Wakeling v Qantas Airways Limited [2009] NTSC 42

PARTIES:	WAKELING, PAUL
	v
	QANTAS AIRWAYS LIMITED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA12 of 2008 (20808628)
DELIVERED:	6 August 2009
HEARING DATES:	1 & 2 June 2009
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	I Morris
Respondent:	S Walsh QC

Solicitors:

Appellant:	Ward Keller
Respondent:	Hunt & Hunt Lawyers

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wakeling v Qantas Airways Limited [2009] NTSC 42
No. LA12 of 2008 (20808628)

BETWEEN:

WAKELING, PAUL
Appellant

AND:

QANTAS AIRWAYS LIMITED
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 6 August 2009)

[1] This is an appeal from the decision of a Stipendiary Magistrate involving the interpretation of s 49 of the Workers Rehabilitation and Compensation Act dealing with normal weekly earnings and, in particular, the interpretation of s 49(2) of the Workers Rehabilitation and Compensation Act.

[2] Mr Morris on behalf of the appellant worker asserts that what should be included as part of the worker's compensation was the access to a concessional travel agreement that enabled employees to obtain travel at about ten percent of the cost of a normal ticket.

[3] The learned stipendiary magistrate in the Work Health Court ruled that the worker's concessional travel entitlements are not part of the worker's normal weekly earnings. It is this ruling which is the subject of appeal.

[4] The issue for the Court, as expressed by Mr Morris, is whether the concessional travel scheme is a benefit which ought to be included in remuneration and if so then to calculate the normal weekly earnings under s 49(1)(d)(ii) of the Workers Rehabilitation and Compensation Act. The 12 months of his employment prior to the injury is the basis for calculation of normal weekly earnings.

Appellant's background

[5] The appellant was born on 31 January 1951. He was at all material times employed by the respondent as an airline services operator at Darwin Airport Ramp Services.

[6] On 20 April 2002, the appellant worker sustained a right knee injury during the course of employment with the respondent employer. He made a work health claim relating to this injury which was accepted by the respondent.

[7] On 1 October 2006, the appellant sustained a left knee injury during the course of his employment with the respondent. The appellant made a work health claim relating to this second injury which was accepted by the respondent.

[8] The respondent employer assessed the worker's normal weekly earnings as at the date of the second injury in the amount of $927.35 gross per week.

[9] The worker asserted in the Work Health Court that his normal weekly earnings as at the date of the second injury to be $2,780.60 made up of $1,853.25 weekly non cash remuneration and $927.35 weekly cash remuneration.

[10] The worker's employment was terminated with effect from 5 December 2007 because the respondent found that he was not able to perform the inherent requirements of his role as an airline services operator. As at 5 December 2007 the appellant was 56 years of age.

[11] Exhibit W11 contains three agreed facts. They are as follows:

> "1. Fringe Benefit Tax in respect of the Worker's Concessional Travel in the 12 months preceeding the date of the worker's injury was paid by the Employer.
>
> 2. At the time of his injury, superannuation payments were made by the Employer in respect of the worker's employment.
>
> 3. The worker will continue to receive concessional travel entitlements subject to the Policy Terms in Exhibit W2 until 5 December 2020."

[12] The question for the Court is whether the concessional travel scheme is a benefit which ought to be included in remuneration and, if that finding is made, then the calculation should be under s 49(1)(d)(ii) of the Workers Rehabilitation and Compensation Act as part of his normal weekly earnings.

[13] The learned stipendiary magistrate concluded that concessional travel entitlements are not remuneration which form part of a worker's normal weekly earnings. He found they were something else and could not be taken into account in assessing the worker's normal weekly earnings. He further stated in his reasons for judgment at paragraph 113:

> "…. ExW2 is a very generous and gratuitous benefit that the employer has apparently unilaterally bestowed upon it's employees, when it appears to have no obligation to do so. The worker has sought to take financial advantage of this gratuitous benefit and have it added to his NWE. I find that there is no proper basis for doing so."

[14] His Honour then stated in paragraph 121 of his reasons for judgment:

> "If I am wrong in my decision that the worker's concessional travel entitlements are not part of the worker's NWE I will proceed to assess their value on the evidence before me."

[15] He then referred to the conflicting evidence on the aspect of quantum and decided that he was unable to properly assess the value of the concessional airfares to the worker as he would only be speculating. His Honour stated at paragraph 124 that he could not be satisfied on the balance of probabilities that the starting figures as used in Exhibit W8 and Exhibit W10 were the appropriate figures and that he was unable to find what would be the appropriate figures.

