannuation payment made pursuant to the statutory obligation was part of workers' normal weekly earnings – amount of rent paid by employer on behalf of the worker – value of workers' private use of employer's motor vehicle.

Legislation:

Work Health Act
Superannuation Guarantee Charge Act 1992 (Cth)
Superannuation Guarantee (Administration) Act 1992 (Cth)
Industrial Relations Act 1988 (Cth)
Workplace Relations Act 1996 (Cth)

Cases:

Rigby v Technisearch (1996) 67 IR 68
Izdes v L.G. Bennett & Co Pty Ltd trading as Alba Industries (1995) 61 IR 439
Condon v G. James Extrusion Company (1997) 74 IR 283
Smith v Hastings Deering (Australia) Ltd (2003) NTMC 029
Hastings Deering (Australia) Ltd v Smith (2004) NTSC 2
Murwangi Community Aboriginal Corporation v Carroll (2002) 12 NTLR 121
Rofin Australia Pty Ltd v Newton (1997) 78 IR 78
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1981-1982) 149 CLR 337
Cretazzo v Lombardi (1975) 13 SASR 4
Hughes v Western Australian Cricket Association (Inc) (1986) ATPR 48
McAuliffe v Vogler (1992) 110 FLR 454
Inn Leisure Industries Pty Ltd v D.F. McCloy Pty Ltd & Another (No 2) (1991) 28 FCR 172
Robert Penfold & Hunt Australia Pty Ltd v Higgins & Northern Land Council (2002) NTSC 89
AAT King's Tours Pty Ltd v Hughes (1994) 118 FLR 126
G.H. Michell & Sons (Australia) Pty Ltd v Bockman, (unreported SC (SA) - 13 May 1994)

REPRESENTATION:

Counsel:

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Respondent:	C.R. McDonald QC

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Appellant:	Hunt & Hunt
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Judgment category classification:	B
Judgment ID Number:	ril0406
Number of pages:	18

ril0406

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

NT Drilling Pty Ltd v McFarland [2004] NTSC 23
No LA 1 of 2004 (20113035)

IN THE MATTER OF the *Work Health Act*

AND IN THE MATTER OF an appeal under the *Work Health Act* at Darwin

BETWEEN:

NT DRILLING PTY LTD
(ACN 090 669 N542)
Appellant

AND:

GARY JOHN McFARLAND
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 30 April 2004)

[1] The respondent/worker was injured in the course of his employment with the appellant/employer in November 2000. He made a claim under the Work Health Act and the employer accepted that claim. There was no dispute between the parties that the worker was at all material times totally incapacitated for work. Dispute arose as to the calculation of the worker's entitlement to compensation for his long-term incapacity. The matter was

heard in the Work Health Court and reasons for decision were delivered by that court on 8 December 2003. The employer has appealed to this Court from the decision and the worker has cross-appealed.

[2] Section 116 of the Work Health Act permits a party who is aggrieved by a decision or determination of a magistrate of the Work Health Court to appeal against the decision or determination "on a question of law".

[3] The issues raised by the employer focus upon the findings of his Worship as to the calculation of the "normal weekly earnings" of the worker. In particular the employer challenged the inclusion in the assessment of normal weekly earnings of: (a) the value of superannuation contributions made by the employer to the worker in compliance with the Superannuation Guarantee Act (Cth); (b) the amount of rent paid by the employer on behalf of the worker; and (c) an amount assessed as the value of the worker's private use of the employer's motor vehicle. In addition the employer complained that his Worship erred in awarding the worker interest on unpaid arrears of weekly benefits pursuant to s 109 of the Act.

Superannuation

[4] It was agreed before the Work Health Court that, at all material times, the employer had an obligation to make superannuation contributions on behalf of the worker in accordance with the provisions of the Superannuation Guarantee Charge Act 1992 (Cth) and the Superannuation Guarantee (Administration) Act 1992 (Cth). His Worship was informed that, as at

10 November 2000, the superannuation contributions were calculated at 8% of the worker's salary or wage which was agreed to be $951 gross per week. It was also agreed that the taxation payable in respect of the superannuation contributions was 15% and was different from the rate of income tax. The question that arose for determination by his Worship was whether the superannuation payment made pursuant to the statutory obligation was part of the worker's "normal weekly earnings" for the purposes of s 49 of the Work Health Act. His Worship concluded that the superannuation contributions were part of the remuneration of the worker and were to be included in the calculation of his normal weekly earnings.

