PARTIES:	MARK PASSMORE trading as PASSMORE ROOFING v GLEN WILLIAM PLEWRIGHT
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 16 of 1997 (From 103/1996 – 8828268)
DELIVERED:	11 December 1997
HEARING DATES:	14 October 1997
JUDGMENT OF:	GALLOP ACJ, MILDREN and BAILEY JJ

CATCHWORDS:

Workers Compensation – Appeal on a question of law –Construction of definition of "normal weekly earnings" – "normal weekly number of hours of work"

Work Health Act 1986 (N.T.), s49(1)

Workers Compensation – Cross-appeal by respondent worker – Construction of definition of "normal weekly number of hours of work" – s49(1) Work Health Act – Whether paragraph (a) or (b) of definition applied in present case.

Workers Compensation – Worker employed as a plumber – worked 10 hours a day 7 days a week except where interruptions due to bad weather – Whether

employee worked a "fixed number of hours" – per para (a) of definition of "normal weekly number of hours worked", s49(1) Work Health Act – Work Health Court and Supreme Court were correct in holding that there were no fixed number of hours which respondent was required to work –Respondent's cross-appeal dismissed – Paragraph (b) of definition held to apply in present case.

Ayrs v Buckeridge; Wheale v The Rhymney Iron Company (Limited) (1901) 18 TLR 20 – referred
Brown v J & J Cunningham, Limited (1904) 41 Sc.LR 835 – referred
Lysons v Andrew Knowles & Sons Ltd [1901] AC 79 at 87 – applied
Walters v Clover, Clayton & Co (1901) 18 TLR 60 – referred

Workers Compensation – Calculation of respondent worker's "normal weekly number of hours of work" – Paragraph (b) of definition – s49(1) Work Health Act – Whether number of hours worked in a period of less than a week is within contemplation of the provision: – Paragraph (b) of definition requires total number of hours actually worked to be divided by total number of weeks actually worked – Appellant employer's appeal against order of Supreme Court and determination of Work Health Court fixing "the normal weekly number of hours of work" is dismissed.

Workers Compensation – Calculation of normal weekly earnings – Whether terms of worker's employment included "allowances of any kind" – s49(2) Work Health Act – Whether Work Health Court had regard to documentary material which was irrelevant to its considerations in determining the respondent worker's hourly rate.

Wilson v Lowery (1994) 4 NTLR 79 at 84 – followed
Work Health Act 1986 N.T. s49(2)

Workers Compensation – Late payment of weekly payments – calculation of interest pursuant to s89 Work Health Act – Date interest is to run from for purpose of s89 – Section distinguishes between a person's "liability" to make a weekly payment of compensation and a person who is "required" to make such payment – Section 88 of Work Health Act is of no assistance in resolving issue of when an employer is "required" to make a weekly payment of compensation for the purposes of s89.

Wormald International (Aust) Pty Ltd v Aherne Unrep. SC N.T. Mildren J 21 June 1994 – approved
Work Health Act 1986 (N.T.) ss85(1)(b) and (c), 85(2), 85(4)(b), 85(8), 87, 88(1), 89.

Workers Compensation – Where employer has caused unreasonable delay in accepting a claim for or paying compensation – s109 Work Health Act – Provisions of s109 "provide more than adequate penalties to deal with recalcitrant employers" – Appellant employer's appeal against order of Supreme Court that interest is payable under s89 and is to be calculated upon the basis that the day on which the employer was required to make a weekly payment of compensation is fixed by s88, is allowed – Work Health Court order substituted.

Work Health Act 1986 (N.T.) ss89, 109(1) and (3).

REPRESENTATION:

Counsel:

Appellant:	Mr T Riley QC
Respondent:	Mr I Nosworthy

Solicitors:

Appellant:	Ward Keller
Respondent:	Hunt & Hunt

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BAI97036

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

No. AP 16 of 1997

ON APPEAL from the judgment of Chief Justice Martin in proceeding No. 103 of 1996.

