Waylexson Pty Ltd v Clarke [2010] NTCA 1

PARTIES:	WAYLEXSON PTY LTD t/as PETERSON EARTHMOVING REPAIRS v CLARKE, PAUL JOHN
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 2 OF 2009 (20531308)
DELIVERED:	20 January 2010
HEARING DATES:	6 & 20 November, 7 & 24 December 2009
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & RILEY JJ
APPEAL FROM:	SOUTHWOOD J

CATCHWORDS:

WORKERS' COMPENSATION – Appeals – Jurisdiction of the Court of Appeal – Appeal on question of law – Injury arising out of or in the course of his employment – whether injury during 'interval' of work arose out of the course of the employment – finding by Work Health Court that employer had not encouraged the employee to go on the excursion giving rise to the injury – Supreme Court held that the employee was engaged in a particular activity encouraged by the employer – whether finding by Work Health Court wrong in law – *Workers Rehabilitation and Compensation Act* s 116(1) – appeal dismissed

Work Health Act (NT); *Workers Rehabilitation and Compensation Act* (NT), s 3, s 53(1), s 57, s 116, s 116(1)

Hatzimanolis v ANI Corporation Limited (1992) 173 CLR 473; *Hope v The Council of the City of Bathurst* (1980) 144 CLR 1; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439; applied

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation (1997) 115 NTR 25; followed

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 ; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139; *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146; *Collector of Customs v Agfa-Gevaert Limited* (1996) 186 CLR 389; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280; *Comcare v Mather* (1995) 56 FCR 456; *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529; *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47; *Humphrey Earl Ltd v Speechley* (1951) 84 CLR 126; *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562; *The Commonwealth v Oliver* (1962) 107 CLR 353; *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239; referred to

REPRESENTATION:

Counsel:

Appellant:	P Barr QC
Respondent:	S Walsh QC

Solicitors:

Appellant:	Hunt & Hunt Lawyers
Respondent:	Pipers

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

Waylexson Pty Ltd v Clarke [2010] NTCA 1
No AP 2 of 2009 (20531308)

BETWEEN:

WAYLEXSON PTY LTD t/as PETERSON EARTHMOVING REPAIRS
Appellant

AND:

PAUL JOHN CLARKE
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 20 January 2010)

MARTIN CJ:

[1] I agree that the appeal should be dismissed. The decision of the learned Judge on appeal was correct.

MILDREN J:

[2] At about 1:00 am on Tuesday 26 July 2005, the respondent worker was injured in a motor vehicle accident whilst travelling from Jabiru towards Oenpelli in order to go fishing with his supervisor, Mark Todd, and another worker, at Cahill's Crossing on the East Alligator River. The accident occurred during the period of the worker's shift change. The Work Health

Court dismissed the respondent's claim because the Court found that the respondent had failed to prove that the respondent's injuries arose in the course of his employment.

[3] The respondent's appeal to the Supreme Court was heard by Southwood J who found that the learned Magistrate, constituting the Work Health Court, had erred by failing to address the correct question in deciding whether or not the injuries were sustained in the course of the respondent's employment with the appellant. Southwood J found that, on the facts as found by the Magistrate, or otherwise not in dispute, the correct conclusion, as a matter of law, was that the injuries occurred in the course of the respondent's employment and he allowed the appeal. An appeal from the Work Health Court to the Supreme Court is limited to questions of law.[1] The appellant has appealed to this Court on grounds essentially challenging the correctness of the decision below that the learned Magistrate erred in law.

The facts

[4] At the material times, the respondent was a diesel fitter employed by the appellant. The appellant conducted a labour hire business, supplying skilled labour to remote mining sites in the Northern Territory. The respondent was deployed by the appellant to work at the Ranger Uranium Mine at Jabiru pursuant to a contract between the appellant and Energy Resources of Australia Limited (ERA), the owner and operator of the mine. It was a term of the respondent's employment that he would submit to supervision by

[1] *Workers Rehabilitation and Compensation Act* (NT), s 116(1).

ERA whilst working at the mine. The respondent's immediate supervisor was Mark Todd (Todd), an employee of ERA. For all intents and purposes the appellant had ceded supervision of the respondent to Todd. For most of the time, the appellant had no employer representative at the mine and the respondent was subject to very little supervision by the appellant, which consisted only of checking the respondent's timesheets and paying his wages. The respondent's duties involved the servicing, maintenance and repair of heavy earthmoving equipment.

[5] The respondent's home was at Palmerston in the Northern Territory. He worked on rostered cycles of seven days on and four days off, then seven days on and three days off. During his days off, he returned to his home in Palmerston.

[6] During his second seven-day cycle, he worked four-day shifts and three night shifts, each of 12 hours duration. The day shift started at 6:00 am and ended at 6:00 pm. The night shift started at 6:00 pm and ended at 6:00 am. When changing from a day shift to a night shift, the night shift would start at 6:00 pm on the day following the completion of a day shift.

[7] In the 24-hour period between a change from a day shift to a night shift, the respondent and other employees of ERA were instructed to stay awake until later at night on the day following the completion of a day shift and arise late the next day to enable their bodies to adjust to the change in shifts. The

respondent was expressly precluded from returning to his home during this interval between shift changes (the interval).

