
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : BGC (AUSTRALIA) PTY LTD -v- MACHALI [2019]
WASCA 121

CORAM : BUSS P
MITCHELL JA
PRITCHARD JA

HEARD : 10 MAY 2019

DELIVERED : 26 AUGUST 2019

FILE NO/S : CACV 81 of 2018

BETWEEN : BGC (AUSTRALIA) PTY LTD
Appellant

AND

HADI MACHALI
Respondent

ON APPEAL FROM:

Jurisdiction : DISTRICT COURT OF WESTERN AUSTRALIA

Coram : VERNON DCJ

Citation : BGC (AUSTRALIA) PTY LTD -v- MACHALI [2018]
WADC 100

File Number : APP 61 of 2017

Catchwords:

Workers' compensation - Whether regular payments of overtime are included in weekly earnings for which compensation is to be paid

Legislation:

Workers' Compensation and Injury Management Act 1981 (WA), sch 1 cl 11

Result:

Leave to appeal granted
Appeal dismissed

Category: A

Representation:

Counsel:

Appellant : Mr G R Hancy
Respondent : Mr J R Brooksby

Solicitors:

Appellant : Greenland Legal Pty Ltd
Respondent : JR Brooksby

Case(s) referred to in decision(s):

EG Green & Sons Pty Ltd v Sabourne [2009] WASCA 172
Mutual Acceptance Co Ltd v Federal Commissioner of Taxation (1944) 69 CLR 389
Thompson v Roche Bros Pty Ltd [2004] WASCA 110

JUDGMENT OF THE COURT:

Introduction

1 This appeal concerns a dispute as to whether overtime payments are part of the respondent's compensable weekly earnings for the purposes of the *Workers' Compensation and Injury Management Act 1981* (WA) (**Act**).

2 The appellant employed the respondent as a truck driver. On 24 May 2016, the respondent fell backwards while climbing into a truck and injured his back and head. He was unable to return to work following that injury. The appellant accepted liability to make weekly payments of compensation under the Act.

3 The BGC Transport Enterprise Agreement 2013 (**Award**) prescribed the respondent's remuneration. It is common ground that this is an 'industrial award' for the purposes of the Act.¹ The award relevantly provided:

12.1 The ordinary hours of work shall not exceed an average of 38 hours per week to be worked over a cycle agreed between the employer and the employee,

...

13.1 Where additional duty is required by the employer which is in excess of or outside of the provisions of clause 12 - Hours of Duty, the employee shall be entitled to an additional payment of time and one half for the first 2 hours and double time thereafter.

...

13.4 An employer may require any worker to work reasonable overtime at overtime rates and such workers shall work overtime in accordance with such requirements.

4 The Act relevantly provides for the respondent's compensable weekly earnings to be 'Amount A' for the first 13 weekly payments, and 'Amount Aa' thereafter. Overtime payments are expressly included as a

¹ See s 5(1) of the Act (definition of 'industrial award'); see appeal ts 11, 32, 33, 34.

component of 'Amount A'. Overtime payments will only be a component of 'Amount Aa' if they are:²

... any allowance paid on a regular basis as part of the worker's earnings and related to the number or pattern of hours worked by the worker ...

5 The parties agree that, prior to his injury, the respondent was paid overtime on a regular basis as part of his earnings and that the payments related to the number or pattern of hours the respondent worked.

6 An arbitrator in the WorkCover WA Arbitration Service decided that the overtime payments paid to the respondent were an 'allowance' for the purposes of par (b) of the definition of 'Amount Aa' and, accordingly, the overtime payments were part of the respondent's 'weekly earnings' for the purposes of the respondent's entitlement to weekly payments under cl 7(1) read with cl 11(3) of sch 1 to the Act.

7 The primary judge, on appeal from the arbitrator's decision, held that on its proper construction the definition of 'Amount Aa' includes overtime payments received regularly and relating to the number and pattern of hours the respondent worked. Her Honour therefore affirmed the arbitrator's decision.

8 The question of law raised by this appeal is whether the overtime payments provided for by the Award were an 'allowance' for the purposes of the definition of 'Amount Aa'. The appellant appeals to this court on that question of law, pursuant to s 254 of the Act. Leave to appeal is required.

