HWE Contracting Pty Ltd v Young and
Newmont Australia Limited v Kastelein [2007] NTSC 42

PARTIES:	HWE CONTRACTING PTY LTD v YOUNG, Damian and NEWMONT AUSTRALIA LIMITED v KASTELEIN, Robert
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE WORK HEALTH COURT EXERCISING TERRITORY JURISDICTION
FILE NOS:	LA 20 of 2006 (20428221) LA 21 of 2006 (20517529)
DELIVERED:	27 August 2007
HEARING DATES:	15-16 August 2007
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL and RILEY JJ

CATCHWORDS:

WORKERS COMPENSATION – Appeal – ‘normal weekly earnings’ – worker’s remuneration – s 49 Work Health Act (NT) 1986 – whether value of residential accommodation provided by employer is included in worker’s

remuneration – whether residential accommodation should have been properly excluded from worker's remuneration – appeal dismissed.

WORKERS COMPENSATION – Appeal – whether a benefit was an 'allowance' for the purposes of s 49 Work Health Act (NT) 1986 – whether identified non-cash benefits included in remuneration – rent, board and electricity not an allowance but remuneration – appeal dismissed.

WORKERS COMPENSATION – Cross-appeal – expert evidence – s 110A Work Health Act – court may inform itself – valuation evidence by experts in a general field – too narrowly defined – error in law does not vitiate decision – appeal dismissed.

WORKERS COMPENSATION – Cross-appeal – whether failure to give reasons for decision – obliged to reach conclusions on information available – appeal dismissed.

Murwangi Community Aboriginal Corporation v Carroll (2002) 171 FLR 116, followed
Normandy NFM Limited v Turner (2003) 180 FLR 212, approved
Alice Springs Town Council v Mpweteyerre Aboriginal Corporation (1997) 115 NTR 25 at 35, approved
Fox v Palumpa Station Pty Ltd [1999] NTMC 024, referred
Dothie & Ors v Robert McAndrew & Co [1908] 1 KB 803, referred
Skailes v Blue Anchor Line Ltd [1911] 1 KB 360 at 363-364, referred
Dawson v Bankers and Traders Insurance Co Ltd (1957) VR 491 at 497, referred
Rofin Australia Pty Ltd v Newton (1997) 78 IR 78 at 81, referred
AAT Kings Tours Pty Ltd v Hughes (1994) 4 NTLR 185 at 193-194, referred
Mutual Acceptance Ltd v Federal Commissioner of Taxation (1944) 69 CLR 389 at 396, considered

REPRESENTATION:

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

HWE Contracting Pty Ltd v Young and
Newmont Australia Limited v Kastelein [2007] NTSC 42
Nos LA 20 of 2006 (20428221) and LA 21 of 2006 (20517529)

IN THE MATTER OF the *Work Health Act*

AND IN THE MATTER OF an appeal against decisions handed down in the Work Health Court at Darwin

BETWEEN:

HWE CONTRACTING PTY LTD
Appellant

AND:

YOUNG, Damian
Respondent

NEWMONT AUSTRALIA LIMITED
Appellant

AND:

KASTELEIN, Robert
Respondent

CORAM: MARTIN (BR) CJ, ANGEL and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 27 August 2007)

MARTIN (BR) CJ:

[1] I agree that the appeals and cross-appeal should be dismissed for the reasons given by Riley J.

ANGEL J:

[2] These two employers' appeals were heard together. In each case the Work Health Court held that the "remuneration" of each respondent worker, for the purpose of determining his "normal weekly earnings" under s 49 Work Health Act NT, included the value to him of residential accommodation provided for him at the Tanami Granites mine site by his employer. The appeals are confined to accommodation and do not involve clothing and food and meals which were also provided free of charge.

[3] Each appeal is restricted to questions of law (s 116 Work Health Act NT). In each case the employer contends that the Work Health Court misconstrued the meaning of "remuneration" in s 49 Work Health Act NT.

[4] The respondent Young was employed as a diesel mechanic at the Tanami Granites mine. It was a term of his employment that he work for two weeks on 12 hour shifts followed by one week off work. He was required to fly to the Tanami mine site from Darwin and stay on site for each two week period, his day time 12 hour shifts running from 6 am to 6 pm, his night shifts running from 6 pm to 6 am. At the end of each two week period he would be flown back to Darwin for one week off before repeating the cycle. Time off work between shifts was to refresh the worker to fit him to work his next 12 hour shift.

