Scott v Sun Alliance: A Bonanza for Casual Workers?

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The recent High Court decision in *Scott* v *Sun Alliance Australia Ltd and Another*[1] has potentially important implications for casual employees and their employers in Tasmania.[2] In this case, the High Court was called upon to interpret part of s 69 of the *Workers Compensation Act* 1988 (Tas) ('the Act') which deals with the amount of compensation payable in the case of incapacity. In particular, the Court had to determine the application of the words 'the ordinary time rate of pay of the worker (as expressed by reference to a week)' in s.69(1)(a)(ii) in respect of a casual worker.[3] The High Court held that this expression must be interpreted as referring to the rate specified in the relevant industrial award or agreement and cannot be determined by reference to the actual hours worked by the employee prior to the commencement of the incapacity.

The worker (the appellant in this case) was engaged in September 1989 as a casual labourer with the tannery company Cuthbertson Brothers to work two eight hour shifts a week. On his second day at work he sustained an injury in the course of his employment which rendered him incapacitated for work. Initially, the worker was paid compensation on the basis of a full 38 hour week. Some time later, however, the employer's compensation insurer (the first respondent in this case) applied to the Workers' Compensation Commissioner for a review of those payments. They sought a ruling from the Commissioner that the amount of weekly compensation to be paid to the worker was to be calculated by reference to a 16 hour week. The Commissioner, Mr Sikk, dismissed the application. An appeal against this decision was later dismissed by Zeeman J in the Tasmanian Supreme Court.[4]

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1 (1993) 116 ALR 16 (hereafter *Scott*).

2 See also 'Big Compo Shock for Employers', *The Mercury*, 27 August 1993, pp 1-2.

3 It should be noted that this particular provision is unique to the Tasmanian *Workers' Compensation Act* 1988 (Tas). An identical provision was contained in Schedule 1 of the former *Workers' Compensation Act* 1927 (Tas) which the 1988 Act replaced.

4 *Sun Alliance Insurance Ltd and Cuthbertson Bros Pty Ltd v Nigel Lionel Scott* Unreported Judgments Serial No 86/1991 List A. Note also Zeeman J's decision in the case of *White v FAI General Insurance Co Ltd and Tomlison*

An appeal from this decision to the Full Court of the Tasmanian Supreme Court was allowed.[5] In a unanimous decision, the Full Court, comprised of Cox, Underwood and Wright JJ, held that upon the proper construction of s 69(1)(a), the worker was entitled to receive compensation for his total incapacity for work determined by reference to the hours actually worked by the employee. The Full Court rejected the argument put on behalf of the worker that the reference to 'the ordinary time rate of pay of the worker (as expressed by reference to a week)' in s 69(1)(a) referred to a 38 hour week which was the ordinary hours of work under the relevant award (Tanning Industry Award). Justice Wright, with whose judgment Cox J agreed, found that the words 'as expressed by reference to a week' can only be expressed by reference to the hours actually worked in the course of a week by the relevant worker whose position is being considered.[6] His Honour took the view that no perceived injustice would arise on this interpretation.[7] The respondent would be entitled during his incapacity to the same payment as that to which he as entitled whilst working.[8] His Honour saw this as being consistent with the whole thrust of modern workers' compensation - that the worker is to be compensated for the loss in fact produced by his incapacity calculated by reference to what he was earning in his employment prior to the accident.[9] Justice Underwood was similarly of the view that the words 'as expressed by reference to a week' must be taken to refer to the incapacitated worker's week.[10] In reaching this conclusion, his Honour referred to the history of the legislation[11] and the whole philosophical basis of the legislation in Tasmania and other jurisdictions, that a worker should not ordinarily suffer a diminution in weekly earnings upon sustaining a work related injury.[12] According to his Honour, this construction puts the Tasmanian legislation on the same basis as legislation elsewhere in Australia, namely, that on sustaining a compensable injury, s 69(1)(a)(i) and (ii) will entitle an injured worker to receive, by way of compensation, the amount he might reasonably have expected to receive for work done

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Steel Pty Ltd T/as Clyde Riley Dodds Unreported Judgments Serial No 29/1991 List A, at 12.

