PARTIES: AAT KING'S TOURS PTY LTD

v

ROBERT ALBERT HALLIDAY HUGHES

TITLE OF COURT: COURT OF APPEAL (NT)

JURISDICTION: APPEAL FROM SUPREME COURT

FILE NO: No. AP 6 of 1994

DELIVERED: Darwin 21 October 1994

HEARING DATES: 3 October 1994

JUDGMENT OF: GALLOP A/CJ, KEARNEY & MORLING JJ

CATCHWORDS:

WORKERS' COMPENSATION - cancellation by employer of compensation payments for total incapacity on ground that worker capable of earning at least "normal weekly earnings" - whether ground relied on necessarily involved a factual issue as to worker's "loss of earning capacity" - whether onus on employer to establish this factual issue - requirements for discharge of onus - whether employer bears onus of proving a change in worker's circumstances

Work Health Act (NT), ss3, 53, 65(1)(2) & (6), 68 and 69(3)

Morrisey v Conaust Ltd (1991) 1 NTLR 183, applied
Horne v Sedco Forex (1992) 106 FLR 373, referred to
J & H Timbers Pty Limited v Nelson (1972) 126 CLR 625, applied
Phillips v The Commonwealth (1964) 110 CLR 347, referred to
Barbaro v Leighton Contractors Pty Limited (1980) 44 FLR 204, followed

WORKERS' COMPENSATION - assessment of amount of compensation in terms of "normal weekly number of hours of work" - worker required to work a pre-determined number of overtime hours each roster - meaning of requirement that to be included in "normal weekly number of hours of work" overtime hours be "fixed", and "worked in accordance with a regular and established pattern" - whether such overtime has to be worked "in each week"

Work Health Act (NT), s49(1)

Francese v. Corporation of the City of Adelaide (1989) 51 SASR 522, followed

REPRESENTATION:

Counsel:

Appellant:	T. J. Riley QC
Respondent:	S. M. Gearin

Solicitors:

Appellant:	Ward Keller
Respondent:	Scicluna & Associates

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

No. AP 6 of 1994

BETWEEN:
A.A.T. KING'S TOURS PTY LTD

Appellant

AND:
ROBERT ALBERT HALLIDAY HUGHES

Respondent

Coram: Gallop ACJ, Kearney and Morling JJ.

REASONS FOR JUDGMENT

(Delivered 21 October 1994)

THE COURT: This is an appeal from a decision of Angel J. allowing an appeal by the present respondent from a decision of Mr Hannan SM sitting as the Work Health Court. The appeal before Angel J. was brought pursuant to s.116 of the **Work Health Act** ("the Act"), which confers a right of appeal on a question of law to the Supreme Court.

The facts giving rise to the application before the Work Health Court and the appeal to the Supreme Court are not in dispute. For ease of reference, we shall refer to the present appellant as the employer and the respondent as the worker.

The worker was a bus driver, commonly called a coach captain, who drove coaches for his employer. He was based in

Alice Springs. On 31 July 1992, whilst on a bus tour in North Queensland, he sustained a penetrating injury to the left eye which caused 95 percent impairment of vision in that eye. He was paid compensation by the employer until 23 April 1993. The employer cancelled payments thereafter in purported pursuance of s.69 of the Act, which confers a right to cancel payments of compensation in certain circumstances. Section 69(1)(b) requires that the employer state its reasons. Importantly, the reasons stated for the cancellation and relied on by the employer before the Work Health Court were:-

> "That the amount you are reasonably capable of earning is equal to or greater than the amount of your normal weekly earnings as defined under the Work Health Act."

It can be seen that the employer's case was not simply that the worker was no longer totally incapacitated; it was that he was no longer incapacitated at all. The worker appealed to the Work Health Court against that cancellation, under s111(1) of the Act.

On 25 October 1993 the worker commenced work as a police aide with the Northern Territory Police Force at a salary of $479.87 per week.

