

WORKERS COMPENSATION TRIBUNAL (SA)

RENNIE, Gregory

v

WORKCOVER/EML LTD (EXTRASTAFF PTY LTD)

JURISDICTION: Judicial Determination

FILE NO/S: 6173 of 2008

HEARING DATES: 12 October 2009

JUDGMENT OF: Deputy President S M Lieschke

DELIVERED ON: 4 December 2009

CATCHWORDS:

Average weekly earnings - Worker engaged as casual carer by two different employers in the 12 months prior to injury, but had ceased the second job prior to the date of injury - Average weekly earnings set by reference only to casual earnings with Extrastaff in the 12 months prior to injury - Whether rate can be set by reference to a period shorter than 12 months - Whether worker reduced his normal hours of work prior to date of disability such as to permit application of s 4(5) - Whether the rate of average weekly earnings determined by reference to s 4(1) was a fair average in accordance with s 4(6) due to the terms of the worker's employment or for any other reason - Consideration of meaning of "fair average" - Held: The change from true irregular casual employment to regular exclusive casual employment with Extrastaff resulted in the determined rate not being a fair average of the level of earnings in this period - Average weekly earnings varied from \$220.69 to \$629.24 based on comparator performing the same work for the same hours - S 4 Workers Rehabilitation and Compensation Act 1986.

The Corporation (SE Meat Australia Ltd) v Shortt [1990] WCATR 10

Brown v WorkCover(Ahrens Engineering Pty Ltd) [1997] SAWCT60

WorkCover(Townhouse Removals Pty Ltd) v McMahon [1995]SAWCAT 15

Frape v WorkCover(DP World Adelaide Pty Ltd) [2009] SAWCT 39

REPRESENTATION:

Counsel:

Applicant: Mr M Saies

Respondent: Mr M Calligeros

Solicitors:

Applicant: Lieschke & Weatherill

Respondent: Minter Ellison

- 1 Greg Rennie is in dispute with EML over the correct rate of weekly payments of compensation he was entitled to in respect of a compensable work related knee injury sustained on 7 September 2008.
- 2 The dispute arises from EML's application of s 4 of the *Workers Rehabilitation and Compensation Act* to Mr Rennie's unusual working arrangements over the full 12 months prior to his injury.
- 3 Mr Rennie was then working as a qualified professional carer in the Aged Care Industry, as he had done for about 10 years. By 7 September he had been working exclusively for a labour hire company, Extrastaff Recruitment Pty Ltd on a regular casual basis for 11 weeks. In this period he worked an average of about 29 hours per week earning a weekly average of \$629.24.
- 4 Immediately prior to this period Mr Rennie had been employed as a carer by the Sutherland Court Retirement Village for 31 weeks. While he worked for Sutherland in each of those 31 weeks, he also did some additional work for Extrastaff in 13 of those weeks. While performing both jobs Mr Rennie earned substantially more from Sutherland than from Extrastaff. His average weekly earnings from Sutherland were \$741.13.
- 5 Prior to this period and during the first 10 weeks of the 12 month period, Mr Rennie did no work in six of the weeks and worked a total of just 22.25 hours for Extrastaff over four other weeks. His average weekly earnings in this period were \$43.38.
- 6 Mr Rennie's average weekly earnings for the entire 12 month period, including the many weeks of no work, and taking into account both jobs, were \$571.99 per week. His average weekly earnings from when he commenced work with Sutherland in the week ending 18 November 2007 and until the date of the injury, were \$694 per week.
- 7 EML fixed his rate of weekly payments at \$220.69 per week based on a summary provided by the employer. How this rate was arrived at was not fully explained, as this is not the average of Mr Rennie's earnings with Extrastaff over the 12 months. His total earnings from Extrastaff, when averaged over the full year, including over the 24 weeks when he did no work at all for it, results in a weekly average of \$229.65.¹
- 8 Whichever way EML calculated the rate, it must have done so by reference only to the amount that Mr Rennie earned from Extrastaff during the period of 12 months preceding his injury and without regard to any income from the Sutherland employment. This was probably

¹ \$11,941.73 divided by 52.

because at the time of the occurrence of the injury he was employed only by Extrastaff. EML must also have included the 24 weeks of no work in its average. That is, it averaged his earnings from about six months work over a full year.

