Palumpa Station Pty Ltd v Victor George Fox (1999) NTSC 144

PARTIES:	PALUMPA STATION PTY LTD v VICTOR GEORGE FOX
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRLIA
JURISDICTION:	APPEAL FROM THE WORK HEALTH COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. LA 7 of 1999 (9809487)
DELIVERED:	20 December 1999
HEARING DATES:	29 October 1999
JUDGMENT OF:	Bailey J

CATCHWORDS:

APPEAL –
Work Health Court – question of law – Work Health Act – construction of section – calculation of normal weekly earnings – benefits which fall within the definition of remuneration for the purposes of this calculation – whether non-monetary benefits such as housing, meat, electricity and gas benefits should be included as part of the worker's remuneration – whether these non-monetary benefits fall within the general exclusion of "any other allowance" under the section

Work Health Act (1986) – s 49(1) and s 49(2)

Mutual Acceptance Co Ltd v The Federal Commissioner of Taxation (1944) 69 CLR 389 at 396-397, distinguished.
Foresight Pty Ltd v Maddick (1991) 79 NTR 17 at 24, followed.
Wilson v Wilson's Tile Works Pty Ltd (1960) 104 CLR 328 at 335, followed.
Dodd v Executive Air Services Pty Ltd [1975] VR 668 at 679 and 682, followed.
AAT King's Tours Pty Ltd v Hughes (1994) 4 NTLR 185 at 194, considered.
Plewright v Passmore (Martin CJ, Supreme Court (NT), unreported, 4th April 1997), applied.
R v Regos and Morgan (1947) 74 CLR 613 at 623-624, considered.

REPRESENTATION:

Counsel:

Appellant:	T. Bryant
Respondent:	M. Grant

Solicitors:

Appellant:	Cridlands
Respondent:	Ward Keller

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Palumpa Station Pty Ltd v Victor George Fox (1999) NTSC 144
No LA 7 of 1999 (9809487)

BETWEEN:

PALUMPA STATION PTY LTD
Appellant

AND:

VICTOR GEORGE FOX
Respondent

CORAM: Bailey J

REASONS FOR JUDGMENT

(Delivered 20 December 1999)

[1] This appeal raises a short but significant question of law as to the proper construction of section 49(2) of the *Work Health Act* ("the Act"). The subsection 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."

[2] In proceedings in the Work Health Court, Mr Trigg SM held that the value of housing, meat, electricity and gas benefits provided by the appellant employer were not to be excluded in calculating the respondent worker's

normal weekly earnings as falling within the description "any other allowance" for the purposes of section 49(2) of the Act.

[3] The terms of the respondent worker's appointment in sofaras remuneration was concerned relevantly provided:

> "Salary: $30,000 per annum, gross before tax
>
> Housing: An unfurnished residence will be provided and the station (appellant employer) will pay the rent to the community.
>
> Meat: Meat for your personal consumption and that of your guests on Palumpa will be provided.
>
> Electricity and Gas: These items will be met by the station."

[4] The learned magistrate found that the housing, meat, electricity and gas benefits formed part of the respondent worker's remuneration for the purposes of paragraph (d) of the definition of "normal weekly earnings" provided by section 49(1) of the Act. No complaint is made by the appellant employer about that finding. However, Mr Bryant on behalf of the appellant employer submits that these benefits fell within the general exclusion ("… any other allowance") in section 49(2) of the Act and accordingly their monetary value should not have been included in calculating "normal weekly earnings".

[5] The learned magistrate referred to the following passage of Latham CJ in *Mutual Acceptance Co Ltd v The Federal Commissioner of Taxation* (1944) 69 CLR 389 at 396-397:

> "'Allowance' in the relevant sense is defined in the *Standard Dictionary* as meaning: - 'That which is allowed; a portion or amount granted for some purpose, as by military regulation, operation of law, or judicial decree; also, a limited amount or portion, as of income or food; as, an *allowance* of rations; an *allowance* for costs; an *allowance* for tare or breakage; an extra *allowance* for services; to put one on an *allowance* of bread.' 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 condition 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.
>
> The latter class of allowances represents higher wages paid on account of special conditions, and may fairly be described as part of wages in the ordinary sense. A victualling allowance has been held to be part of the wages of a seaman (*The Tergeste* (1903) P.26). Allowances which are wages in the ordinary sense are, however, included in the word 'wages' itself where it appears in the definition. If the word "allowances" were limited by construction to allowances which fell within the ordinary concept of 'wages', the result would be that the word 'allowances' in the definition would have no application, and would not operate to extend the ordinary meaning of the word 'wages'. It would have no significance or effect. Accordingly, in my opinion it is proper to reject the contention that only such allowances as are remuneration for services are included within the work 'allowances' in the definition."

[6] His Worship continued:

> "Therefore, in my opinion, to be an allowance to be excluded under s.49(2) it must be a payment or portion allowed which of itself does

> not form a part of the worker's remuneration in the ordinary sense. It must be something different."