BETWEEN:

MARK PASSMORE trading as PASSMORE ROOFING

Appellant

AND:

GLEN WILLIAM PLEWRIGHT

Respondent

CORAM: GALLOP ACJ, MILDREN and BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 11 December 1997)

THE COURT:

Background

This appeal by an employer, from the judgment of Martin CJ delivered on 4 April 1997, raises questions of construction relating to the definitions of "normal weekly earnings" and "normal weekly number of hours of work" provided by section 49(1) of the *Work Health Act* ("the Act") and the date from which interest is to run for the purposes of section 89 of the Act. By a cross-appeal, the respondent worker also seeks to raise a question of construction relating to the definition of "normal weekly number of hours of work" provided by section 49(1) of the Act.

The following (partial) chronology is not in dispute:

22.01.1988	Respondent worker commenced employment with the appellant as a plumber at a station property.
22.03.1988	Respondent worker suffered injuries to his neck, shoulder and right ankle as a result of falling from a roof. Appellant commenced paying weekly compensation for total lack of capacity for work under the Act.
16.11.1988	Appellant cancelled weekly payments (pursuant to section 69 of the Act after receiving a medical report in which the opinion was expressed that the respondent was fit for work as a plumber).
04.11.1989	Work Health Court (per Gray CSM) found that the appellant's cancellation of payments was not justified and that the respondent was totally incapacitated for work until

	1 March 1990 and partially incapacitated for work thereafter.
19.07.1995	Supreme Court (per Angel J) held that the Work Health Court had erred in law in its assessment of the weekly compensation to which the respondent was entitled.
15.05.1996	Work Health Court (per Gray CSM) made new findings in the light of the law held to apply by Angel J on 19 July 1995.
04.04.1997	Supreme Court (per Martin CJ) upholds, in part, the respondent worker's appeal as to calculation of "normal weekly earnings" and the date from which interest is to run for the purposes of section 89 of the Act; dismisses appellant's cross-appeal on a question of the respondent's potential "most profitable employment" for the purposes of section 65(2)(b) of the Act. (Note: the appellant abandoned appeal grounds relating to this aspect of the judgment.)

"Normal weekly number of hours of work"

It is convenient to turn first to this issue as the relevant order made by the learned Chief Justice is the subject of appeal by the appellant employer and cross-appeal by the respondent worker.

The evidence as to the agreement between the appellant and the respondent which was accepted by the learned magistrate, Mr Gray CSM, was given in the following brief terms by the respondent:

"Q: What were the – did you have a discussion about hours and number of days that you would work?

A: Yes.

Q: What were the …?

A: When we were in Perth we – he said it was eleven dollars an hour, seven days a week, ten hours a day if we worked at that – providing no rain and the weather …

Q: Did you accept the job?

A: Yes I did."

Section 49(1) of the Act defines "normal weekly earnings", in the present context, to mean remuneration for the worker's "normal weekly number of hours of work" which is defined as:

> "(a) in the case of a worker who is required by the terms of his employment to work a fixed number of hours…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…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."

Martin CJ held that the Work Health Court's decision that paragraph (b) of the definition applied in the particular circumstances was correct (albeit that he differed from the learned magistrate as to the details of the calculation required by that paragraph). By his cross-appeal, the respondent worker submits that paragraph (a) of the definition is applicable to the evidence, which was accepted, that the worker was to work seven days a week, ten hours

a day for eleven dollars an hour. On this basis, Mr Nosworthy submits that the respondent's "normal weekly earnings" were $770 ($11 x 10 x 7).

Evidence of the number of hours and days actually worked by the respondent prior to the accident may be summarised as follows:

Total number of days employed:	59
Total number of days where work performed	47
Total number of hours worked:	409
Least number of hours worked in a day	4
Most number of hours worked in a day	11

Both Martin CJ and Mr Gray CSM held that paragraph (a) of the definition of "normal weekly number of hours of work" was inapplicable to the respondent worker as the terms of his employment did not require him to work a "fixed number of hours".

