

N2LR



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Reported  
- NZACR -

IN THE MATTER of the Accident  
Compensation Act, 1972

- AND -

IN THE MATTER of an appeal pursuant  
to Section 168

BETWEEN ROBERT HUGH SOMERVILLE  
of Auckland

Appellant

A N D THE ACCIDENT COMPENSATION  
CORPORATION

Respondent

Hearing: 9th February, 1982.

Counsel: Mrs. Kerr for Appellant.  
Mines for Respondent.

Judgment: - 1 MAR 1982

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JUDGMENT OF SPEIGHT, J.

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The Appellant, who is ordinarily resident in New Zealand, suffered a severe and permanently disabling injury while he was paying a short visit to England in 1978. On return to New Zealand he applied for compensation under the Accident Compensation Act, 1972. There were two hearings before agencies of the Commission, but the claim was declined. He appealed to District Court Judge Willis, who is the Appeal Authority constituted under the Act. Judge Willis upheld the decisions of the Commission and dismissed the appeal. Pursuant to Section 108 of the Act leave was granted to the Appellant to appeal to the High Court against Judge Willis' decision of the 4th November, 1980, on the ground there was a question of law

involved.

It is a very sad case. Mr. Somerville was a music teacher employed jointly by three institutions or organisations, viz. Hereworth School, Woodford House and the Vestry of St. Luke's Church, all of Havelock North. These three combined to pay him a total salary of \$9,383 per annum, and he taught music at the two schools, and he played the organ and was choirmaster at the Church. In addition he was a housemaster at Hereworth School and he was provided for the purposes of his employment with a flat in the grounds of the school, and for that he was charged a weekly rental of \$35 which was deducted from his salary there. In 1977 and 1978 he and Canon King of the St. Luke's Church, were instrumental in arranging that the H. B. Williams Educational Trust should make a grant or grants to Hereworth School for the development of the teaching of music there and, in addition, it was arranged that there would be available the sum of \$500 from the Williams Trust to pay Mr. Somerville's tuition fees at Magdalen College, Oxford, and elsewhere in England. He had arranged with all his employers to take leave without pay and travel to England and spend a short period, I think perhaps a term, taking<sup>a</sup> course of tuition at Magdalen and organ lessons in London. He also pursued other enquiries concerning the teaching of music, with particular reference to Church and school choral work, all of which would be of great value for the furtherance of his duties as an employee of the three institutions, and there was an undertaking given by him, which he obviously intended to honour, that he would thereafter return and resume his employment. Indeed the motivation for the Williams Trust to pay his tuition fees was related to certain increased facilities which that Trust was also providing at Hereworth School. He was to undertake special study overseas which would enable him to use these facilities to greater advantage than would otherwise have been the case. He was granted leave without pay and he travelled to England paying his

own fares, and he received favourable accommodation by arrangement with friends in England. Hereworth School also agreed that while he was away it would waive any rental charges in respect of the flat and it was implicit in the arrangement that the flat would be again available for him to re-occupy when he took up his duties again. There is a suggestion that he left some of his belongings in the flat, but the evidence on this was not very specific. The highest that the evidence comes to as to this arrangement is contained in a letter which was subsequently received from the Headmaster of Hereworth School, which reads as follows:-

" The Commissioner,  
Accident Compensation Commission.

Dear Sir,

I write once again in support of Mr. Somerville's claim for compensation for the accident he suffered while in England.

Although supported by an Educational Trust Mr. Somerville was still a member of my staff.

I could not afford to pay both him and his relieving teacher but he was still very much a member of my staff as outlined in his statement, paragraphs 5, 8, 13 and 14.

While not paid his salary during his absence Mr. Somerville was assisted by our Board of Trustees which held his school flat for him and waived the rental on it in lieu of a salary. This was the only way we could afford to help him.

It should also be stated that the Rev. Canon King, who organised the study trip, was Chaplain to this School and arranged the financial assistance in the knowledge that while we supported the trip, we couldn't finance it.

Mr. Somerville in fact worked at this school as a labourer during the holidays to augment his income in preparation for the trip.

Yours faithfully,

A. CURTIS.

Headmaster.