[8] At the material time, the respondent was accommodated at the Lakeview Caravan Park at Jabiru. After completing a day shift on 25 July 2005, the respondent returned to the Lakeview Caravan Park at about 6:30 pm. At this time, he was on a shift turn around to start a night shift commencing at 6:00 pm on 26 July 2005.

[9] At about 11:30 pm on 25 July 2005, Todd asked the respondent if he would like to go fishing with him. The respondent agreed and also agreed to lend his fishing rod to Todd. There are no findings as to the circumstances concerning this invitation. The evidence of the respondent, Todd and the witness Geoffrey Verzelletti, which does not appear to have been contested, was that the conversation occurred between 11:00 pm and midnight at the "fly-in/fly-out camp" not far from the caravan park. Nothing turns on this. Thereafter, it appears to have been common ground that the respondent, Todd and Verzelletti left the area to drive to Cahill's Crossing in order to go fishing using a company mini-bus rented by ERA from Thrifty Rent-A-Car. It was in the course of this journey that the accident occurred whilst the vehicle was being driven by Todd.

[10] The Work Health Court found that the respondent went on the trip for a number of reasons including as a means of staying awake to attune his body to the shift change and in order to keep on the good side of Todd, so as to

enhance his prospects of obtaining direct employment with ERA in the future. The Court found that there were limited suitable activities to fill in time and to assist the workers to stay awake during the interval. The Court also found that workers frequently went fishing during shift changes for the purpose of staying awake, as the respondent and others had been instructed to do.

[11] However, the Court found that "although ERA in general knew that workers engaged in fishing as a recreational activity, the corporation did not encourage or induce the activity as an activity to be engaged in during shift changes". Further, the Court found that Todd was not acting on behalf of ERA in encouraging the respondent and Verzelletti to go fishing during the early hours of 26 July 2005. Further, there was no evidence that Todd had authority from ERA, either express or implied, to encourage or induce workers to take part in night fishing activities in Kakadu National Park as part of ERA's general encouragement to workers to defer sleep as long as possible during shift changes.

[12] As to the use of the ERA vehicle, the Court found that Todd's use of that vehicle at that time for the purpose of going fishing at night was unauthorised. There was no finding that the respondent knew that this was so. The evidence, so far as activities to be undertaken during the interval of which the respondent was made aware, was that the respondent was left to his own devices except that he was not permitted to return home to Palmerston. It follows from this that fishing activities were not specifically

prohibited so far as the respondent was aware. The evidence of Mr Dawe, a Human Resource Manager for ERA at the relevant time, was that ERA had no specific policy about employees fishing during shift changes. There was a finding that ERA had not banned or discouraged workers from going fishing during shift changes since the accident. There were no findings that the respondent was guilty of any misconduct.

[13] So far as concerned Mr Peterson, who owned and managed the appellant company, the Court found that it had not been proved that he knew that the respondent went fishing at night during shift changes or that he was aware of the fishing excursion on 26 July 2005.

[14] There was no specific finding as to how far Cahill's Crossing is from Jabiru (and the evidence on that topic was inconsistent). There were no specific findings about conditions of the roads. The learned Magistrate did find that "driving at night on Territory roads, is an inherently dangerous exercise". His Honour also alluded to the danger of "fishing in waters which are known to be frequented by crocodiles", but did not specifically find that this activity could not be safely undertaken. However, he did find that "the activity was not one which a sensible employer would be minded to encourage or induce".

[15] There was no finding as to whether or not Todd had the apparent authority of ERA to invite the respondent to go fishing in ERA's vehicle at that time or at that location.

The reasoning of the Work Health Court

[16] The learned Magistrate concluded that Todd should not be viewed as synonymous with ERA and that it was important to keep in mind ERA's corporate structure and its chain of command. The authority of ERA's supervisors was confined to encouraging workers to stay awake for as long as possible during a shift change. There was no express or implied authority conferred upon Todd to encourage or induce workers to achieve that object by going fishing at night in Kakadu National Park and to use a company vehicle for that purpose. He also found that Todd was not acting on behalf of ERA at the relevant time and that the respondent was not subject to Todd's supervision then either. Even if he was subject to Todd's supervision, "given the unusual nature of the activity said to be encouraged – an activity which would not ordinarily be regarded as being incidental to employment – the employer would have had to have had specific knowledge of the encouragement or inducement in order for it to be properly attributed to it". As to Mr Peterson, he found that he was unable to be reasonably satisfied that he had induced or encouraged the respondent to take part in the excursion.

[17] After considering a number of relevant authorities, including the decision of the High Court in *Hatzimanolis v ANI Corporation Limited*,[2] the Court concluded that the injury occurred during an interval or interlude within an overall period or episode of work, but that the fishing excursion was not in

[2] (1992) 173 CLR 473.

the course of the respondent's employment, because Todd, in acting as he did, did not have the actual or implied authority of ERA to act as he did; and because ERA did not induce or encourage workers to leave the confines of the camp or the immediate environs of Jabiru township and to be at a particular place, such as one of the fishing spots frequented by workers. His Honour distinguished the decision of Keifel J in *Comcare v Mather*[3] on its facts because, in that case, although the employer (the Army) did not encourage any particular recreational activity whilst on leave, the Army by implication encouraged the men to leave the camp and pursue any lawful recreational activity, including drinking in hotels, because it had provided transport from the camp to licensed premises.