[16] The appellant lodged a Notice of Appeal against the decision of the learned stipendiary magistrate. The grounds of appeal are as follows:

"1. The learned magistrate erred in failing to find that the concessional travel entitlements provided by the worker's (the applicant) employer (the respondent) to the appellant did not form part of the appellant's 'remuneration' for the purposes of section 49 of the *Workers Rehabilitation and Compensation Act* (the Act).

1.1 The learned magistrate erred in finding that whether fringe benefits tax was or was not paid did not assist him in determining whether concessional travel entitlements were or were not part of the appellant's remuneration [21].

1.2 The learned magistrate erred in having regard to the continuing entitlement to the appellant to receive concessional travel entitlements in the future as a determinant of whether those entitlements were part of the appellant' remuneration for the purposes of section 49 of the Act [27] [48].

1.3 The learned magistrate erred in considering that the scheme of the Act as one of the income maintenance bore upon the application of section 49 of the Act in regards to the inclusion of benefits received by the appellant in the course of his employment as part of his remuneration [68].

1.4 This ground of appeal is not pressed.

1.5 The learned magistrate erred in finding that a reduction in salary paid to the appellant was necessary in order to establish that the appellant obtained a benefit from the concessional travel scheme as it applied to his beneficiaries and to himself [83] [84].

1.6 The learned magistrate erred in finding that the concessional travel scheme did not form any part of the appellant's contract of service [86].

1.7 The learned magistrate erred in finding that a relevant consideration in determining whether the concessional travel entitlements were a benefit that would be included in the appellant's remuneration was whether or not the appellant's wages had been reduced in anticipation of the benefit [93] [95].

1.8 The learned magistrate erred in finding that whether or not a fellow employee was able to avail himself or herself of the concessional travel entitlements impacted on the consideration of whether the benefit received by the appellant from the concessional travel scheme in the

12 months prior to the injury could be considered as part of the appellant's remuneration pursuant to section 49 of the Act [99].

1.9 The learned magistrate erred in finding that the fact that the appellant was able to continue to obtain benefits from the concessional travel scheme constituted a potential for 'double dipping' [100].

1.10 The learned magistrate erred in finding that a gratuitous practice by an employer cannot become part of a worker's remuneration [102].

1.11 The learned magistrate erred in finding that the concessional travel entitlements were not a reward for work performed by the appellant [107].

1.12 The learned magistrate erred in failing to have regard to the benefits received by the appellant in the 12 month period before the appellant's injury in determining the total remuneration of the appellant in the service of the respondent.

2. The learned magistrate erred in failing to accept the evidence of the appellant concerning the value of the benefit received by him from the concessional travel entitlements provided by the respondent.

2.1 The learned magistrate erred in finding that the figures contained in exhibit W8 did not, on the balance of probabilities, establish the value of the benefit received by the appellant from the concessional travel entitlements received by the appellant from the respondent.

2.2 The learned magistrate erred in failing to find that the document provided to him by the counsel for the respondent was an alternate calculation of the benefit received by the appellant from the concessional travel entitlement provided by the respondent.

2.3 The learned magistrate erred in failing to assess the value of the benefit to the appellant in the evidence advanced by the appellant and/or the respondent at hearing."

[17] The orders sought are as follows:

"3.1 That the benefit received by the appellant from the concessional travel entitlement supplied by the respondent

form part of the appellant's remuneration for the purposes of section 49 of the Act.

3.2 That the benefit received by the worker should be valued in the sum of $1,853.25.

3.3 That the respondent pay interest on the amount in 3.2 pursuant to s89 and s109 of the Act.

3.4 That the respondent pay the appellant's costs of and incidental to this appeal and his costs of an incidental to the proceedings before the Work Health Court and the dispute giving rise to those proceedings at 100% of the Supreme Court scale to be taxed in default of agreement."

[18] Mr Morris, on behalf of the appellant, submitted that a significant factor in considering whether the benefit received by the worker is actually part of his remuneration is that the employer was required to pay fringe benefit tax in respect of the benefit received by the worker. When the worker took advantage of the concessional travel scheme the worker was required to report to the employer as to the trips he and his wife had taken. A cost for that was established by the employer and fringe benefit tax was paid in respect of that cost. At the end of the taxation year when the employer provided the worker with a group certificate, it showed his wage and it showed the benefit and the tax to be paid. It is the argument for the appellant that this is a strong indicator that the benefit is actually part of the remuneration of the worker because tax is paid in relation to it.

[19] It is submitted for the appellant that concessional travel was a benefit to him because he could travel round the world at a fraction of the cost of a normal ticket. The learned stipendiary magistrate found it was a benefit but that benefit was not part of his remuneration.

[20] The argument for the appellant is that his Honour, in the Work Health Court, having found the concessional fares were a benefit, should have come to a valuation, as he had assistance from the valuation prepared by the employer and the valuation as prepared by the employee. It was argued that it was for his Honour to choose from that range and to come to a view.

