NT Drilling Pty Ltd v McFarland [2005] NTSC 2

PARTIES:	NT DRILLING PTY LTD (ACN 090 669 542) v GARY JOHN McFARLAND
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE WORK HEALTH COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	LA 1 of 2004 (20113035)
DELIVERED:	4 February 2005
HEARING DATES:	2 February 2005
DECISION OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	M.P. Grant
Respondent:	J.M. Neill

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Ward Keller

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

NT Drilling Pty Ltd v Gary John McFarland [2005] NTSC 2
No LA 1 of 2004 (20113035)

BETWEEN:

NT DRILLING PTY LTD
(ACN 090 669 542)
Appellant

AND:

GARY JOHN McFARLAND
Respondent

CORAM: RILEY J

REASONS FOR DECISION

(Delivered 4 February 2005)

[1] On 15 April 2004 I heard an appeal from the Work Health Court. The appellant was the employer and the respondent was the worker. A cross-appeal by the worker was heard at the same time.

[2] On 30 April 2004 I delivered judgment in relation to both appeals. I allowed the appeal of the employer in part and I dismissed the cross-appeal. The matter was then adjourned to enable the parties to formulate orders and to endeavour to agree the appropriate costs orders. There is now some level

of agreement as to the appropriate orders but the issue of costs remains in dispute.

[3] There were four principal issues raised in the appeal by the employer. The first was whether the superannuation contributions made by the employer on behalf of the worker were to be treated as part of the normal weekly earnings of the worker for the purposes of the Work Health Act. Consistent with the decision of the Work Health Court I concluded they were. The employer was unsuccessful on this ground of appeal.

[4] The next ground of appeal related to whether payment of rent made by the employer on behalf of the worker was to be included in the calculation of the normal weekly earnings of the worker. Again I upheld the decision of the court below and the employer was unsuccessful on this ground of appeal.

[5] The third ground related to the use of the employer's motor vehicle by the worker. The learned magistrate had found that an amount should be included in the remuneration of the worker to reflect this situation. I ruled that error had occurred and the employer was successful in this regard.

[6] The final issue in the appeal by the employer was concerned with a claim for the payment of interest by the employer pursuant to s 109 of the Act. The learned magistrate ruled that such interest was payable. I allowed the appeal and the employer was successful in that regard.

[7] Before the court on appeal the employer was successful in relation to two of the four matters addressed. Three of those issues were accepted by the parties as being significant issues in terms of both time taken in argument and importance in the conduct of the proceedings. The fourth, being the liability for interest pursuant to s 109 of the Work Health Act, was less so.

[8] The cross-appeal of the worker raised two issues for consideration, being the order for costs made by the court below and whether the court correctly took into account the incidence of taxation on non-cash remuneration. These were both agreed to be significant issues for present purposes. I dismissed both grounds of the cross-appeal.

[9] I am now invited to make rulings in relation to the costs of the proceedings before the Work Health Court and in relation to the proceedings in this court.

[10] In the Work Health Court the learned magistrate ordered that the employer pay 90 per cent of the worker's costs at the appropriate scale. His Worship did so because, although the worker was successful overall, he thought that it would be wrong for the employer to have to pay the entire costs given that it was successful on the important issue relating to the impact of taxation on non-cash benefits.

[11] In relation to the costs in the court below the employer submitted that I ought to reduce the figure from 90 per cent to 85 per cent. The worker submitted that I should not alter the order of the Work Health Court,

notwithstanding the success of the employer in relation to some issues on appeal.

[12] The submissions of the worker included that the effect of the success of the appeal did not make a significant monetary difference to the award made in the Work Health Court. It was submitted that the consequence was "the removal of the relatively small sum of $62.50 per week". I do not agree with that submission. In my opinion the amount involved was significant. In any event I do not agree with the submission that this is the major criterion by which I should exercise my discretion in the circumstances of this case. The exercise of my discretion is to be addressed in light of the nature of the issues raised in the proceedings, the time taken in addressing those issues and the overall importance of the issues to the parties in the context of the case. The dollar consequences that flow from the resolution of issues may be important in some cases but not in the present case.

[13] The principles to be applied are set out in various decisions which I do not propose to address. I have referred to some of them in general terms in my earlier reasons. I have had further reference to *Cretazzo v Lombardi* (1975) 13 SASR 4, *Hughes v Western Australian Cricket Association (Inc.) & Ors* (1986) ATPR 48, *North Australian Aboriginal Legal Aid Service Inc v Bradley (No 2)* FCA 564, *Penfold & Anor v Higgins & Anor* (2002) NTSC 65 and *McAuliffe v Vogler* (1992) 110 FLR 454 and the cases referred to in those authorities.

[14] In the Work Health Court the claim of the worker to compensation was not disputed. The principal issues agitated were the same issues as were addressed in this Court. As the matter stood before the hearing of the appeal to this Court it seems to me that the order for costs made in the Work Health Court in favour of the worker was appropriate. The employer has now been successful to some extent on the appeal. A further significant issue has been resolved in its favour. I think that the reduced allowance of 85 per cent suggested by the employer appropriately recognises that the employer has been successful on the issues to which reference has been made. The employer will pay 85 per cent of the worker's costs of and incidental to the proceedings in the Work Health Court assessed at 100 per cent of the Supreme Court Scale.

[15] In relation to the costs of the appeal and cross-appeal I note that the employer was successful in relation to two out of the four issues agitated in the appeal. One of those issues was less significant for present purposes than the others. The worker was entirely unsuccessful on the cross-appeal including the challenge to the ruling on the impact of taxation upon the non-cash component of normal weekly earnings which was a major issue on the hearing of the appeal. The employer was more successful on the appeal and the cross-appeal than was the worker. Although I have looked at the individual issues addressed and resolved, I have taken a global view of the proceedings in order to determine what is an appropriate order in all the circumstances. Doing the best I can in the circumstances and bearing in

mind the observations in the authorities to which I have referred, I order that the worker pay 50 per cent of the employer's costs of and incidental to the appeal and cross-appeal assessed at 100 per cent of the Supreme Court Scale.

[16] In addition I make the following orders: (1) that the determination of the Work Health Court in relation to the calculation of normal weekly earnings is set aside and varied only to the extent that the calculation not include any amount for the respondent's use of the appellant's motor vehicle and petrol; (2) that the determination of the Work Health Court in relation to s 109 interest is set aside.

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