The agreement between the parties for the respondent to work seven days a week, ten hours a day was expressly subject to interruptions due to rain and other vagaries of weather. Judicial notice may be taken of the fact that work out of doors as a "plumber" (he is more accurately described as a roofing plumber's labourer) would inevitably be interrupted by bad weather in the 'wet' season months of the respondent's employment. The evidence in the present case shows that the respondent's work was in fact stopped by rain on seven days before the date of his accident. We consider that the reference to

being required to work seven days a week, ten hours a day in the arrangement between the appellant employer and respondent worker here was in the nature of a **maximum** number of hours which he could be expected or required to work, rather than a **fixed** number of hours. The arrangement expressly contemplated that the respondent would work in fact less than the maximum number of hours because of interruptions due to bad weather. Martin CJ (and the Work Health Court) were correct to hold that there was no fixed number of hours which the respondent was required to work in this case.

It follows from these reasons that we would dismiss the respondent's cross-appeal.

Another aspect of the respondent's "normal weekly number of hours of work" is the subject of appeal by the appellant employer.

Martin CJ in applying paragraph (b) of the Act's definition had calculated the respondent's "normal weekly number of hours of work" as 48.53 hours. He arrived at this figure by referring only to the number of hours worked by the respondent in the eight completed weeks that the respondent had worked prior to the accident and disregarded the three odd days worked by the respondent immediately before the accident. Martin CJ was of the view (at p9) that:

> "To take into the calculation of the average weekly number of hours worked, number of hours worked in a period of less than a week, is not within the contemplation of the provision. It may lead to distortion of the prescribed average, as this case shows. Had the legislation intended, it could have provided for a calculation based on an average number of hours worked over other periods of time, for example daily, fortnightly or

> monthly. It chose to fix the criteria on the working week. Odd days are not to count in calculating the average. The Court erred in taking the hours worked during the additional three days into account in calculating the average weekly number of hours worked."

In the Work Health Court the learned chief magistrate had accepted a submission by the appellant employer to take account of the odd three days work in the respondent's ninth week by averaging the hours worked on those three days to calculate the hours for a "notional" ninth week. By this process, Mr Gray CSM had arrived at a figure of 46.7778 hours as the respondent's "normal weekly number of hours of work".

We consider that the words used by paragraph (b) of the Act's definition of "normal weekly number of hours of work" are quite clear. Where it applies, the definition requires the calculation of:

> "… the average weekly number of hours … worked by (the worker) during the period **actually worked** by him in the service of his employer during the twelve months immediately preceding the date of the relevant injury;" (emphasis added)

Martin CJ noted in his reasons for judgment:

> "As to 'average', it is 'synonymous with equalling an arithmetical mean or, less strictly, approximating an arithmetical mean', a process which usually involves a division of unequal sums or quantities (*George Pearse Pty Ltd v O'Flynn* (1962) 79 WN (NSW) 328; *Flinders Shire Council v Smiles; Ex Parte Flinders Shire Council* (1982) 42 LGRA 92 at 95)."

The word "average", as it appears in workmen's compensation legislation in reference to expressions such as "average weekly earnings", is used in its

popular sense. In *Lysons v Andrew Knowles & Sons Limited* (1901) AC 79 at 87, the Earl of Halsbury LC said:

> "I think in ordinary popular parlance when you talk of a man, if he has earned irregular wages, whether unequal wages or equal wages, you would say, speaking of a yearly servant, that on the average he got so much a week or so much a month, as the case might be. I think it was in that popular sense, taking one day with another or one week with another, that the Legislature used those words, and I think it is what everybody would understand by "average" that his earnings were so much – not his agreed earnings by contract, there it would be definite – that if a man was only employed at irregular intervals or irregular amounts you were to get at what the average was by putting them together and striking an average so as to afford a test of the weekly sum to be paid."

It is therefore incorrect to base the average only on completed working weeks and to ignore odd parts of a week, as the Chief Justice has done. If this approach were correct, a workman who had worked for less than a week, but whose entitlement fell to be considered by reference to the definition, would be entitled to nothing. This was rejected by the House of Lords in *Lysons* case (supra), and see also *Ayers v Buckeridge; Wheale v The Rhymney Iron Company (Limited)* (1901) 18 TLR 20; *Walters v Clover, Clayton, and Co* (1901) 18 TLR 60.

