Murwangi Community Aboriginal Corporation v Carroll [2002] NTCA 9

PARTIES:	MURWANGI COMMUNITY ABORIGINAL CORPORATION v DENIS MARTIN CARROLL
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	ANGEL, RILEY JJ & PRIESTLEY A/J

REPRESENTATION:

Counsel:

Appellant:	M. Grant
Respondent:	C. McDonald QC

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Ward Keller

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

Murwangi Community Aboriginal Corporation v Carroll [2002] NTCA 9
No. AP12 of 2001 (20009940)

BETWEEN:

MURWANGI COMMUNITY ABORIGINAL CORPORATION
Appellant

AND:

DENIS MARTIN CARROLL
Respondent

CORAM: ANGEL, RILEY JJ & PRIESTLEY A/J

REASONS FOR JUDGMENT

(Delivered 16 October 2002)

THE COURT

[1] This appeal focuses attention upon the operation of sections 49 and 64 of the *Work Health Act (NT)*.

[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.

[3] On 12 March 1998 the respondent was injured in the course of his employment and, as a result, he was partially incapacitated for work from that date. Notwithstanding his reduced capacity for work he continued his employment with the appellant for almost two years. In that time his employer provided him with modified duties and additional manpower to assist him in the fulfillment of his employment obligations. His employment was terminated by the appellant on 31 March 2000 at which time his incapacity remained partial and ongoing.

[4] Subsequent to the cessation of his employment the worker pursued a claim for compensation in the Work Health Court. By the time the matter reached this Court only two issues continued to be agitated.

Normal Weekly Earnings

[5] The first of those issues centred upon the interpretation of s 49 of the *Work Health Act (NT)* and, in particular, whether an amount reflecting the value of the provision of free food, accommodation and electricity was to be included within the normal weekly earnings of the worker for the purpose of determining the compensation payable to him.

[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.

[7] Normal weekly earnings is defined in s 49 of the *Work Health Act (NT)* by reference to various circumstances. For present purposes the relevant definition is contained in par (d)(ii) of the definition which provides that where the worker is remunerated in whole or in part other than by reference to the number of hours worked, normal weekly earnings means:

> "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."

[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.

[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. We make reference to three of those cases.

[10] In *Skailes v Blue Anchor Line Ltd* [1911] 1 KB 360 Cozens-Hardy MR said (at 363-4):

> "Now 'remuneration' is not the same thing as salary or cash payment by the employer … I do not think it is open to this Court, after our decision in *Dothie v Robert Macandrew & Co*, to take any other view. We there held that the value of board and lodging must be brought into account in considering whether the remuneration of the deceased man exceeded £250, and that the mere cash salary was not to be solely regarded."

[11] In the same case Fletcher Moulton LJ said (at 369):

> "If in addition to wages there is remuneration in kind, such as gratuitous board and lodging, it must take a fair estimate of the annual value of such remuneration to the workman."

[12] In *Dawson v Bankers and Traders Insurance Co. Ltd.* [1957] VR 491 Sholl J said (at 497):

> "Board and lodging are properly included in remuneration, - at any rate where they are not provided solely for the benefit of the employer".

[13] In more recent times the Australian Industrial Relations Commission in *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78 said (at 81):

> "The term now used is 'remuneration', a term which denotes a broader concept than salary or wages. 'Remuneration', in our view, is properly defined as the reward payable by an employer to an employee for the work done by that employee in the course of his or her employment with that employer. It is a term that is confined neither to cash payments nor, necessarily, to payments actually made

> to the employee. It would include non-pecuniary benefits and payments made on behalf of and at the direction of the employee to another person out of moneys otherwise due to that employee as salary or wages."

[14] In the hearing before this Court the employer did not seek to argue that the benefits received by the worker by way of free rent, board and electricity were not to be regarded as items of remuneration. Rather it was contended that such benefits were to be excluded from the normal weekly earnings of the worker by operation of s 49(2) of the *Work Health Act (NT)*. That section is in the following terms:

> "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."

[15] The submission of the employer was to the effect that in the circumstances of the present matter the benefits of free rent, board and electricity received by the worker must be regarded as "allowances" for the purposes of s 49(2) and, as they do not fall within the inclusionary provisions of s 49(2) they must be excluded as "any other allowance".