[5] Young's employer was contractually obliged to provide him with accommodation and messing whilst on site. Whilst working at the Tanami

mine site he lived in the accommodation village situate some 45 kilometres away from the mine itself. In that village he had a single room which he was not required to share. He did not have to vacate or clean out the room for other occupants during his week off.

[6] The Tanami mine site and accommodation village were in a very remote featureless location in the Tanami Desert. The weather conditions were extreme. The learned magistrate described the site as "in the middle of nowhere". Young had no way of getting away from the village or mine site except by air from the airstrip. He had no vehicle. Young used the accommodation solely as a place to refresh and recover in preparation for his next shift. Young was contractually required to stay at the village during the whole two weeks that he was working. There was no alternative accommodation available. The accommodation was cleaned for Young at no cost.

[7] Amenities at the accommodation village included a wet mess which sold alcohol where there were pool tables and dart boards, a projection room where movies were shown once or twice a week, a gym, a library, a swimming pool, a tennis court and a basketball court. Young's work clothes were washed and cleaned for him at the mine site at the end of each shift in readiness for the next shift. Laundry was done at no expense to the worker. The value of accommodation and facilities (not including food and meals) to the worker was assessed by the Work Health Court on "a broad brush approach" at $100 per week for those weeks he was at work.

[8] The respondent Kastelein was employed as a supply officer at the Tanami Granites mine. His conditions of employment were similar to Young being required to work 14 days on 12 hour shifts each day followed by seven days off work. It, also, was a "fly in/fly out" contract, as it was described in evidence. From the moment Kastelein was on the plane travelling to the mine site his employer supervised everything, providing clothing for his use on the mine site, the equipment and other amenities he required to perform his duties, a computer and office, steel capped work boots and hard hat, and transport from the accommodation to his office. Whilst working at the mine site all workers were under the control of the employer for 24 hours per day.

[9] Kastelein was also obliged to stay at the accommodation provided for him by the employer there being no alternative accommodation available. During his period of seven days off work no–one stayed in his room and he could leave his possessions there. Throughout the period of his employment at the Tanami Granites mine Kastelein maintained his residence in Darwin or the Darwin rural area (Humpty Doo). The value of the Granites accommodation (not including food and meals) to Kastelein was assessed by the Work Health Court as $25 per day or $175 per week.

[10] The accommodation was geographically isolated – "in the middle of nowhere" – subject to extreme weather conditions, a place where the respondents were obliged contractually and in any event practically, to refresh and fit themselves for the effective discharge of their duties on the next long shift, the unpaid for provision of which was an integral and

unseverable part of the contract to work. On the facts as found in each case, as a matter of law, the respondents remained in the course of employment during the whole of the time they were at the Tanami Granites mine including whilst at their employer–provided free accommodation whilst off duty. The off duty rests at the accommodation were not merely incidental to the performance of their work but necessary in order to fit them to carry out their duties whilst on shift.

[11] As Barwick CJ said in *Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 at 536:

> "It has become apparent in Australia that what is in the course of an employment cannot be limited to what the employee is by the terms of his engagement express or implied contractually bound to do. The strict view expressed in such cases as *Philbin v Hayes* are no longer valid, in my opinion, for the solution of such a problem in Australia as is posed in this case. The course of an employment, to use the language of Dixon J in *Henderson v Commissioner of Railways(WA)* includes the doing of 'whatever is incidental to the performance of the work' and will include what he 'is reasonably required, expected or authorised in order to carry out his actual duties'. Thus it may include being at a place which the workman's presence 'is so consequential upon or incidental or ancillary to the employment that in being there he is doing something in virtue, or in pursuance of his employment'. In applying such a statement to the facts and circumstances of a particular case, its elements, in my opinion, should be applied liberally and practically".

See also *Hatzimanolis v ANI Corporation* (1992) 173 CLR 473 at 478–484.

[12] The on–site accommodation in the present cases is correctly to be characterised as part of each respondent's workplace. It was required and used "in virtue, or in pursuance of his employment". Given the respondents'

obligation to use it, not only contractually but because there was no alternative accommodation available, given the geographical isolation of the site, the extreme weather conditions, the very long shifts worked and that there was no need or justification for the accommodation save as a necessary adjunct or service to the mine operation itself, can it be said to be part of the employee's "remuneration" for working at the mine?