Where the evidence gives rise to the inference that, but for the accident, the worker would have continued working for the rest of the week (whether the "week" be 5, 6 or 7 days) but it is uncertain what he would have earned because the hours were not fixed, the appropriate course may be to calculate the earnings actually earned in that part of the week as a fraction of the "week" of 5, 6 or 7 days as the case may be, depending on what the employer's

ordinary working week for that workman or that class of workman may have been. Alternatively, if the facts show that the hours are constant and the worker is paid by the hour, the average may be calculated by reference to the hourly rate multiplied by the number of hours he was expected to work in the week: see *Ayers v Buckeridge; Wheat v The Rhymney Iron Company (Limited),* supra. If the work is so casual that it is not able to be found that the worker would have been employed on other days during the week, the correct approach may be to calculate the average by reference to what he earned multiplied by the number of days worked divided by the employer's ordinary working week: see for example *Brown v J & J Cunningham, Limited* (1904) 41 Sc.LR 835. The appropriate course will depend on the facts in each case, and there may be other methods by which the appropriate average should be calculated.

In the present case, the respondent worker worked for a total of 409 hours over a period of eight weeks and three days. The terms of his employment required the respondent to work – or at least work if required to do so and subject to the vagaries of the weather – seven days a week. Accordingly, the respondent actually worked 409 hours over a period of 8.43 (working) weeks. In our view, paragraph (b) of the definition simply requires the total number of hours actually worked to be divided by the total number of weeks actually worked, i.e. in the present case 409 (hours) is to be divided by 8.43 (weeks), resulting in the normal weekly number of hours of work for the respondent being 48.52. In the present case, the difference between this figure and that

produced by Martin CJ's calculation is negligible (a difference of 0.01 hours a week); it may not be so in other circumstances.

It follows that we would dismiss the appellant employer's appeal against the order of Martin CJ that the determination of the Work Health Court fixing the normal weekly number of hours of work be varied to 48.53 hours except to the minimal extent of substituting a figure of 48.52 hours.

"Normal weekly earnings"

The learned Chief Justice allowed the respondent worker's appeal as to another aspect of calculating the worker's "normal weekly earnings".

As we have noted earlier in these reasons, the learned chief magistrate had accepted the respondent's evidence that his remuneration was to be $11 per hour. However, in calculating the respondent's "normal weekly earnings", Mr Gray CSM had reduced this hourly rate by relying upon section 49(2) of the Act to exclude certain allowances from the worker's remuneration.

Section 49(2) provides:

> "(2) For the purposes of the definition of 'normal weekly earnings' and 'ordinary time rate of pay' in subsection (1), a worker's remuneration includes an over-award payment, climate allowance, district allowance, leading hand allowance, qualification allowance, shift allowance (where shift work is worked in accordance with a regular and established pattern) and service grant, but does not include any other allowance."

The agreement for the payment of $11 per hour contains no reference to allowances of any kind, and there was no evidence to show that this figure was based upon or incorporated an industrial award, where allowances of the type referred in section 49(2) are often to be found.

As Martin CJ noted (at p10):

> "The only evidence that allowances played any part in the relationship between the worker and the employer is contained in a memorandum of 20 August 1993 to 'Whom it may Concern', signed on behalf of the respondent (employer)".

The document, after confirming the respondent worker's employment with the appellant as a 'Roof Plumber's Labourer' at Tipperary Station, continues:

> "During the period of 22 January 1988 – 22 March 1988, he was being paid $11.00 per hour.
>
> Unfortunately he had an accident and then was receiving worker's compensation paid on the gross award rate of $350.70 per week.
>
> | | |
> |---|---|
> | District Allowance | $16.60 per week |
> | Construction Allowance | $13.50 per week |
> | Tool Allowance | $ 7.50 per week |
> | Total: | $388.30 per week" |

Martin CJ held that the Work Health Court made an error of law in taking this material into account: "It has to do with a view taken as to the make-up of an amount paid to the worker by way of compensation after the injury was sustained" (at p11).

Mr Riley QC, on behalf of the appellant, submits that the information set out above was provided by the worker as part of his case (namely, annexed to an affidavit). In the submission of Mr Riley QC, it was open to the learned chief magistrate to rely on this material in arriving at his findings of fact and it was not open to Martin CJ to interfere with such a finding on appeal: *Wilson v Lowery* (1994) 4 NTLR 79 at p84.