9 For the following reasons, leave to appeal should be granted but the appeal should be dismissed.

Statutory provisions

10 The following summary of the central provisions of the Act is taken from the primary judge's decision.³

11 Section 18 of the Act requires an employer to pay compensation in accordance with sch 1 to the Act if an injury to a worker occurs.

12 Clause 7(1) of sch 1 to the Act provides as follows:

² Sch 1, cl 11(2) (par (b) of the definition of 'Amount Aa').

³ *BGC (Australia) Pty Ltd v Machali* [2018] WADC 100 (**Primary Decision**) [12] - [14].

Subject to section 56 and subclause (3) when total incapacity for work results from the injury a weekly payment during the incapacity equal to the weekly earnings of the worker calculated and varied in accordance with this Schedule.⁴

13 Clause 11 of sch 1 to the Act defines the term 'weekly earnings' for the purpose of sch 1 to the Act, and provides as follows:

(1) Subject to clauses 12 to 16, for the purposes of this Schedule weekly earnings has the meaning given by this clause.

(2) In this Schedule -

Amount A means the rate of weekly earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation, plus -

(a) any over award or service payments paid on a regular basis as part of the worker's earnings; and

(b) overtime; and

(c) any bonus or allowance;

Amount Aa means the rate of weekly earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation, plus -

(a) any over award or service payments paid on a regular basis as part of the worker's earnings; and

(b) any allowance paid on a regular basis as part of the worker's earnings and related to the number or pattern of hours worked by the worker; and

(c) any other allowance prescribed by the regulations;

...

bonus or allowance means any bonus or incentive, shift allowance, week-end or public holiday penalty allowance, district allowance, industry allowance, meal allowance, living allowance, clothing allowance, travelling allowance, or other allowance;

earnings includes wages, salary and other remuneration;

⁴ Section 56 and subclause (3) are not relevant to the issues to be determined in this appeal.

overtime means any payment for the hours in excess of the number of ordinary hours which constitute a week's work.

...

- (3) In the case of a worker whose earnings are prescribed by an industrial award when the injury occurs, weekly earnings are -
- (a) for the 1st to the 13th weekly payments: Amount A but not more than Amount C or less than Amount D;
 - (b) for weekly payments after the 13th: Amount Aa, or a lesser amount determined in accordance with the regulations, but not more than Amount C or less than Amount D.

...

- (5) Subject to subclause (6) -
- (a) the references in the definition of Amount A in subclause (2) to overtime and any bonus or allowances; and
 - (b) the references in the definition of Amount Aa in subclause (2) to allowances,

are references to those items averaged over the period of 13 weeks ending at the date of incapacity.

- (6) If the worker was totally or partially incapacitated from working or for any other reason did not work during any part of the period of 13 weeks mentioned in subclause (5), that part is to be disregarded in calculating the average amount per week that the worker was paid over that period.

14 In cl 11 of sch 1 to the Act, the maximum amount payable is 'Amount C', which in general terms is twice the average weekly earnings for Western Australia. The minimum amount payable is 'Amount D', which in general terms is the minimum rate of weekly earnings payable under the relevant award.

Legislative history

15 The relevant general structure of the Act has not significantly changed since its enactment. However, there have been a number of amendments to cl 11 of sch 1 to the Act, including in relation to the payments which are and are not included in compensable weekly earnings.

1981 provisions

16 As originally enacted in 1981, cl 11(1) provided for weekly earnings to comprise:

... the total wages, salary, or other remuneration payable, at the time of the incapacity, for a week's work in such employment, under the industrial award or industrial agreement plus any over award or service payment payable on a regular basis as part of the worker's wages, salary or other remuneration ...

17 However, cl 11(3) and (4) specifically excluded the following payments:

- (3) overtime, being any payment for the hours in excess of the number of hours stated in the industrial award or industrial agreement as ordinary hours which constitute a week's work; and
- (4) any bonus or incentive, shift allowance, week-end or public holiday penalty allowance, district allowance, industry allowance, meal allowance, living allowance, clothing allowance, travelling allowance, or other allowance,

...