[13] Cases on remuneration are many and learned counsel for the appellant conceded he knew of no case where it was held that the provision of free accommodation was not part of the employee's remuneration.

[14] In *Normandy NFM Ltd v Turner* (2003) 180 FLR 212 at 214, Mildren J said:

> "It has long been the case that *whenever* the employer provides free food, clothing or accommodation that the value of these items are treated as part of the employee's remuneration: see for example *Great Northern Railway Co v Dawson* [1905] 1 KB 331; *Dothie v Robert Macandrew & Co* [1908] I KB 803; *Skailes v Blue Anchor Line Ltd* and *Sharpe v Midland Railway Co* [1903] 2 KB 26. This is the same line of authority as was approved by the Court of Appeal in *Murwangi Community Aboriginal Corp v Carroll*. I think the learned Magistrate was right when he held that *the question had to be decided by that case*." (emphasis added).

However it is a question of fact in each case itself whether accommodation provided free of charge constitutes part of an employee's "remuneration" for the purpose of determining his "normal weekly earnings" under s 49 Work Health Act NT, not one to be decided by other cases. The language of the Statute is not to be submerged by the many cases. It is to speak for itself.

As Lord Loreburn LC said in *Glasgow Corporation v Lorimer* [1911] AC 209 at 215:

> " … decided cases are chiefly valuable when they establish a principle. Where they do not establish a principle, but merely record the application of a principle to a particular set of facts, they may be instructive as to the point of view from which the judge regards the facts; but they are of little importance from any other point of view."

See, also, per Lord Shaw of Dunfermline (dissenting) in *St Helens Colliery Co v Hewitson* [1924] AC 59 at 81–82.

[15] In *Great Northern Railway v Dawson* , supra, at 335, Cozens–Hardy LJ, as he then was, said:

> "It cannot be doubted, for instance, that, if a workman is, in addition to his wages in money, allowed to occupy a house belonging to his employer, the value of that occupation must *generally* be considered as part of his earnings, because the necessary inference would be that, but for this privilege, the amount of his wages in money would be higher." (emphasis added)

On the facts as found in the present cases no such inference arises. The contract to work is a composite whole. There is no prospect of either worker being paid more on account of forgoing the proffered accommodation. Without accommodation the job is neither available nor possible and there is no alternative accommodation.

[16] In the circumstances it is difficult to conceive how the free accommodation is of economic benefit to the worker over and above his paid remuneration, or how it can be regarded as reward for or the fruit of his labour. Were there alternative accommodation available the free accommodation would be

of benefit because the worker would otherwise have to pay for the alternative accommodation in order to do his job. In the present cases as I have said and emphasise, the accommodation is inextricably wedded to each employee's contract to work. What worth is the free accommodation – as a discrete item – to the employee? What would either employee pay for his accommodation in order to keep his job? In the circumstances of these cases these questions can receive no answer because the job is at nought without accommodation and the only accommodation available is that of the employer.

[17] It was submitted that analogous to the present cases are cases involving the service of seamen who are given a free cabin, the value of which to a seaman has been held part of his remuneration. See eg. *Dothie v Robert Macandrew & Co* [1908] 1 KB 803*; Skailes v Blue Anchor Line Ltd* [1911] 1 KB 360. However I think such cases are distinguishable. In the present case there is no market for use of the on–site accommodation apart from employment at the mine. The site is "in the middle of nowhere" and lacks any physical attraction whereas cabins on board ships plying coastal towns would self–evidently have their attractions and be marketable. A submariner's bunk would be another matter. The present cases are also distinguishable from cases where third party off–site accommodation is paid for and provided to employees. In such cases the worth of the accommodation to the employee plainly is to be treated as part of the employee's remuneration.

[18] *Murwangi Community Aboriginal Corporation v Carroll* (2002) 171 FLR 116 was relied upon but the remuneration point was conceded by the employer there and in any event the supervisor had his permanent home on the property where time was his own unlike the present cases where the accommodation was part of the work place.

[19] In all the cases where free accommodation has been held to be part of an employee's remuneration the accommodation provided had a discrete economic value to the worker, one quite apart and distinct from that of the contract to work itself. That is not so in the present cases.