The reasoning of Southwood J

[18] His Honour, after referring to *Inverell Shire Council v Lewis*[4] and *Comcare v Mather*[5] said that it is not always necessary in an interval case between an overall period of work, to establish that the employer positively encouraged the precise activity which resulted in the worker's injury. He said that activities will fall within the course of employment if they are a reasonable or foreseeable incident of the undertaking that a worker has been encouraged to participate in by the employer, or if the activity falls within the ambit of the encouraged undertaking, or if the activity amounts to conduct which logically arises from the encouraged undertaking. The activity may be left

[3] (1995) 56 FCR 456.
[4] (1992) 8 NSWCCR 562.
[5] (1995) 56 FCR 456.

to the discretion or choice by the worker. This was consistent with the requirement, stated in *Hatzimanolis v ANI Corporation Limited*[6] that "regard must be had to the general nature, terms and circumstances of the employment and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen".

[19] Southwood J held that the Work Health Court erred by failing to address the question of whether the activity in which the worker was injured fell within the ambit of the employer's instructions to stay awake during a shift change; and failed to recognise the ordinary way in which workers at the mine may be expected to act during a shift change in the circumstances of their employment in a remote location.

[20] His Honour then considered what the correct legal conclusion on the facts was, by reference to the general nature, terms and circumstances of the employment and not merely by reference to the particular circumstances out of which the injury to the worker had arisen. His Honour said that the question to be determined was whether the undertaking fell within the instruction to stay awake as long as possible and whether the activity logically arose from that instruction or was a reasonable and foreseeable incident of the instruction. He held that the incident during which the respondent was injured was "an incident growing out of his employment"; he was acting in the ordinary way those employed at the Ranger Uranium Mine might be expected to act in order to stay awake as long as possible

[6] (1992) 173 CLR 473 at 484 per Mason CJ, Deane, Dawson and McHugh JJ.

during a change over between shifts and that it was a reasonable and foreseeable incident of the instruction to stay awake. His Honour concluded that the injury occurred in the course of his employment.

Submissions of the parties

[21] It is common ground that the learned Magistrate correctly concluded that the period of the respondent's shift change was an interval or interlude within an overall period or episode of work, rather than an interval between two discrete periods of work. This is clearly correct. In *Hatzimanolis v ANI Corporation Limited*,[7] the majority said that, "where an employee is required to embark upon some undertaking for the purpose of his or her work in circumstances where, notwithstanding that it extends over a number of daily periods of work, the whole period of the undertaking constitutes an overall period of work". The classical example of such a case occurs when an employee is required to go to a remote place to live where accommodation is provided by the employer for a limited time until a particular undertaking is completed, as was the case in *Danvers v Comissioner for Railways (NSW)*[8] and *Hatzimanolis* itself. Cases where employees are flown in (or otherwise brought in whether by their own transport or not) to a remote area for a few weeks and then returned home also fit this description. However, these are only examples of general principle. Cases such as *The Commonwealth v Oliver*[9] where the workers are encouraged to remain at the employer's

[7] (1992) 173 CLR 473.
[8] (1969) 122 CLR 529.
[9] (1962) 107 CLR 353.

premises during the lunch hour also fit the description although the workers go home at the end of the working day.[10]

[22] Mr Barr QC for the appellant submitted that the relevant question to be determined by the Work Health Court was:

> Did the employer expressly or impliedly induce or encourage the worker to spend the shift change interval at a particular place or in a particular way such that it could be said that the worker's injury sustained in the shift change interval occurred 'at the place or while the employee was engaged in that activity'?

[23] Mr Barr QC submitted that, having correctly identified the relevant question, the answer to that question was one of fact, relying on the observations of Walsh J in *Bill Williams Pty Ltd v Williams*.[11] That was an unusual case. The Workers Compensation Commission had found that a worker who fled from the employer's premises to avoid an irate husband threatening him with a rifle and who was shot in the back whilst running into the street, was not injured in the course of his employment. The Commission stated a case to the Court of Appeal of New South Wales asking whether, on the facts found by the Commission, the decision reached was right. The Court of Appeal answered the question in the negative, but in doing so referred to the transcript of the evidence. On appeal, McTiernan J held that the finding that the applicant's flight from the employment was not an incident of his employment was one of fact, even if

[10] *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473 at 483.
[11] (1972) 126 CLR 146.

the finding was unreasonable.[12] Menzies J found that the conclusion of the Commission that the employment had been interrupted at a time before the worker fled the premises was a question of fact for the trial judge.[13] Walsh J held that it is only where the facts found were such that as a necessary legal consequence the worker must have been held to have been in the course of his employment that an error of law can be attributed to the primary judge, but, if different conclusions are reasonably possible, determination of the correct conclusion is a question of fact. As the ultimate conclusion reached by the Commission was open to it, the question was one of fact and not law.[14]

[24] The appellant's submission was that it was for the learned Magistrate to identify the real activity in which the respondent was engaged during the interval and that the real activity was not staying awake, but a night-time fishing excursion combined with a long trip. In relation to that activity, the Magistrate found that there was no implied encouragement by ERA or the appellant. The nub of this submission seems to be that this finding was open to the Work Health Court and that even if a different conclusion was open, the facts as found did not compel a conclusion that the injury occurred in the course of the respondent's employment.