- 9 Mr Rennie complains that this rate of average weekly earnings bears no relationship to any level of earnings from work performed by him during the previous 12 months except for a few weeks in the first couple of months of that period when he was only engaged in the workforce to a very limited extent due to a need to care for his aged mother. Mr Rennie complains that the strict application of subsections (1) and (2) should have been modified by the application of subsections (5) or (6) for two reasons.
- 10 His first ground is that because he voluntarily reduced the alleged “normal number of hours” he worked, at the time he commenced exclusive employment with Extrastaff in June 2008, the period before that reduction took effect should be disregarded for the purpose of determining his average weekly earnings.
- 11 His second ground is that due to the particular circumstances of the changes in the terms of his employment in June 2008 the strict application of subsection (1) does not result in a fair average level of weekly earnings and therefore the appropriate rate should be determined by reference to the average weekly amount being earned by a comparator performing the same work at the same classification level and working the same hours as he was in this period.
- 12 Mr Rennie contends that his circumstances fit within the specific provisions of subsections (5) and (6) of s 4. The result he contends for is the rate of \$629.24 per week being what a comparator necessarily earned during the 11 week period of his exclusive employment with Extrastaff, ie a true comparator performing the same hours of work with the same employer for the same rate of pay as he did during that period.
- 13 The issue for determination is therefore the correct application of the provisions of s 4 to Mr Rennie’s circumstances. Because s 4 was amended in part as of 1 July 2008 it is convenient to set out the amended s 4 in full.

“4—Average weekly earnings

- (1) Subject to this section, the average weekly earnings of a disabled worker is the average weekly amount that the worker earned during the period of 12 months preceding the relevant date in relevant employment.

- (2) For the purposes of subsection (1), relevant employment is constituted by—
 - (a) employment with the employer from whose employment the disability arose; and
 - (b) if the worker was, at the time of the occurrence of the disability, in the employment of 2 or more employers, employment with each such employer.
- (3) For the purposes of this section, any amount paid while a worker was on annual, sick or other leave will be taken to be earnings.
- (4) If during the period of 12 months before the relevant date the worker had changed the circumstances of his or her employment from working casually or seasonally to working in permanent employment (whether on a full-time or part-time basis) and the worker was in that permanent employment on the relevant date, the worker's average weekly earnings may be determined by reference to the average weekly amount that the worker earned during the period of that permanent employment rather than during the period of 12 months preceding the relevant date, unless to do so would disadvantage the worker.
- (5) If a worker voluntarily (otherwise than by reason of an incapacity resulting from a compensable disability)—
 - (a) reduces the normal number of hours worked; or
 - (b) alters the nature of the work performed with the result that a reduction occurs in the worker's weekly earnings,any period before the reduction or alteration takes effect will be disregarded for the purposes of determining average weekly earnings.
- (6) In addition, if by reason of the shortness of time during which the worker has been in employment, the terms of the worker's employment or for any other reason, it is not possible to arrive at a fair average, the worker's average weekly earnings may be determined by reference to the average weekly amount being earned by other persons in the same employment with the same employer who perform similar work at the same grade as the worker or, if there is no person so employed, by other persons in the same class of

employment who perform similar work at the same grade as the worker.