The paragraphs referred to were in Mr. Somerville's original statement for a hearing at the Commission on 5th July,

1979. They read as follows:-

- " 5. The Boards of both Hereworth School and Woodford House readily acceded to my taking this opportunity of further study and granted me leave on condition that I would resume my duties of teaching on July 17, 1978, as also did the Vestry of St. Luke's Church.
8. I kept in constant communication with Mr. Curtis and Canon King as to my condition and I was given authority to reserve any decisions about the future and they stated that my employment would be held open for me.
13. During my years at Hereworth a music course was developed and new materials and equipment were obtained. Prior to my trip the school was fortunate in receiving an endowment fund for the establishment of a choral scholarship. One of my tasks while away was to see how this fund could best be used in developing the choral scholarship as this was a new situation for New Zealand but well established in the choir schools in England and Europe.
14. The crux of this appeal is that I was under the control of my employers at the time of the accident, as I have outlined in written and verbal evidence. I maintain that I most certainly was under the control of my employers. My temporary leave was subject to the control of and organized by my employers.

Unfortunately while he was in England he fell and suffered a severe injury to his hip. This required extensive hospitalisation and the greatest difficulty was encountered by him in being able to manage to get back to New Zealand. Hereworth School endeavoured to re-employ him in another capacity, but unfortunately his injuries were such that he could not properly be so employed, and with reluctance by all parties he was obliged to resign. He then made his claim for compensation which has thus far been unsuccessful as outlined above.

The provisions of the Act concerning entitlement to compensation for a person who is injured overseas are to be found in Section 60 and, in particular, as far as Mr. Somerville is concerned, in Section 60 (2). Omitting non-essential parts of that sub-section the entitlement arises if and only if four criteria are satisfied:-

- (a) That the claimant was entitled to cover under the earner's scheme immediately prior to departing from New Zealand.
- (b) The accident happened outside New Zealand within twelve months of the date of his departure.
- (c) He was absent from New Zealand only temporarily and exclusively or principally for the purposes of his employment in New Zealand; and
- (d) While he remained out of New Zealand he continued to derive earnings from that employment.

There is no challenge to points (a) or (b). The Commission has argued, though not strongly, that his absence from New Zealand was not principally for the purposes of his employment, but that matter was decided conclusively in his favour by Judge Willis. As I see it, this being an appeal on a point of law only, that conclusion cannot now be challenged and indeed, even were it so, on the transcript of the evidence and the reasoning of Judge Willis, I am quite satisfied that his absence from New Zealand was principally for that purpose.

The crucial question is whether, while he was out of New Zealand, he continued to derive earnings from his employment. It is clear that he was on leave without pay and received no money or money's worth from any of his employment. It is not argued on his behalf that the payment of his tuition fees by the Williams Trust was earnings from his employment. The only matter which can be availed of and the matter upon which Mrs. Kerr relies on behalf of the Appellant, is the situation concerning the flat and the abatement of rent in respect of it during his absence. The question is whether this was a "house allowance".

The four tests which have been enumerated above to determine eligibility for a person suffering personal injury by accident out of New Zealand are taken from Section 60 of the Act. Did the indulgence extended to the Appellant amount to "earnings" from his employment? By Section 2 of the Act earnings have the

definition attributed to it in Section 103, which reads, in sub-section (2), as follows:-

" For the purpose of this Act 'earnings as an employee' includes -

- (a) any wages, salary, allowances (including allowances of any of the kinds referred to in Section 89 of the Land and Income Tax Act, 1954), holiday pay, overtime pay . . . . . to any person in respect of or in relation to the employment of that person as an employee. "

Section 89 of the 1954 Act has been replaced by Section 72 of the Income Tax Act, 1976, and it reads as follows:-

" Value of board, lodging and house allowances - Without limiting the meaning of the term allowances as used in Section 65 (2)(b) of this Act, the said term shall be deemed to include (in the case of a taxpayer who in any income year has been provided in respect of any office or position held by him with board or lodgings or the use of a house or quarters or has been paid an allowance instead of being so provided with board or lodging or with the use of a house or quarters) the value of those benefits; and the value of the benefits shall be determined in each case of dispute by the Commissioner. "

But for the existence of this section and its antecedents, generally speaking allowances made available to an employee are only assessable for income tax purposes if they are ejusdem generis with salaries and wages under Section 88 (1)(b) of the 1954 Tax Act (superseded by equivalent provisions in the 1976 Act): see Stagg v. Inland Revenue Commissioner (1959) N.Z.L.R. 1252, approved by the Court of Appeal in Commissioner of Inland Revenue v. Parsons (No. 2) (1968) N.Z.L.R. 574. That case related to a free air fare to tour overseas and is not of application in respect of house allowances which are specifically dealt with in Section 89. In broad terms that section specifically equates free or subsidised accommodation with money or money's worth. It has been applied by the Taxation Review

Authority in Case C.13, 3 N.Z.T.C. 119, and 2 T.R.N.Z. 385.