[25] Counsel for the respondent, Mr Walsh QC, submitted that whether or not the facts as found by the learned Magistrate fit the description of a legal term,

[12] (1972) 126 CLR 146 at 148.
[13] (1972) 126 CLR 146 at 151-152; Stephen J concurring at 159.
[14] (1972) 126 CLR 146 at 155-157.

such as the phrase "arising out of the course of his employment" is always a question of law, citing *Hope v The Council of the City of Bathurst*.[15] Likewise, he submitted that whether or not a particular inference can be drawn from facts found or agreed is a question of law.[16] If the correct legal test was not applied to the facts as found, that would also be an error of law. Mr Walsh QC's submission was that Southwood J correctly found that the Work Health Court applied the wrong test and that had the correct test been applied, the only conclusion open was that the injury was caused in the course of the respondent's employment.

Conclusions

[26] The difference between what is a question of fact and what is a question of law is often a difficult one. As was observed in *Collector of Customs v Agfa-Gevaert Limited*,[17] no satisfactory test of universal application has yet been formulated.

[27] This Court has previously decided that whether or not on the facts as found or not in dispute, a worker suffered an injury in the course of his employment is a question of law, the question being whether or not there was evidence upon which the Court could competently find that the worker's injuries arose out of the course of his employment.[18] A similar conclusion

[15] (1980) 144 CLR 1 at 7 per Mason CJ.
[16] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 per Mason CJ, Brennan J concurring; per Deane J at 367-368.
[17] (1996) 186 CLR 389 at 394.
[18] *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239 at 245.

was reached in *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*.[19]

[28] The matter was put somewhat more strongly in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*,[20] where the Full Federal Court held that "the question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law". This was subject to the qualification that, where the statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question as to whether they do or do not is one of fact.[21]

[29] In *Hayes v Federal Commissioner of Taxation*,[22] Fullagher J seems to have accepted a more rigorous test, relying on a distinction drawn by Wigmore between the *factum probandum* (the ultimate fact in issue) and *facta probantia* (the facts adduced to prove or disprove that ultimate fact). His Honour said:

> Where the *factum probandum* involves a term used in a statute, the question whether the accepted *facta probantia* establish that *factum probandum* will generally – as far as I can see, always – be a question of law.[23]

[19] (1997) 115 NTR 25 at 35-36.
[20] (1993) 43 FCR 280 at 287.
[21] *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, citing *Hope v The Council of the City of Bathurst* (1980) 144 CLR 1 at 8.
[22] (1956) 96 CLR 47.
[23] *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 at 51.

[30] The decision in *Hayes* was expressly approved by the High Court in *Hope v The Council of the City of Bathurst*,[24] with the rider, however, that if the statute uses words according to their common understanding (which itself is a question of law), the question then is whether or not the facts as found reasonably admit of different conclusions as to whether or not the facts fall within the ordinary meaning of the words so determined and that is a question of law. If different conclusions are reasonably open, the question of which is the correct conclusion is a question of fact.[25]

[31] The decision in *Hope* has not been overruled and has been consistently followed and applied by all Courts for many years, including recently by the High Court in *Vetter v Lake Macquarie City Council*.[26] However, there is dicta in the authorities to the effect that the expression "injury arising out of the course of the employment" is an expression which has its ordinary meaning in common speech. The leading authority is *Azzopardi v Tasman UEB Industries Ltd*,[27] which Gallop J cited with approval in *Tiver Constructions Pty Ltd v Clair*.[28] This approach is consistent with *Humphrey Earl Ltd v Speechley*[29] and also with the way in which the High Court expressed its conclusions in *Hatzimanolis.*[30]

[24] (1980) 144 CLR 1 at 7 per Mason J; Gibbs, Stephen, Murphy and Aitken JJ concurring.
[25] *Hope v The Council of the City of Bathurst* (1956) 96 CLR 47 at 7-8.
[26] (2001) 202 CLR 439 at 450-451 per Gleeson CJ, Gummow and Callinan JJ; at 477-478 per Hayne J.
[27] (1985) 4 NSWLR 139 at 157 per Glass JA; Samuels JA concurring.
[28] (1992) 110 FLR 239 at 242.
[29] (1951) 84 CLR 126 at 134.
[30] (1992) 173 CLR 473 at 486; 491, where the Court refers to the conclusion as "inevitable".

[32] Despite the fact that the expression, particularly in interval cases, has been given a meaning which might be argued to be a technical legal meaning, I do not think that it can now be argued that we are free to draw our own conclusions as to whether or not, on the facts as found, the facts fall within the description "arising out of the employment" if all that is demonstrated is that the ultimate conclusion reached was reasonably open to a different conclusion from that reached by the learned Magistrate. Specific error aside, what must be demonstrated to establish an error of law, is that there is really only one conclusion reasonably open (or to adopt the expression used in *Hatzimanolis*, a finding to the contrary was "inevitable") and that was a conclusion which differs from the conclusion reached by the learned Magistrate.

Did the learned Magistrate err in his approach?