[21] In *Murwangi Community Aboriginal Corporation v Denis Martin Carroll*[1] the Court of Appeal, Angel, Riley JJ and Priestley AJ, held as follows in paragraph 18 of the judgment:

> "The purpose of s 49(2) of the Work Health Act (NT) is to identify some payments made to a worker that are to be taken into account in assessing his or her normal weekly earnings and to exclude all 'other allowances' from that assessment. It is to make clear in relation to those payments what is and is not to be included in normal weekly earnings for the purpose of assessing compensation. The amounts identified for inclusion are not limited to allowances. For example an over award payment is not necessarily an allowance. Although it is not clear what is meant by the expression, a service grant would seem unlikely to be an allowance. By operation of the section there are included within normal weekly earnings some payments that would qualify as an allowance and some that may not. However it is clear that payments excluded are limited to 'any other allowances', that is, allowances other than those that have been specifically included. The section does not expand the meaning of the expression 'normal weekly earnings' but, rather, it identifies some payments that fall within the ambit of the expression and clarifies how those payments are to be treated for the purpose of calculating the entitlement of a worker to compensation."

[22] The Court in that instance held that the benefits received by the worker in respect of rent, board and electricity were part of the remuneration of the worker. That being so none of the benefits was an "allowance" to be

[1] (2002) 171 FLR 116.

excluded by the application of s 49(2) of the Workers Rehabilitation and Compensation Act. Section 49(2) of the Workers Rehabilitation and Compensation Act provides as follows:

> "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.

[23] Mr Morris then went through the various documents that had become exhibits in the proceedings before the Work Health Court.

[24] Exhibit W1 is the Enterprise Bargaining Agreement which was relevant to the worker at the time of the worker's accident. This document does not contain a reference to concessional travel arrangements for full time workers. It does state at paragraph 18.5.16: "Part time employees will receive equal concessional travel benefit as full timers."

[25] I would agree with the submission for the appellant that inferentially the Enterprise Bargaining Agreement does refer to concessional benefits available to full time workers.

[26] Under the heading "Other Entitlements" in the Enterprise Bargaining Agreement paragraph E is headed "Employee Travel" and states "See staff travel policy manual".

[27] The staff policy manual is Exhibit W2. On the front page appears the heading "Policy" and the following words:

> "Rebate travel benefits are a privilege extended by the Company and where applicable, by the Company's wholly owned Subsidiary Companies. This policy may be altered, suspended or withdrawn at the discretion of the Company at any time. …"

[28] The document sets out what occurs if there is an infringement of this policy or breach of the policy procedures. At page 14 of the Staff Policy Manual, there is a reference to re-employed staff which was Mr Wakeling's position and it states under the heading "General":

> "An employee whose travel concessions gained from a former employment with Qantas, are current at the date of re-employment, will become eligible for the travel concessions of a current employee with 6 months service immediately on appointment, thus waiving the 6 month service requirements. However, all concessions, except for available free trips gained from the former employment, will be suspended for the period of re-employment. If the previous travel benefit was available for a specific time frame, this time frame <u>will not</u> be extended irrespective of the previous benefit being unavailable during the current employment period. On subsequent termination the employee must elect either the travel concessions accrued in the current employment, or those of their former employment period."

[29] The document makes the following provision for "Retired Employees" at page 23:

> "The following concessions are available to retirees, including their eligible beneficiaries. The concessions will remain available for a period equal to the number of completed years of service with the Company. Retiree benefits apply to former employees who retire from the Company and are at least 55 years of age at the date of termination <u>or</u>, who have been provided retiree travel benefits as part of a redundancy package. These retiree benefits only apply to travel on Qantas services."

[30] Reference was made in submissions to the evidence given by Mr Wakeling that he continues to be entitled to the concessional travel and that entitlement is for a period until 2020 because he is a retired person.

[31] On page 24 of the Staff Policy Manual (ExW2) is a heading "Employees After Completion of Ten Years Service". It concludes with the words "The trip is generally referred to as the 'Ten Year Trip'". There are other references in the document to disability termination through the superannuation plan and health termination by the company. It is a comprehensive policy applying to all staff. There is also provision for an international travel upgrade and sets out the procedures for obtaining free air travel or heavily discounted air travel on a number of other airlines included in the scheme.

[32] Mr Wakeling took advantage of the concessional travel arrangement. He used concessional travel and the access he had to overtime, and days in lieu, to take holidays and use his concessional travel within Australia and overseas. The concessional travel also applied to his named beneficiaries.