5 *Sun Alliance Insurance Ltd and Cutherbertson Brothers Pty Ltd v Nigel Lionel Scott* Unreported Judgments Serial No 25/1992 List A.

6 Id at 6 (judgment of Wright J).

7 Id at 4.

8 Ibid.

9 Id at 6.

10 Id at 5 (judgment of Underwood J).

11 Id at 4-5.

12 Id at 5.

had the injury not intervened.[13] Thus, the Full Court ruled that the worker's rate of compensation be reassessed on the basis of the 16 hours a week that he was engaged to undertake.

The worker then appealed from this decision to the High Court of Australia. The Court, consisting of Mason CJ, Brennan, Dawson, Toohey and McHugh JJ, delivered a joint judgment upholding the appeal. Initially their Honours identified the relevant question in the appeal as being whether the words 'as expressed by reference to a week' in s 69(1)(a)(ii) of the Act mean that the compensation payable to a worker is to be calculated by reference to the actual number of hours he or she ordinarily works in a week or by some other criterion, and if so, what criterion.[14]

The High Court held that the words 'as expressed by reference to a week' in s 69(1)(a)(ii) mean the ordinary hours for a week fixed by the award or agreement and not the hours agreed to be worked by the worker each week. In so holding, the High Court substantially affirmed the first instance decision of Zeeman J that the relevant ordinary time rate of pay is one expressed by reference to a week in the objective sense as provided for by the award and not by reference to the hours normally worked by the particular worker during the course of a week.

Section 69(1) of the Act provides:

> Subject to this section, where total or partial incapacity for work results from an injury suffered by a worker and where the existence of such total or partial incapacity is supported by a certificate in the prescribed form from a medical practitioner, the compensation payable to him under this Act is, in addition to any lump sum that may be payable under section 71 or 72 in respect of that injury:
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> (a) in the case of the total incapacity of the worker for work, weekly payments equal to:
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> (i) the average weekly earnings of the worker; or
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> (ii) the ordinary time rate of pay of the worker (as expressed by reference to a week) for the work in which he was engaged immediately before he period of incapacity,
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> whichever is the greater.

As their Honours in the High Court pointed out,[15] the first limb of s 69(1)(a) is concerned with the actual earnings of the worker.

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13 Id at 6.

14 *Scott* at 17.

15 *Scott* at 18.

It takes the average weekly earnings of the worker (as defined)[16] as the criterion for measuring his or her entitlement to compensation. In contrast, however, the second limb of s 69(1)(a) is not necessarily concerned with the actual earnings of the worker.[17] It uses an objective benchmark - 'the ordinary time rate of pay of the worker (as expressed by reference to a week)' - as the criterion of compensation.[18] What the court had to decide was whether the legislature, in using the expression 'ordinary time rate of pay of the worker (as expressed by reference to a week)' in s 69(1)(a)(ii) intended that it should apply to rates of pay fixed by individual contracts as well as industrial awards and agreements.[19] Their Honours were of the opinion the better conclusion is that the term was intended to apply only to industrial awards and agreements. Two considerations were put forward in support of this conclusion.

Firstly, the terms of s 69(3) of the Act suggest that the second limb of s 69(1)(a) is dealing with a rate fixed by an industrial award or agreement and not the actual pay or hours worked by the worker in accordance with an agreement with the employer. Section 69(3) provides:

> If, during a period of incapacity of a worker, the ordinary time rate of pay (as expressed by reference to a week) for any work on which he was engaged immediately before the commencement of that period increases or decreases, the compensation payable to him shall correspondingly be increased or decreased by the like amount.