[5] There is support for the conclusions of his Worship to be found in decisions in the industrial relations field. In relation to the Industrial Relations Act 1988 (Cth) and the Workplace Relations Act 1996 (Cth) it has been held that non-pecuniary benefits such as superannuation contributions do come within the concept of remuneration: *Rigby v Technisearch* (1996) 67 IR 68; *Izdes v L.G. Bennett & Co Pty Ltd trading as Alba Industries* (1995) 61 IR 439; *Condon v G. James Extrusion Company* (1997) 74 IR 283. For example, in *Rigby* (supra) Marshall J said (at 91):

> "Superannuation contributions by employers are in the nature of payments in respect of work performed by employees … Superannuation is unquestionably, in my view, when paid into a fund by an employer on behalf of an employee, part of the remuneration of the employee."

[6] There has been some consideration of the issue in relation to the Work Health Act (NT). In *Smith v Hastings Deering (Australia) Ltd* (2003) NTMC 029 Ms Blokland SM considered the decisions of the Industrial Relations Commission of Australia referred to above in light of the provisions of the Work Health Act and concluded that the superannuation contributions may be regarded "on one view as remuneration *simpliciter*" and may also be "more readily grounded in s 49(1)(d)(ii)" of the Work Health Act. She therefore held that the superannuation contributions should be incorporated into the calculation of normal weekly earnings in that case. The matter was appealed by the employer and, in *Hastings Deering (Australia) Ltd v Smith* (2004) NTSC 2, Thomas J upheld the decision of the learned magistrate. In so doing, her Honour adopted the same reasoning as the court below. In the case the subject of this appeal the learned magistrate also referred to and adopted the reasoning of Ms Blokland SM in *Smith v Hastings Deering (Australia) Ltd* (supra). He concluded that the "superannuation contributions are remuneration simpliciter" and included those payments in the assessment of normal weekly earnings.

[7] In my opinion the conclusion reached by his Worship is correct. For the purposes of assessing normal weekly earnings remuneration is not limited to a salary or wage paid by an employer to an employee. Remuneration is a term of broader concept than salary or wages. It may include non-monetary benefits such as free rent, board and lodging and electricity: *Murwangi Community Aboriginal Corporation v Carroll* (2002) 12 NTLR 121. It may

include money paid to another on behalf of the worker: *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78.

[8] In the present case superannuation contributions were made by the employer pursuant to the statutory obligation imposed upon it. In broad terms, the legislative scheme provides for the contributions made by an employer to be placed in an approved fund and invested for the benefit of the employee. There are choices to be made as to how that is achieved but, whatever option is adopted, the result is that a fund for the benefit of the employee is created. The rights of the employee in relation to the fund so created are governed by terms and conditions imposed by law. The terms and conditions may vary from time to time but presently include limitations on access to the fund governed by considerations of age and retirement from full-time work. Notwithstanding that access to the fund is governed by the necessity for preconditions to be fulfilled, the intention is that the benefit of the fund will ultimately flow to the employee.

[9] The submission made on behalf of the employer was that such payments were not part of the remuneration of the worker. It was submitted that such payments were not "consideration a person receives for his services under a contract of work". Rather, it was said, the contributions were made pursuant to specific statutory provisions that did not involve the worker. Whilst that may be so, it does not mean that such payments are not part of the remuneration of the worker. The statutory obligation imposed upon the employer is to make payments which are ultimately for the benefit of the

worker. The receipt of that benefit may be deferred but will be received by the worker upon fulfilment of the relevant preconditions. Although the payments are made pursuant to a statutory obligation, they are in the nature of part of the reward payable by the employer to the employee for work done by the employee in the course of his employment with the employer: *Rofin Australia Pty Ltd v Newton* (supra at 81). The payments differ from a tax in that they are made for the benefit of the worker as an individual. If the statutory scheme was not in place the worker would be required to expend part of his wages in order to achieve the benefit provided by the scheme.

[10] In my opinion the superannuation contributions are to be regarded as remuneration simpliciter for the purposes of the definition of "normal weekly earnings" in the Work Health Act. The amount payable as a superannuation contribution is therefore to be included in the calculation of normal weekly earnings.