We agree, with respect, with Martin CJ that the learned chief magistrate made an error of law in relying upon the material, set out above, to reduce the respondent's hourly rate by excluding the construction and tool allowances referred therein. In *Wilson v Lowery* supra at p84, this Court held:

> "If … there is no evidence to support a finding of fact which is crucial to an ultimate finding that the case fell within the words of the statute … there is an error of law".

Here, the learned chief magistrate had accepted the evidence that the respondent was to be paid $11 per hour. The document referring to an "award rate" and detailing its make-up by reference to the inclusion of various allowances formed no part of the arrangements between the appellant employer and the respondent worker for his employment. The document emanating from the appellant expressly refers, without qualification, to the respondent having been paid $11 per hour during the period of 22 January 1988 to 22 March 1988. The fact that the document then continues by referring to the respondent's accident and that he "**then** was receiving worker's compensation" paid on a particular basis cannot be relevant to what the respondent received as remuneration before the accident. At its highest, the

use of the document by the respondent worker confirms what he received initially as compensation from the appellant employer; in no sense can the document also be used against the worker to infer that he received remuneration on a similar basis during the term of his actual employment.

We consider that Martin CJ was correct to hold that the material was irrelevant to the Work Health Court's considerations. This amounted to an error of law which his Honour was obliged to correct. We would dismiss this aspect of the appeal.

Having regard to the variation we propose to the respondent worker's normal weekly number of hours of work to 48.52 hours, it would follow that the determination of the respondent worker's normal weekly earnings should be varied to $533.72 ($11 x 48.52).

Late payment of weekly payments – Calculation of interest pursuant to section 89

Section 88(1) of the Act provides:

"(1) Unless otherwise agreed in writing by the worker, a weekly payment shall be made to the worker before the expiration of 7 days after the end of the week in respect of which it is payable or, where the worker is normally paid at intervals greater than one week, before the expiration of 7 days after the end of the period in respect of which he is normally paid.

Penalty: In the case of a body corporate – $10,000
In the case of a natural person – $ 2,000

Default Penalty: In the case of a body corporate – $ 500
In the case of a natural person – $ 100"

Section 89 of the Act provides:

> "Where a person liable under this Part to make a weekly payment of compensation to a worker fails to make the weekly payment on or before the day on which he is required to do so, the worker shall, in respect of that weekly payment, be paid, in addition to any other payment required to be made under this Part, an amount represented by the formula –
>
> $$A \times \text{the prescribed rate of interest} \times \frac{B}{52}$$
>
> where –
>
> A is the amount of that weekly payment payable to the worker; and
>
> B is the number of weeks (with a part of a week being counted as a whole week) occurring within the period commencing immediately after the day on which payment of that weekly payment was due and concluding at the end of the day on which payment of that weekly payment is made."

The Work Health Court had ordered that the appellant employer was liable to pay interest pursuant to section 89 of the Act on weekly compensation payments due for payment on or after 4 November 1994. The learned chief magistrate selected this date upon the basis that he had on that day made a "clear finding" that the appellant's cancellation of weekly compensation payments on 16 November 1988 was not justified.

On appeal before Martin CJ, this order was set aside and the learned Chief Justice ordered:

> "That the interest payable pursuant to section 89 is calculated upon the basis that the day on which the respondent (employer) was required to make a weekly payment of compensation was fixed by section 88."

The appellant appeals against the order of Martin CJ and seeks restoration of the order made by Mr Gray CSM.

In his reasons for judgment, Martin CJ noted the observation by Mildren J in *Wormald International (Aust) Pty Ltd v Aherne* (unreported, SC N.T., 21 June 1994) that:

> "… s89 applies where a person is liable under Part V of the Act to make weekly payments for compensation. No order is necessary, interest is payable by force of the section if a payment is not made on time."