[33] In the Work Health Court, Mr Wakeling gave evidence that he operated his own business in Papua New Guinea and then became employed with Qantas in 1990. This was because his wife wanted to retire from Qantas. He then left the hotel industry and applied to Qantas because he wanted to keep the concessional benefits being the reduced airfares with Qantas.

[34] He gave further evidence that he took a 50 percent reduction in wages when he moved to Qantas so that he could keep the airfares. There was evidence about the waiting period of 12 months to qualify for the concessional travel arrangement. Reference was made to the evidence of Mr Wakeling as to how he was able to take 12 weeks holiday a year. Mr Wakeling gave evidence about how he and his wife had calculated the cost of the trips that he had taken in the 12 months prior to his injury. Mr Wakeling did take a reduction in wages when he moved to Qantas after being self employed. However, this is very different to the situation of an employee who makes an arrangement with his employer to sacrifice part of this salary for other benefits. That is not what happened to Mr Wakeling. The reduction he did take is not a consideration in this matter – see *Rofins Australia Pty Ltd v Newton*.[2]

[35] Mrs Wakeling also gave evidence about the way she calculated the benefit received for the cost of the airfares. She did this by making a dummy booking to obtain the cost it would have been. This information is contained in Exhibits 8 and 10. Exhibit W8 shows the gross ticket payment on the dummy booking and the amount the worker actual paid. It also lists the net benefit to the worker or as it is described the net ticket payment. The amount actually paid by the worker was approximately 10 percent of the total fare plus airport taxes. Exhibit W9 shows a computer printout of the trips taken between 19 October 2005 to 8 September 2008.

[2] (1997) 78 IR 78.

[36] Exhibit W9 is the employer's version of the benefit to the worker of the concessional travel as opposed to Mrs Wakeling's calculations. At the foot of the aide memoire to Exhibit W9 appears the following statement:

> "Therefore based on travel by worker only, the value of the concessional travel is ($21,290.00 less $2190.00 (sic) – this should read $2129) / 52 = $368.48 per week
>
> Based on travel by worker and beneficiaries, the value of the concessional travel is $37,990.00 - $3799.00) / 52 = $657.52 per week."

[37] Essentially it is agreed Mr Wakeling and his nominated beneficiary would pay approximately ten percent of their respective fare.

[38] Mr Morris argues that his Honour in the Work Health Court could have come to a figure between the calculations in Exhibit W8 (the worker's figures) and those set out by the employer (Exhibit W9).

[39] In his Honour's judgment he concluded that the effect of the travel scheme was a benefit for the worker. However, he was not persuaded that it was part of his remuneration. His Honour did not accept that whether or not fringe benefit tax was paid by the employer assisted him in determining whether concessional travel entitlements were or were not part of the worker's remuneration. He concluded that whether or not it was remuneration must be determined upon the wording of the Workers Rehabilitation and Compensation Act and any relevant case law. Mr Morris' argument is that it is hard to distinguish fringe benefit tax from paying tax on a worker's wage. He maintains it is a powerful argument supporting a

conclusion that the benefit paid to the worker is part of the worker's remuneration because it is part of a group certificate as a taxed benefit. I am in agreement with the learned stipendiary magistrate that the payment of fringe benefit tax is not an indicator one way or the other when considering the issue of the workers remuneration.

[40] Mr Morris also maintains that his Honour was in error in taking into account that the worker was entitled to concessional travel beyond the date of his injury and beyond the date of his resignation. His Honour concluded that because the worker was able to continue to use the benefit afterwards, that that was an argument against it being included in the calculation for remuneration. Mr Morris asserts that in concluding this his Honour was confusing how you calculate the normal weekly earnings which should be done in accordance with s 49(1)(d)(ii) of the Act being a snapshot of what happened in the 12 months prior to the injury and that the calculation of economic loss under s 64 and s 65 was not a matter for his consideration. I do not consider his Honour erred in his approach. This was a relevant factor to take into account together with a number of other factors.

[41] With respect to Ground 1.5 of the Grounds of Appeal, Mr Morris argued that in paragraphs 83 and 84 of his judgment, his Honour had stated there was no evidence of the fact the worker had foregone or in anyway reduced the amount of salary and wages due to him in order to obtain a benefit to any of his beneficiaries by way of concessional travel:

> "83. There was no evidence before me to suggest that the worker had foregone, or in any way reduced, the amount of salary and wages due to him in order to obtain a benefit to any of his 'beneficiaries' by way of concessional travel. Sometimes (for taxation or other reasons) a person might reduce his taxable income by diverting pre-tax income to other sources (such as partner superannuation, housing rent, car repayments etc). Clearly, in my view, this would still form a part of a worker's remuneration. But that is not what occurred here.
>
> 84. There is in fact no evidence that the worker received any benefit at all from any of his nominated 'beneficiaries' being able to access discounted airfares. More importantly, there is no evidence that the worker received anything less than he would otherwise have been entitled to for his labour, as a consequence of any 'beneficiary' having access to concessional airfares."