Rent

[11] In the agreed facts placed before his Worship the parties noted that the employer paid rent on behalf of the worker in the sum of $180 per week. The payment of rent continued long after the occurrence of the injury in November 2000. The learned magistrate found that the normal weekly earnings of the worker were properly calculated for the purposes of the Work Health Act by including the amount of rent the employer paid on

behalf of the worker. It was the submission of the employer that his Worship erred in so doing because, it was said, the payment of rent was an allowance expressly excluded by s 49(2) of the Work Health Act. The employer sought to distinguish the payment of rent in this proceeding from those cases where a worker has been provided with free accommodation at a mine site or on a station such as occurred in *Murwangi Aboriginal Community Corporation v Carroll* (supra). It was said that here the rent was paid for the purpose of meeting a particular requirement connected with the service rendered by the worker or as compensation for the unusual conditions of that service, namely that he needed to be away from home in order to work.

[12] The learned magistrate considered the circumstances surrounding the payment of rent and concluded that the payments were to be characterised as part of the regular remuneration of the worker. This was a conclusion open on the evidence. The payment was not in the form of an allowance as contemplated by that expression in s 49(2) of the Act but was, rather, a non-monetary benefit received by the worker as part of the remuneration earned by him. The following observations made by the Court in *Murwangi Aboriginal Community Corporation v Carroll* (supra) are, as his Worship acknowledged, applicable:

> "In our view the benefits received by the worker in this case in respect of rent, board and electricity are not allowances and they are therefore not 'other allowances' as contemplated by s 49(2) of the Work Health Act. Rather they are part of the remuneration of the worker simpliciter. They, along with the amount that he is paid in

> cash, make up his remuneration. There was no additional cash payment made to the worker in respect of those items. None of the benefits was a grant of something additional to ordinary remuneration for the purpose of meeting some particular requirement connected with the service rendered by the worker or as compensation for unusual conditions of that service. The provision of the benefits was part of his remuneration. That being so, none of the benefits was an "allowance" to be excluded by the application of s 49(2) of the Work Health Act."

[13] No error on the part of his Worship has been demonstrated in this regard.

The use of the employer's motor vehicle

[14] The agreed facts placed before the Work Health Court included that the employer provided the worker with a motor vehicle for his use in his work for the employer. The vehicle was returned to the employer on 1 August 2001. Evidence was led before his Worship in relation to the arrangement regarding the car and that evidence was, as his Worship noted, quite vague and uncertain. His Worship reviewed the evidence which included reference to the worker having in fact enjoyed private use of the vehicle for purposes not associated with his employment.

[15] The learned magistrate was unable to conclude that there was any explicit term in the contract of employment that enabled the worker to enjoy the unrestricted private use of the motor vehicle. He said he was not persuaded that the employer ever informed the worker that he could not use the car for himself and he accepted that the worker honestly believed that he was permitted to use the car for private purposes. His Worship also concluded that, had the parties turned their minds to the issue at the time of finalising

arrangements for the employment of the worker, the employer would have accepted the worker using the car "for sundry private purposes". His Worship went on to say:

> "My conclusion is that it was a term, understood or implied, of Mr McFarland's contract of employment that he enjoy reasonable private use of the vehicle when it (and he) were not required for work purposes."

[16] His Worship dealt with the situation by implying a term into the contract of employment between the employer and the worker.

[17] This is not a case where either party sought rectification of the contract of employment to give effect to the intention of the parties. Rather his Worship implied a term to cover a situation which had not been considered or addressed by the parties. Courts will act to imply a term into a contract where what has been omitted is something that "is so obvious that it goes without saying". However a necessary condition to the implication of such a term is that "it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it": *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1981-1982) 149 CLR 337. In this case it cannot be said that the implication of the term was necessary to give business efficacy to the contract. The term to be implied was incidental to the contract and covered a benefit to be received by the worker outside the ordinary scope of his employment.

[18] The state of the evidence left the learned magistrate in a position of finding that the worker believed that he had a right to private use of the motor vehicle but the employer had not considered the prospect that the worker would do so. The representative of the worker, who his Worship found was an honest witness, said that he had not informed the worker that the vehicle could be used for personal use. He said that the vehicle was stored at the premises of the worker when it was not being used for employment purposes. In these circumstances the worker has used the vehicle as a matter of fact but has not done so with the approval of the employer. In my view it cannot be said that the use of the vehicle was a part of the remuneration of the worker, that use occurring without the knowledge or consent of the employer. The learned magistrate fell into error in implying a term into the contract in circumstances where it was not open to him to do so. This ground of appeal must be allowed.