The High Court was of the view that subsection (3) plainly assumes that 'ordinary time rate of pay (as expressed by reference to a week)' is an impersonal concept which is not dependent on the particular contract between the injured worker and his or her employer. According to their Honours, the evident object of this subsection is that changes in work value should be reflected in the amount of compensation which the worker receives and that object will only be achieved if the interpretation of the subsection is limited to industrial awards or agreements.[20]

The second consideration put forward in support of the conclusion that the expression 'ordinary time rate of pay (as expressed by reference to a week)' should be taken to apply only to rates of pay

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16 'Average weekly earnings' are defined in s 69(2) to mean the average weekly earnings of the worker over the period of 12 months ending at the commencement of the period of incapacity.

17 *Scott* at 18.

18 Ibid.

19 *Scott* at 19.

20 *Scott* at 20.

fixed by industrial awards or agreements was that this expression is not ordinarily found in individual contracts of employment.[21] This led the court to conclude that s 69(1)(a)(ii) would seem to have little scope for operation in relation to private employment contracts.[22] The court was of the view that whilst by itself, this factor could not be decisive, it strongly confirmed the construction which flows from the presence of s 69(3) in the Act.[23]

Accordingly, the court ruled that the expression 'ordinary time rate of pay (as expressed by reference to a week)' in s 69(1)(a)(ii) refers to a rate fixed by an industrial award or agreement and does not cover a rate fixed by an individual employment contract.[24] Having accepted that the legislature intended the term 'the ordinary time rate of pay' in s 69(1) and (3) to mean a rate fixed by an industrial award or agreement, their Honours thought it 'inconceivable' that the legislature intended the words 'as expressed by reference to a week' in those subsections to mean the hours agreed to be worked by the worker each week, and not the ordinary hours for a week fixed by that award or agreement.[25]

The High Court recognised that this conclusion leads to the result that, if the amount calculated by reference to the ordinary time rate of pay is higher than the amount of the worker's average weekly earnings over the preceding 12 months, the worker may obtain compensation which is higher than the wages he or she was earning at the commencement of the period of incapacity. In the case of a casual worker, this may mean that that person is entitled to be compensated at the same rate as a permanent or full-time employee and in some cases at an even higher rate than a full-time employee.[26]

Reference was made to the decision of the Full Court from which this appeal was made, in particular, to the judgment of Wright J (with whom Cox J had agreed) where his Honour had questioned the logic of requiring an employer to compensate a casual employee at the same level he or she would be required to compensate a full-time employee. The judges of the High Court were of the view that these remarks overlooked the effect of the direction in s 69(1) that the worker is to be paid the higher of the two amounts to which s 69(1)(a) refers. In a case where a casual worker's average weekly earnings are high enough, the employer may be required to compensate a casual

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21 Ibid.

22 *Scott* at 21

23 Ibid.

24 *Scott* at 21.

25 *Scott* at 21-22.

26 *Scott* at 22.

worker at an even higher rate of compensation than he or she would be required to compensate a full-time employee.[27] In any event, their Honours thought that no assistance is to be obtained in the construction of s 69(1)(a) by reference to what is fair to the employer or to the worker.[28] They pointed out that in some instances, the terms of the subsection may work in favour of the employer, in other cases they may work in favour of the worker.[29] In circumstances where s 69(1)(a)(ii) is the governing provision, the compensation payable may have only the slightest relationship to the usual earnings of the worker at the commencement of his or her period of incapacity.[30]

The members of the High Court also took objection to Wright J's reliance on the words of Lord Loreburn LC in the case of *Anslow v Cannock Case Colliery Co Ltd*[31] where his Lordship said:

> The object of the Act broadly stated is to compensate a workman for his loss of capacity to earn which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident.[32]

In their Honours' view, this proposition is not applicable to the Tasmanian workers' compensation legislation. Section s 69(1) of the Act directs that the worker is to be paid an amount equivalent to his or her average weekly earnings if that amount is higher than the ordinary time rate of pay (as expressed by reference to a week) for the work in which he or she was engaged, immediately before the period of incapacity.[33] The legislation itself contemplates that those average weekly earnings may be the product of earnings in other jobs for other employers.[34] Moreover, the judges of the High Court were of the view that the statement of Lord Loreburn is not consistent with the view of modern workers' compensation legislation which the High Court has taken, namely, that compensation is payable for the loss of the

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27 Ibid.