1999 Amendment

18 Section 32(13) of the *Workers' Compensation and Rehabilitation Amendment Act 1999* (WA) (**1999 Amendment Act**) repealed and replaced cl 11. Save for the definition of 'Amount Aa', and that 'Amount A' was payable only for the first four weekly payments, the substituted provisions (including the definitions of 'bonus or allowance', 'earnings' and 'overtime') were materially in their current form. The definition of 'Amount Aa' was in the following terms (with the definition of 'Amount A' also included for ease of reference):

"Amount A" means the rate of weekly earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation, plus -

- (a) any over award or service payments paid on a regular basis as part of the worker's earnings;
- (b) overtime; and
- (c) any bonus or allowance;

"Amount Aa" means the rate of weekly earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation, plus any over award or service payments paid on a regular basis as part of the worker's earnings;

...

19 The definition of 'Amount Aa' under the 1999 Amendment Act did not include, either in form or in substance, pars (b) and (c) of the current definition. Pursuant to the 1999 Amendment Act, overtime was a component of compensation paid as 'Amount A' for the first four weeks after injury, but was not included as a component of 'Amount Aa' thereafter. This was a departure from the original provisions under which overtime was expressly wholly excluded from compensable weekly earnings (see the original cl 11(3)).

20 The Full Court of the Supreme Court in *Thompson v Roche Bros Pty Ltd*⁵ considered cl 11 of sch 1 to the Act as amended in 1999. The point in issue in *Thompson* was whether payments which the relevant industrial agreement provided for were properly characterised as 'overtime', as that term was defined in cl 11 of sch 1 to the Act. EM Heenan J, with whom the other members of the court agreed, said that the language of sch 1 made it plain that weekly payments of compensation after the fourth weekly payment must be calculated without regard to overtime or to any bonus or allowance payable at the time of incapacity.⁶

2004 Amendment

21 Clause 11 of sch 1 to the Act was amended, materially,⁷ into its current form by the *Workers' Compensation Reform Act 2004* (WA) (**2004 Amendment Act**).

22 In the course of his second reading speech to the Bill for the 2004 Amendment Act, the Minister observed:⁸

The period before a step down in weekly payments occurs will also be increased from four to 13 weeks which will mean that the vast majority of workers in the statutory workers compensation system will not

⁵ *Thompson v Roche Bros Pty Ltd* [2004] WASCA 110.

⁶ *Thompson* [20].

⁷ Some further, presently immaterial, amendments were subsequently made by s 15 of the *Workers' Compensation Legislation Amendment Act 2005* (WA).

⁸ Western Australia, *Parliamentary Debates*, Legislative Assembly 5 May 2004, 2307 (Mr JC Kobelke, Minister for Consumer and Employment Protection).

experience a step down. The new limit on maximum weekly payments will apply immediately to all workers on weekly payments at the time of proclamation. From week 14, the weekly payments step down amount payable for award workers will be amended to include allowances paid on a regular basis as part of a worker's earnings, which are related to the number or pattern of hours worked.

Appellant's submissions

23 The appellant submits that, on the Act's proper construction, 'overtime' is not an 'allowance' and is therefore not a component of the weekly earnings identified in the definition of 'Amount Aa'. The appellant submits that the reference to an 'allowance' in pars (b) and (c) of the definition of 'Amount Aa' is to all of what is comprehended in the definition of 'bonus or allowance', other than 'any bonus or incentive', and not 'overtime'.⁹ The appellant submits that the reference to an 'allowance' in pars (b) and (c) of the definition of 'Amount Aa' is to payments for a particular requirement of the job rather than payments simply for doing the work itself.¹⁰

24 The appellant contends that its construction is supported by the statutory text, in particular:

- (1) The separate definitions of 'overtime' and 'bonus or allowance', and the distinct treatment of 'overtime' and 'any bonus or allowance' in the definition of 'Amount A'.
- (2) References to 'overtime' as distinct from a 'bonus or allowance' in cl 7(2), cl 11(5) and cl 13(2) of sch 1 to the Act.
- (3) References to an 'allowance' in various other provisions of the Act in a context which does not indicate that the term was intended to include 'overtime'.¹¹

25 The appellant contends that the construction adopted by the primary judge involves reading 'allowance' in the definition of 'Amount Aa' as if 'amount' was used.

26 The appellant also contends that the legislative history does not support a conclusion that the 2004 Amendment Act altered the

⁹ See appeal ts 29 - 30.

