Suich v Northern Territory of Australia [2010] NTSC 41

PARTIES:	KALIKAMURTI SUICH v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA11 of 2009 (20730437)
DELIVERED:	11 August 2010
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JUDGMENT OF:	KELLY J
APPEAL FROM:	BRADLEY R/SM

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Interpretation Act 1978 (NT), s 62A
Workers Rehabilitation and Compensation Act, s49, 64, 65

J & H Timbers Pty Ltd v Nelson [1972] 126 CLR 625; *Sedco Forex Australia Pty Ltd v Sjoberg* (1997) NTLR 50; *Thompson v Groote Eylandt Mining Co Ltd* [2003] NTCA 5; *Victims Compensation Fund Corp v Brown* (2002) 54 NSWLR 668; and *Workcover v Nolan* [1999] SAWCT 20, referred to.

REPRESENTATION:

Counsel:

Appellant:	B O'Loughlin
Respondent:	G Macdonald

Solicitors:

Appellant:	Priestleys
Respondent:	Solicitor for the Northern Territory

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

Suich v Northern Territory of Australia [2010] NTSC 41
No. LA11 of 2009 (20730437)

BETWEEN:

KALIKAMURTI SUICH
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 11 August 2010)

[1] Ms Suich was employed by the defendant as a counsellor for the Central Australian Mental Health Services, which is a Northern Territory Government agency. In February 2007, she suffered an injury at work when a client punched her. It is common ground that the injury arose out of or in the course of her employment with the defendant.

[2] In her government employment, Ms Suich worked varying hours per week and was paid a gross hourly rate for that work. In the 12 months before the injury she worked for 34 weeks and was paid $25,719.15, which amounts to average weekly earnings of $756.45 for that employment.

[3] At the time of her injury, Ms Suich was also earning income from a business which she conducted independently (with the knowledge and approval of the defendant). In that business, Ms Suich provided services to various clients as a counsellor, yoga instructor, trainer and facilitator. On most occasions the income received by the business was paid to her by clients of the business by reference to the hours worked by Ms Suich, but on some occasions payment was as a lump sum (for writing assessment reports) or per student (in relation to yoga classes). All income from that business was paid to the Kalikamurti Enterprises Trust of which Ms Suich was the trustee.

[4] Although the body of the trust deed makes provision for the inclusion of a discretionary class of beneficiaries and enables distributions of income to those beneficiaries at the discretion of the trustee, the relevant item in the schedule to the deed was never completed and in fact the sole beneficiary of the trust was Ms Suich herself. All of the expenses of the business were paid by Ms Suich from the trust bank account and all distributions of income from the trust were paid to Ms Suich. The business expenses included rent, depreciation, and motor vehicle expenses. In the 12 months prior to her injury, Ms Suich received an average nett income by way of distributions of business income through the trust of $436.31 per week.

[5] It is common ground that Ms Suich is entitled to be paid benefits under the *Workers Rehabilitation and Compensation Act* ("the Act"). Since the injury she has been paid benefits calculated on the basis that her normal weekly earnings immediately prior to the injury were $756.45 – that is, her average

weekly earnings from her government employment only. Ms Suich contends that her benefits should have been calculated on the basis that her normal weekly earnings included the income she received from the business (ie a total of $1,192.76).

[6] Ms Suich brought proceedings in the Work Health Court claiming an order that she be paid benefits calculated on the basis that her normal weekly earnings included her business income. She was unsuccessful in those proceedings and now appeals to the Supreme Court. The ground of appeal specified in the Notice of Appeal is:

> "The learned Stipendiary Magistrate erred in law in that he:
>
> Held that the Worker's remuneration or earnings from self employment should not be included in the calculation of the Worker's Normal Weekly Earnings pursuant to section 49 of the *Workers Rehabilitation and Compensation Act*."

[7] Both in this Court and the court below, the parties were agreed that the existence of the trust is of no relevance and that the income received by Ms Suich by way of trust distributions can be treated as business income from a business operated by her on her own account[1].

[8] The learned magistrate hearing the matter at first instance considered the scheme of the Act as a whole, including the provisions of the Act relating to compulsory insurance, and came to the conclusion that the Act provided "a scheme to compensate a worker for loss of capacity in the field of

[1] In fact, as Ms Suich is the trustee and sole beneficiary, there is no trust and this is literally the case.

employment in which he was injured and in respect of which insurance cover exists"[2] and that, accordingly, Ms Suich's earnings from self employment should not be included within the amount to be calculated as normal weekly earnings within the definition in s 49(1) of the Act[3].

[9] In my view, the Work Health Court was not in error in determining that earnings from self employment should not be included in calculating an injured worker's normal weekly earnings pursuant to s 49(1).