28 Ibid.

29 *Scott* at 23. The terms of the subsection may work against an employee in circumstances where he or she was a casual or part-time worker, working hours in excess of the 'ordinary time' working week and for whom s 69(1)(a)(i) regarding average weekly earnings was inapplicable. An illustration of this situation can be found in the case of *White v FAI General Insurance Co Ltd and Tomlison Steel Pty Ltd T/as Clyde Riley Dodds* Unreported Judgments Serial No 29/1991 List A.

30 *Scott* at 23.

31 [1909] AC 435.

32 id at 437.

33 *Scott* at 23-24. (Emphasis in the original.)

34 See s 70.

worker's capacity to earn in the future and that incapacity is not measured by what the worker was earning in the industry or employment in which the injury incurred. Their Honours preferred the statement of principle by Starke J in *Williams v Metropolitan Coal Co Ltd*[35] where he said:

> Compensation is not payable for the injury but for the loss of power to earn caused by the injury, that is, for incapacity for work which results from the injury. The question is whether the injury has left the worker in such a position that in the open labour market his earning capacity in the future is less than it was before the injury.[36]

They also noted with approval the words of Kitto J in *Thompson v Armstrong and Royse Pty Ltd*[37] where he stated that:

> Loss of wages is in most cases a result of, but it does not itself constitute, the relevant economic fact. That fact is the inability or the reduced ability by reason of a physical deficiency, to sell work for wages.[38]

Although these statements were made in cases concerning partial incapacity for work, the High Court felt that they accurately reflect the philosophy of modern workers' compensation legislation in relation to total incapacity.[39] In their Honours' view, to compensate a worker by reference only to what he or she was actually earning may produce serious injustice if for some reason, the worker was not exercising of all of his or her working capacity at the time of the commencement of the incapacity.[40] According to their Honours, the legislature has adopted a formula in s 69(1)(a) whose evident object is to ensure that throughout a period of total incapacity, the worker will receive a weekly sum that is either the equivalent to his or her average weekly earnings or, if that amount is below the ordinary rate of pay, an amount that represents fair weekly compensation having regard to the work that the worker was doing immediately before the incapacity commenced.[41] They felt that it should occasion no surprise that the operation of the paragraph, in its application to a casual worker who is totally incapacitated, may result in the worker receiving an amount of compensation higher than the ordinary wages of the casual worker.[42] This is because the amount the casual worker was earning

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35 (1948) 76 CLR 431.

36 Id at 444.

37 (1950) 81 CLR 585.

38 Id at 621.

39 *Scott* at 24.

40 Ibid.

41 Ibid.

42 Ibid.

at the commencement of the period of total incapacity may bear no relationship to the value of the earning capacity which has been lost as a result of the injury sustained.[43]

Accordingly, their Honours concluded the hours of work of a casual employee are irrelevant in determining compensation for the purpose of s 69.[44] To determine that compensation, s 69(1) directs that a comparison be made between the average weekly earnings of the worker and the ordinary time rate of pay (as expressed by reference to a week) for the work in which he or she was engaged immediately before the period of incapacity.[45] If the ordinary time rate of pay (as expressed by reference to a week) for the work is greater than the average weekly earnings, the worker is to be compensated at that rate.[46] Drawing on its earlier conclusions, the court ruled that, in s 69(1)(a)(ii), a week is a reference to the relevant week under the industrial award or agreement.[47] Applying this to the facts before them, their Honours found that the relevant award stipulates that the ordinary hours of work shall be an average of 38 hours a week to be worked on one of four alternative bases.[48] Consequently, the worker was entitled to be paid compensation in an amount representing 38 hours of work at the ordinary rate for the work upon which he was engaged before the commencement of this incapacity, assuming that that amount is higher than his average weekly earnings over the preceding 12 months.[49]

There is no doubt at all that the High Court's decision in *Scott v Sun Alliance Australia Ltd* is an important decision for Tasmanian workers' compensation law, clarifying what was a rather ambiguously drafted section of the Tasmanian *Workers Compensation Act* 1988.[50] Having overruled the decision of the Full Court and finding in favour of the appellant worker, the High Court interpreted subsection 69(1)(a)(ii) of the *Workers Compensation Act* 1988 (Tas.) so as to allow full compensation to a casual employee regardless of the number of hours that were actually worked prior to the injury.