¹⁰ Appeal ts 20.

¹¹ Section 80, s 100A, s 101, s 106(3)(a), s 145G, s 146Q, s 146W, s 158F, s 270A, s 292(1)(e), s 322, sch 1 cl 1A, cl 1B, cl 1C, cl 3, cl 16A.

previously established position, recognised in *Thompson*, that overtime was not a component of 'Amount Aa'.

Disposition

27 For the following reasons, we do not accept the appellant's construction of the term 'allowance' in the definition of 'Amount Aa' in cl 11(2) of sch 1 to the Act. In our view, the arbitrator and the primary judge correctly concluded that the overtime payments made to the respondent on a regular basis, pursuant to cl 13.1 of the Award, were an allowance of the kind described in par (b) of the definition of Amount Aa.

28 **First**, the ordinary and natural meaning of the word 'allowance', used in the context of payments by an employer to an employee, does not exclude payments in the nature of overtime. Relevantly, the Macquarie Dictionary defines the term 'allowance' as 'an addition, as to a wage etc, on account of some extenuating or qualifying circumstance'. A payment on account of an employee working beyond his or her ordinary hours of work fits within that description. As Latham CJ observed, in relation to the ordinary meaning of the word 'allowance', in *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation*:¹²

When the word is used in connection with the relation of employer and employee it means in my opinion a *grant of something additional to ordinary wages* for the purpose of meeting some particular requirement connected with the service rendered by the employee or *as compensation for unusual conditions of service*. (emphasis added)

His Honour referred to 'overtime allowances' as a specific example of allowances as compensation for unusual conditions of service.

29 **Secondly**, the context in which the word 'allowance' appears in cl 11 does not suggest that the word 'allowance' was used as a word of limitation or that 'overtime' and 'allowance' are necessarily distinct, mutually exclusive, concepts. The defined phrase in cl 11(2) is not 'allowance' but the composite 'bonus or allowance'. It would be expected that the term 'allowance' would have been defined if it was intended to operate in the manner for which the appellant contends. The structure of the definition of 'Amount Aa', in the context of cl 11 as a whole, is not such as to require that the term 'allowance' in par (b) of the definition operate in that manner in order to produce a 'step-down' in weekly

¹² *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389, 396 - 397.

payments. That step-down is provided for by the qualifying or restricting words which follow 'any allowance' in par (b) of the definition.

30 **Thirdly**, there is, in any event, obvious room for overlap between the defined expressions 'bonus or allowance' and 'overtime'. Some specific examples of a 'bonus or allowance', such as a 'shift allowance' or 'week-end or public holiday penalty allowance', may (depending on the terms of employment and other circumstances) constitute payments 'for the hours in excess of the number of ordinary hours which constitute a week's work' within the definition of 'overtime'. More generally, a 'bonus or allowance' may be 'any bonus or incentive ... or other allowance'. That expansive language allows for a degree of overlap with other elements of the definition of 'Amount A'.

31 **Fourthly**, the appellant's submission depends on reading par (b) of the definition of 'Amount Aa' as referring to a subset of 'any bonus or allowance' in par (c) of the definition of 'Amount A'. If par (b) of the definition of 'Amount Aa' was intended to catch only a subset of par (c) of the definition of 'Amount A' then it would be expected that the defined term 'bonus or allowance' would have been used in both instances with words of qualification or restriction in the definition of 'Amount Aa'.

32 **Fifthly**, the view which we prefer is consistent with that adopted by Wheeler JA, with whom the other members of the court agreed, in *EG Green & Sons Pty Ltd v Sabourne*.¹³ An aspect of the question of law raised by that appeal was:¹⁴

... whether the definition of 'Amount Aa' in the context of the Act, must be read as excluding every payment which is capable of being regarded as an 'incentive' within the definition of 'bonus or allowance' in cl 11(2)...

33 Wheeler JA rejected as too simplistic the submission that the definition of 'Amount Aa' must be read as if it expressly excluded any payments which answered the description of the payments referred to in pars (b) and (c) of the definition of 'Amount A'. Wheeler JA observed:¹⁵

It seems to me, for example, that the amount described in subpar (b) of Amount Aa is capable of including some (but not all) types of overtime payment; that is, it would include overtime which satisfied the twin conditions of being paid on a regular basis and being related either to the

¹³ *EG Green & Sons Pty Ltd v Sabourne* [2009] WASCA 172.