[10] The appellant contends that s 49(d)(ii) of that definition applies to the calculation of the worker's normal weekly earnings, rather than s 49(a), because in respect of her business income, she was "remunerated" in part other than by reference to the number of hours she worked.

[11] This would be so only if the phrase "the worker is remunerated" in s 49(d)(ii) means something other than remunerated for the work done by the worker in his or her employment as a worker. It is common ground between the parties that in respect of her employment by the respondent, the appellant was remunerated on the basis of an hourly rate and that, accordingly, unless her business income is to be taken into account as part of her remuneration, the appellant's normal weekly earnings are to be calculated in accordance with s 49(a).

[12] The relevant part of the definition of "normal weekly earnings" in s 49(1) is:

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2 Reasons paragraph [28]

3 Reasons paragraph [33]

> "***normal weekly earnings*** , in relation to a worker, means:
>
> …
>
> (d) where:
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> …
>
> (ii) … 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."

[13] The key question is what is meant by the phrase "the worker is remunerated in whole or in part other than by reference to the number of hours worked", in particular the underlined portion and the term "remuneration" in the phrase "average gross weekly remuneration". The appellant claims that she was "remunerated … in part other than by reference to the number of hours worked" because some of the income she received from her business was paid on the basis of a lump sum or by reference to numbers of people involved and that the definition in s 49(d)(ii) is therefore the applicable definition of normal weekly earnings. Using the same reasoning, she claims that her business income should be included in the calculation of her normal weekly earnings.

[14] The question for determination on this appeal, therefore is: is the income from the appellant's business activities part of that with which "the worker

is remunerated", bringing the definition in s 49(d)(ii) into play, and, on the same basis, is that business income to be included in calculating the average gross weekly remuneration?

[15] Obviously the remuneration referred to in s 49(d)(ii) cannot refer to all money received by a person who is a worker from whatever source or for whatever reason – for example birthday gifts or inheritances. To take a less extreme example, would it include rent received from an investment property owned by the "worker", and, if not, what distinguishes that rent from fees received from a business in which the "worker" is self-employed?

[16] "Remunerated" and "remuneration" are not defined in the Act. The Macquarie Dictionary defines "remunerate" as:

> "*v. tr* **1.** reward; pay for services rendered. **2.** serve as or provide recompense for (toil etc) or to (a person)."

[17] It has been pointed out that "remuneration" is a wider term than "salary" and that it would include whatever consideration a person receives for providing services[4].

[18] Counsel for the appellant concedes that "remuneration" in s 49(d)(ii) would not include rent or other income derived from the investment of capital in a business, and concedes that it may not always be easy to separate income received from a business conducted by a worker into two separate streams: that attributable to the employment of capital, and that which should be

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4 See eg *R v Postmaster-General* 1 Q.B.D. 663 per Blackburn J at 664

taken into account in assessing the worker's normal weekly earnings. Nevertheless he contends that mere difficulty in application is not a reason for construing s 49(d)(ii) to exclude income from self employment.

[19] However, that reasoning leaves out the crucial initial step of determining with precision what meaning should be given to the words "remuneration" and "remunerate" in s 49(d)(ii) so that, whatever difficulty there may be in practice in working out what should be counted in an individual case, there is in principle a clear meaning given to the provision in the Act being construed.

[20] One possible solution, is to limit the meaning of "remuneration" in s 49(d)(ii) to amounts received for "services rendered" (whether performed as an employee or through a business in which a person is self employed). As conceded by counsel for the appellant, there are practical difficulties in so limiting the word. It may be difficult to determine in a given case whether income is actually derived from the performance of services: for example, income earned from, say, a florist business, may be partly profit from things sold and partly from services performed.[5] The business through which the income is earned may be a partnership or have employees, in which case the income earned from the business by the "worker" may be remuneration received by her for the performance of services rendered by her partners or employees as well as herself. As Mr O'Loughlin pointed out,

[5] Even in an extremely simple case such as the present, the income earned by Ms Suich from the business is not a simple payment in return for services performed alone, but involves putting to use premises, equipment and a motor vehicle or vehicles, as the claims for deductions in her income tax return make clear. See also comments of SA Workers Compensation Tribunal in *Workcover v Nolan* [1999] SAWCT 20

those difficulties in themselves would not be sufficient reason to construe the Act in such a way as to avoid the difficulties. However, they provide some reason to question whether the legislature intended a construction which would produce such a result.

[21] More importantly, there is nothing in the scheme of the Act to support this construction.

[22] The other, more obvious, solution is to construe the terms "remunerated" and "remuneration" in s 49(d)(ii) as limited to remuneration from employment with an employer. Such a construction is compatible with the scheme of the Act.