[20] Adapting the language of Lord Davey in *Midland Railway v Sharpe* [1904] AC 349 at 351, the free accommodation in the present cases was not the fruit of the respondents' labour. It was not on account of, and in return for, the respondents' services. It was provided rather as a requisite to enable them to do the work for which they were paid. To employ the language of Lord Macnaughten in *Abram Coal Co v Southern* [1903] AC 306 at 308, the free accommodation was not something "for which the man is engaged to work". The mere fact that an employer provides facilities at the work place – even costly or valuable facilities – does not mean that the provision of those facilities is "remuneration" to the worker. The provision of a workplace does not constitute part of the worker's remuneration. Whilst each case must be decided according to its own circumstances I agree with learned counsel for the appellant that sleeping cabins on road trains utilized by long distance haulage drivers in the Territory are analogous to the present cases.

Such accommodation is not part of "remuneration" even in the most generous sense of that word. It is not "earnt". It is not *quid pro quo* for the job done. It is an incident of the job itself.

[21] In my opinion on the facts as found the free accommodation provided to each respondent was not part of his remuneration and each appeal should be allowed.

[22] It is unnecessary to consider the other questions raised in the appeals. The cross–appeal should be dismissed.

[23] I would allow each appeal and dismiss the cross–appeal.

RILEY J:

[24] These matters have been heard together at the request of the parties. They each raise for consideration the treatment under the Work Health Act of the value of residential accommodation provided to injured workers who were "fly in/fly out" employees at a mine situated in a remote part of the Northern Territory.

[25] Both workers were employed at the Tanami Granites Mine which is situated in the Tanami Desert some 650 kilometres north-west of Alice Springs. It is a location described as being "very isolated". Although employed by different employers and in different capacities the terms and conditions of employment of the workers included similar provisions. Both were required to work for a period of 14 days (working 12-hour shifts) and then had seven

days off. They were employed on a fly in/fly out basis and obliged to reside at the accommodation village at the mine where they were provided with accommodation and meals at no cost to themselves. Each of the workers maintained residential accommodation elsewhere for periods when they were not engaged in their employment at the mine.

[26] The workers had no choice other than to reside in the village. The mining site was remote and no other accommodation was available. They worked very long shifts and, as Mr Trigg SM found in the matter of *Damian Young v Henry Walker Eltin Contracting Pty Ltd* [2006] NTMC 063, the whole reason for the worker being at the mine was to work and time off between shifts was to enable the worker to be "refreshed and able to work his next 12 hours".

[27] Each of the workers was injured in the course of his employment and was found to be entitled to compensation under the terms of the Work Health Act. The respondent, Damian Young, took proceedings against his employer, HWE Contracting Pty Ltd, and, on 3 August 2006, was granted an award by Mr Trigg SM. His Honour concluded that part of the remuneration of the worker was the provision of free accommodation at the village, the value of which he assessed at $100 per week for those weeks the worker was at the mine.

[28] The respondent, Robert Kastelein, took proceedings against his employer, Newmont Australia Limited, and, on 28 September 2006, was granted an

award of compensation by Ms Blokland CM. Her Honour concluded that the provision of accommodation formed part of the remuneration of the worker and, in so doing, expressed her substantial agreement with the reasoning of Mr Trigg SM. However, she assessed the value of the accommodation at $175 per week.

[29] Each of the employers has appealed on the following grounds:

1. The Work Health Court erred in law in finding that the "remuneration" of each of the respondent workers, for the purposes of determining their "normal weekly earnings" under s 49 Work Health Act, included the value of residential accommodation provided to them at the Tanami Granites Mine.

2. In the alternative, if the "remuneration" of each of the respondent workers for the purpose of determining their "normal weekly earnings" under s 49 Work Health Act, otherwise included the value of residential accommodation provided to them at the Tanami Granites Mine, the Work Health Court erred in finding that the provision of such accommodation was not excluded from their "remuneration" under s 49(2) Work Health Act.

Remuneration

[30] The issues raised in this appeal have been touched upon by the Court of Appeal (Angel and Riley JJ and Priestley AJ) in *Murwangi Community Aboriginal Corporation v Carroll* (2002) 171 FLR 116 and by Mildren J in *Normandy NFM Limited v Turner* (2003) 180 FLR 212. In the proceedings in the Work Health Court each of their Honours relied heavily upon those decisions in reaching their separate conclusions that the provision of accommodation in the particular circumstances was part of the worker's

remuneration for the purposes of the Work Health Act. The employers have sought to distinguish those decisions and to limit their impact for present purposes.