[42] Mr Morris argues this is an irrelevant consideration and that his Honour revised the test that is to be applied. Mr Morris used the example of tips being included as part of remuneration (*Great Western Railing Company v Helps*)[3] see also Mills New South Wales Workers Compensation at page 313. It is the submission for the appellant that a gratuitous practice can be part of the earnings of the worker. I do not consider the learned stipendiary magistrate has been shown to be in error on this issue.

[43] Under 1.6 of the Notice of Appeal, it is argued for the appellant that his Honour was in error in concluding that because the concessional travel did not form any part of the enterprise bargaining agreement, it was not part of the worker's contract of service. Mr Morris asserts it must be part of the contract of service because if you breach the travel concession scheme your employment can be terminated. There is also a requirement that the

[3] [1918] AC 141.

employees become familiar with the terms of the travel concession agreement including the obligations they have to their employer. Finally, under that point Mr Morris asserts that there is in fact a reference even though not particularly clearly, to concessional travel in the enterprise bargaining agreement. I agree with the learned stipendiary magistrate that the concessional travel scheme does not form any part of the appellant's contract of service.

[44] Under 1.7 of the Grounds of Appeal, Mr Morris argues there is no requirement that there be any demonstration wages were reduced to obtain the concessional travel. It is asserted for the appellant that that is not a relevant consideration, it is the fruits of the worker's labour and should be considered part of his remuneration. I consider the learned stipendiary magistrate was entitled to take into consideration the fact that the employee did not take a reduction in wages in anticipation of the benefit.

[45] Under Ground 1.8, Mr Morris states that it was not a proper approach on the part of the learned stipendiary magistrate to consider the possible disparity between an entitlement between a worker who wanted to travel and another who did not. Mr Morris argues that was not a proper approach by the learned stipendiary magistrate. In Mr Morris' submission, there is no suggestion s 49 applies to anything else but the worker himself. He pointed out that throughout the Act there is a disparity of benefits. Mr Morris gave a number of examples including workers who had been injured in the same accident and were both incapacitated for the same period but the amount of

compensation they each received could be different because overtime is taken into account in the calculation of wages. I would not consider disparity of entitlement between employees to be of any great significance but am not persuaded that taking this into account amounts to an error.

[46] Under Ground 1.9, Mr Morris stated that the learned stipendiary magistrate applied the wrong test when he referred to the potential for double dipping and his concern that the worker would get the benefit of the value of the concessional travel as part of his remuneration and continue to get benefits from the concessional travel because of his incapacity. On Mr Morris's argument the first depends on s 49 being calculation of normal weekly earnings and the second depends on compensation under s 64 and s 65 of the Act. I consider the important aspect to be the fact that the appellant has not suffered any actual loss. I do not take the approach urged upon the Court by Mr Morris.

[47] Under Ground 1.10, Mr Morris refers to paragraph 102 of the reasons for judgment of the learned stipendiary magistrate which states as follows:

> "In my view, if a practice is truly gratuitous, then even if it is of long standing, it does not become part of a person's weekly remuneration. It is not something upon which this worker or any other employee might be able to sue on the evidence before me."

[48] Mr Morris submits this is fundamentally wrong for a number of reasons:

1) The concessional travel was a reward for service because it depends on being employed by Qantas. A worker had to work for a period of

time to qualify. When taking the concessional travel an employee had to follow all the rules and procedures or his employment could be terminated. Mr Morris argues concessional travel is not truly gratuitous it is connected to performance of service and impacts on a worker's contract of employment.

2) Voluntary gratuities from third parties such as a tip as in the case of *Helps*,[4] has been found to be part of a worker's remuneration. Mr Morris made the same criticism of paragraph 107 of the learned stipendiary magistrate's reasons for judgment which reads:

> "It follows, in my view, that the concessional travel entitlements are not (and cannot be) a reward for work performed on a week by week basis, otherwise it should cease by no later than 31 January 2016 also. The fact that under the policy it does continue beyond his working life shows it's true character. It is not remuneration which forms part of the worker's NWE. It is something else, and is therefore not to be taken into account in assessing the worker's NWE."

[49] Mr Morris submits that again his Honour has applied the wrong test because one is an assessment under s 49 and the other an assessment under s 64. I am not persuaded that his Honour applied the wrong test.

[50] Mr Morris has referred the Court to a number of authorities for the proposition that this appeal raises a question of law being the proper construction of s 49(2) of the Workers Rehabilitation and Compensation Act – *Palumpa Station Pty Ltd and Victor George Fox*,[5] *Hastings Deering*

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[4] [1918] AC 141.
[5](1999) 132 NTR 1.