[7] The learned magistrate explained that "remuneration in the ordinary sense" was "reward or payment of the service provided by the worker to the employer". In His Worship's opinion if a benefit provided by an employer to a worker met this description then it fell outside the general exclusion in section 49(2) of the Act which was directed at "allowances" in the sense of recompense for extra expenses that the worker might need to incur in order to perform his duties. In the present case, His Worship found that the housing, meat, electricity and gas benefits were:

> "… all properly characterised as extras provided to the worker to take account of the special conditions of his employment (particularly the remote locality) and to attract a person to the position, and they may therefore by fairly described as part of his remuneration in the ordinary sense. They were all reward or payment for his services."

[8] Upon this basis, each of the items fell within the worker's remuneration and accordingly were not excluded by section 49(2) of the Act in calculating the respondent worker's "normal weekly earnings".

[9] In Mr Bryant's submission, the learned magistrate erred in interpreting the general exclusion of allowances in section 49(2) of the Act as applying only to rewards or payments by an employer which fell outside what could be described properly as remuneration for services rendered by the worker. If this were so, Mr Bryant submits, there would have been no necessity for the Legislature to have referred expressly to "an over-award payment, climate

allowance, district allowance, leading hand allowance, qualification allowance, shift allowance … and service grant" as being included in a worker's remuneration for the purpose of calculating "normal weekly earnings". Mr Bryant submits that each of such "allowances" are "remuneration in the ordinary sense" i.e., reward or payment for services rendered. Accordingly on the learned magistrate's approach to section 49(2) of the Act there would have been no necessity to make specific reference to such allowances as forming part of a worker's remuneration for the purpose of calculating a worker's normal weekly earnings.

[10] In Mr Bryant's submission, section 49(2) of the Act is designed to promote administrative efficiency in calculating a worker's normal weekly earnings by providing an exclusive list of those allowances which are to be included in calculating normal weekly earnings. Mr Bryant submits that the present case provides a clear example of the difficulties in calculating a worker's normal weekly earnings if all rewards in cash or kind for services rendered are to be included in calculating normal weekly earnings. In each case where a worker receives a non-monetary benefit as part of his ordinary remuneration detailed calculations would need to be undertaken to establish the value of such "allowances" (in this case, housing, meat, electricity and gas provided by the employer to the worker).

[11] In Mr Bryant's submission, the respondent worker's normal weekly earnings should have been calculated by reference only to the salary component of his remuneration and the additional benefits of housing, meat, electricity

and gas provisions excluded as not being within the allowances specified by section 49(2) of the Act as ones to be included in calculating normal weekly earnings.

[12] For the respondent worker, Mr Grant submits that the learned magistrate's interpretation of section 49(2) is consistent with the beneficial character of the Act. Mr Grant stresses that the Act is properly classified as remedial or beneficial legislation that should be interpreted liberally in favour of the worker. Where there is ambiguity, the construction most favourable to be worker is to be preferred: *Foresight Pty Ltd v Maddick* (1991) 79 NTR 17 at 24; *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328 at 335, *Dodd v Executive Air Services Pty Ltd* [1975] VR 668 at 679, 682.

[13] In addition to the construction of section 49(2) favoured by the learned magistrate, Mr Grant submits that section 49(2) creates a class by the use of the words:

> "… over-award payment, climate allowance, district allowance, leading hand allowance, qualification allowance, shift allowance… and service grant, but does not include any other allowance".

[14] In Mr Grant's submission, the genus of the class created by section 49(2) of the Act is that of an allowance by way of **monetary** payment related to some specific aspect of a worker's duties or employment. Mr Grant submits the housing, meat, electricity and gas benefits of the present case do not fall within that genus and are, accordingly, not "allowances" in the material sense. Further, acceptance of the appellant's submissions as to the proper

approach to section 49(2) in the case of a worker remunerated substantially by non-monetary benefits, would be contrary to the object of the Act which was described by the Court of Appeal (Gallop ACJ, Kearney and Morling JJ) in *AAT King's Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 194 as follows:

> "The intention appears to be to provide to the worker during disability amounts by way of compensation calculated by reference to the normal weekly earnings which he could have counted upon receiving if there had been no disability. To that extent it reflects an 'income maintenance' approach."

[15] In my view, the learned magistrate erred in law as to his approach in interpreting section 49(2) of the Act but was correct to have included the value of the housing, meat, electricity and gas benefits provided to the respondent worker in calculating his normal weekly earnings.

[16] I do not consider that the passage from the judgment of Latham CJ in *Mutual Acceptance Co Ltd v The Federal Commissioner of Taxation*, supra, relied upon by the learned magistrate can assist in interpreting section 49(2) of the Act. That case was concerned with the construction of "wages" within the meaning of s.3 of the *Pay-roll Tax Assessment Act 1941* (Cmth). "Wages" was defined to include, *inter alia*, allowances paid or payable in cash or in kind and the provision by an employer of meals or sustenance or the use of premises or quarters as consideration or part consideration for the employee's services. The statutory definition with which the High Court was concerned with there is clearly far removed from section 49(2) of the

Act. With respect, I agree with the following observation of Dixon J (dissenting) at p.402 of the *Mutual Acceptance* case:

> "The question we must decide turns, in my opinion, upon the meaning in… context of the word allowance. For I cannot think that the ordinary meaning of the word 'wages' would cover the payments with which this case is concerned.
>
> 'Allowances' 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 that allowing of a thing or a thing allowed. It is only by its application that you discover the kind of thing in mind."