The two principal questions for the Work Health Court were, first, whether the employer justifiably cancelled compensation payments and, second, whether and to what extent the worker's earnings of overtime with the employer ought to have been taken into account in calculating his pre-injury normal weekly earnings. The Work Health Court held that the employer was justified in cancelling compensation payments as from 23 April 1993 and that no regard was to be had to overtime worked by the worker, in the calculation.

The issues raised on appeal before Angel J. are not easy to discern as the reasons given by the Work Health Court are far from clear. The first issue before Angel J. appears to have been whether the Work Health Court erred in law in finding that the employer had established justification for cancellation of compensation payments on 23 April 1993. His Honour held that in making this finding the Work Health Court had applied a wrong onus of proof. It had, in his opinion, failed to apply an onus which rested, in law, on the employer to establish that at the time of the cancellation of payments, namely 23 April 1993, there had been a change of circumstances such as to show that the worker was no longer incapacitated for work.

The second issue before Angel J. was whether the Work Health Court erred in law in finding that no regard was to be had to overtime worked by the worker in calculating his pre-injury normal weekly earnings. Angel J. held that the Work Health Court had wrongly interpreted the meaning of the expression "normal weekly number of hours of work" as used in s.49 of the Act, in making its finding.

The question for this Court is whether Angel J.'s decision was correct.

We were informed by senior counsel for the employer, Mr Riley Q.C., that there is a substantial amount of litigation in the Work Health Court in respect of claims under the Act and that Angel J.'s decision has given rise to difficulties of construction of the relevant provisions of the Act. Accordingly, guidance is sought from this Court as to the correct construction of the relevant provisions.

On the first issue Mr Riley submitted that his Honour erred in holding that there was an onus on the employer to establish that work was available for the worker, the date upon which it became available and the rate of pay for that work. It was further submitted that the only onus resting upon the employer was to establish a change of circumstances that warranted cessation or variation of compensation payments and thereby to establish that the worker had a capacity to earn some amount, although less than his normal weekly earnings. Once the employer had satisfied that onus, if the worker wished to establish partial incapacity he bore the onus of showing the level of his partial incapacity and its money value.

It was argued, in effect, that his Honour had held that the onus of establishing that work was available, the date upon which it became available and the rate of pay applicable to the work rested upon the employer as part of the onus to demonstrate that the decision to cease payments was warranted; and that that was an error of law.

His Honour said in the course of his reasons that in order to justify cancellation the employer carried an onus of establishing a change of circumstances warranting cancellation. In particular, the onus was on the employer to demonstrate that the worker had ceased to be incapacitated for work; that is, by virtue of the definition of "incapacity" in s.3, that the worker had an ability to undertake paid work. His Honour cited *Horne v Sedco Forex* (1992) 106 FLR 373 at 376. That was a decision of Mildren J. following the decision of this Court in *Morrisey v Conaust Ltd* (1991) 1 NTLR 183.

His Honour then referred to part of the reasons for judgment of the Work Health Court, and in particular the following passage:

> "Between October and March selection of a date would be arbitrary and so I'm satisfied that the time that should be chosen is the earlier date, 25 March '93, and I so choose. I'm satisfied then that the employer's decision to terminate payments was correct, that the payments date of termination is the correct date and that there is no loss of earning capacity."

No criticism is made of that passage in his Honour's reasons where he cast the onus of establishing a change of circumstances warranting cancellation on the employer and, in particular, of demonstrating in terms of the definition of "incapacity" (s.3 of the Act) that the worker had an ability to undertake paid work.

However, his Honour then went on to say:

> "The appropriate legal test to determine whether the worker is incapacitated for work depends on whether there is loss of earning capacity within the meaning of s.65(2) of the Work Health Act which provides:
>
> '(2) For the purposes of this section, loss of earning capacity in relation to a worker is the difference between -
>
> (a) his normal weekly earnings indexed in accordance with subsection (3); and
>
> (b) the amount, if any, he is from time to time reasonably capable of earning in a week during normal working hours in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably available to him.'