Australia Ltd v Smith,[6] and *Murwangi Community Aboriginal Corporation v Dennis Martin Caroll*.[7] It is Mr Morris' submission that the learned stipendiary magistrate sought to re-define what is meant by remuneration and that is the question of law upon which he misdirected himself.

[51] The learned stipendiary magistrate did make a finding (paragraph 20) that access to concessional travel was a benefit. In Mr Morris' submission he should have stopped there, as it is a benefit and should be included in the remuneration Mr Morris quoted paragraphs from the Court of Appeal decision in both *Murwangi*[8] and *Hastings Deering*.[9] I quote hereunder paragraph 45 of the Court of Appeal decision in *Hastings Deering*:[10]

> "This Court has taken a broad view of the concept of remuneration for the purposes of determining 'normal weekly earnings' as defined in s 49(1) of the Act. In *Murwangi Community Aboriginal Corporation v Carroll* (2002) 171 FLR 116, this Court held that non-cash benefits received by an employee in respect of rent, board and electricity are part of the employee's remuneration and are not 'other allowances' as contemplated by s 49(2). The essence of the Court's reasoning is found in the following passage at 118 [9]:
>
> > 'In our view there can be little doubt that the remuneration of a worker in this case is not limited to the wages paid to the worker but extends to include benefits of other kinds received by the worker in respect of services rendered for or on behalf of the employer. The identified non-monetary benefits form part of the reward for work done and services rendered and therefore comprise 'remuneration … earned by the worker …'".

[6] (2004) 18 NTLR 1.
[7] (2002) 171 FLR 116.
[8] (2002) 171 FLR 116.
[9] (2004) 18 NTLR 1.
[10] (2004) 18 NTLR 1.

and *Murwangi Community v Carroll*[11] at paragraph 9:

> "In our view there can be little doubt that the remuneration of a worker in this case is not limited to the wages paid to the worker but extends to include benefits of other kinds received by the worker in respect of services rendered for or on behalf of the employer. The identified non-monetary benefits form part of the reward for work done and services rendered and therefore comprise 'remuneration ... earned by the worker ...'. Similar cases are gathered in the decision of Mr Trigg SM at first instance in Fox v Palumpa Station Pty Ltd (1999) NTMC 024. ..."

[52] With respect to the appeal relevant to the quantum of the remuneration, Mr Morris acknowledged that the learned stipendiary magistrate did not have to proceed to assess the value of the remuneration in view of his findings that the concessional benefits did not constitute part of the remuneration.

[53] Mr Morris does, however, criticise the learned stipendiary magistrate for coming to a conclusion that there was not sufficient evidence to come to a conclusion as to the value of the concessional benefit. Mr Morris pointed out that the learned stipendiary magistrate had the benefit of calculations by the worker and calculations by the employer. The rule of thumb was the worker paid 10 percent of the full airline fare therefore the benefit to him was the other 90 percent. In Mr Morris' opinion, his Honour could have come to that conclusion on the evidence before him.

[54] I now turn to the arguments raised in this matter by Mr Walsh, on behalf of the respondent. Mr Walsh argues that it is not correct as Mr Morris has

[11] (2002) 171 FLR 116.

stated that the test is the fact these benefits arise out of the employment. Mr Walsh submits many things may arise out of the employment but they may not be normal weekly earnings as defined in the Act.

[55] Mr Walsh referred to the statement in Exhibit W2 under the heading "Overview Policy" which has already been set out in paragraph 27 of these reasons for judgment.

[56] Mr Walsh is in agreement that this is a benefit but points out it is a benefit which the employer can withdraw at any time. It is a discretionary entitlement and the discretion is wholly that of the employer. It is Mr Walsh's submission that the critical issue has always been, what is the worker's entitlement, what does he earn by way of his employment and to what is he entitled by way of remuneration as a result of his contract? It is argued on behalf of the respondent that the learned stipendiary magistrate has not made errors of law by creating tests which are not appropriate. What he has done is to look at the proper characterisation of Exhibit W2 and decided it is not part of the terms of employment and not remuneration for the purpose of s 49 of the Act.

[57] In developing this submission Mr Walsh commenced by referring to s 53 of the Act the relevant parts of which provides a follows:

> " (1) Subject to this Part, if a Territory worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her:
>
> (a) death;

(b) impairment; or

(c) incapacity,

there is payable by his or her employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed.

(2) Compensation under this Act is payable only in respect of employment that is connected with the Territory."