- (7) If a worker is a contractor rather than an employee, the worker's average weekly earnings will be determined by reference to the rate of pay that the worker would have received if the worker had been working as an employee and, if there is an award or industrial agreement applicable to the class and grade of work in which the worker was engaged, the worker's average weekly earnings will be determined by reference to that award or industrial agreement.
- (8) (Not in operation)
- (9) If because of the gradual onset of a compensable disability it appears that the level of earnings of a disabled worker prior to the relevant date were affected by the disability, the average weekly earnings of the worker must be set at an amount that fairly represents the weekly amount that the worker would have been earning if the level of earnings had not been so affected.
- (10) The average weekly earnings of a disabled worker who—
 - (a) was not a full-time worker immediately before the relevant date; and
 - (b) immediately before the relevant date had been seeking full-time employment; and
 - (c) had been predominantly during the preceding 18 months a full-time worker,

will be taken to be the average weekly earnings of the worker while employed in full-time employment during the period of 18 months preceding the relevant date.

- (11) If a worker who suffers a permanent incapacity (whether total or partial) is under the age of 21 years, the average weekly earnings of the worker must be determined by applying the rate of pay that would have been payable to the worker had the worker been 21 years old and if a worker who suffers a permanent incapacity (whether total or partial) is an apprentice, the average weekly earnings of the worker must be determined by applying the rate of pay that would have been payable to the worker had the worker completed the apprenticeship (and this determination may have

effect (if not before) when it is determined that a worker has a permanent incapacity under a redetermination under section 53).

- (12) For the purposes of determining the average weekly earnings of a worker—
- (a) any component of the worker's earnings attributable to overtime will be disregarded if, at the relevant date, the worker had no reasonable expectation to work overtime within the foreseeable future because of a change in employment arrangements or work practices, or other relevant factors, announced, introduced or occurring on or before the relevant date, but otherwise payments attributable to overtime will be taken into account; and
 - (b) to the extent that a worker has worked overtime that is to be taken into account, the component for overtime will be an amount calculated as follows:

$$C = \frac{A}{B}$$

Where

‘C’ is the amount of the component

‘A’ is the total of the amounts paid or payable to the worker for overtime during the period used to calculate the average weekly earnings of the worker under a preceding subsection (the "relevant period")

‘B’ is the number of weeks in the relevant period during which the worker worked or was on annual, sick or other paid leave.

- (13) For the purposes of determining the average weekly earnings of a worker—
- (a) any amount otherwise payable to the worker that has been the subject of a voluntary salary sacrifice for superannuation purposes by the worker will be taken into account as earnings; and
 - (b) any non-cash benefit of a prescribed class provided to the worker by an employer—

- (i) will be taken into account if the worker does not retain the benefit of the non-cash benefit (and valued after taking into account any principles specified by this Act or prescribed by the regulations); and
 - (ii) will not be taken into account if the worker retains the benefit of the non-cash benefit.
- (14) Despite a preceding subsection, the following will be disregarded for the purposes of determining the average weekly earnings of a worker:
 - (a) any contribution paid or payable by an employer to a superannuation scheme for the benefit of the worker;
 - (b) any prescribed allowances.
- (15) Despite a preceding subsection—
 - (a) if a disabled worker's remuneration was, at the relevant date, covered by an award or industrial agreement, the worker's average weekly earnings will not be less than the weekly wage to which the worker was then entitled under the award or industrial agreement;
 - (b) if, but for this paragraph, the average weekly earnings of a worker (not being a self-employed worker) would be less than the prescribed amount, the average weekly earnings will be fixed at the prescribed amount;
 - (c) the average weekly earnings of a worker will in no case be fixed at more than twice State average weekly earnings.
- (16) In this section—
 - (a) a reference to the relevant date is a reference to the date on which the relevant disability occurs; and
 - (b) a reference to State average weekly earnings is a reference to the amount last published before the relevant date by the Australian Bureau of Statistics as an estimate of Average Weekly Earnings for Ordinary Hours of Work for each Full-time Employed Adult Male Unit in this State.”