[23] First, the term used in s 49(d)(ii) is "the worker is remunerated" – which is an indication that the remuneration must be something received by a person in the person's capacity as "worker". The definition of "worker" in the Act is lengthy. For the purposes of the present analysis it is sufficient to note that, in that part of the definition supplied for the purposes of the workers compensation provisions of the Act, for a person to be a "worker" requires the identification of an employer.

[24] The appellant contends that to construe s 49(d)(ii) in this way would be to read the words "earned as a worker" into the Act. I do not agree. That concept is inherent in the phrase "the worker is remunerated". Business income received by a person is not a method whereby a worker is

remunerated: it is a method whereby a business owner (who may in another context also be a worker) is remunerated.

[25] Secondly, the normal weekly earnings calculated in accordance with s 49(d)(ii) are limited to the average gross weekly remuneration which … was earned by the worker during the weeks that he or she was engaged in paid employment. There would be no reason to so limit the calculation of normal weekly earnings if "remuneration" was intended to have a wider meaning than "remuneration from paid employment".

[26] Thirdly, all of the other parts of the definition of normal weekly earnings in s 49 [ie s 49(a), (b) and (c)] clearly utilise remuneration from employment only in their calculations, and there is no logical reason why workers who are remunerated on, say, a weekly basis, should have income other than employment income included in calculating their normal weekly earnings, while those remunerated on an hourly basis do not.

[27] Fourthly, one needs to look at the interaction between the definition of normal weekly earnings in s 49 and the sections of the Act in which that definition is applied to determine the amount of compensation payable to an injured worker. Section 64 provides that in the first 26 weeks of incapacity a worker is entitled to 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 on which he or she first became entitled to compensation. If business income were to be included as

part of the normal weekly earnings (even if only limited to business income earned for the performance of services) then there would be no necessary relationship between that which was lost and the compensation for that loss. Some of the business income may not have been lost – particularly where there are partners or employees in the business. Yet the only thing taken into account in assessing the compensation payable, is the amount actually earned in employment, so the worker could be receiving both the business income and compensation for loss of that business income. On the other hand, if in calculating normal weekly earnings in the manner set out in s 49(d)(ii), one construes "remuneration" as referring only to remuneration from employment, then there is a direct and straightforward connection between what has been lost and what is being compensated for, and no "double dipping". To use the term used by the appellant in submissions – the only thing taken into account on both sides of the ledger is income from employment.

[28] Finally, one needs to look at the purpose of the Act which is to establish a workers' compensation scheme designed to provide a means of compensating workers (defined in the Act in ways which involve in each case identifying an employer[6]) for losses due to injuries (defined by reference to employment – ie arising out of or in the course of employment[7]). The scheme established under the Act is designed to

6 See definition in section 3.

7 Section 3

compensate workers for loss of employment income – not loss of income from other sources.[8]

[29] Counsel for the appellant stressed that the Act is beneficial legislation and relied, among other authorities on *Thompson v Groote Eylandt Mining Co Ltd*[9] in which Mildren J said:

> "There is no doubt that this legislation is beneficial legislation, and therefore the provisions of the Act must be beneficially construed so as to provide the most complete remedy of the situation with which they are intended to deal and which are consistent with the actual language employed and to which its words are fairly open." [emphasis added]

[30] The underlined words indicate that Mildren J was applying the principle of construction that, in interpreting a provision of an Act, a construction that would promote the underlying purpose or object of the legislation is to be preferred to a construction that would not promote that purpose.[10]

[31] The fact that the Act is beneficial legislation does not mean that one must always strive to find a construction that would maximise the benefits to the worker. As Spigelman CJ said in relation to New South Wales crimes victims compensation legislation:

> "In the present proceedings, the respondent submitted that the purpose was to compensate victims. Even if I were to accept a

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8 See for example general comments on the nature of workers' compensation schemes in *J & H Timbers Pty Ltd v Nelson* [1972] 126 CLR 625 per Barwick CJ at p 633 and per Windeyer J at p 643.

9 [2003] NTCA 5

10 See *Interpretation Act* 1978 (NT) s 62A

> legislative purpose stated at that level of generality, that would not entail that any ambiguity must be construed in such a way as to maximise compensation (cf *Flavelle Mort Ltd v Murray* (1976) 133 CLR 580). In any event, the very specificity of the provisions of the legislation indicate that the legislative purpose is to provide compensation in accordance with the Act and not otherwise."[11] [emphasis added]

[32] The appellant points to the fact that in s 65, in calculating loss of earning capacity, one must take into account amounts the worker is reasonably capable of earning from employment including self employment. The appellant says that, in that case, it is only fair to take into account amounts earned in self employment in calculating the normal weekly earnings. Counsel for the appellant referred to the decision of the Court of Appeal in *Sedco Forex Australia Pty Ltd v Sjoberg*[12] in which it was contended by the employer that certain allowances which were specifically excluded from the definition of "normal weekly earnings" should nevertheless be included when calculating the amount the worker was reasonably capable of earning for the purposes of s 65. The effect would have been that those allowances would not have been counted on the positive side of the ledger in determining the benefits payable to the worker, but would count against the worker on the negative side of the ledger in calculating the amount to be subtracted. The Court of Appeal agreed with Angel J at first instance who