[33] The relevant question is whether the employer, expressly or impliedly, induced or encouraged the worker to spend the interval or interlude at a particular place or in a particular way, having regard to the general nature, terms and circumstances of the employment and not merely to the circumstances of the particular occasion out of which the injury to the respondent has arisen.[31]

[34] However, I do not understand the High Court in *Hatzimanolis* to be using the expression "impliedly" in the same legal sense as that word is used in the cases dealing with implied authority in the general law of agency. First,

[31] *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473 at 484.

their Honours did not discuss what the situation would be if the supervisor who organised the trip on that occasion had the apparent or ostensible authority of the employer to do so. Yet in agency law, a principal will be bound by the acts of his agent in such circumstances. One way in which a principal can be bound by the acts of an agent is by conduct, e.g. by permitting the agent to act in some way in the course of the principal's business, to the extent that the acts performed by the agent are those normally implied from the circumstances. In any event, the distinction between implied authority and apparent authority is not always easy to draw. Further what the test requires is whether the employer impliedly "induced or encouraged". As Keifel J said in *Comcare v Mather*[32] "'encouragement' is not to be taken as a narrow meaning and limited to positive action and in specific terms which might lead the employee to undertake a particular activity or attend at a particular place".

[35] It is to be noted that the "encouragement" may be either to undertake a particular activity or to attend a particular place, or both. In *Comcare v Mather,* the encouragement was found to be satisfied when the employer left to the employees some choice as to location as well as to the activity to be undertaken, but the encouragement would have been satisfied if it fell into either category.[33]

[32] (1995) 56 FCR 456 at 462.
[33] (1995) 56 FCR 456 at 463.

[36] Southwood J found that the learned Magistrate erred because he characterised the activity as participating in night fishing activities (including going on the journey to Cahill's Crossing)[34] or "to engage in the fishing excursion"[35]. Southwood J characterised the relevant activity as "staying awake". The correct characterisation of the relevant activity is critical to the outcome of this appeal.

[37] In *Danvers v Commissioner for Railways (NSW)*,[36] an employee of the Commissioner for Railways died in a fire that destroyed a railway van standing at a siding in a remote locality. The van was fitted out to provide lodgings for two employees. The fire occurred in the evening at some time after the deceased retired. The inference was that he died whilst asleep in the bed provided, or at least resting. His death was held to have arisen in the course of his employment. The activity which the deceased was engaged in, in that case, was sleeping, or resting, in the van provided to him for that purpose by his employer. His presence in the van was a practical necessity in order for him to do his job and the van and its contents were provided so that he may live on the job as conducive to his employment. He was also at a place during the interval which his employer encouraged him to stay for the same purposes.

[34] Reasons, para [66].
[35] Reasons, para [88]; para [120].
[36] (1969) 122 CLR 529.

[38] In *Hatzimanolis*[37] the worker was employed on a project at the remote location of a mine at Mt Newman in Western Australia. The employee's supervisor organised a trip to Wittenoom Gorge on a work free Sunday during an overall interval of work. The group travelled in the employer's vehicle. The worker was injured during the course of the trip when the vehicle in which he was travelling crashed. The facts established that the supervisor was acting on behalf of the employer when he organised the trip and he had the employer's authority to use the employer's vehicle for this purpose. The Court held that the injury arose out of the course of his employment. In that case, the evidence established that the employer encouraged the worker to spend the interval in a particular way, viz to go on the trip.

[39] In *Inverell Shire Council v Lewis*,[38] the worker was temporarily living in a caravan park whilst attending a training course arranged by his employer. During an interval in the overall episode of work, the employee attended at another caravan in the caravan park to have a cup of coffee with a Miss Davis who was unrelated to the employment. An altercation occurred as a result of which the worker was shot by Miss Davis' brother. The majority of the Court held that the injury occurred in the course of the employment because it occurred at the place where the employer encouraged the worker to stay, namely the caravan park, and the employer must have contemplated that he would use his free time in and around the caravan park. Although

[37] (1992) 173 CLR 473.
[38] (1992) 8 NSWCCR 562.

the employer had not encouraged the worker to visit Miss Davis that evening, the social visit 'was a reasonable and foreseeable incident of his residence at the park".[39] The majority decision characterised the case as one where the employee was encouraged to be at a particular place and extended the place to include Miss Davis' caravan as well. Sheller JA approached the case on the basis that although it was a relevant factor that he was within the park at the time of the injury, taking into account that the worker had been encouraged to spend his time taking part in other social activities in the park, the injury arose in the course of his employment.[40] Thus, the majority view was that the worker's injury occurred at a place he was encouraged to be, whilst Sheller JA seems to have dealt with it as an activity which the employer encouraged.

[40] In *Comcare v Mather*,[41] two soldiers had been taking part in a large-scale military training exercise. They (as well as others) were granted local leave which permitted them to stay away from the camp where they were otherwise required to be. The leave was given for recreational purposes and was regarded as being good for morale and important to maintaining a freshness of approach to their duties. There were no restrictions placed on where they could go except that they were to remain within the exercise area and two particular hotels were "off limits". Transport was provided to a casino and a hotel within the environs of Darwin and it was anticipated that

[39] per Handley JA at 545; Clarke JA concurring.
[40] at 547.
[41] (1995) 56 FCR 456.

most would take their leave in Darwin and its environs. The two soldiers spent the day at various locations in and around Darwin within the limits of the exercise area and, later, took a taxi to the Humpty Doo Hotel. Later in the evening, when they were unable to procure a taxi to return to camp, they proceeded on foot along the Arnhem Highway when both were struck by a passing intoxicated motorist.