[17] Similarly, with respect, I agree with the observation of Martin CJ in *Plewright v Passmore* 103 of 1996, unreported, 4 April 1997 that in construing words of the Act:

> "…the words of the statute … are not used in their common understanding, they are used in a statute noted for its technical, legal language. The words must be construed in their context and bearing in mind the purpose of the Act."

[18] Martin CJ was concerned with the meaning of "average weekly number of hours worked" (s.49(1) of the Act) but, in my view, his observation is equally valid in the approach to be adopted to the phrase "any other allowance" in section 49(2) of the Act. Little, if anything, is to be gained in construing this phrase in context by consideration of dictionary definitions of "allowance" or the approach adopted by other courts in relation to use of the word in legislation far removed from the Act.

[19] I do not consider that the learned magistrate's attempt to distinguish in section 49(2) between inclusion or exclusion of allowances for the purpose of calculating normal weekly earnings on the basis of whether or not the benefit provided by the employer forms "part of the worker's remuneration in the ordinary sense" can withstand scrutiny. I agree with Mr Bryant's submission that each of the allowances specified in section 49(2) for inclusion in calculation of normal weekly earnings would form part of a worker's remuneration in "the ordinary sense" and accordingly their express inclusion in a worker's remuneration would be redundant on the learned magistrate's construction of section 49(2).

[20] I am satisfied that Mr Grant is correct in his submission that section 49(2) creates a class by identifying specific allowances which are to be included in a worker's remuneration (for the purpose of calculating "normal weekly earnings") in conjunction with the exclusion of "any other allowance". It follows that the latter words are to be construed *ejusdem-generis* with those allowances that have been expressly identified in section 49(2).

[21] In *R v Regos and Morgan* (1947) 74 CLR 613 at 623-624, Latham CJ explained the *ejusdem-generis* rule in the following terms:

> "The *ejusdem-generis* rule is sometimes stated in very broad terms as, for example, by Lord Campbell in *R v Edmundson* (1859) 28 LJMC 213 at p.215 – 'Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.' But in more recent cases a very different view has been taken of the rules as for example, in *Anderson v Anderson* (1859) 1 QB 749, where it was said in the Court of Appeal that 'prima facie general words are to be taken in the

> larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before' (1985) 1 QB at p.753. The *ejusdem-generis* rule is a rule of construction only; that is, it is designed to assist in ascertaining the intention of Parliament in the case of a statute and of the parties to a document in other cases (*Thorman v Dowgate Steamship Co Ltd* (1910) 1 KB 410 at p.419).
>
> The rule is that general words may be restricted to the same *genus* as the specific words that precede them (*Thames & Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484, at p.490). Before the rule can be applied it is obviously necessary to identify some *genus* which comprehends the specific cases for which provision is made. In *Tillmanns & Co. v S.S. Knutsford Ltd* (1908) 2 KB 385, it was pointed out that 'Unless you can find a category there is no room for the application of the *ejusdem-generis* doctrine' - per *Farwell* LJ (1908) 2 KB at p.403: see also per *Vaughan Williams* LJ (1908) 2 KB at p.395 and per *Kennedy* LJ (1909) 2KB at p.409. In *Mudie & Co v Strick* (1909) 100 LT 701, Pickford J said: 'You have to see whether you can constitute a *genus* of the particular words, and, if you can, then unless there is some indication to the contrary, you must construe the general words as having relation to that *genus*. If you cannot do this, then … you must read all the particular words separately, and take the general words separately also' (1909) 100 LT at p.703. In *S.S. Magnhild v McIntyre Bros & Co* (1920) 3 KB 321, there is a full discussion of the rule by McCardie J in which it is clearly shown that where it is sought to apply the rule to a case where an enumeration of specific things is followed by general words it must appear that the specific things 'possess some common and dominant feature' so that they can be described as constituting a *genus* distinguished by that feature."

[22] In the case of section 49(2) of the Act, the *genus* constituted by the provision is that of **monetary** allowances. I am satisfied that the Legislature intended to exclude from calculation of a worker's normal weekly earnings only such allowances paid to a worker (other than those expressly referred to in the provision). Such a construction accords with the ordinary and

usual meaning of the word "allowance" and is consistent with a broad and liberal interpretation of the Act in favour of the worker.

[23] I consider that the learned magistrate was correct not to have excluded the respondent's worker's housing, meat, electricity and gas benefits from calculation of his normal weekly earnings. Accordingly, the appeal is dismissed. The appellant employer is ordered to pay the costs of the appeal to the respondent worker.