That case concerned amongst other allowances the free accommodation supplied to the manager of licensed premises and his wife. It distinguishes such English cases as Tennant v. Smith (1892) A.C. 150 where no specific provision was contained in the legislation concerning housing allowances. One also notes Hochstrassen v. Mayes (1959) 3 All E.R. 817, where there is an analysis of the true nature of payments made in respect of house transfers, which were not held to be assessable as income derived from the employment, but that case too is clearly distinguishable.

Under Section 89 most cases of free accommodation supplied in addition to salary as part of the conditions of employment will be vulnerable to assessment, except perhaps in rare cases of what were once called "service occupancy" where an employee is required to live in particular premises for the purpose of the discharge of his duty as, for example, a lighthouse keeper or a railway signalman.

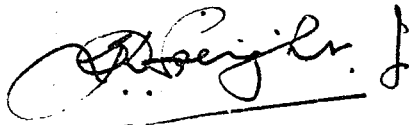
In the present case during the ordinary course of Mr. Somerville's employment it seems unlikely that any enquiry would have been made by the Commissioner as to whether or not his occupancy of this house amounted to "an allowance", for it would seem likely that \$35 per week for a flat in Hastings would be a fair rent and not part payment for services. It would be otherwise, however, in cases where but a token rent was paid and a claim by the Commissioner for the difference between that and a proper rent would seem hard to resist as part of an employee's allowance. The crux of the present case is that for the period that Mr. Somerville was to be absent from the school payment of his rent was remitted. There was apparently a clear understanding that the house would be held for him so that he could re-commence his occupancy after he returned. That doubtless was a gentleman's agreement and he may well have had no cause for complaint if, due to alteration in circumstances, his employer had been obliged to

let it to someone else. Indeed the evidence is that there was a relieving teacher taken on during his absence. Whether this person had the use of the flat or lived elsewhere is not stated in any of the material before me. What, however, was the situation vis-a-vis the Appellant during the period of his absence and nil rental from him? The very best that can be suggested on his behalf, and the evidence is skimpy, is that some of his personal belongings were still in the building and no charge was being made for what was in effect storage. Does this amount to "the provision in respect of an office or position held by him with the use of a house"? The point is a fine one. One would wish to strain the interpretation favourable to Mr. Somerville whose position evokes much sympathy. It appears to me, however, even on the most liberal view in his favour, the house was not being used by him in respect of his employment at the crucial time. The structure of the tax provisions indicate that the purpose and origin of adding such benefits to assessable income is that the value provided amounts to a supplement to wages and provides financial benefit. If so the taxpayer so placed is liable to assessment for equivalent value. Mr. Somerville's employment was temporarily suspended. He was on leave without pay. He was no longer himself using the house nor, I fancy, could he have delegated its use to anyone else, either friend or relative. The fact that it would be available to him as and when he returned to employment was an act of grace by the employer and one has no doubt that the question of his having left some personal belongings in the house during his absence (if he did) was never regarded as a matter of any moment by either party. Judge Willis in his judgment said that if the Commissioner had assessed the Appellant with income at \$35 per week during his absence, Mr. Somerville would have been the first to complain. With respect I suggest that is not quite stating the test correctly. It is not a question as to whether Mr. Somerville would have complained but whether he could have successfully objected to an assessment



of \$35 per week for the right of occupancy. Obviously he could have done so because he had pro tem surrendered the right of occupancy and his employers would have been entitled, though subject to criticism for moral breach, to re-let. At most it could have been suggested that there was some trifling value to him, perhaps a dollar or two a week, for free storage of personal belongings. The quantity of these is unknown. The house may have been furnished; it may merely have had some of his clothes and personal chattels there, but in the absence of evidence one cannot say that a claim that such a trifling favour was a valuable allowance to him made by the Commissioner in a tax assessment could have been sustained.

For these reasons, and with some regret, I have come to the conclusion that the situation does not bring the Appellant within the tests required by the wording of the two statutes under review, and accordingly the appeal is dismissed, but without costs.



Solicitors:

Hooker, Gill & Ivory, Auckland, for Appellant.

Accident Compensation Appeal Authority, Tribunals Division,  
Wellington, for Respondent.