[16] It is therefore necessary to consider what is meant by the term "allowance" in the context of s 49 of the Act. In *Mutual Acceptance Co Ltd v The Federal Commissioner of Taxation* (1944) 69 CLR 389 Dixon J said (at 402):

> "'Allowance' is one of the many words which take their meaning from a context rather than affecting or controlling the meaning of other words of the context in which they occur. For, considered alone and at rest rather than at work with other words, it means the allowing of a thing or a thing allowed. It is only by its application that you discover the kind of thing in mind."

[17] In that case Latham CJ considered the meaning of the word in the context of an employment relationship. His Honour said (at 396-7):

> "When the word is used in connection with the relation of employer and employee it means in my opinion a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of that service. Expense allowances, travelling allowances, and entertainment allowances are payments additional to ordinary wages made for the purpose of meeting certain requirements of a service. Tropical allowances, overtime allowances, and extra pay by way of 'dirt money' are allowances as compensation for unusual conditions of service."

[18] 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.

[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 s 49(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 s 49(2) of the *Work Health Act (NT)*.

[20] Although the result is the same, in our opinion the reasoning adopted by the Supreme Court in *Palumpa Station Pty Ltd v Fox* (1999) 132 NTR 1 and in the Court below in this case, ought not be followed. In our opinion the non-monetary benefits received by the worker for food, accommodation and electricity were correctly included in the assessment of his normal weekly

earnings albeit for reasons different from those expressed by the Court below. We would dismiss the appeal on this ground.

The First 26 Weeks

[21] The remaining issue was whether, in the circumstances that prevailed, it was an error of law to find that the worker was entitled to weekly benefits pursuant to s 64 of the *Work Health Act (NT)* commencing at a date after the cessation of his employment.

[22] Section 64(1) of the *Work Health Act (NT)* is in the following terms:

> "Subject to sections 65A and 66, 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."

[23] The worker was injured on 12 March 1998 and, at that date, was unable to perform certain duties required of him in his employment with the employer. To meet that circumstance the employer modified the duties of the worker so that he was not required to perform heavier tasks and the worker had assigned to him other workers who assisted in the discharge of his duties. Although partially incapacitated for work as from 12 March 1998 he continued to work until he was dismissed on 31 March 2000. In the

intervening period he did not take any time off work which was productive of economic loss on his part.

[24] The issue for determination was the proper construction of s 64(1) of the *Work Health Act (NT)*. The employer contended that the worker was entitled to be compensated pursuant to that provision for a period of up to 26 weeks dated from the time that he became incapacitated for work. His entitlement to be compensated under the section existed in all periods in which he was totally or partially incapacitated for work up to a maximum of 26 weeks. This was so whether or not the incapacity for work resulted in actual loss of income to him. On the other hand the worker contended that compensation was payable pursuant to s 64(1) for a period or periods not exceeding 26 weeks subsequent to the date of injury but only for "the time or times when the worker is in need of financial compensation because of actual economic loss". The effect of the approach suggested by the worker was that entitlements to compensation pursuant to s 64(1) would only have commenced upon the worker leaving his employment and not whilst he continued in employment even though during that period he was partially incapacitated.

[25] The entitlement of a worker to compensation arises where the worker suffers injury that results in or materially contributes to the incapacity of the worker (s 53). When that occurs there is payable to the worker compensation as provided for in the Act. In relation to compensation for loss of earning capacity the first 26 weeks are governed by s 64 and

thereafter “long term incapacity” is governed by s 65 of the Act. In this matter, excluding unnecessary words, s 64 provides that, during the first 26 weeks of incapacity, a worker who is partially incapacitated for work as a result of an injury shall be paid 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 he or she first became entitled to compensation. Thereafter the worker is entitled to compensation equal to 75% of his or her loss of earning capacity up to a maximum amount.

[26] Incapacity for the purposes of the Act is defined to mean an inability or limited ability to undertake paid work because of an injury. Contrary to the submission made by the worker this does not imply the additional requirement of an economic loss suffered by the worker. All that is necessary for an entitlement to compensation to arise is a reduced capacity to undertake paid work whether or not that is productive of financial loss by the worker.