The learned Chief Justice identified, with respect, correctly that the issue is, when is an employer "required" to make a weekly payment of compensation within the meaning of section 89 of the Act? The learned Chief Justice canvassed and rejected a number of possibilities and concluded (at p21):

> "However, in my opinion, s89 … relates back to what is provided for in subs(1) of s88. Unless otherwise agreed in writing by the worker, a weekly payment shall be made to the worker before the expiration of seven days after the end of the week in respect of which it is payable or, where the worker is normally paid at intervals greater than one week, before the expiration of seven days after the end of the period in respect of which he is normally paid. Other subsections relate to the manner in which the weekly payments may be made. A person liable to make a weekly payment of compensation to a worker fails to make the weekly payment, if it fails to do that on or before the day he is required to do so under s88(1). The other provisions of the Act fix liability for payment and provide for enforcement in default by way of determination and execution, but it is s88 that fixes the day on or before which the weekly payments are required. Interest runs in default of payment in accordance with that requirement. By definition, in s79: 'weekly payment' means a weekly payment of compensation and obviously refers to the compensation payable for incapacity for work as a result of an injury allowed for in ss64 and 65. His Worship erred in law in fixing the date he did in respect of the payment of interest. Interest is payable on each weekly payment due to be paid to the worker in accordance with the

formula in s89, taking into account the period of grace allowed under s88."

At the risk of failing to do justice to the detailed and persuasive submissions made by Mr Riley QC, the appellant employer submits that the learned Chief Justice:

- has failed to have sufficient regard to the distinction drawn in section 89 of the Act between a **liability** to make weekly payments of compensation and a failure to make such payments "on or before the day on which he is **required** to do so";

- has failed to appreciate that the approach adopted carries the potential for retrospective imposition of penalties under section 88 of the Act upon an employer who legitimately (albeit incorrectly) denies liability for compensation in accordance with section 85(1)(c) or who even defers such liability under section 85(1)(b); and

- overlooked the requirement under section 109 of the Act of the Work Health Court to impose penalty interest and the discretion of that Court to order payment of punitive damages where the Court is satisfied that "the employer has caused unreasonable delay in accepting a claim for payment or paying compensation".

On behalf of the respondent worker, Mr Nosworthy submits that the appellant's position is entirely unmeritorious. The Work Health Court had made a clear finding that the cancellation of payments on 16 November 1988

was not justified and, in Mr Nosworthy's submission, interest should be paid at the statutory rate provided by section 89 on all payments due to the worker since that date rather than since 4 November 1994 when the adverse finding regarding liability was eventually made against the appellant employer.
Mr Nosworthy stresses that the employer made a considered and deliberate decision to cancel weekly compensation payments; and this decision was found to be unjustified. The employer had the use of money which should have been paid as weekly compensation to the respondent for nearly six years.
Mr Nosworthy submits that in such circumstances an employer must bear the risk of incurring an interest liability; without such a risk, employers might be encouraged to terminate compensation payments without justification, procrastinate and delay proceedings as much as possible with a view to avoiding their liability to pay compensation for as long as possible.

In our view, section 89 draws a clear distinction between a person's **liability** to make a weekly payment of compensation under Part V of the Act and "the day on which he is **required**" to make such a payment; so much is clear from the words employed in the provision. Section 89 itself does not define when an employer is "required" to make a weekly payment of compensation; this can be ascertained only by reference to provisions of the Act imposing an obligation to make a payment at some particular time.

We agree with the submissions of Mr Riley QC that the starting point for such an analysis is section 85 of the Act. Section 85(1) provides an employer

with three options upon receipt of a claim for compensation. The employer may, pursuant to sub-section (1) of section 85:

> "(a) accept liability for compensation;
>
> (b) defer accepting liability for the compensation; or
>
> (c) dispute liability for the compensation."

If the employer fails to adopt one of these courses of action in accordance with the time specified by section 85, he is deemed to have accepted liability for the compensation claimed: see section 87.

If the employer decides to accept liability (or is deemed to have accepted liability), section 85(2) is applicable and the employer:

> "… shall … commence those payments within three working days after accepting liability."

In terms of section 89, there can be no doubt that this mandatory direction particularises "the day on which (the employer) is required" to make the payment. If the employer fails to make the payment on or before the expiry of three working days after accepting liability (or is deemed to have accepted liability), he will be obliged to pay interest at the statutory rate provided by section 89.

Similarly, if the employer decides to defer liability, section 85(4)(b) requires that the employer:

> "… shall, within three working days of making the decision to defer accepting liability for the compensation claimed, commence those payments."

