

WORKERS COMPENSATION TRIBUNAL (SA)

FRAPE, David

v

WORKCOVER/EMPLOYERS MUTUAL LIMITED (DP WORLD
ADELAIDE PTY LTD)

JURISDICTION: Judicial Determination

FILE NO: 5390 of 2008

HEARING DATES: 30 October 2009

JUDGMENT OF: Deputy President Judge B P Gilchrist

DELIVERED ON: 1 December 2009

CATCHWORDS:

Dispute about the calculation of average weekly earnings for the purposes of the Act - Worker worked for a limited period prior to the occurrence of a compensable disability - Whether the assessment of average weekly earnings is to be made by reference to wages earned over that period or by reference to wages earned over the preceding twelve months - Held that the primary assessment is to be made by reference to wages earned over the preceding twelve months - If that methodology does not produce a fair average whether there is scope to substitute some other figure as average weekly earnings and if so how is that achieved - Held that s 4(6) permits in appropriate circumstances the assessor to make the assessment by reference to the earnings of appropriate comparators and that that process can be undertaken with some flexibility - WorkCover's determination is set aside - Worker's Rehabilitation and Compensation Act 1986, Worker's Rehabilitation and Compensation (Scheme Review) Amendment Act 2008, s 4(1), s 4(6), s 51 Worker's Compensation Act 1971.

Francese v Corporation of the City of Adelaide (1989) 51 SASR 522
National Bank of Greece (Canada) v Katsikouris: [1990] 2 S.C.R. 1029
R v Regos and Morgan (1947) 74 CLR 613 at 624
Dean v Attorney-General (Qld) [1971] QdR 391
Perry v Wright [1908] 1 K.B. 441

REPRESENTATION:

Counsel:

Applicant: Mr S Cole

Employer: Mr S Richter

Respondent: Mr M Calligeros

Solicitors:

Applicant: Lieschke & Weatherill

Employer: Kelly & Co

Respondent: Minter Ellison

The issues

- 1 This is a dispute about the calculation of average weekly earnings for the purposes of the *Worker's Rehabilitation and Compensation Act 1986* (the Act). What complicates the assessment is the fact that the worker only worked a limited part of the year prior to the occurrence of his compensable disability. His wages over that period varied as they did in his employment generally. The assessment also brings into consideration the effect of legislative changes brought about by the *Worker's Rehabilitation and Compensation (Scheme Review) Amendment Act 2008*.
- 2 The facts of the case and the legislative provisions raise the following issues:
 - Where a worker has worked for a limited period prior to the occurrence of a compensable disability is the assessment of average weekly earnings made by reference to wages earned over that period or by reference to wages earned over the preceding twelve months?
 - If it is the latter and that methodology does not produce a fair average is there scope to substitute some other figure as average weekly earnings and if so how is that achieved?

The legislation

- 3 The calculation of average weekly earnings is provided for by s 4 of the Act. For present purposes it relevantly provides as follows:

“(4)(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 (being the date on which the disability occurs)¹ in relevant employment.

...

(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

¹ S 4(16) of the Act.

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.”

4 These provisions are to be contrasted with the relevant provisions in s 4 as they were prior to 1 July 2008². At that time they provided that:

“(4)(1) Subject to this section, the average weekly earnings of a disabled worker are the average amount that the worker could reasonably be expected to have earned for a week’s work if the worker had not been disabled.

(2) ...

(b) subject to subsection (3)³

(i) the actual weekly earnings of the worker over a period of up to 12 months before the relevant date (being the date on which the relevant period of incapacity for work commenced)⁴ may be taken into account; and

(ii) 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 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.”

5 Under both the present and former regimes there are provisions that deal with the exclusion of prescribed allowances and, in certain circumstances, overtime.

6 I think it is helpful to further contrast these provisions with the analogous provisions under the *Worker’s Compensation Act 1971*, being the legislative scheme in place immediately prior to the introduction of the Act. It provided through s 51(1) as follows:

² Being the date upon which the changes brought about by *Worker’s Rehabilitation and Compensation (Scheme Review) Amendment Act 2008* took effect.

³ In these proceedings that subsection is not relevant.

⁴ This was the meaning of relevant date prescribed by s 4(9)(a)(i) of the Act as it then was.

“Where total or partially incapacity for work results from the injury, the amount of compensation shall, subject to subsection (5) of this section⁵ be a weekly payment during the incapacity equal to the average weekly earnings of the worker during the period of 12 months immediately proceeding the incapacity if the worker has been so long employed, but if not, then for any less period during which the worker has been in employment of the same employer.”