[27] By reference to the plain meaning of the words in s 64(1) it can be seen that the entitlement to compensation arises when the worker is at least partially incapacitated for work. It does not require that the partial incapacity for work be productive of economic loss suffered by the worker. The entitlement having been established by reference to incapacity the calculation of the compensation to be paid is determined by reference to the amount he or she actually earned in employment and assessing the extent to

which that is less than his or her normal weekly earnings. In circumstances where the worker is working at a reduced capacity but, nevertheless, is being paid his or her normal weekly earnings, compensation will not be payable. Notwithstanding that the worker continues to work, the period of 26 weeks commences and continues to run because the worker is partially incapacitated as a result of the injury.

[28] Contrary to the submission of the worker there is nothing in s 64 or elsewhere in the Act that compels the view that the 26 week period is limited to those periods where the incapacity is productive of actual financial loss. As the employer submitted to so find would involve the interpolation of words into s 64 as follows:

> "… during which the total period, or aggregate of the periods, of his or her total or partial incapacity *which resulted in actual economic loss* … does not exceed 26 weeks."

[29] Those words do not appear in the section and to include them would be to change the plain meaning of the words of the section.

[30] We were referred to the decision of the Chief Justice in *Rozycki v Work Social Club Katherine Inc* (1997) 112 NTR 19 and of the Court of Appeal in *Work Social Club Katherine Inc v Rozycki* (1998) 120 NTR 9. Those decisions are not inconsistent with the views expressed above. There the relevant incapacity of the worker did not arise until some three years after the injury occurred. There was no finding of any incapacity of a kind that resulted in a limitation upon the ability of the worker to undertake paid work

between the date of injury and the date upon which the worker in fact became incapacitated in that sense. In the Court of Appeal Mildren J noted (at 18) that "all the worker has to show to be entitled to compensation under s 64(1) is that the worker is totally incapacitated for work as the result of the injury, in the sense explained in *Arnotts Snack Products*". In *Arnotts Snack Products Pty Ltd v Yacob* (1985) 155 CLR 171 it was held that the partial incapacity must be accompanied by a "loss of earning power" or, to use the expression in the *Work Health Act (NT)* "a limited ability to undertake paid work".

[31] In the present case the worker was incapacitated within the meaning of that expression as defined for the entirety of the period from 12 March 1998 to the date of termination of his employment on 31 March 2000 and beyond. During that period he had a limited ability to undertake the duties of his paid employment. He had a limited ability to undertake paid work because of his injury. He had suffered a loss of earning power. However he was not entitled to compensation because his employer continued to employ him despite his reduced capacity and paid him his normal weekly earnings as defined in the legislation. Any economic loss resulting from the injury was met by the employer. In our opinion, in the circumstances of this matter, the period of 26 weeks referred to in s 64(1) commenced on 12 March 1998 and continued uninterrupted until the period expired. The entitlement of the worker was thereafter to be assessed in accordance with s 65 of the Act.

[32] This approach to s 64(1) reflects the plain meaning of the words contained in the section and fosters the intention expressed in the legislation that the employer should take all reasonable steps to ensure the worker is provided with suitable employment.

[33] We would add that we have reached our conclusion on the proper construction of s 64(1) independently of *State Rail Authority of NSW v Belgrove* [1982] 2 NSWLR 738 to which we were not referred by counsel. In that case Mahoney JA, having (at 745F) said that the test laid down by the statute for the operation of s 9(1)(a) of the *Workers' Compensation Act* 1926 (NSW) "is incapacity, not liability to pay, or to be made to pay, compensation under the Act", went on to say (at 746C):

> 'Section 9(1) operates only where compensation is payable by the employer. In par (a) it provides for the basis of calculation of that compensation. It does so by indicating one basis where the preceding incapacity has not exceeded twenty-six weeks and another basis where it has. But the fact that those tests are relevant only where compensation is payable does not lead, in my opinion, to the requirement that the incapacity which is to constitute the test be limited to incapacity which has occurred when compensation was payable.'

We think that reasoning applies to s 64(1)(a) of the Northern Territory Act and note that *State Rail Authority of NSW v Belgrove,* supra, was approved in *Steggles Pty Ltd v Vandenberg* (1987) 163 CLR 321 at 326.

[34] The appeal should be allowed on the ground that the learned Judge erred in law in finding that the respondent was entitled to weekly benefits pursuant to s 64 *Work Health Act (NT)* commencing from 11 May 2000.