[41] The Administrative Appeals Tribunal found that there was no express encouragement to the men to attend at a bar or hotel. The Tribunal found that the men had attended the hotel on a social occasion and in the exercise of their choice as to how to spend their leave. The Tribunal found that the circumstances suggested that there was an express or implied inducement or encouragement to take leave pursuing recreational activities and it was reasonably incidental to this that they would attend at a place such as the Humpty Doo Hotel and return later that evening. This was a finding that the employer encouraged the men to take their leave in a particular way. It was submitted that the Tribunal had erred because the evidence did not support a conclusion that the particular activity on which the men had been engaged was encouraged by the employer. Keifel J rejected this submission holding that the test in *Hatzimanolis* was not limited to some positive action and in specific terms which might lead to the employee to undertake a particular activity or to attend a particular place. Her Honour said:[42]

[42] at 462-463.

> In each case, the question will be whether the attendance at the place at which or the undertaking in which the employee is involved when injured in an interval falls within the ambit of statements, acts or conduct made by the employer and what may be said to logically arise from them. And in each case, importantly, they must be viewed in the background of the particular employment and the circumstances in which the employer (sic) is then placed.

[42] Her Honour's conclusion was expressed in the following paragraph:[43]

> The terms of the inducement or encouragement here were such as to leave the soldiers some choice as to location and activity to be undertaken during the interval in question. Attendance at locations outside the boundaries or even beyond points which could be conveniently accessed by available transport in the short period allowed and undertaking activities which could not be regarded as social or recreational pursuits may not fall within the compass of the matters in which the Army might expect or foresee the soldiers participation. Drinking and socialising at hotels and returning to camp from not-distant points do not however fall into this category. The soldiers' participation in them and which placed them on the highway at the relevant time was encouraged by the Army by the grant of local leave which, of its nature and having regard to the conditions of the exercise, implied these undertakings. The encouragement could fall into either category in *Hatzimanolis*, that the soldiers spend the interval in a place of their choice or in a way chosen by them, the latter being the finding of the Tribunal.

[43] Thus, in this case, no narrow meaning was given either to the "particular place" (which was anywhere in the exercise area except the two hotels which were off limits") or to the "particular way" (recreational activities, where the choice of which activities was left to them, subject only to the same restrictions).

[44] In my opinion, the conclusion which Southwood J reached was correct. The learned Magistrate focused his attention on the fishing expedition, rather

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[43] at 463.

than the real activity which was “staying awake”, when he found that the worker went on the trip to stay awake, there were limited suitable activities available to fill in time to assist workers to stay awake whilst making the advisable adjustment to sleeping during the day, the employer left the choice to the respondent as to how he might achieve that objective, subject only to the restriction that he was not to return to his home in Palmerston and the employer encouraged the workers to stay awake for as long as possible. The means employed by the worker were not expressly prohibited and the employer knew that its workers frequently went fishing during shift changes out of Jabiru and within the boundaries of Kakadu National Park and did nothing to discourage this. Further, although this is not essential, it might be inferred that the purpose of encouraging the workers to stay awake was to improve safety and efficiency at the mine. In order to succeed, the respondent did not have to show that the activity of taking a fishing trip at night was either expressly or impliedly approved by his employer. This confuses the “activity” in the broad sense with the means by which the activity was accomplished, which was left to the respondent.

[45] Further, the question whether Todd had the authority to use the employer’s vehicle was in this case irrelevant. It may have been relevant if there had been a finding of gross misconduct on the part of the respondent (such as he knew that the use of the vehicle was forbidden), in which case other considerations would have had to be taken into account, including whether,

in terms of s 57 of the Act, the worker had suffered permanent or long-term incapacity.[44]

[46] I would dismiss the appeal with costs.

RILEY J:

[47] The Respondent worker was injured in a motor vehicle accident which occurred in the early hours of the morning of 26 July 2005. At that time he and a fellow worker were passengers in a vehicle being driven by Mark Todd from Jabiru towards Cahill's Crossing on the East Alligator River where they had intended to go fishing. The worker made a claim for benefits under the provisions of the *Workers Rehabilitation and Compensation Act*[45] in relation to the injuries he sustained. On 30 October 2007 the worker's claim was dismissed and he appealed to the Supreme Court. On 14 May 2009 Southwood J allowed the appeal and made orders requiring the employer to make weekly payments and payments of other compensation pursuant to the *Workers Rehabilitation and Compensation Act*. The employer has now appealed to this Court from the decision of his Honour.

The employment relationship

[48] At the time of the injury the worker was employed by the employer as a diesel fitter and was subcontracted to Energy Resources Australia Ltd (ERA) to work at the Ranger Uranium Mine near Jabiru. He was directed by the

[44] See *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239 at 247-248.
[45] Formerly the *Work Health Act*.

employer to work under the supervision, direction and control of the supervisory staff of ERA. Mr Todd, the driver of the motor vehicle, was employed by ERA and was the immediate supervisor of the worker whilst he was employed at the Ranger Mine. The learned magistrate, at first instance, concluded that for all intents and purposes the employer had ceded supervision of the worker to the ERA supervisor.

[49] The worker was employed to work a cycle of day shifts (from 6.00 am to 6.00 pm) and night shifts (from 6.00 pm to 6.00 am) and, whilst working those shifts, was accommodated at a caravan park in Jabiru. During the course of the work cycle the worker moved from day shifts to night shifts. The worker completed a series of day shifts at 6 pm on 25 July 2005 and was to commence a night shift at 6.00 pm on 26 July 2005.