[31] In *Murwangi Community Aboriginal Corporation v Carroll* the employee, Mr Carroll, was an abattoir supervisor employed at a remote location in the Northern Territory. Under the terms of his employment he was paid a monetary wage and also provided with free food, accommodation and electricity. The issue for the court was whether an amount reflecting the value of the provision of free food, accommodation and electricity was to be included within the "normal weekly earnings" of the worker for the purpose of determining the compensation payable to him. It was noted by the Court that the definition of "normal weekly earnings" in s 49 of the Work Health Act included, where the worker is remunerated in whole or in part other than by reference to the number of hours worked:

> " … the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he or she was engaged in paid employment."

[32] The issue was whether the identified non-monetary benefits received by the worker were to be included in the expression "remuneration … earned by the worker …". It was noted this was a question of fact.

[33] The Court observed at 118[9]:

> "There can be little doubt that the remuneration of a worker in this case is not limited to the wages paid to the worker but extends to include benefits of other kinds received by the worker in respect of services rendered for or on behalf of the employer. The identified non-monetary benefits form part of the reward for work done and services rendered and therefore comprise 'remuneration … earned by the worker …'."

In support of that conclusion reference was made to various cases including *Fox v Palumpa Station Pty Ltd* [1999] NTMC 024; *Dothie & Ors v Robert McAndrew & Co* [1908] 1 KB 803; *Skailes v Blue Anchor Line Ltd* [1911] 1 KB 360 at 363-364; *Dawson v Bankers and Traders Insurance Co Ltd* (1957) VR 491 at 497 and *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78 at 81.

[34] It was noted in the course of the reasons for decision that the employer in that case did not seek to argue that the benefits received by the worker could not be regarded as items of remuneration. The issue with which the court was immediately concerned was whether such payments were allowances excluded by s 49(2) of the Act. In the present proceedings it was submitted by the appellant employers that, in those circumstances, the decision of the Court of Appeal in relation to "remuneration" was obiter, the issue not having been argued.

[35] In *Normandy NFM Ltd v Turner* Mildren J dealt with an appeal from the Work Health Court where the issues were almost identical to those raised in this appeal. The respondent worker was employed at the Granites Gold Mine and was provided with free accommodation at the mine site. Again the

sue was, inter alia, whether the value of the accommodation should be taken into account in the calculation of normal weekly earnings pursuant to s 49(1) of the Work Health Act.

[36] Mildren J made reference to the reasons for decision in *Murwangi Community Aboriginal Corporation v Carroll* and adopted the passage from that judgment set out at par [33] above. His Honour noted that it has long been the case in Workers Compensation cases that, whenever the employer provides free food, clothing or accommodation, the value of those items is to be treated as part of the employee's remuneration. His Honour made reference to the line of authority cited in *Murwangi Community Aboriginal Corporation v Carroll*. His Honour stated that, even if that decision was distinguishable on the basis that the real ratio concerned whether or not the benefits were allowances excluded by s 49(2) of the Work Health Act, nevertheless the conclusion that the provision of free food and accommodation was part of the employee's remuneration was inescapable in the circumstances. In light of the authorities gathered in *Murwangi Community Aboriginal Corporation v Carroll* and in the absence of any authority to the contrary the correctness of his finding is beyond challenge.

[37] In *Normandy NFM Ltd v Turner* Mildren J was also asked to distinguish the circumstances of the case from those earlier decisions on the basis that the accommodation provided to the worker was "only on a two weeks on, two weeks off basis". His Honour observed that he could not see how "that has anything to do with it" and went on to say (at 215):

> "The railway guard in *Sharpe v Midland Railway Co* was paid an allowance for lodgings whenever he was away from home (an entitlement which under the circumstances he got irrespectively of whether he incurred any out-of-pocket expenses or not), but it was nevertheless held to be part of his remuneration. Similarly, the food and accommodation provided to the ship's master in *Skailes v Blue Anchor Line Ltd* was held to be part of his remuneration notwithstanding that he also had a residence in his home port."

Reference should also be made to *Dothie & Ors v Robert Macandrew & Co* and *Dawson v Bankers and Traders Insurance Co Ltd* (supra).

[38] The decision of the Court in *Normandy NFM Ltd v Turner* was, of course, binding upon the Work Health Court and correctly applied by each of their Honours in that Court. The decision is not binding on this Court. Whilst the reasons for decision on this issue in *Murwangi Community Aboriginal Corporation v Carroll* may have been obiter, they remain compelling and, in my view, correct.