This necessarily requires an assessment of the most profitable employment available to the worker under s.68 of the Work Health Act. It is for the Court to consider both the potential availability for employment and whether such employment is reasonably available to the worker.

The learned Magistrate found that employment was not readily available to the appellant, despite his strenuous and diligent efforts to gain employment. There was no evidence before the learned Magistrate that the appellant could obtain gainful employment prior to taking up his job with the Police Force on 25 October 1993. In March 1993, the appellant went overseas to visit relatives. There is evidence that the appellant had applied to the Police Force for a position before his departure. He obtained employment with the Force upon his return to Australia. In the words of the learned Magistrate:

> 'In March 1993, he went overseas for family reasons. At that time, he had made application for a position as an NT Police Auxiliary as a watch house court guard. In September 1993, an offer of employment was made to Mr Hughes. This offer he has accepted.'

However, there was no evidence as to when a position with the Police first became available or as to the rate of pay offered or as to the appellant's likelihood or otherwise of being accepted for the job when it first became available. The onus was on the employer to establish these things and they remain a matter of speculation."

It is to this passage that criticism was directed by the employer's counsel. It is said to have given rise to difficulty of interpretation, in litigation in the Work Health Court. Before dealing with the criticism, it should be added that before passing to the overtime issue, his Honour returned to the onus being on the employer to establish *a* change of circumstances and reached his conclusion in terms of the employer having failed to establish -

> "a change of circumstances such as to show the appellant was no longer incapacitated for work, *Morrisey v Conaust Ltd* (1993) 1 NTLR 183 at 189."

In our opinion, on a complete reading of his Honour's reasons on this issue, there is no sustainable argument that his Honour cast any greater onus on the employer than that of establishing a change of circumstances such as to warrant cancellation of payments at the rate then being paid, namely total incapacity.

It is necessary to go to the structure of the Act. Where a worker suffers an injury and that injury results in incapacity, there is payable by his employer to the worker compensation as prescribed (s.53). In the case of long-term incapacity, a worker who is totally or partially incapacitated for work as the result of an injury out of which his incapacity arose, shall be paid, for present purposes, 75 percent of his "loss of earning capacity" (s.65(1)).

"Loss of earning capacity" in relation to a worker is the difference between (a) his normal weekly earnings indexed and (b) the amount, if any, he is from time to time reasonably capable of earning in a week during normal working hours in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably available to him (s.65(2)). It will be recalled (see p2) that the employer put its case for cancellation on the basis that the worker no longer had <u>any</u> loss of earning capacity.

The worker is taken to be totally incapacitated for the purposes of s65 if he is not capable of earning any amount during normal working hours if he were to engage in the most profitable employment reasonably available to him (s.65(6)).

In assessing what is the most profitable employment available to a worker, regard shall be had to:

(a) his age;

(b) his experience, training and other existing skills;

(c) his potential for rehabilitation training;

(d) his language skills;

(e) the potential availability of such employment;

(f) the impairments suffered by the worker; and

(g) any other relevant factor.

(s.68).

In this case, the basis of the cancellation was that the worker was no longer incapacitated at all, being able to earn an amount "equal to or greater than [his] normal weekly earnings" (see p2), which meant that he had no "loss of earning capacity". There was said by the employer to have been evidence showing a capacity to earn based upon the worker's physical capacity which would permit him to work as a labourer and bartender. It was said the reason he had not obtained work was because of the economic conditions in Central Australia and not because of the fact that he was a "one-eyed man". It was further said that by March 1993 he had attained proficiency in day-to-day living activities and had a capacity to work as a police auxiliary at a salary of $479.87 per week.

The only onus which the employer had to discharge, as correctly stated by his Honour, was to establish a change of circumstances warranting cancellation of compensation payments; see *Morrisey v Conaust Ltd* (supra) at p189, per

Gallop J. In this case it attempted to discharge that onus by reference to the above factors, claiming that they demonstrated that the worker was no longer incapacitated. This approach necessarily required an assessment of the "most profitable employment available" to the worker as part of the equation to establish as alleged that he had no "loss of earning capacity" (s.65(2)) and, for that purpose, an assessment of the potential availability of such employment and whether it was "reasonably available" to the worker.