[50] The magistrate found that it was common practice at the Ranger Mine for workers on a turnaround from day shifts to night shifts to stay up late into the night so that they awoke well into the following day to enable their bodies to adjust to the forthcoming night shift. The worker was aware of the practice and was encouraged by his supervisors to endeavour to remain awake for as long as possible during the course of a shift change. There were limited activities available to assist workers in remaining awake. Whilst the worker would return to his home in Palmerston on his days off he was not permitted to do so during the course of the work cycle.

The circumstances of the motor vehicle accident

[51] At about 11:30 pm on the night in question the worker was approached by his supervisor Mr Todd and invited to go fishing. This was not a planned fishing expedition. It was arranged in a spontaneous manner. The presiding magistrate found that the worker went on the fishing trip for various reasons including to stay up late to attune his body to the shift change and also because he was conscious of keeping on the good side of his immediate superior Mr Todd in order to enhance his prospects of obtaining direct employment with ERA.

[52] The motor vehicle driven by Mr Todd at the time of the accident was hired by ERA. Mr Todd was not authorised to use the motor vehicle as he did. It was not a permissible use of the vehicle to transport workers to and from fishing spots at night. Indeed Mr Todd was subsequently dismissed for the unauthorised use of the vehicle on this occasion.

[53] The worker was injured when Mr Todd lost control of the vehicle and it ran off the road and collided with some trees near Magella Creek.

The decision of the Work Health Court

[54] The presiding magistrate in the Work Health Court found that whilst the period of the shift change amounted to an interval or interlude occurring within an overall period or episode of work, the worker failed to establish on the balance of probabilities that the fishing expedition which resulted in his injury arose in the course of his employment.

[55] In his reasons for decision the magistrate addressed in some detail the judgments of the High Court in *Hatzimanolis v ANI Corporation Limited.*[46] In that case the Court discussed the principles to be applied in relation to a claim arising out of an injury occurring to a worker between periods of actual work in the context of the worker being required to go to a remote place, and live in accommodation provided by the employer, for the purpose of completing a particular undertaking. In those circumstances, even though the period of the undertaking extended over a number of daily periods of actual work, the Court held that the whole period of the undertaking constituted one overall period or episode of work, and not a series of discrete periods or episodes of work. The majority (Mason CJ, Deane, Dawson and McHugh JJ), in what is now a familiar passage, said:[47]

> An injury occurring during the interval between periods of actual work in such a case is more readily perceived as being within the current conception of the course of employment than an injury occurring after ordinary working hours to an employee who performs his or her work at a permanent location or in a permanent locality.
>
> Moreover, *Oliver* and the cases which follow it show that an interval or interlude in an overall period or episode of work will ordinarily be seen as being part of the course of employment if the employer, expressly or impliedly, has induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way. Indeed, the modern cases show that, absent gross misconduct on the part of the employee, an injury occurring during such an interval or interlude will invariably result in a finding that the injury occurred in the course of employment. Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee

[46] (1992) 173 CLR 473.
[47] (1992) 173 CLR 473 at 483–484.

> to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment "and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen".

[56] It is not disputed that the worker in the present proceedings was injured during an interval or interlude within an overall period or episode of work. A finding to this effect was made by the presiding magistrate and it was accepted by the learned judge. On appeal the issue for determination was whether the employer expressly or impliedly induced or encouraged the worker to spend the shift change interval at a particular place or in a particular way such that it could be said that the worker's injury sustained in the shift change interval occurred at that place or while the employee was engaged in that activity.

[57] The magistrate regarded the place and activity to be considered for the purposes of applying the principles in *Hatzimanolis* as being the particular fishing expedition which led to the motor vehicle accident and the injury. He concluded that the employer did not relevantly induce or encourage the worker to take part in the fishing expedition. In relation to Mr Todd, the supervisor who had invited the worker to go fishing, the magistrate concluded that he had no relevant authority to encourage or induce participation in the fishing expedition and his Honour observed that there

was no evidence that Mr Todd acted on behalf of ERA or the employer in encouraging the worker to undertake the trip. This was a finding of fact and not subject to challenge on appeal. His Honour found that ERA did not otherwise induce or encourage fishing activities of the kind undertaken. He said:

> One can glean from the above evidence that although ERA in general knew that workers engaged in fishing as a recreational activity, the corporation did not encourage or induce the activity as an activity to be engaged in during shift changes.

[58] The learned magistrate concluded:

> Although ERA induced or encouraged workers to defer sleep during the course of a shift change, it did not encourage or induce workers to leave the confines of the camp or the immediate environs of Jabiru township and to be at a particular place - for example one of the fishing spots frequented by workers - or to take up temporary residence in a particular location.

The decision of the Supreme Court on appeal

[59] The learned judge allowed the appeal finding that the presiding magistrate had misapplied the test enunciated in *Hatzimanolis*. His Honour reviewed the familiar authorities of *The Commonwealth v Oliver*,[48] *Danvers v Commissioner for Railways (NSW)*,[49] and *Hatzimanolis*. He considered authorities subsequent to *Hatzimanolis* including *Inverell Shire Council v Lewis*[50] and *Comcare v Mather*[51] and observed:

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[48] (1962) 107 CLR 353.
[49] (1969) 122 CLR 529.
[50] (1992) 8 NSWCCR 562.
[51] (1995) 56 FCR 456.