Again, the "day on which (the employer) is required" to make the payment is readily identifiable and failure by the employer to make the payment on or before the relevant day would oblige him to pay interest in accordance with section 89.

In the case of both sub-sections (2) and (4)(b) of section 85, the Act establishes both an obligation (or liability) to make a weekly payment of compensation and a requirement that such payment be made within a fixed period. Under section 89 if the employer "fails to make the weekly payment on or before the day on which he is required to do so" (namely expiry of the three working days' grace period) he will be obliged to pay interest at the statutory rate.

This situation may be contrasted with one where an employer disputes liability for compensation pursuant to section 85(1)(c). In such circumstances, sub-section (8) of section 85 obliges the employer to furnish the employee with specified information in a prescribed form as to the employee's right to pursue his claim and the employer's reasons for its rejection. However, section 85(8) imposes no immediate requirement to make a weekly payment. In the absence of any immediate requirement to make a weekly payment of compensation, the Act is necessarily silent as to "the day on which (the employer) is required" to make a weekly payment. In due course, the Work Health Court may determine that the employer is liable to pay compensation in

accordance with the worker's claim, but the Act imposes no immediate requirement to make payment of compensation at any particular time.

The learned Chief Justice held that section 88 of the Act:

> "…fixes the day on or before which the weekly payments are required. Interest runs in default of payment in accordance with that requirement".

With respect, we cannot agree with either of those propositions.

Section 88 provides that "a weekly payment shall be made to the worker before the expiration of seven days **after** the end of the week in respect of which it is payable …" and provides financial penalties for default. As we have sought to explain, an employer's potential liability for statutory interest on late payments pursuant to section 85(2) and (4)(b) runs from three working days after an employer's decision to accept or defer liability.

The additional grace period of seven days provided by the penal provision of section 88 has no application to liability for interest arising under section 89. Accordingly, we do not agree that interest runs in default of payment in accordance with the requirement of section 88. Nor can we agree that section 88 fixes the day on or before which the weekly payments are required. Where an employer accepts or defers liability for weekly compensation payments, section 85(2) or (4)(b) respectively provide for "the day on which (an employer) is required" to make the weekly payment. In a case where an employer disputes liability for compensation, the Act makes no express provision as to when an employer is "required" to make a weekly

payment; and indeed it is difficult to conceive how the Act **could** make such provision until such time as liability to pay compensation has been established.

In our view, section 88 provides no assistance in resolving the issue of when an employer is required to make a weekly payment of compensation for the purposes of section 89. Section 88 is a penal provision which can apply only where both an employer's liability to pay weekly compensation payments has been established and the time fixed for payment has expired. If an employer accepts or defers liability for compensation, both the employer's liability to pay and the time when he is required to do so is fixed by section 85. If he disputes liability, it is a matter for the Work Health Court to determine whether he is liable to compensation and there can be no requirement for him to pay compensation before such determination.

The mandatory requirement of section 88 that "… a weekly payment shall be made to the worker before the expiration of seven days after the end of the week **in respect of which it is payable** …" may perhaps have been better expressed by adopting the language of section 89 and referring to a requirement to pay the compensation. However, we consider that the legislature's intent to maintain a distinction between a liability to pay compensation and the particular date when it is required to be paid is tolerably clear. In the case of disputed claims, the Work Health Court's findings may establish an employer's past and continuing liability to pay compensation, but there can be no "requirement" to pay compensation pending the Court's determination of liability.

As Mr Riley QC submits, if the construction favoured by the learned Chief Justice was correct, an employer who rejected (legitimately, albeit wrongly) a compensation claim would be subject to the penal sanctions provided by section 88. Such a result could not possibly have been intended by the legislature. We consider the word "payable" in s88 means, in the context of disputed past compensation found to be due by the Work Health Court, "ordered to be paid".

Reference has been made to Mr Nosworthy's submission that the appellant employer's position is entirely unmeritorious in light of the Work Health Court's finding, some six years after the event, that the appellant's cancellation of payments was unjustified. However, the force of this submission (and general expressions of concern that the approach to section 89 favoured by Mr Gray CSM will encourage delay and procrastination on the part of employers faced with valid claims) is dissipated by section 109 of the Act.