In our opinion, Angel J. did not suggest that an employer who cancelled compensation under s69 of the Act was excused from the obligation to discharge the onus of demonstrating a change of circumstances. Far from it. Nor was he intending to convey that there was any legal onus upon such an employer to prove the worker's earning capacity. It may not have been appropriate to describe the test to determine whether the worker was incapacitated for work as a "legal test". It would have been more appropriate to call it a "factual issue" in the circumstances of this case as to whether, as the employer alleged (p2), the worker no longer suffered any loss of earning capacity within the meaning of s.65(2). Understood in that sense, his Honour's comments (at pp5-6) do no more than state, correctly, that in attempting to discharge the legal onus of establishing a change of circumstances, the employer by choosing to frame its case on cancellation as set out at p2 necessarily assumed an evidentiary onus to establish that the worker no longer had a "loss of earning capacity". In other words, the employer simply bore the onus of establishing the case it put forward.

When relief is sought from an award based on total incapacity, the onus is on the employer to show a change in the circumstances upon which the award is based. Those circumstances comprise loss of total incapacity. When it is shown that total incapacity has ceased, which normally also demonstrates a change in loss of earning capacity, the employer will discharge the onus. It has been said that it is "logical" that the onus of proving any partial incapacity should then pass generally to the worker as the facts are necessarily known to him and not necessarily, or even probably, to the employer; see *Barbaro v Leighton Contractors Pty. Ltd*. (1980) 44 FLR 204 at 223, per Smithers J.

In *J & H Timbers Pty Limited v Nelson* (1972) 126 CLR 625 at 651, Gibbs J, as he then was, commented that at least in cases of primary claims for compensation the applicant-worker bears the onus of proving his entitlement based upon his diminution of earning capacity, citing *Phillips v The Commonwealth* (1964) 110 CLR 347. His Honour went on to say that at least in the case of primary applications the question where the onus lies is not of much importance in an ordinary case, because of the "well established rule" that the compensation tribunal "is entitled to make use of its judicial knowledge as to such matters as rates of wages and availability of employment".

Those comments were regarded as having application in the ordinary case of an employer seeking to discharge a liability to pay compensation by showing that total incapacity had ceased, in *Barbaro v Leighton Contractors Pty Ltd* (supra) at 220 where Smithers J. said that-

> "it may well happen, and no doubt does happen in countless cases, that the evidence, for instance of cessation of total incapacity, may well indicate a continuance of partial incapacity".

In this case, however, the employer assumed the burden of proving that the worker was not incapacitated at all; see p2. In the light of that we are not persuaded that on a proper reading of Angel J.'s reasons he was wrong in finding that the Work Health Court was not justified in concluding that the employer had shown that it was entitled to terminate the payments of compensation on 23 April 1993. The first ground of appeal must fail.

We turn to the other aspect of the appeal relating to the decision of Angel J: that the Work Health Court erred in finding that no regard was to be had to overtime worked by the worker, in calculating his pre-injury normal weekly earnings.

The factual basis on the question of overtime was not in dispute before the Work Health Court. The worker was one of a number of coach drivers who worked on a roster system. Each fortnight coach drivers were advised in advance of the bus tours which they were to undertake during the following fortnightly period. The bus tours varied considerably in length and geographical location. Particular bus tours carried with them a vast amount of overtime. The worker was paid $10.04 per hour for a 40-hour week and if further hours were worked, the overtime payments were one and a half times the base rate for certain hours and twice the base rate for further extra hours.

The worker was required to work at least 40 hours in each week. He was also required to work a predetermined number of overtime hours depending upon the tours to which he had been rostered in advance. The Work Health Court held that there was no "regular and established pattern" of overtime worked "in each week". In reaching this decision it appears to have considered that unless overtime was worked every week, it could not be said to be worked "in accordance with a regular and established pattern" as required by s.49 of the Act.