Interest

[19] The final ground of the employer's appeal focused upon the award of interest made by the learned magistrate pursuant to s 109 of the Work Health Act. The power to grant interest under that section is based upon the court being satisfied "that the employer has caused unreasonable delay in accepting a claim for or paying compensation".

[20] In considering this question the learned magistrate concluded that the employer had failed to make some payments for reasons which his Worship

regarded as exceptional. He gave reasons for so classifying the failure and those reasons are not now challenged. He went on to say:

> "All things considered the Employer's failure is therefore about as blameless as it could be in a losing litigant. Having said that, the successful litigant has, as the facts and law have turned out, been deprived of the benefit of payments rightfully his and is in my judgment entitled to be paid interest on the outstanding amounts, by virtue of s 109(1) of the Act."

[21] With respect to his Worship, if, as he has found, the employer is "about as blameless as it could be", in the circumstances, and without more, it is inconsistent to conclude that the employer "caused unreasonable delay" which is the pre-requisite for the awarding of interest under s 109(1) of the Act. This ground of appeal must be allowed.

The cross-appeal

[22] The worker cross-appealed on two grounds. The first of those was that his Worship erred in awarding costs in favour of the worker against the employer limited to 90% of the worker's costs. The second is that his Worship erred in the manner in which he dealt with the taxation of the worker's non-monetary benefits.

Costs

[23] The worker complains that the learned magistrate failed to make an order that the employer pay the whole of the costs of the worker. The order made was that the employer pay 90% of the worker's costs at the appropriate

scale. It was the submission made on behalf of the worker that the worker was successful in relation to most of the issues dealt with in the course of the hearing and was unsuccessful on one issue alone. If looked at "globally", it was submitted, the worker was overwhelmingly successful.

[24] Reference was made to the various authorities on this issue including *Cretazzo v Lombardi* (1975) 13 SASR 4; *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR 48; *McAuliffe v Vogler* (1992) 110 FLR 454*; Inn Leisure Industries Pty Ltd v D.F. McCloy Pty Ltd & Another (No 2)* (1991) 28 FCR 172; and *Robert Penfold & Hunt Australia Pty Ltd v Higgins & Northern Land Council* (2002) NTSC 89.

[25] The principles set out in those cases are not in dispute. It is clear that a successful party who has failed on some issues in proceedings may be deprived of the costs of those issues and may also be ordered to pay the other party's costs in relation to those issues. The discretion to award costs against a successful party will be exercised with care. Many authorities have identified the dangers involved in attempting to divide up a case into issues in relation to which parties were successful or unsuccessful. In the present case the learned magistrate was referred to many of the authorities and clearly had them in mind in making the order for costs to which I have referred. He referred to the various issues that had been raised in the course of argument and observed:

> "I would have thought, given the number of questions arising, for example, from the incidence of taxation, income tax and fringe

> benefit tax affecting just about every issue in the case that that sort of exercise would be ultimately less distinct than he thinks it would be … I do think, though, that the issue was separate enough – severable enough and triumphant enough for the employer that some sort of allowance ought to be made and it would be wrong for the employer to have to pay the entire costs of the worker in a case where such a separate and unsuccessful issue exists."

[26] Although the worker may be unhappy with the conclusion reached by his Worship and although I may have reached a different conclusion, it has not been demonstrated that error occurred in the exercise of the acknowledged very wide discretion available to his Worship. This ground of appeal has become largely academic because I have allowed the appeal in relation to other matters and therefore the issue of costs will have to be revisited. However, but for that circumstance, I would have dismissed this ground of appeal.

Taxation

[27] In allowing the inclusion of non-monetary items within the calculation of normal weekly earnings the learned magistrate accepted that these items were fringe benefits in relation to which the employer would have been liable to pay taxation. The impact of that taxation burden falls upon the employer and not the employee. Having characterised those items as part of the worker's remuneration for the purposes of assessing normal weekly earnings, from which compensation payments are calculated, his Worship observed that they would be "indistinguishable from the wages component of normal weekly earnings, and any compensation payments based upon

normal weekly earnings would be subject to income tax". As the worker bears responsibility for income tax he would no longer receive the full value of the benefits but, rather, a value reduced by whatever income tax rate applied to the worker in the circumstances.