7 It also contained s 60 which provided that:

“Average weekly earnings on which the amount of compensation is fixed shall be computed in such manner as is best calculated to give the rate per week at which the worker was being remunerated; however, where, by reason of the shortness of the time during which the worker has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the incapacity to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the incapacity, was being earned by a person in the same grade employed at the same work by the same employer or, if there is no person so employed, by a person in the same grade employed in the same class of employment in the same district.”

The facts

- 8 The worker, Mr David Frape, like the other stevedores employed by DP World, undertakes most of his duties at the Outer Harbour Terminal unloading and loading containers on and off ships, trains and trucks.
- 9 The amount of labour that DP World requires depends upon the lift volume, which fluctuates from year to year, and within the year. The lift volume is affected by seasonal differences, economic factors, the number of vessels serviced in the terminal each week, fluctuating costs and efficiency of alternate modes of transportation and fluctuating numbers of imports and exports into and from South Australia.
- 10 In order to cope with these fluctuations DP World has engaged a flexible workforce that is made up of several classifications of stevedores who are allocated shifts according to their level of guaranteed income. These classifications comprise of permanent irregular (PIE) stevedores, part-time permanent (PTP) stevedores and supplementary stevedores. PIE and PTP stevedores are both permanent classifications. They are guaranteed certain minimal annual wages regardless of the actual hours worked. PIE stevedores are guaranteed a higher amount. They are the first of the classifications to be offered shifts. Shifts are then allocated to

⁵ This is not presently relevant.

PTP stevedores. Finally shifts are allocated to supplementary stevedores who do not have any level of guaranteed income.

- 11 At DP World, stevedores are paid different rates of pay depending upon what work they perform and whether they work during the day, the evening, after midnight, or on Saturdays, Sundays or Public Holidays.
- 12 When he first commenced employment for DP World in February 2002 Mr Frape was employed as a supplementary stevedore. In early 2007 he became a PTP stevedore. Over the period of that employment he performed nearly all aspects of stevedoring work. Usually he worked as a straddle operator and was paid Grade 3 rates. Sometimes he worked as a lasher and was paid Grade 2 rates. On other occasions he worked as a lasher supervisor and was paid Grade 5 rates. There is about an 8% differential between Grade 2 and Grade 3 and about a 10% differential between a Grade 3 and a Grade 5.⁶
- 13 In April 2007 Mr Frape sustained an injury to his left knee in non-compensable circumstances. As a result of this injury he was unable to work and took an extended period of unpaid leave. He returned to work in March of 2008.
- 14 On 1 July 2008 Mr Frape sustained an injury in the course of his employment with DP World. He stopped work on account of it from on or about 15 July 2008. He has since returned to work and is presently performing modified duties.
- 15 Mr Frape only worked for a period of seventeen weeks in the twelve month period immediately prior to the occurrence of his compensable disability. In all, he worked 657 hours and was paid 21 hours leave. To complicate matters further, over that 17 week period, his wages fluctuated.
- 16 Over that period Mr Frape worked 174 day hours, 226 evening hours, 122 hours after midnight, 71 hours on Saturdays, 56 hours on Sundays, and eight hours on Public Holidays. On average he earned \$1,712.93 a week.
- 17 When Mr Frape's average weekly earnings were first determined, WorkCover simply applied that average. This prompted the lodgement of a Notice of Dispute by DP World. It contended that the figure of \$1,712.93 was: "not reflective of our employees true average weekly earnings and an insufficient period of time, that is not inclusive of leave

⁶ TB 69

taken by an employer, has been utilised to set the average weekly earnings”.⁷

18 By the time this matter came on for trial before me WorkCover had changed its position and aligned itself with DP World.

19 All of the parties have agreed that if the calculation of Mr Frape’s average weekly earnings has to be undertaken by reference to s 4(6) of the Act, the following employees, all of who are PTP stevedores employed by DP World, and whom I shall identify by their initials, are potentially “other persons in the same employment with the same employer who perform similar work at the same grade as the worker”. They being:

- Comparator 1, who over the seventeen week period preceding Mr Frape’s compensable disability worked 625 hours, took 42 hours leave and averaged \$1,617.94 per week. His average weekly earnings over the 12 months prior to 15 July 2008 were \$1,554.28. Over that period he worked 1,771 hours and took 63 hours leave.
- Comparator 2, who worked 520 hours, took 56 hours leave and averaged \$1,209.42 per week for the first period. Over the second period his average weekly earnings were \$1,095.81 per week and he worked 1,190 hours and took 227 hours leave.
- Comparator 3, who worked 336 hours, took 35 hours leave and averaged \$1,247.22 per week for the first period. Over the second period his average weekly earnings were \$1,101.021 per week and he worked 1,186 hours and took 99 hours leave.
- Comparator 4, who worked 327 hours, took 51 hours leave and averaged \$1,105.60 per week for the first period. Over the second period his average weekly earnings were \$1,077.71 per week and he worked 904 hours and took 121 hours leave.
- Comparator 5, who worked 510 hours, took 28 hours leave and averaged \$1,721.80 per week for the first period. Over the second period his average weekly earnings were \$1,666.41 per week and he worked 1,882 hours and took 98 hours leave.

⁷ TB 16

Application of the legislation to the facts

Are Mr Frape's average weekly earning to be assessed by reference to the wages earned over the limited period of paid employment prior to the disability or by reference to the wages he earned over the preceding twelve months?

- 20 There seems little doubt that had Mr Frape's disability occurred prior to 1 July 2008 his average weekly earnings would have been calculated by averaging what he earned in the seventeen week period prior to the disability. This is so because under the former provision the assessment of average weekly earnings for the purpose of determining a worker's entitlement to income maintenance was directed to what the worker could reasonably be expected to have earned during the period of incapacity. In other words, it was focussed towards the future, not the past.⁸
- 21 Here the surest guide to what Mr Frape might have been earning during the period of incapacity was what he was earning at the time of its commencement.
- 22 Mr Cole, counsel for Mr Frape, submitted that notwithstanding the changes to the methodology in determining average weekly earnings brought about by *Worker's Rehabilitation and Compensation (Scheme Review) Amendment Act 2008* the result on the facts in this case is the same. He said that it was significant that the subsection used the words "during the period of 12 months preceding the relevant date" as opposed to "during the *whole* period of 12 months". He argued that unless the words were given the same construction as that which was provided for by s 51 of the *Worker's Compensation Act 1971*, unlikely outcomes would result. He said that I should adopt a construction to avoid those outcomes. He said that the language of the provisions permits me to conclude that where a worker did not work for a full twelve months in the period of twelve months preceding the disability, s 4(1) permits the assessor to divide the aggregate amount of earnings over the period actually worked by the number of weeks of employment. As this is what WorkCover had done in this case, he contended that it correctly calculated the worker's average weekly earnings such that its initial determination should be confirmed.
- 23 In my view this submission must be rejected as it fails to give effect to the language used. Had Parliament intended for s 4(1) to operate in the manner suggested by Mr Cole it would have utilised language similar to that provided for s 51 of the *Worker's Compensation Act 1971*. In my opinion s 4(1) means what it says and that is that as a general

⁸ See *Francese v Corporation of the City of Adelaide* (1989) 51 SASR 522 at 526 per King CJ.

proposition, and subject to the provisions providing for the possible exclusion of allowances and overtime, average weekly earning are determined by aggregating earnings in the twelve months prior to the compensable disability and dividing that figure by 52 to produce a weekly rate.

- 24 Mr Cole is right in saying that this will sometimes yield odd outcomes. However, the methodology prescribed by s 4 makes allowance for that by providing through s 4(6) that if it is not possible to arrive at a fair average and that has occurred because of the shortness of time during which the worker has been in employment, or because of the terms of the worker's employment or for some other reason, there is scope to arrive at another figure.

Does the methodology prescribed by s 4(1) produce a fair average and if not, is there scope to substitute some other figure as average weekly earnings?

- 25 Based on the figures provided to me, Mr Frape earned something like \$29,119.81 over the seventeen week period and if that amount is divided by 52 it yields a weekly amount of around \$560. That calculation plainly produces an unfair outcome. It is less than 1/3 of the amount Mr Frape was earning in the period during which he was working prior to his disability. Thus it is not possible to arrive at a fair average using the methodology that s 4(1) prescribes. That in turn potentially enlivens s 4(6).
- 26 Here the inability to arrive at a fair average is not attributable to the shortness of time during which Mr Frape has been in employment nor is it due to the terms of his employment. Accordingly, for s 4(6) to apply, I must find that it has been caused by "any other reason".
- 27 It might be expected that "any other reason" means something other than any other reason at all. For as La Forrester J noted in *National Bank of Greece (Canada) v Katsikouris*: "Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it."⁹ His Honour's use of the word "normally" is important because it recognises that this is not an absolute principle. The absence of an identifiable: "genus to which all the acts or things specifically mentioned can be assigned."¹⁰ strongly points to the principle having no application. So too might the overall focus of the provision.¹¹ In my opinion "the shortness of time

⁹ [1990] 2 S.C.R. 1029

¹⁰ *R v Regos and Morgan* (1947) 74 CLR 613 at 624.