¹⁴ *Sabourne* [2].

¹⁵ *Sabourne* [21].

number or pattern (eg, regular excess hours, or regular "unsocial" hours) worked by the worker.

34 As Wheeler JA went on to observe:¹⁶

Because of the overlap between the various expressions used, it is not possible to read cl 11 as if the legislature had expressly excluded, from the definition of Amount Aa, every payment capable of answering the definition of any of subpars (a) to (c) of Amount A. I am fortified in that conclusion by the fact that, in a prior form, cl 11 had expressly excluded certain types of payments from the definition of 'weekly earnings', including payments which were a 'bonus or incentive'. ... [I]t seems to me that in moving from an express exclusion of bonuses and incentives to the present form of cl 11, the legislature may have recognised the potential for overlap in some cases, and intended to exclude bonuses and incentives only where they did not otherwise fairly fall within the definition used in the words of Amount Aa.

35 Wheeler JA also said:¹⁷

I accept that, as the appellant submits, a legislative purpose behind the difference between the definitions of Amount A and Amount Aa is that, after an initial period, a worker is to be encouraged to return to work, by the withdrawal of some types of income support. However, there are a number of other public policy considerations which it appears likely that the legislature would have taken into consideration. There is a need to balance considerations of fairness between worker and employer (or employer's insurer). It would be fair to withdraw payments which were of a "one off" nature (eg, an annual bonus, where a business had been particularly profitable) or an unusual incentive (eg, "salesman of the month" loading), or which related to expenses an injured worker would no longer have (eg, dry-cleaning or travel), but not those which both worker and employer contemplated would be a regular part of the worker's remuneration. These considerations appear to me to explain the references to "regular" payments in par (b) of Amount Aa.

36 The appellant contended that Wheeler JA's reference to an 'overlap' between various expressions was inapposite in the context of provisions requiring the calculation of a specific amount. The appellant submitted that the requirement for components to be added together to arrive at a single weekly payment amount suggests that the components must be discrete.¹⁸ We do not accept that submission. If a particular kind of payment can properly be characterised as being both 'overtime' and a

¹⁶ *Sabourne* [22].

¹⁷ *Sabourne* [25].

¹⁸ Appeal ts 26 - 27.

'bonus or allowance', then it will still only be included once in the calculation required by cl 11(3) and (5).

37 **Sixthly**, on balance the legislative history does not support the appellant's construction. The Act as enacted expressly excluded overtime payments from compensable weekly earnings. Between the 1999 Amendment Act and the 2004 Amendment Act, the difference between 'Amount A' and 'Amount Aa' was that the former included overtime and any bonus or allowance and the latter did not. However, that ceased to be the case when the 2004 Amendment Act identified some kinds of allowances which were to be included in the definition of 'Amount Aa'. The new kinds of allowances were not identified by the use of the defined terms 'overtime' or 'bonus or allowance'.

38 Overtime is, by its nature, related to the number or pattern of hours worked by the worker, satisfying that element of par (b) of the definition of 'Amount Aa'. Therefore, whether the payments will form part of 'Amount Aa' will depend on whether they were paid 'on a regular basis as part of the worker's earnings'. For example, if during four of the 13 weeks in which payments are to be averaged under cl 11(5), a worker exceptionally works an additional 10 hours of overtime then those overtime payments will be taken into account in determining 'Amount A', but will not be taken into account in determining 'Amount Aa'. If, on the other hand, the worker regularly works 10 hours of overtime a week, the payments related to those 10 hours will be taken into account for both purposes. That is, overtime payments received in the 13 weeks prior to a worker's incapacity will ordinarily be taken into account after the initial 13 week payment period referred to in cl 11(3)(a) if the overtime payments were paid on a regular basis as part of the worker's earnings.

Orders

39 The appeal raises a question of law of general importance to the administration of the Act. There is also, on the agreed facts, a significant difference between the respondent's weekly earnings if overtime is or is not taken into account. We would grant leave to appeal, but would dismiss the appeal.

JUDGMENT OF THE COURT

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

ZMM

Research Associate/Orderly to the Honourable Justice Mitchell

26 AUGUST 2019