[28] It was argued on behalf of the worker that the Work Health Act provided for income maintenance (see *AAT King's Tours Pty Ltd v Hughes* (1994) 118 FLR 126 at 133-134) and that the reduction in income effected by the changed taxation regime was in breach of that principle. The worker further submitted that the use of the word "gross" in relation to remuneration referred to in the definition of normal weekly earnings in s 49(1)(d) of the Act required the court to "gross up" the value of the benefits to a figure that, income tax having been deducted therefrom, would restore the original value of the benefits in the worker's hand.

[29] "Normal weekly earnings" is defined in s 49 of the Work Health Act 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 less; 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."

[30] There is no suggestion that the "remuneration" referred to in paragraph (a) of the definition of normal weekly earnings means other than the remuneration of the worker before tax is deducted in the hands of the

worker. In that sense it is gross remuneration. There is no reason to conclude that the word "remuneration" is to be understood in any different sense when used in paragraphs (b), (c) and (d) of the definition.

[31] Reference to the similarity of expression between paragraphs (a) and (b) of the definition demonstrates the word must be intended to have the same meaning in both paragraphs. Similar observations apply to the word where employed in paragraph (c) of the definition. In both paragraph (b) and paragraph (c) of the definition the word "remuneration" is qualified by the adjective "gross". Given the meaning of the word "remuneration" as discussed above, the expression "gross remuneration" cannot mean, as the worker submits, "grossed up remuneration". I agree with the conclusion of the learned magistrate that there is no reason to interpret the word "gross" as it is used in paragraph (d) to mean "grossed up".

[32] The issue raised by the worker has been addressed in the South Australian case of *G.H. Michell & Sons (Australia) Pty Ltd v Bockman*, an unreported judgment of the Full Court of the Supreme Court of South Australia delivered on 13 May 1994. In that case Mullighan J, with whom King CJ and Bollen J agreed, said:

> "In my view the decision of the Tribunal is correct in that it necessarily meant that the amount of compensation was not to be increased to allow for the amount of fringe benefits taxation paid by the appellant when the respondent was working. I would express the reasons for that conclusion in a different way. The respondent is entitled to income maintenance to be assessed in accordance with the principles laid down in the Act. The amount of that benefit depends upon weekly earnings. Those earnings may include other than a cash

component but they do not include the incidence of taxation upon those earnings. There is no reason to interpret the relevant provisions in the Act as to the method of assessment of income maintenance in that way. The obligation of the appellant is to pay income maintenance based upon earnings.

If the taxation laws provide that the liability for taxation falls upon the employer in some respect, that does not affect the amount of the worker's earnings. Such is the case with the Fringe Benefits Tax Assessment Act. If there is a change in circumstances so that the liability for taxation falls upon the worker, that also does not affect his earnings. The liability for taxation arises independently of the Workers Rehabilitation and Compensation Act and is irrelevant in the assessment of the level of income maintenance to which a disabled worker is entitled. The respondent is obliged to meet his taxation obligations, as is the case with all persons in the community with a taxable income, and the fact that the appellant was previously obliged to pay taxation with respect to a benefit which had formed part of the salary package of the respondent is of no significance in the assessment of the amount of income maintenance."

[33] The worker sought to distinguish that case by pointing to differences between the South Australian legislation and the Work Health Act. In particular it was submitted that the word "gross" does not appear in the South Australian legislation and does appear in the Northern Territory Act. I do not accept that difference as a relevant distinction.

[34] In the South Australian legislation it is clear that, although the word "gross" is not used, the compensation payable to the worker is calculated on the basis of the income of the worker without reduction for taxation. In my view the provisions and the underlying concepts are sufficiently similar for the decision of the Full Court in *G.H. Michell & Sons (Australia) Pty Ltd v Bockman* (supra) to be of persuasive value in interpreting the Northern Territory legislation. Further, with respect, I consider the approach

reflected in the reasoning of the Full Court to be correct. This ground of the cross-appeal fails.

[35] The appeal of the employer is allowed in part. The cross-appeal is dismissed. I will hear the parties as to the orders to be made.

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