¹¹ See, for example: *Dean v Attorney-General (Qld)* [1971] QdR 391.

during which the worker has been in employment” and “the terms of the worker’s employment” do not create a relevant genus. Moreover, given that the mischief to which s 4(6) is directed is to cure the unfairness that would otherwise ensue where it is impossible to arrive at a fair average, there would appear to be no obvious reason why the circumstances in which that situation could be remedied would be limited to certain sorts of cases but not others. This leads me to conclude that the expressions “the shortness of time during which the worker has been in employment” and “the terms of the worker’s employment” are not expressions of limitation impacting up the meaning to be ascribed to “any other reason” but are no more than examples of the sorts of circumstances that might make it impossible to arrive at a fair average.

- 28 I therefore find that the circumstances of this case satisfy the threshold necessary to invoke s 4(6). This in turn raises the next issue that must be resolved, and that is how that provision it is to be applied in this case.
- 29 Mr Cole argued that the words “may be determined by reference to” as they appear in s 4(6) are permissive and give the assessor of average weekly earnings some leeway in striking “a fair average”. In other words, he submitted that the provision does not impose upon me a mathematical formula through which I am obliged to average out the amount earned by the comparators.
- 30 He contended that here Mr Frape had, though his work in the preceding 17 weeks prior to his disability, demonstrated that he would willingly take on what work was on offer and that as such in identifying appropriate comparators I should look to those who did the most work rather than simply average out the wages received by those identified as performing similar work for DP World at the same grade as Mr Frape.
- 31 He therefore contended that if I were to take that approach I should limit my consideration to Comparator 1 who earned \$1,617.94 in the seventeen week period and whose annual average weekly earnings were \$1,554.28 and to Comparator 5 who earned \$1,721.80 in the seventeen week period and whose annual average weekly earnings were \$1,666.41 and that I could select one or other or average the two.
- 32 Mr Calligeros, counsel for WorkCover, argued that through its amendments to the method by which average weekly earnings were to be assessed Parliament has evinced an intention to simplify matters and that to adopt the loose methodology suggested by Mr Cole would not achieve that outcome. He submitted that s (4)(6) should be construed so as to achieve the simplicity and certainty that Parliament can be presumed to have intended. He said that in line with that approach the task was to simply identify all of the other persons who performed similar work for

DP World at the same grade as Mr Frape, aggregate their annual earnings, and divide that sum by the number of employees and a factor of 52 to arrive at a weekly rate.

- 33 Mr Richter, counsel for DP World, adopted a position somewhere between these extremes. He suggested that there was some flexibility in selecting the comparators in the sense that the assessor did not have to identify all of the other persons who performed similar work at the same grade as the disabled worker. However, he said that once an appropriate group of comparators had been selected, the entire group had to be taken into account.
- 34 In terms of the outcome that each would urge upon me here, the result would be the same, namely \$1,299.04 being the average weekly rate earned by Comparators 1, 2, 3, 4 and 5.
- 35 Whilst I accept that the methodology prescribed by s 4(1) seems to reflect an intention to make the primary calculation simpler, and that lends some support for Mr Calligeros's submission, I cannot ignore the fact that s 4(6) is in virtually identical terms to the previous s 4(2)(b)(ii) (and therefore might be thought to have the same meaning) nor can I ignore the fact the provisions like s 4(6) have a long history in workers compensation legislation and have a settled construction giving effect to the words used.
- 36 In *Perry v Wright*, a decision of the Kings Bench delivered over 100 years ago, Fletcher Moulton L.J said of this type of provision:

“Their object is only to give greater freedom to the Courts in the admission of evidence in cases where the ordinary modes of computing the average weekly earnings fail; and here, again, they seem to permit or prescribe the same process which would ordinarily be followed in practice by sensible men. But this extraneous assistance is to be treated by the Court only as help. “Regard may be had” it. In other words (to use the words employed by Farwell, L.J. in the course of the argument of one of the cases before us), the facts which the Courts may thus take cognizance of are to be “a guide and not a fetter”.¹²

- 37 I do not perceive any material difference between the expression: “regard may be had” and “by reference to”. In my opinion the words of the subsection are, as Mr Cole submitted, “permissive” and enable the

¹² [1908] 1 K.B. 441 at 458.

assessor of average weekly earnings to make such use of the evidence presented as is appropriate to arrive at a fair average.