- 14 Throughout all relevant periods Mr Rennie worked as a casual for Extrastaff. He stated that he would be contacted at relatively short notice and offered work assignments in a variety of aged care facilities. For example in the final 11 weeks of exclusive employment with Extrastaff he worked in approximately 20 different establishments. He did not work to any fixed roster. In his final period with Extrastaff he had indicated that he was available to work seven days a week, but preferred to work about five shifts per week. This contrasted to his much more limited availability when his main employment was with Sutherland. Shifts varied in length from between four and eight hours.
- 15 Mr Rennie resigned from his work at Sutherland due to that work involving lengthy sleepover shifts for which he was poorly remunerated. In the three months prior to resigning in June 2008, Mr Rennie was at times working very long hours with the maximum being 120 hours in the fortnight ending 27 April and 115 hours in the following fortnight. Mr Rennie started employment with Sutherland in the week commencing 18 November 2007.
- 16 I accept that Mr Rennie was told by a representative of Extrastaff, Derek Jaffer that more work would be offered to him if he made himself available upon resigning from Sutherland. This eventuated and Mr Rennie was able to obtain suitable shifts with Extrastaff prior to 7 September. Mr Rennie stated that his goal was to earn about \$600 per week gross. The achievement of this goal is reflected in Mr Rennie's actual earnings over this period. He could have made himself available for more shifts but he chose not to do so.
- 17 Mr Rennie had previously worked with a proposed comparator Kelly Jader. They had worked together at Extrastaff performing exactly the same work, sometimes as a paired team, both at the PC 4.2 classification level.
- 18 Kylie Rowan provided some brief evidence on behalf of Extrastaff. With respect to the issue of average weekly earnings this evidence was limited given that she had no direct involvement with Mr Rennie prior to his injury. She did confirm that Extrastaff had "lots of work" on its books at the time of his injury, and that they had 105 Carers at the PC 4.2 Level.

Section 4(1)

- 19 Mr Saies, counsel for Mr Rennie, firstly contended that subsection (1) itself permitted the selection of a shorter period of actual employment than the full 12 months preceding the injury for the purpose of calculating average weekly earning, in cases where a worker had some employment throughout the whole year, as did Mr Rennie. How this shorter period was to be selected and by reference to what criteria was

not explained. In my view subsection (1) alone does not permit this interpretation if a worker was in the defined relevant employment for the full 12-month period. If so, use of the whole period to determine average weekly earnings is not optional, subject only to possible qualification by the remaining subsections of s 4.

- 20 Only if the worker has been in the relevant employment for less than 12 months, should the average weekly earnings of that lesser period be used to establish the rate. In this regard I respectfully disagree with the contrary conclusion expressed in *Frape v WorkCover (DP World Adelaide Pty Ltd)*². That rate however, is then subject to modification by an application of the provisions of subsection (6), subject to a finding that by reason by the shortness of time during which the worker has been in employment it is not possible to arrive at a fair average.

Section 4(5)

- 21 Next Mr Saies contended that subsection (5) had application to Mr Rennie's circumstances. On this argument the period prior to the week ending 29 June 2008 should be disregarded due to Mr Rennie then reducing "the normal number of hours worked" by him. This was when he gave up the Sutherland job, substantially increased his availability with Extrastaff, and worked for it thereafter on a regular basis.
- 22 The validity of this approach depends initially upon there being a finding that the worker had reduced his normal number of hours worked. In my view, for the reasons that follow, such a finding is not open on the evidence. The first consideration is that Mr Rennie was working on a casual basis with irregular hours and not in accordance with any sort of fixed roster although the work was ongoing on a regular weekly basis. This makes the task of ascertaining his normal number of hours worked after ceasing at Sutherland more difficult. The records demonstrate that Mr Rennie worked an average of 29.23 hours per week in the final 11 weeks of exclusive employment with Extrastaff. These hours varied from as low as 19 and up to 38, with two weeks of 35 hours. I add that Mr Rennie had worked 31 hours in the final week ending 7 September, being the day of disability, and had been forced to go off work due to his injury two hours into a six hour shift. I have accordingly included the unworked four hours of the final shift in the total of 35 hours for the final week.
- 23 This average of 29.23 contrasts with a substantially greater number of hours worked in both jobs from mid April to mid June. The difference in hours worked in these two periods is relied on by the worker. The flaw in this approach is that this difference does not establish a reduction in