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11 *Victims Compensation Fund Corp v Brown* (2002) 54 NSWLR 668 at p 672 Spigelman CJ was in dissent on the result in this case, but that does not detract from the logic of the remarks, which are apposite to the NT *Workers Rehabilitation and Compensation Act*. As counsel for the respondent pointed out in oral submissions, the Act does not purport to provide full compensation for all losses suffered by a worker as a result of a workplace injury. There are various limitations in the Act limiting the compensation available, for example s 65(1) which limits the compensation payable in respect of long term loss of income earning capacity to less than full compensation.

12 (1997) NTLR 50

noted the beneficial nature of the legislation and held that the allowances in question were not "earnings" at all but "a payment in lieu of a disability incurred as a result of working". In agreeing with this approach, Bailey J in the Court of Appeal (with whom Gallop ACJ and Mildren J agreed) said "it would be quite inequitable for relevant allowances to be excluded for the calculation of a worker's 'normal weekly earnings' and 'ordinary time rate of pay', but count against him in assessing the amount that he is 'reasonably capable of earning' for the purpose of assessing earning capacity."

[33] The appellant contends that the same reasoning should be applied in this case. It would be "quite inequitable" (according to the appellant) for earnings (or rather potential earnings) from self-employment to be counted against the worker for the purpose of assessing the amount she is reasonably capable of earning if it is not included in calculating her normal weekly earnings.

[34] I am not totally convinced that this would be inequitable. It is certainly not as clear cut as the case of the allowances in *Sedco*. The purpose of s 65 is to calculate the loss of earning capacity ie the loss of the ability to perform work from which money can be earned as a result of long term physical (and or psychological) disability, by contrast with s 64 which compensates directly for the loss of income from employment as a result of short term injury. There is good reason to ignore for this purpose the method whereby that capacity may be utilised and turned into income – ie paid employment or self employment. However, even if such a construction might be

productive of unfairness in some circumstances, I am of the opinion that the construction contended for by the appellant is simply not open.

[35] The appellant contends that, in order to avoid the anomalous situation with respect to s 64 (referred to at paragraph [27] above) s 64 should be construed so that the phrase "earned in employment in a week" refers to self employment as well as employment in the conventional sense. The final position of the appellant, helpfully summarised in supplementary written submissions filed after the hearing of the appeal, is that the terms "employment" and "earnings" should be given a consistent meaning across s 49(d), 64 and 65, and that this would be the result of construing s 49(d)(ii) in the manner contended for by the appellant.

[36] I cannot accept this submission. It seems to me that that construction is not open when the Act is read as a whole. Where the words "employ" or "employed" are used in the definition section of the Act, it indicates employment by an employer. [See, for example s 3 (1)(b)(iii), (viii) and (ix).] The definition of "worker" is complex but in each case a "worker" requires an employer and the definition is evidently designed to exclude the self employed. See for example ss 3(2), (3) and (4), and the definition of "employer" all aimed at identifying an employer (or deemed employer) for categories of people who are intended to be included. People who perform services for another are included (and that other is the employer) unless they notify the employer of an ABN number. [S 3(b)(i)] Also excluded are people who are employed otherwise than for the purposes of the employer's

trade, business or enterprise and in respect of whom the employer does not make any withholding payments under the PAYG provisions. That would exclude people who perform services for clients, rather than an employer.

[37] Moreover, the construction contended for by the appellant would not in fact reflect a consistent use of the words "employment" and "earnings". As pointed out above, where the words "employ" or "employed" are used in the definition section of the Act, it indicates employment by an employer. Where the legislature intends income from self employment to be included in the term "earnings" for a particular purpose under the Act, it says so explicitly, as in s 65. This gives further support to the conclusion that where the legislature has not specified that earnings from self employment are to be included, they are not intended to be included, whether the expression be "average gross weekly remuneration which … was earned by the worker during the weeks that he or she was engaged in paid employment" [as in s 49(d)(ii)] or "what he or she actually earned in employment during a week" [as in s 64].

[38] Finally, I consider the construction urged by the appellant would not promote the evident purpose of the Act, and would lead to absurdity and injustice. In my opinion the legislature could not have intended to make employers and their insurers responsible for insuring loss of business income for some people only who conduct their own businesses – namely those who happen also to engage in paid employment for an employer, and who receive some part of either their salary or their business income

otherwise than by reference to an hourly rate. I can see no basis in either logic or the purpose of the legislation for arbitrarily singling out such a group for special treatment.

[39] The appeal is dismissed with costs.