[39] The appellant employers sought to distinguish *Murwangi* on a further basis. It was noted that the policy of the Work Health Act is one of income maintenance for the injured worker: *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 193-194. It was submitted that whilst accommodation was provided free of charge for the worker/respondents it did not, in the circumstances of the present matters, affect their net financial position. The accommodation was said to be "consumed" in the course of their employment and therefore the worker retained no financial benefit from it. The appellant employers submitted that the provision of accommodation was to be distinguished from the provision of food and

meals which the workers would ordinarily have provided for themselves. By receiving meals at no cost they received the financial benefit of not having to pay for their meals out of wages, however,

> " … in the present case, accommodation at the fly in/fly out remote area workplace (1) made no net difference to the workers' financial position, and (2) was a duplication of the workers' own residences elsewhere. Therefore, the assessed value of accommodation should not be treated as 'remuneration' for the purposes of determining 'normal weekly earnings' in a statutory compensation scheme which has 'income maintenance' as its object."

[40] It was submitted that the circumstances of the present matters could be distinguished from *Murwangi* because the worker in that case (Mr Carroll) was not provided with temporary accommodation for the limited periods of his fly in/fly out roster but, rather, was provided with a full-time residence at the station where he worked for himself and his family without constraint as to his ability to use and enjoy the residence as his own. The workers in the present matter were said to have been provided with temporary accommodation when working for limited periods away from their homes.

[41] In fact, the findings of the Work Health Courts were different from the suggestion made in the submissions. Whilst at the village each worker was provided with a single room which he was not required to share. He did not have to vacate or clean out the room for other occupants during his week off. By way of example, Mr Young had a television set which he kept in his room. He did not have to store the television set during his days off. In the event that the worker took annual leave the room remained exclusively

available to him. Indeed, should a worker have chosen not to leave the camp during his days off permission to remain may be given. That was not "common" and was not something the employer would encourage, but it did happen. In other words, the room remained for the exclusive use of the worker for the duration of his employment. He may absent himself from the room during his days off in the same way other workers may go away for a weekend or annual holiday. The room remained his for the term of his employment.

[42] In those circumstances the situation was not significantly different from the nature of the accommodation provided to Mr Carroll. During the period the worker was at the village he did not have to provide accommodation for himself elsewhere. What accommodation he obtained when he was absent from the village on his days off was a matter for himself. He may have stayed temporarily in hostels or with others or he may have stayed in his own home. However, having been injured and consequently being obliged to be accommodated at a location away from the village, the worker had no choice other than to obtain permanent accommodation for himself. He lost the net benefit of the accommodation previously provided to him free of charge.

[43] In my view the reasoning in *Murwangi Community Aboriginal Corporation v Carroll* and in *Normandy NFM Ltd v Turner* applies to the circumstances of these cases and the value of residential accommodation provided to the

respondent workers was remuneration for the purposes of assessing normal weekly earnings.

Allowances – s 49(2) Work Health Act

[44] The appellant employers relied upon an alternate ground of appeal. In the event that the Court found the value of residential accommodation provided to the workers at the Tanami Granites Mine was remuneration for the purposes of s 49 it was contended that the provision of such residential accommodation was an "allowance" for the purposes of s 49(2) and was therefore excluded from the respondent workers' remuneration. That was the matter directly addressed in *Murwangi Community Aboriginal Corporation v Carroll* in 2002. The appellants contend that, in one respect, *Murwangi* was wrongly decided.

[45] The submission of the appellants was that the Court in *Murwangi* erred in concluding that an allowance for the purposes of s 49(2) of the Act must be paid in cash rather than being payable in cash or in kind. Reference to the reasons for decision in *Murwangi* makes it clear that the Court regarded the payment of cash as but one of a number of indicators of whether a benefit was an allowance for the purposes of the legislation.

[46] It was further submitted that, for the purposes of the section, as an allowance need not be received in cash, the grant of accommodation at no cost to the workers, in addition to wages and other remuneration, was an allowance. It was submitted that such an approach met the tests for an

allowance as provided for by Latham CJ in *Mutual Acceptance Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 396 where his Honour referred to an allowance as being a grant that "met some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of the service".