> Various authorities decided since *Hatzimanolis v ANI Corporation Ltd* have established that it is not always necessary for an injured worker to establish that the employer provided specific authorisation of the precise activity undertaken by the worker when he was injured; nor is it always necessary to establish that the employer positively encouraged the precise activity which resulted in the worker's injury. Activities will fall within the course of employment if they are a reasonable and foreseeable incident of the undertaking that a worker is encouraged to participate in by the employer, if they fall within the ambit of the encouraged undertaking or if they amount to conduct which logically arises from the undertaking the worker is encouraged to engage in by the employer. The activity may include the exercise of discretion or choice on the part of the worker.

[60] His Honour held that the magistrate had failed to address the question whether the activity in which the appellant was involved when he was injured fell within the ambit of the employer's instructions to stay awake during a shift change and what may be said to logically arise from that instruction. He identified the question to be determined as follows:

> The question to be determined in this case is whether the undertaking in which the appellant was involved when injured fell within the employer's instruction to stay awake as long as possible during a change over between a day shift and a night shift and what may be said to logically arise from the instruction or what may be said to be a reasonable and foreseeable incident of the instruction.

[61] The learned judge answered the question as follows:

> So far as the application of the second limb of the *Hatzimanolis* test to this case is concerned, the relevant instruction of the employer to the appellant was the instruction to stay awake as long as possible during a change over from a day shift to a night shift. The appellant was encouraged to spend the relevant part of the interval when he was injured in a particular way; he was encouraged to spend the interval awake. The instruction left the matter of staying awake to the discretion of the appellant. At the time he was injured the appellant was doing something that was reasonably incidental to the expectation that he stay awake in order to adjust to his shift change.

> The fact that the fishing excursion was of the appellant's choosing does not prevent the relevant nexus being established. His employment required him to stay awake and such fishing excursions as the appellant embarked upon were a reasonable and foreseeable incident of the instruction to stay awake, his remote location, the rudimentary accommodation where he was required to reside and the limited activities available to assist workers to fill in time and stay awake. It was a common practice. The employer placed no restrictions on such fishing excursions. The activity in which the appellant was injured fell within the ambit of the instruction to stay awake during a shift change.

The appeal

[62] The right of appeal from the Work Health Court is limited to questions of law.[52] An appellate court has no authority to make any findings of fact and, in the present case, the question of law is limited to the legal effect of the facts as found by the Work Health Court.[53] There is no challenge to the facts as found by the presiding magistrate. The question for determination is "not whether the learned (magistrate) ought to have decided the case in the respondent's favour, but rather whether he was bound in law to do so".[54]

[63] The employer contended before this Court that the judge on appeal erred by characterising the question posed as a question of law. It was argued that the question of law, being the application of the test enunciated in *Hatzimanolis*, was not the subject of error. It was submitted that the issue whether the employer had induced or encouraged the worker to spend the night/early morning of the worker's shift change in the activity in which he suffered injury was one of fact and the learned judge erred by re-

[52] s 116 *Workers Rehabilitation and Compensation Act.*
[53] *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146 at 154.
[54] *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146 at 154.

adjudicating the facts of the case in the absence of any error of law in the decision of the trial magistrate.

[64] In my opinion the issue addressed on appeal was a question of law. His Honour accepted the facts as found by the Work Health Court and went on to consider the legal effect of those facts as found. His Honour considered whether the "injury" suffered by the worker arose "out of or in the course of his employment".[55] In so doing he applied the second limb of the test in *Hatzimanolis* to those facts. The learned judge was addressing a question of law.[56]

[65] The issue then arising is whether his Honour correctly determined the legal effect of the facts as found. The employer submits that his Honour erred.

[66] In my opinion it is apparent that the conduct of ERA was such as to encourage workers to undertake activities in order to stay awake for as long as possible during the course of a shift change. There is no dispute that the general policy of ERA as communicated to the workers was to encourage workers to stay awake during this period. The undertaking of the particular fishing expedition was not inconsistent with the instruction of the employer to workers to remain awake as long as possible during a shift change. There was no express or other direction to workers not to undertake such fishing trips. It was well known, including by ERA, that workers went fishing at night and at distances from Jabiru in order to defer sleep and attune the body

[55] s 53(1) and s 3 of the *Workers Rehabilitation and Compensation Act.*
[56] *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239 at 245.

of the worker to the shift change. Fishing was just one of a range of activities undertaken by workers during a shift change in order to stay awake.

[67] As the High Court observed in *Hatzimanolis*,[57] it is necessary to consider the general nature, terms and circumstances of the employment and not merely the circumstances of the particular occasion upon which the injury arose. Whilst ERA may not have been aware of this particular fishing excursion it was aware of the general practice and, by its acceptance of that practice, induced or encouraged workers to engage in such excursions during shift changes. There was, as the learned judge discussed, a nexus between the fishing expedition and the requirement of the employer that the worker stay awake. The worker was doing something that was reasonably incidental to the requirement that he stay awake. Fishing expeditions, such as that undertaken by the worker, were "a reasonable and foreseeable incident of the instruction to stay awake". The application of the facts as found by the presiding magistrate to the law as set out in *Hatzimanolis* leads to the conclusion that ERA relevantly induced or encouraged the worker to spend the interval or interlude in a particular way, that being to undertake activities which would enable him to stay awake. There was no suggestion that the fishing expedition amounted to gross misconduct taking him outside the course of his employment. It follows that the decision of the judge on appeal was correct. The appeal should be dismissed.

[57] (1992) 173 CLR 473 at 483-484.