Section 109(1) and (3) provide:

"(1) If, in a proceeding before it, the Court is satisfied that the employer has caused unreasonable delay in accepting a claim for or paying compensation, it must

(a) where it awards an amount of compensation against the employer – order that interest on that amount at a rate specified by it be paid by the employer to the person to whom compensation is awarded; and

(b) if, in its opinion, the employer would otherwise be entitled to

have costs awarded to him – order that costs be not awarded to him.

(3) Where the Court orders that interest be paid under subsection (1) or (2), it may, in addition, order that punitive damages of an amount not exceeding 100% of such interest be paid by the employer to the person to whom compensation is awarded or to whom the weekly or other payment due under this Act is payable."

The provision for an interest payment in cases of 'unreasonable delay' is mandatory. No upper limit is placed upon the rate of interest which may be ordered to be paid by the Work Health Court under section 109(1)(a) and the Court has a discretion under section 109(3) to double the total amount of interest ordered to be paid by an award of punitive damages. These provisions, coupled with the provision in section 109(1)(b) requiring the Work Health Court to deprive an employer of costs to which he would otherwise be entitled provide more than adequate penalties to deal with recalcitrant employers.

In the light of these reasons, we would allow the appellant employer's appeal against the order of Martin CJ that interest payable pursuant to section 89 is to be calculated upon the basis that the day on which the employer was required to make a weekly payment of compensation is fixed by section 88. In substitution, We would restore the order of the Work Health Court fixing 4 November 1994 as the date upon which the appellant employer was required to make weekly payments of compensation for the purposes of calculating interest pursuant to section 89 of the Act.

With respect to the issue of costs, on the basis of the orders we propose, both the appellant and the respondent were unsuccessful in their respective

appeal and cross-appeal relating to calculation of the worker's "normal weekly earnings" – albeit on our construction of the Act's definition of "normal weekly number of hours of work" we have found that an adjustment of 11 cents per week should be made in the appellant's favour. The issue arising for consideration under section 89 of the Act occupied by far the longest period of time in the hearing of this appeal. On this issue the appellant has been successful.

Before Martin CJ, the respondent worker successfully argued to have his "normal weekly number of hours of work" increased from the determination made in the Work Health Court (albeit failing in his primary submissions on this issue) and that gain has been maintained almost in its entirety on the orders we propose to be made. The respondent also successfully resisted a cross-appeal before Martin CJ on the question of "most profitable employment"; a matter not pursued in this Court.

Taking all these matters into account, we would order the respondent to pay 70% of the appellant's costs of and incidental to this appeal and the appellant to pay 50% of the respondent's costs of and incidental to the appeal before the learned Chief Justice.

In addition, we consider that the respondent should have his costs of and incidental to the grounds of appeal abandoned by the appellant. In this regard, we note that at the outset of the hearing of this appeal, Mr Riley QC informed the Court that the appeal grounds numbered (i), (iv), (vii), (viii) and (ix) of the

Amended Notice of Appeal filed on 6 October 1997 were not pressed on behalf of the appellant.

We would propose the following orders:

1. The respondent's cross-appeal regarding the worker's "normal weekly number of hours of work" be dismissed as not showing an error of law.

2. The determination of the learned Chief Justice (order 1 of 20 May 1997) fixing the "normal weekly number of hours of work" be varied to 48.52 hours.

3. The determination of the learned Chief Justice (order 2 of 20 May 1997) fixing "normal weekly earnings" be varied to $533.72.

4. Orders 4 and 5 of 20 May 1997 of the learned Chief Justice regarding the calculation of interest pursuant to section 89 of the Act be set aside and the determination of the Work Health Court fixing 4 November 1994 as the date upon which the appellant is required to make weekly payments of compensation for the purpose of calculation of interest pursuant to section 89 be restored.

5. The order of the learned Chief Justice made 19 September 1997 in relation to costs be set aside.

6. The appellant pay 50% of the respondent's costs of and incidental to the appeal before the learned Chief Justice.

7. The respondent pay 70% of the appellant's costs of and incidental to this appeal.

8. The appellant pay the respondent's costs of and incidental to grounds (i), (iv), (vii), (viii) and (ix) of the appellant's Amended Notice of Appeal filed on 6 October 1997.