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43 Ibid.

44 Ibid.

45 Ibid.

46 Id at 25.

47 Ibid.

48 Clause 19 of the Tanning Industry Award 1987.

49 *Scott* at 25.

50 See also the comments of Mr Graham Wood, one of the lawyers who argued the appeal in the High Court, as reported in *The Mercury*, 27 August 1993, p 1.

It must be emphasised that this conclusion depended, to a large extent, on the terms of the relevant award which stipulated a 38 hour week. This then became the relevant rate within the meaning of the phrase 'ordinary time rate of pay of the worker (as expressed by reference to a week)' in s 69(1)(a)(ii). As stated earlier, the High Court has made it clear that s 69(1)(a)(ii) only applies in the case of workers who are employed under an industrial award or agreement and in any future case, the precise wording of the award or agreement will be critical to the outcome of the decision. It should also be noted that the potential scope of the decision may extend beyond casual workers. Whilst the employee in this case was a casual worker, it has been suggested that the interpretation of s 69(1)(a) adopted by the High Court may also apply to the majority of part-time workers.[51] This is because for the majority of part-time workers, awards do not specify a particular 'ordinary time rate of pay' so the relevant rate would have to be determined, as for most casual employees, by reference to the ordinary time rate of pay of a full time employee. In the submissions put to the High Court on behalf of the appellant worker, no distinction was drawn between casual and part-time employees. However, the joint judgment handed down by the High Court was specifically confined to casual workers so the applicability of the High Court's reasoning to part-time workers is yet to be judicially considered.

Inevitably, the reaction to the High Court's decision in *Scott v Sun Alliance Australia Ltd* has been somewhat mixed. The decision was hailed as significant by the chief industrial advocate of the Tasmanian Chamber of Commerce and Industry with potentially serious cost implications for Tasmanian employers,[52] and concerns have already been raised about increased insurance premiums for employers. There has also been some criticism of the logic of the decision on the grounds that employees should not be entitled to be paid for more hours than they were actually working just because they are on workers' compensation.[53] From other quarters, the decision has been supported, with claims that it merely confirms the law which has been in force throughout Australia that a worker is to be compensated for lost earning capacity and not actual loss of earnings.[54]

In the wake of the High Court's ruling, the issue was raised as to whether the Government should move to reverse the effect of the decision by an amendment to the *Workers Compensation Act* 1988

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51 Verbal communication with Mr Graham Wood.

52 *The Mercury*, 27 August 1993, 1, at p 2.

53 Ibid.

54 See, for example, the views expressed by Mr John Green, spokesman for the Association of Tasmanian Labor Lawyers, reported in *The Mercury*, 23 September 1993.

(Tas). Representations have already been made to the Government on behalf of employers for a change to the law so as avoid the anticipated increase in insurance premiums as a result of the decision, particularly in industries where there are a high proportion of casual workers. The State Government is, apparently, concerned about the decision and is reported to be looking closely at its implications.[55] However, suggestions of any legislative amendment to reverse the effect of the High Court's ruling have been met with stiff opposition from some quarters, including Tasmania's Labor Lawyers.[56] At the time of writing, the matter was under consideration by the Government. It remains to be seen whether the Government will respond to pressure from the business community and take steps to amend the provision so that casual worker who suffer a total incapacity are paid workers' compensation on the basis of hours actually worked rather than on the basis of a full working week.

55 *The Mercury*, 27 August 1993, p 2.

56 'Leave Workers' Compo Alone: Lawyers' *The Mercury*, 23 September 1993.