[58] Prescribed compensation is set out in s 64:

"(1) Subject to sections 65A and 65B, a worker who is totally or partially incapacitated for work as the result of an injury shall be paid, in addition to any other compensation to which under this Part he or she is entitled, compensation equal to the difference between what he or she actually earned in employment during a week and his or her normal weekly earnings immediately before the date on which he or she first became entitled to compensation, in respect of any period during which the total period, or aggregate of the periods, of his or her total or partial incapacity, as the case may be, arising out of or materially contributed to by the same injury does not exceed 26 weeks.

(2) A worker shall be paid compensation under subsection (1) notwithstanding that his or her retirement has intervened between the date he or she sustained the injury out of which the incapacity arose and the date on which his or her entitlement to the payment of the compensation would otherwise cease and, for the purposes of calculating his or her continuing entitlement, his or her normal weekly earnings applying immediately before his or her retirement shall be deemed to continue to be his or her normal weekly earnings."

[59] There is a similar description in s 65 for long term incapacity where there is a different rate.

[60] Mr Walsh pointed out that the parties are not in disagreement as to the starting point, which is that at the date of the injury on 1 October 2006, the worker who was a baggage handler was earning $927.35 per week. Normal

weekly earnings are to be characterised and calculated at that point of time. It is the submission by Mr Walsh that what is provided for by way of the Policy Manual is not part of his normal weekly earnings, it was not part of what he earned during a week because it is completely at the discretion of the employer. It is not of such a character that it forms part of the normal weekly earnings.

[61] Mr Walsh then turned to the provisions of s 49 of the Act and the definition of normal weekly earnings in s 49:

> ***"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;"

Subparagraph (d)(ii) provides:

> "(d) where:
>
> > (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."

[62] It is Mr Walsh's argument that a discretionary policy which could be taken away at any time which involved a scheme whereby people could be offloaded at the discretion of the employer, involved the payment of a fee

for it but at the end of the day might be cancelled at anytime, could not be an entitlement that falls within the definition of "normal weekly earnings".

[63] Mr Walsh equated the concessional travel benefits to long service leave entitlements or a bonus for having worked well which are not part of normal weekly earnings. It is something provided to the worker at the discretion of the employer and cannot be characterised as remuneration in the definition of "normal weekly earnings". Mr Walsh noted that the word "remuneration" is not defined in the Act. He referred to the meaning as set out in the Oxford Dictionary or alternately to the interpretation in *Chalmers v Commonwealth of Australia*[12] which is "pay for services rendered".

[64] Mr Walsh argues that remuneration under subparagraph (d) could happen in two ways. Firstly, it could be a salary sacrifice for some other benefit or it could be an additional benefit such as provision of rent, board and electricity. Something which is part of the contractual term of employment. There must be a contractual entitlement to it as part of your remuneration.

[65] Mr Walsh then referred to the Court of Appeal decision in *Murwangi v Carroll*[13] in particular paragraphs (2), (6) and (8).

> [2] In 1998 the respondent was employed as an abattoir supervisor at a remote location in the Northern Territory. Under the terms of his employment he was paid a monetary wage and also provided with free food, accommodation and electricity. His remuneration package was made up of cash and non-monetary benefits.
>
> ....

[12] (1946) 73 CLR 193.
[13] (2002) 171 FLR 116.

> [6] There is no dispute that the worker was in receipt of a cash wage and, in addition, part of his entitlements included non-monetary benefits in the form of rent free accommodation, free electricity to that accommodation and the provision of three meals per day. In the Work Health Court the combined value of those items was assessed at $155 per week and the Court included that amount in the calculation of the normal weekly earnings of the worker. The appellant/employer contends that to do so was an error of law.
>
> ....
>
> [8] The first issue to be determined is what is included in the expression "remuneration ... earned by the worker ...", and, in particular, whether the identified non-monetary benefits received by the worker are to be included. This is a question of fact."

[66] Mr Walsh submits that the status of the Policy document is a question of fact. The point he emphasises is that there must be a contractual entitlement if it is to form part of a worker's remuneration and it is not correct to say that all benefits, whether there be a contractual entitlement or not, form part of normal weekly earnings. Mr Walsh then referred to paragraph 19 in the Court of Appeal decision in *Murwangi v Carroll* [14] which reads as follows:

> "**[19]** 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 s49(2) of the 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 s49(2) of the Work Health Act (NT)."

[14] (2002) 171 FLR 161.