² [2009] SAWCT 39 at [23]

normal hours. That is because the average hours worked in both jobs from mid April to mid June does not establish a norm in the context of earlier shorter hours and significant variability in those hours. This is demonstrated by the preceding five fortnights worked between 10 February and 13 April in which weekly totals of 24, 25, 31.25, 30.75 and 32.5 were worked. The totals of weekly hours worked in that period are very similar to the totals of weekly hours worked in the final 11 weeks. However there is no identifiable pattern of hours worked, or identifiable 'normal' hours, in the period prior to ceasing with Sutherland.

- 24 Even if the full 31 week period from when Mr Rennie first commenced with Sutherland in November 2007 and until his resignation is considered, an average of 38.3 hours were worked per week. But even in that whole period there was still substantial variation. For example in five of the fortnights for which figures have been provided, (one third of the period), Mr Rennie worked less hours than he did in the final 11 weeks. If the full 12 months preceding the injury are considered, there are many more weeks in which very little work or no work was performed. Accordingly, while it is true that there was a substantial reduction in the number of hours worked when the period May to June is compared with July to September, this does not establish a change in the total normal hours worked. I am therefore unable to discern from the available data a point in time that corresponded with a reduction in "the normal number of hours worked" by Mr Rennie. In my view subsection (5) cannot be applied to Mr Rennie's circumstances.

Section 4(6)

- 25 Mr Saies next argued that subsection (6) should be applied for two reasons. Firstly, the changes to the terms of Mr Rennie's employment with Extrastaff from being an irregular true casual to being a regular casual meant that an average based on both types of engagement would not result in a fair average. The second and related reason is that by Mr Rennie giving up his higher paying job, performed over 31 continuous weeks of the year, specifically in order to perform more work for Extrastaff, the average of his weekly earnings over the full year calculated by reference only to the Extrastaff employment did not result in a fair average of the worker's level of earnings when employed by Extrastaff at the time of his disability. The changes to Mr Rennie's employment arrangements were themselves significantly influenced by his temporary very limited labour market participation prior to November 2007³. Accordingly Mr Rennie's average weekly earnings ought to be determined by reference to the average weekly amount being

³ Prior to starting with Sutherland Court Mr Rennie worked an average of just 2.23 hours per week over the 10 weeks.

earned by Ms Jader from Extrastaff for the same average hours as worked by him in the final 11 weeks.

- 26 Mr Calligeros, counsel for EML, opposed these arguments. He submitted that the changes to subsections (1) and (2) could best be described as Parliament reversing the previous dominant principle of attempting to ascertain the level of earnings that an incapacitated worker could have expected to have earned but for sustaining the disability. The argument goes that the current s 4 indicates a new dominant principle of ascertaining a historical average over the previous 12 months of employment. This average specifically disregards any second employment during that 12-month period if the second employment was not being performed at the date of disability.
- 27 On this argument there is no need to look beyond a direct application of subsections (1) and (2). The rate should be based on “the average weekly amount that the worker earned during the period of 12 months” solely from Extrastaff. This would result in a weekly average of \$229.65 if the full 52 weeks was used as the divisor, i.e. including weeks when the worker was not working at all. For the reasons that follow I do not agree with this submission.
- 28 Nor do I agree with this result if I am wrong and the argument is legally correct that only s 4(1) is relevant in this case. A number of different averages can be calculated on this set of wages data. An average of \$259.60 results if the 46 weeks of at least some work with either employer was used as a divisor. It would result in \$248.78 per week if 48 weeks was used as the divisor, in recognition of the statutory right to four weeks annual leave per year. It would result in \$426.49 if only the 28 weeks of some work being performed for Extrastaff are considered.
- 29 In my view if s 4(1) was to be strictly applied only earnings from the relevant employment as defined, being Extrastaff, could be considered. Next the number of weeks in which the worker had some earnings from Extrastaff need to be identified so that the average weekly amount of these earnings over that period can be identified. This results in average weekly earnings of \$426.49.
- 30 While I accept there has been a substantial change to the starting point for ascertaining average weekly earnings in subsections (1) and (2), much of the section remains essentially the same as previously. I agree that the starting point requires a decision maker to look backwards, at least for non-overtime time earnings. Overtime has been dealt with slightly differently in that there is no longer a requirement for a worker to have historically worked overtime in accordance with a substantially uniform pattern plus have an expectation that overtime would continue to be worked in accordance with that pattern. Instead overtime will be