His Honour, applying the dicta of King CJ in *Francese v Corporation of the City of Adelaide* (1989) 51 SASR 522 held that overtime worked by the worker should have been taken into account in calculating his "normal weekly number of hours of work" for the purposes of his claim.

The entitlement depends upon the definition of "normal weekly number of hours of work" in s.49 of the Act. The expression is defined to mean:

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

The submission on behalf of the employer was that the decision in *Francese v Corporation of the City of Adelaide* was based upon a different compensation scheme reflecting a policy of income maintenance and is not of direct assistance in the interpretation of the Act. The plain meaning of the words used in the definition of "normal weekly number of hours of work" so it was submitted, requires that hours of overtime be "fixed", be "worked in accordance with a regular and established pattern" and be worked "in each week" for those hours of overtime to be included in the definition. Mr Riley emphasised that the words "in each week" did not appear in the South Australian legislation interpreted in *Francese v Corporation of the City of Adelaide*.

As to this last matter, we are of the opinion that the definition in s49 differentiates between a worker who is required by the terms of his employment to work a fixed number of hours in each week (para (a)) and a worker who is not required by the terms of his employment to work a fixed number of hours in each week (para (b)). On this point Angel J. said:

> "Contrary to what was held by the learned Magistrate, I do not think that overtime worked need be in accordance with a regular and established pattern in each week. I agree with the submission of counsel for the appellant that there was a pattern of overtime, that is, for each tour rostered there was a set number of days and that on each day a number of hours were allowed including overtime; that is, the overtime in respect of each rostered trip was fixed. The pattern was established in the sense that it was pre-arranged in accordance with the general terms of employment. The established overtime was regular in that it was consistent and not capricious or casual or ad hoc. The overtime

> followed a predetermined principle. I do not think the word 'regular' in the definition means symmetrical or even, but rather habitual or frequent or usual as contrasted with occasional or spasmodic. The appellant's overtime in the present case was earned habitually and frequently and was part of his normal earnings, even though it was not worked symmetrically at fixed intervals. I think it is neither here nor there that, viewed in retrospect, the overtime varied in quantity from week to week. The object of the definition of 'normal weekly number of hours of work' is to arrive at a 'norm' of earnings, that is, a standard level by which a loss of earning capacity, if any, might be calculated. The fact that, pursuant to s49(3) of the Act, 'regard shall be had' to the overtime worked during the six month period preceding the date of injury supports this view."

We agree with his Honour's observations.

Whether overtime is to be included in the "normal weekly number of hours of work" turns upon whether the overtime "is worked in accordance with a regular and established pattern". Whether the worker falls within para (a) or para (b), he is entitled to the inclusion of overtime in his normal weekly number of hours of work as long as the overtime is worked in accordance with a regular and established pattern. The worker who falls within para (a) is entitled to have the overtime worked in accordance with a regular and established pattern included in the number of hours so fixed and worked in the week. The worker who falls within para (b) is entitled to have the average weekly number of hours worked by him during the 12 months immediately preceding the date of the relevant injury, including hours of overtime worked in accordance with a regular and established pattern, treated as his "normal weekly number of hours of work".

In our opinion, it is a legitimate approach to the construction of the definition to look to the object of the legislation. 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. It is sufficient (as King CJ observed in *Francese v Corporation of the City of Adelaide* at p527) if the overtime to be included is -

> "sufficiently established and worked with sufficient regularity to form part of the worker's regular income - - -. If overtime is worked regularly and is an established incident of the employment so as to form in practice part of the regular income, a regular and established, albeit perhaps an uneven or disjointed, pattern exists".

In our opinion, Angel J. was correct to find that the Work Health Court erred in law in finding that no regard was to be had to the overtime worked by the worker. We agree with his Honour's reasons and his application of the definition of "normal weekly number of hours of work" in s49 to the facts of the case.

The appeal should be dismissed with costs.