[67] Mr Walsh also addressed the principles expressed by the Court of Appeal in *Hastings Deering (Australia) Ltd v David John Smith*.[15] He referred to a number of paragraphs in that decision. I repeat one of those being paragraph 28:

> "A different factual situation was considered in *Doncaster Amalgamated Collieries Limited v Leech* [1941] 1 KB 649. A soldier separated from his family by reason of his service received a family allowance which was paid direct to his wife. It was argued that the family allowance was not "earnings" within the meaning of the Workmen's Compensation Act 1925. The Court held that the allowance was earned by the soldier. As Scott LJ said in dealing with the question of whether the allowance was earned (653):
>
> > 'To my mind the answer is obvious. He is entitled to it and he does earn it, and none the less so because he is compelled to assent to the condition on which he earns it, namely, that it shall be paid direct to his wife.'"

[68] Reference was also made by Mr Walsh to the decision of Riley J in *NT Drilling v McFarland*[16] and in particular paragraphs 14, 15, 16 and 18:

> "**[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

[15] (2004) 18 NTLR 1.
[16] [2004] NTSC 23 delivered 30 April 2004.

> 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.
>
> **.....**
>
> **[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.

[69] Mr Walsh stressed the argument that if a benefit is not part of the contract of employment then it is not part of the worker's remuneration. I agree that if it is not part of that characterisation then it is not part of normal weekly earnings. That is supported by the authorities to which he referred.

[70] With respect to the arguments raised by Mr Morris on the Enterprise Bargaining Agreement (Exhibit W1) the reference to part time employees receiving "equal concessional travel benefits as full time" is not imposing an obligation as part of a contractual term. At page 53E of the enterprise

bargaining agreement appears the words "Employee Travel – See staff travel policy manual". This however is under the general heading of Appendix A: Compulsory Redundancy Agreement". I agree with Mr Walsh's submission that it refers to redundancy not remuneration. I agree that there is nothing in the enterprise bargaining agreement to the effect that the concessional travel entitlement referred to therein comprised the workers terms of employment or is contractually binding. The entitlement was at the sole discretion of the employer and not part of the contract of employment. In fact the worker remains entitled to concessional travel. It is an agreed fact that based on the workers age and years of service he is still entitled to concessional travel for the next 13 years. The worker agreed in evidence that when his wife worked at Qantas he had access to concessional airfares even if he were not working there. The worker also agreed that the concessional airfares were subject to availability the possibility of being off loaded and a number of other conditions. There is also a finding of fact by his Honour at paragraph 48 that the worker has continued to avail himself of concessional airfares.

[71] Mr Walsh referred to the judgment in the Work Health Court the reference by his Honour to the case of *Rofin Australia Pty Ltd v Newton*.[17]

[72] I agree with the findings in the judgment of the learned stipendiary magistrate in the Work Health Court as set out in the following paragraphs of his judgment (paragraphs 95 and 96):

> "95. … There is no evidence to suggest that ExW1 by itself does anything other than provide a fair and reasonable remuneration to the worker for the work that he did with the employer.
>
> 96. Accordingly ExW2, in my view, stands alone. It is an additional benefit that the employer affords to it's employees. There was no evidence to suggest that ExW2 was a negotiated document. On it's face it purports to be a unilateral reward system that the employer generously makes available to employees who have remained for over 12 months. It is subject to unilateral variation, change, suspension or even termination by the employer (although some of these steps might be unpopular). It is a reward for accumulated service, not a reward for work done in any particular week."

[73] I am not in agreement with the submissions made by Mr Morris that his Honour fell into error and applied a number of wrong tests.

[74] The issue in this case is whether the concessional travel benefits granted by the employer can be regarded as remuneration in assessing his normal weekly earnings.

[75] I find that the concessional travel granted by the employer was certainly a benefit to the worker. However, it was not part of the terms of his contact of employment. It was a benefit granted at the sole discretion of the employer it carried with it a number of conditions and could be withdrawn by the employer at any time.

[76] It is not sufficient to establish that it is a benefit. The issue is whether concessional travel was a benefit that formed part of his remuneration. I agree with the learned stipendiary magistrate that it was not and therefore cannot form part of his normal weekly earnings.

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[17] (1997) 78 IR 78.

[77] In those circumstances the learned stipendiary magistrate had no obligation to attempt to assess the value of the benefit. It is commendable that he was willing to make that effort in case his decision was overturned on appeal. Ultimately, his Honour decided that he could not make a finding based on the differing valuations put forward by the worker and the employer.

[78] If the worker were to be subsequently successful on appeal from this Court, then the matter may have to be referred back to the Work Health Court for further evidence as to the correct calculation of the benefit.

[79] I do understand the difficulty facing the learned stipendiary magistrate, although ultimately if there were to be a successful appeal it may be necessary to take a broad brush approach in assessing the value of the benefits. The one matter the parties are in agreement about is that the concessional fare meant the worker and his beneficiaries paid only 10 percent of their respective fares.

Summary of Orders

[80] 1. The appeal is dismissed.

2. The appellant to pay the respondent's costs of this appeal as agreed or taxed.

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