included if the worker has a reasonable expectation to work overtime within the foreseeable future after the date of disability.

- 31 The extent of the historical focus of s 4(1) is qualified by the need to identify the actual periods of work during that year. 52 should not be used as the divisor if a worker did not work for 52 weeks, whether due to the shortness of time during which the worker has been in the employment, due to a lack of offers of work to a true casual or due to periods of unpaid leave. The divisor should be the actual number of weeks of earnings. Subsection (6) specifically contemplates this approach by providing an alternate means of setting the rate if a shorter period of employment than 12 months does not result in a fair average under subsection (1). In my view the section does not require resort to the relative complexity and uncertainty of subsection (6) in each case of employment for less than 12 months.
- 32 Next subsections (4) and (5) permit a period shorter than a full year to be used in specified circumstances. Subsection (10) permits average weekly earnings to be set by reference to a shorter part of an 18 month period before the date of injury for a part-time worker who had been seeking full-time employment before the injury in certain circumstances.
- 33 Subsection (6) permits regard to be had to comparators if it is not possible to arrive at a fair average by reason of the shortness of the employment, the terms of the workers employment or for any other reason.
- 34 Subsection (9) also incorporates a notion of fairness. It states that average weekly earnings of a worker “must be set at an amount that fairly represents the weekly amount that the worker would have been earning” in circumstances whereby the earnings of a worker were affected by the disability prior to the deemed date of disability.
- 35 Subsection (11) retains a prospective focus in its application to apprentices and workers under age 21 who suffer permanent incapacity.
- 36 However the redrafted s 4 can be described, it is beyond argument that subsection (6) has been drafted in such a way that it may qualify subsection (1) if enlivened.
- 37 To apply subsection (6) the first question becomes whether there is anything significant about the terms of the worker’s employment, or any other reason, which renders it not possible to arrive at a fair average. The reference to employment differs from the reference to “relevant employment” in subsections (1) and (2). Accordingly I understand employment in this context to include all forms of employment and all employers in the 12 months. This enquiry then raises the question of what is meant by the phrase “fair average”.