[47] This issue was addressed by the Court in *Murwangi* where it was said (at par 18 and 19):

> "[18] The purpose of s 49(2) of the *Work Health Act* is to identify some payments made to a worker that are to be taken into account in assessing his or her normal weekly earnings and to exclude all 'other allowances' from that assessment. It is to make clear in relation to those payments what is and is not to be included in normal weekly earnings for the purpose of assessing compensation. The amounts identified for inclusion are not limited to allowances. For example an over-award payment is not necessarily an allowance. Although it is not clear what is meant by the expression, a service grant would seem unlikely to be an allowance. By operation of the section there are included within normal weekly earnings some payments that would qualify as an allowance and some that may not. However it is clear that payments excluded are limited to 'any other allowances', that is, allowances other than those that have been specifically included. The section does not expand the meaning of the expression 'normal weekly earnings' but, rather, it identifies some payments that fall within the ambit of the expression and clarifies how those payments are to be treated for the purpose of calculating the entitlement of a worker to compensation.
>
> [19] In our view the benefits received by the worker in this case in respect of rent, board and electricity are not allowances and they are therefore not 'other allowances' as contemplated by s 49(2) of the Act. Rather they are part of the remuneration of the worker simpliciter. They, along with the amount that he is paid in cash, make up his remuneration. There was no additional cash payment made to the worker in respect of those items. None of the benefits was a grant of something

> additional to ordinary remuneration for the purpose of meeting some particular requirement connected with the service rendered by the worker or as compensation for unusual conditions of that service. The provision of the benefits was part of his remuneration. That being so none of the benefits was an 'allowance' to be excluded by the application of s 49(2) of the *Work Health Act*."

[48] I see nothing in the submissions presented on behalf of the appellants that would lead to a conclusion that the Court of Appeal was wrong in so deciding. The decision is consistent with long established and accepted authority characterising such benefit as part of the remuneration of the worker. Had it been the intention of the legislature to change that longstanding approach one would expect the use of plain language to that effect. Any uncertainty arising out of the use of the word "allowance" in s 49(2) of the Act should be resolved consistently with the beneficial nature of the legislation.

Cross-appeal – Damian Young

[49] In the matter of Damian Young, the respondent worker has lodged a cross-appeal against the decision of Mr Trigg SM to the effect that the evidence of two valuers was not "expert evidence". Further he contends that the reasoning process of his Honour in providing a value to the provision of meals and accommodation for compensation purposes was not revealed.

Expert evidence

[50] The relevant evidence was from Mr Martin Gore and Mr Mark Harris. Each witness had qualifications in the valuation of property and had prepared and provided a valuation report. There was, in the material provided by Mr Gore, an assessment of the difficulties of the task being undertaken, a discussion of relevant methods of valuation and identification of the problems with each approach to valuation in the particular circumstances of the case. His Honour considered the evidence of the two valuers and then observed:

> "[179] It is apparent from the evidence of Mr Harris and Mr Gore that this area of valuation is relatively new (probably only arising since the decision in *Fox v Palumpa Station*) and as such I doubt that a field of expertise has built up such that it is truly within the scope of 'expert evidence'. Rather, both Mr Harris and Mr Gore have made some subjective assessments based partly on their market inquiries. However, both accept that they are not comparing like with like, and therefore the 'direct comparison' method is not directly appropriate. The reality is that isolated mine sites do not charge the cost of on-site food and accommodation to mine employees at all, let alone at a commercial rate. Similarly, oil rigs do not charge for food and accommodation. What Mr Harris and Mr Gore have both done is to try and seek information from other dissimilar situations and tried to fit that into the current circumstance. They have each purported to use the 'direct comparison' method, whilst conceding that there is in fact no direct comparison. In my view, it does not really work.
>
> [180] In my view, having considered the evidence of Mr Harris and Mr Gore (and their reports), I find that their evidence is not 'expert evidence' as it does not fit within the requirements laid down in *Clark v Ryan* (as referred to supra). However, they have gathered together some information that may be of assistance to the Court. Further,

> they have expressed views which (although not expert opinion) may be of some assistance if treated more as submissions by persons who have expertise in the general area of valuing."

[51] The learned magistrate then went on to consider the information that had been provided to him by each of the witnesses. He said (par183):

> "I do not accept that a field of expertise exists in the valuing of mine accommodation, such that expert evidence can be given on it. Further, whilst I accept both valuers as experts in their field, I do not find that they are able to give expert evidence on this topic, due to the relatively new nature of it. I will make my own assessment. In doing so I have taken on board what the two valuers have said in evidence more as a submission, rather than as expert evidence."