- 38 The evidence shows that in the seventeen week period prior to his disability Mr Frape did as many hours as any of the identified comparators. Indeed he did slightly more, although he earned slightly less than Comparator 5. Whilst I acknowledge that Mr Frape said that when he returned to work after his extended leave he asked for as much work as he could get, there is no evidence before me to suggest that his preparedness to work extended hours in the seventeen week period was an aberration.
- 39 At this point I need to record that DP World sought to tender evidence of Mr Frape's earnings in the period 22 October 2006 and 15 April 2007. I agree with Mr Cole that this evidence is inadmissible because it is irrelevant. It might have been relevant if it showed that Mr Frape's work ethic in that seventeen week period in 2008 was not a reliable indicator of what he might have worked over a full year, that being the focus of s 4(1). However none of this was put to Mr Frape.
- 40 In light of Mr Frape's work record over the seventeen week period I think Comparator 3 and Comparator 4 can be disregarded as appropriate comparators. Over that period BR did less than 55% of the hours Mr Frape did. Comparator 4 did less than 50%. That leaves Comparators 1, 2 and 5.
- 41 Mr Cole submits that I should focus upon what Comparator 5 earned because over the course of twelve months he did the most work.
- 42 Given that the focus of s 4 is now directed towards what the disabled worker earned in the period of twelve months prior to the disability I think that what s 4(6) requires me to do is to look to the comparators with the view of striking a fair average that reflects hypothetically what the disabled worker might have been expected to have earned over that period. However, in undertaking that exercise, I think it is appropriate to have regard to what the comparators worked over the period that Mr Frape worked within that twelve month period. The evidence shows that the two of the hardest working comparators in the seventeen week period, Comparator 1 and Comparator 5 earned an average of around \$1,600 a week over that twelve month period and that the third, Comparator 2 earned 1,095.81 per week. It is notable that Comparator 2 took 227 hours leave over that twelve month period, whilst Comparator 1 took 63 hours and Comparator 5 took 98. The DP World Enterprise Bargain Agreement reveals that annual leave is paid at the salary rate and it is reasonable to infer that that rate is lower than the average rate of pay. It is also notable that in the twelve months preceding Mr Frape's

disability Comparator 2 worked 581 hours less than Comparator 1 and 692 hours less than Comparator 5. This leads me to conclude that Comparator 2 should also be disregarded.

- 43 This leads me to conclude that Mr Frape's average weekly earnings should be assessed by reference to what PM and Comparator 5 earned. In my view the figure of \$1,600 per week reflects a fair average for Mr Frape. In reaching this conclusion I have assumed that because I was not addressed on the topic that issues about exclusion on account of prescribed allowances or overtime do not arise. I have also taken a broad-axe approach recognising that to attempt to descend into the detail of what work might have been done and whether it would have been worked during the day, or on evenings, after midnight, or on Saturdays, Sundays or Public Holidays would be nigh impossible.

Summary and conclusion

- 44 WorkCover's determination, which was arrived at by simply averaging the amount that Mr Frape had earned over the seventeen week period prior to the occurrence of the compensable disability, cannot be sustained because it does not reflect the general approach that s 4(1) requires. That provision prescribes that as a primary position average weekly earnings are determined by aggregating the worker's earnings in the twelve months prior to the compensable disability and dividing that figure by 52 to produce a weekly rate.
- 45 Here the use of that methodology does not make it possible to arrive at a fair average. That unfairness can be addressed by the invocation of s 4(6). Section 4(6) enables the assessor of average weekly earnings to arrive at a fair average "by reference" to appropriate comparators. The expression "by reference to" gives the assessor some flexibility in striking a fair average. As Mr Frape worked as hard as any of the identified comparators over the seventeen week period that he worked prior to his compensable disability and there is no evidence to suggest that his work ethic over that period was an aberration. Accordingly the fair average should be struck by reference to the hardest working comparators.
- 46 As the focus of s 4 is directed towards the twelve month period prior to the occurrence of the compensable disability the fair average should reflect hypothetically what Mr Frape might have expected to earn over that period.
- 47 Taking a broad-axe approach, and taking into account what the hardest working comparators earned over the twelve month period preceding Mr Frape's compensable disability, I determine that amount to be \$1,600 per week. I therefore set aside WorkCover's determination and substitute

in lieu thereof the amount of \$1,600 per week as Mr Frape's average weekly earnings.

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.

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.