- 38 The concept of needing to arrive at a fair average in the identified circumstances was a feature of s 4 in the 1986 Act and of the previous 1971 Act. Important questions then arise as to what factors the notion of fairness is to be applied, by reference to what considerations, and from whose perspective? Are different considerations now to be applied in view of the new focus of subsection (1)?
- 39 It was initially contended on behalf of EML that the word fair must attach to the concept of the average calculated by reference to the full period of 12 months or whatever part of that period the employment had been extant for. In my view that makes no sense because an average cannot be fair or unfair in itself. An average is an objective arithmetical construct. It is a product solely of a total and a divisor. In my view the concept of fairness must relate to something other than the objective arithmetical average ascertained in accordance with subsection (1).
- 40 A similar provision in the repealed s 4(2)(b)(ii) was considered by the Workers Compensation Appeal Tribunal in *The Corporation (SE Meat Australia Ltd) v Shortt*.⁴ In that decision Stanley J. stated on behalf of the Tribunal that the provision in the context of s 4 as it then existed required the Tribunal “to arrive, as far as is humanly possible, at a fair average of weekly payments which the worker is likely to earn during the period of incapacity.”⁵ There is a difficulty however in applying that interpretation to the current provision due to the substantial change to subsection (1). There is no indication in the current provision that the concept of fairness should be directed to equating average weekly earnings with the rate that the worker could be expected to have earned in the future but for sustaining the disability, except in the case of a disability that has a gradual onset in accordance with subsection (9).
- 41 Subsection (6) is expressed to be “in addition” to the preceding provisions, and so should be construed consistently with subsection (1), which it qualifies. Subsection (6) is not expressed as an alternate means of setting a rate of average weekly earnings.
- 42 The reference to a fair average in subsection (6) is linked to three possible factors or categories of factors, being the shortness of employment, the terms of the worker’s employment or any other reason. This is all in the context of trying to arrive at a historical average of earnings that the worker would have received from the pre-injury employment. This is indicated by the permitted use of a comparator whose historical earnings records may be used if they performed similar work in the same employment or in the same class of employment. The appropriateness of the comparator is determined by them being

⁴ [1990] WCATR 10

⁵ p 18

representative of the same type of employment, and therefore of the same level of earnings, as that being performed by the worker at the date of disability. A comparator was used to set the rate for a short period of employment, when applying the corresponding repealed s 4(2)(ii) in both *Brown v. WorkCover (Ahrens Engineering Pty Ltd)*⁶ and *WorkCover (Townhouse Removals Pty Ltd) v. McMahon*.⁷

- 43 The first category of shortness of employment is readily understandable, because if there are insufficient divisor weeks the concept of an average loses arithmetical validity. An extreme example is where a worker becomes incapacitated before even completing one week, one roster or one pay cycle. A divisor of one cannot produce an average.
- 44 While the second and third categories provide less guidance, the provision does specifically allow for consideration of the terms of a worker's employment. I understand this to mean more than a change to a term of a single contract of employment as this concept has little relevance to casuals. If the terms of employment allow significant changes to earnings for reasons other than fluctuations in the hours of stable or regular casual employment, the whole of a worker's employment in the year before injury may not be representative of the particular type of employment and earnings received in any identifiable period preceding injury. Accordingly this category appears directed towards ascertaining a representative type of and period of employment, consistent with that being performed at the time of disability.
- 45 This interpretation is consistent with other provisions of s 4 that are focussed upon having the rate of average weekly earnings ascertained by reference to a representative historical period. That includes subsection (4) that allows a lesser period to be used if an employee changes from seasonal or casual work to permanent employment, provided that would not disadvantage the worker. Similarly subsection (5) allows a shorter period to be used for calculating average weekly earnings if there has been a reduction in a normal number of hours worked or the change in the nature of the work performed that results in a reduction of earnings. Similarly subsection (9) permits a historical period or a comparator or even a purely prospective calculation in some circumstances of gradual onset.
- 46 In my view the concept of a fair average must relate to a consideration of whether a strict application of subsection (1) gives a resulting rate of average weekly earnings that is a fair representation of the level of earnings received by the worker in a historical period that is

⁶ [1997] SAWCT 60

⁷ [1995] SAWCAT 15

representative of the same type of employment being performed at the date of injury. This view is consistent with that adopted in *Frape's* case⁸.