[52] Mr Trigg SM then had regard to the evidence pursuant to the provisions of s 110A of the Work Health Act which provides that proceedings within the Work Health Court shall be conducted with as little formality and technicality and with as much expedition as the requirements of the Act and a proper consideration of the matter permits. Section 110A(3) of the Act provides that the Court is not bound by any rules of evidence and may inform itself on any matter in such manner as it thinks fit. His Honour considered the information provided by the two witnesses and discussed it in detail.

[53] In approaching the matter in this way his Honour took a narrow view of what may be regarded as the relevant field of expertise. He regarded the field to be limited to the valuing of the non-cash benefits the employee received as part of his employment at the Granites mine site. In particular

he referred to the valuing of the accommodation at the mine. His Honour considered the evidence of each of the valuers referred to and acknowledged their expertise in the wider field of valuing amenities. However, in light of the hesitation they each expressed and the difficulties for the valuation process they identified arising out of the nature of the accommodation and its location, he concluded that it was not open to them to give "expert evidence on this topic".

[54] Expert evidence need not be confined in this way. Significant assistance can be provided to a court or tribunal by the provision of expert evidence of a more general nature which then may be considered in light of the circumstances of the particular matter to hand. Experts with relevant training and/or experience may assist in identifying appropriate information upon which to rely and appropriate approaches to that information. For example, in the present case the Work Health Court may be assisted by the information provided by the acknowledged experts as to the available approaches to remote area valuations, the process of valuation of accommodation generally and the nature of information which may be of assistance in the particular circumstances of this case. The Court may be alerted to the dangers or shortcomings of different approaches to valuing this accommodation in these circumstances and assisted by the view of the experts as to how those challenges may be met. The information obtained from the experts can be harnessed by the court and used to guide it in reaching a conclusion as to the best approach to the problem at hand. Such

evidence is conducive to more reliable decision making – see generally the discussion in Ligertwood, Australian Evidence, 4th ed, Butterworths at 484 to 487.

[55] The same problem was addressed by Blokland CM in *Kastelein v Newmont Australia Limited* [2006] NTMC 081 where her Honour observed that the area of expertise need not be narrowly defined. Rather, it is the general expertise associated with commercial valuation of remote accommodation and amenities which is to be considered. By reference to a wider field of expertise the court is assisted in coming to a decision as to the value to the worker of the remote accommodation or amenity. Having received the evidence it remains a matter for the court as to what is to be accepted, what is to be rejected, what is to be relied upon and what is not.

[56] In this case the learned magistrate, whilst not according the information provided by Mr Harris and Mr Gore the status of expert evidence, in fact gave detailed consideration to the material they placed before him and discussed why he did not accept it at face value. The process undertaken informed the approach ultimately adopted by his Honour and the final result reached by him. He followed this course in reliance upon s 110A of the Work Health Act. Although his Honour did not accord the evidence the status of expert evidence it is clear that he considered it and the manner in which he did so was clearly identified. Had he received the evidence as expert testimony his decision would have remained the same as is made clear by his analysis.

[57] In my view his Honour should have received the evidence of each of the witnesses as expert testimony but his failure to do so was, in all the circumstances, of no consequence. Although an error of law has been identified in the approach adopted by his Honour, the appeal should not be allowed as the error was not such as to vitiate the decision appealed from: *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 115 NTR 25 at 35.

Failure to give reasons

[58] The respondent worker, Mr Young, also complains that his Honour failed to give adequate reasons for his assessment of the value of accommodation and food for the purposes of awarding compensation pursuant to the terms of the Act. It was contended that his Honour failed to provide sufficient detail of his reasoning process to permit an understanding of how he reached the sum attributed to the value of accommodation and food. His Honour was said to have failed to reveal his process of reasoning.

[59] This complaint is without substance. In determining these matters his Honour conducted a detailed review of the evidence of Mr Gore and Mr Harris and gave reasons as to why he did not accept or follow the opinions or views expressed by either valuer. Having done so his Honour adopted what he described as a "broad brush approach" and set the values. In the absence of further evidence there was little else he could do. He was

obliged to reach a conclusion on the basis of the information available to him and he did so.

[60] Each of the appeals and cross-appeal should be dismissed.

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