- 47 Accordingly if there is any feature of the terms of the worker's employment or any other reason which indicates that a straightforward averaging of the period of employment of up to 12 months pre-injury does not fairly represent the rate of earnings during a period of similar employment immediately preceding the disability, then subsection (6) permits reference to a comparator or comparators.
- 48 How then is this to be applied to Mr Rennie's circumstances? The first observation to be made is that the rate as determined of \$220.69, or the correct arithmetical average of \$229.65, bears no resemblance to the rate of earnings of Mr Rennie in any period after he re-entered the workforce on his preferred basis in late November 2007.
- 49 The absence of any correlation between the determined rate and Mr Rennie's actual income from working is a product of the fact he worked on an irregular and intermittent basis as a true casual for Extrastaff in the first 41 weeks of the year. This was due to his very limited availability to Extrastaff based on his initially very limited labour market participation and later on the Sutherland employment being his main work. Prior to the end of June 2008 Mr Rennie worked for Extrastaff in only 17 weeks of the year, and did not perform any work at all for Extrastaff in 24 weeks. This contrasts with the final 11 weeks in which substantial hours were worked in each and every week consistent with the indication given by Mr Jaffer to Mr Rennie when he resigned the Sutherland employment.
- 50 Accordingly the changes to Mr Rennie's employment with Extrastaff demonstrate that the employment performed by him after the end of June 2008 bore little relationship to the employment he performed for Extrastaff on occasions prior to then. The initially irregular and limited casual nature of Mr Rennie's Extrastaff employment, often performed concurrently with a higher paying job, contrasts markedly with the period of exclusive regular and continuous casual employment in the final 11 weeks. In my view it follows that the average ascertained by subsection (1) is not a fair representation of his average level of earnings during his final identifiable period of exclusive but regular casual employment with Extrastaff. In my view these circumstances permit reference to a comparator to ascertain his average weekly earnings.
- 51 This conclusion is also consistent with the approach taken in *Shortt* where a change from casual employment to permanent employment was held to be a change in the terms of that worker's employment such that

⁸ see [25]

the Tribunal determined it was inappropriate “to have regard to amounts earned during the period of casual employment”.⁹

- 52 I was provided wage records for 12 of the other 104 carers at the same classification level. It was suggested by both counsel that I could take an average of the earnings of an agreed four of those employees to arrive at a final rate. The difficulty with this approach is that it would still build in a different, and by reference to the data a higher level of hours of work than those performed by Mr Rennie in the 11 weeks before his disability. In my view that would not be an appropriate approach as it still would not result in a fair average. However the comparator Ms Jader is a valid source of data to the extent that she was working in the same employment with the same employer performing the same work and at the same grade. If the same number of hours as performed by Mr Rennie in his final 11 weeks of exclusive regular casual employment for Extrastaff is used, the result is \$629.24 per week. This is based upon average hours of 29.23 at \$19.50 per hour. While this is also the average earnings of Mr Rennie in this period, this approach is nonetheless a valid means of determining his rate “by reference to” the earnings of a comparator.
- 53 My conclusion is that the level of average weekly earnings as determined by EML is incorrect as it fails to have proper regard to s 4. In my opinion when s 4 is properly applied to Mr Rennie’s unusual circumstances the rate of average weekly earnings is to be determined at the rate of \$629.24 per week. It follows that the determinations of 17 September 2008, 17 November 2008 and whatever informal unwritten determination occurred between those two distinct closed period determinations, are to be varied by substituting the rate of \$629.24 for the rate of \$220.69.
- 54 I adjourn further consideration of the worker’s challenge to the validity of the determination of 17 November 2008.

NOTE CAREFULLY:

Parties are advised that if a party wishes to appeal against any part of this decision which is appealable pursuant to s 86(1) of the Act such appeal must be filed with the Registrar in accordance with the form titled Notice of Appeal within 14 days of the delivery of this decision and must be served on all parties.

⁹ p. 18

PUBLICATION OF THESE REASONS

It is the practice of this Tribunal to publish its reasons for decision in full on the Internet. If any party or person contends that these reasons for decision should not be published in full the party or person must make an application within seven days of the delivery of these reasons. The application shall be by an Application for Directions with a supporting affidavit and should be addressed to the presiding member(s). If no such application is lodged within the time specified these reasons will be published in accordance with the Tribunal's usual practice.