SUPREME COURT OF QUEENSLAND

CITATION:	*WorkCover Qld v Australia Meat Holdings P/L* [2003] QCA 350
PARTIES:	**WORKCOVER QUEENSLAND** (applicant/respondent) **v** **AUSTRALIA MEAT HOLDINGS PTY LIMITED** ACN 011 062 338 (respondent/appellant)
FILE NO/S:	Appeal No 6308 of 2002 SC No 7053 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2003
JUDGES:	Davies and Williams JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Appellant to pay respondent's costs to be assessed**
CATCHWORDS:	STATUTES - ACTS OF PARLIAMENT - INTERPRETATION - PARTICULAR WORDS AND PHRASES - SPECIFIC INTERPRETATION - where three agreements existed between appellant and Australasian Meat Industry Employee's Union - where agreements included a clause setting out amount payable to a totally incapacitated worker - where s 174 *WorkCover Queensland Act* 1996 (Qld) provides for amount of compensation payable to totally incapacitated worker whose employment is governed by industrial instrument - where s 174 provides that worker may be entitled to 'the amount payable under the worker's industrial instrument' - whether 'amount payable under a worker's industrial instrument' is the amount fixed by the agreement *Workplace Relations Act* 1996 (Cth), s 170LT *WorkCover Queensland Act* 1996 (Qld), s 132, s 174
COUNSEL:	W Sofronoff QC, with A K Herbert, for the appellant

P A Keane QC SG, with G C Martin SC, for the respondent

SOLICITORS: Allens Arthur Robinson for the appellant
Crown Solicitor for the respondent

[1] **DAVIES JA:** This is an appeal by Australia Meat Holdings Pty Ltd against a declaration made in the Supreme Court on 12 June 2002. The respondent is WorkCover Queensland who had sought the declaration. The declaration was in the following terms:

> "I declare that on the proper construction of the *WorkCover Queensland Act* 1996 and the Dinmore Enterprise Agreement 2000, the Beef City Enterprise Agreement 2000, and the Rockhampton Enterprise Agreement (2000), that the words "the weekly rate of wages" in s 132 of the Act referred to and only to, the weekly rates of pay set out in the wage rates clause in each of the Agreements."

That decision and this appeal concerned the proper construction of s 132 and s 174 of the *WorkCover Queensland Act* 1996 ("the Act") and the application of those provisions to the three certified agreements referred to in the declaration.

[2] The agreements, which were in materially similar form were each between the appellant and Australasian Meat Industry Employees Union.[1] They relate to three meatworks conducted by the appellant. The employment of relevant employees at each of those meatworks is regulated by those agreements which are certified under s 170LT of the *Workplace Relations Act* 1996 (Cth). Consequently they bind the appellant, all persons whose employment is, at any time when the agreement is in operation, subject to the agreement and the employee organization, referred to above, which is a party to the agreement.[2]

[3] The question in dispute between the parties concerns the amount payable to a totally incapacitated worker whose employment is governed by one or other of the agreements to which I have referred. In order to understand the competing contentions of the parties in this respect it is necessary to set out the relevant statutory provisions and the relevant clauses of one of the agreements.

[4] Section 174[3] of the Act relevantly provides:

> "(1) The compensation payable to a totally incapacitated worker whose employment is governed by an industrial instrument is, for each week -
>
> (a) for the first 26 weeks of the incapacity, the greater of the following -
>
> (i) 85% of the worker's NWE;

---

1 They were the Beef City Enterprise Agreement dated 12 January 2000, the Dinmore Enterprise Agreement dated 14 April 2000 and the Rockhampton Enterprise Agreement dated 4 July 2000. The only relevant difference between them is noted at fn 11. It is common ground that all were industrial instruments within the meaning of s 132 and s 174 of the Act.

2 *Workplace Relations Act* 1996 (Cth), s 170M. They also prevail over terms and conditions of employment specified in a State law, State award or State employment agreement, to the extent of any inconsistency: s 170LZ. However they operate subject to the provisions of the *WorkCover Queensland Act* 1996 with respect to workers compensation: s 170LZ(2)(b).

3 Now s 150 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

(ii) the amount payable under the worker's industrial instrument;

… "

[5] "NWE" in s 174(1)(a)(i) means normal weekly earnings which are "the normal weekly earnings of a worker from employment (continuous or intermittent) had by the worker in the 12 months immediately before the day the worker sustained an injury".[4] It is, in effect, the average of the worker's actual weekly earnings over a 12 month period.

[6] The "amount payable under the worker's industrial instrument" in s 174(1)(a)(ii) is defined in s 132[5] in the following terms:

> "(1) An amount payable under an industrial instrument to a worker is the weekly rate of wages to which the worker is entitled for the time being under the industrial instrument".

[7] The term "wages" is defined to mean "the total amount paid, or provided by, an employer to, or on account of, a worker as wages, salary or other earnings by way of money or entitlements having monetary value … ".[6] It may be inferred from the phrase "other earnings" in that definition that the money or entitlements are consideration for work or service which earns it.[7] That is, relevantly, the way in which "wages" has been defined at common law.[8]

[8] The meaning of s 174(1)(a)(ii), when read with s 132(1) and the definition of "wages" in Schedule 3 to the Act is not entirely clear. However some relevant propositions may be stated with some confidence. The first is that the purpose of s 174 is to fix the minimum compensation to which a worker is entitled upon becoming totally incapacitated by an injury. The second is that that entitlement arises upon the occurrence of an injury to that worker.[9] The third is that it replaces the worker's entitlement to wages, as defined, to which, up to that instant, he or she was entitled.[10] And the fourth is that the essential difference between s 174(1)(a)(i) and s 174(1)(a)(ii) is that the former fixes the amount of compensation by reference to an average of actual earnings over a period of 12 months whilst the latter fixes it by reference to a rate of wages, as defined, to which the worker is entitled at a specific time.

---

4 Section 133(1) - now s 106(1) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld); they are calculated as provided under a regulation: s 133(3),) - now s 106(3) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

5 Now s 105 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

6 Schedule 3, definition of "wages"; the definition goes on to provide for some exclusions, none of which is relevant here - now in Schedule 6 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

7 "earn" is defined in the Macquarie Dictionary, Federation Edition, as "to gain by labour or service".

8 See, for example, *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 452, 465.

9 Section 5(1)(a), s 5(2)(a), (c), s 135(1).

10 Section 12, Schedule 3 definition of "wages".

[9] I turn now to the terms of the industrial instruments for they were essential to the appellant's submissions. I have taken as an example the Dinmore Enterprise Agreement. Clause 25 provides for weekly wage rates for various classes of employees. Clause 26 then provides:

> "26.1 Notwithstanding any other provision of this Agreement, if an employee is totally or partially incapacitated from performing work by reason of a circumstance which entitles the employee to a weekly payment of compensation under Division 4 or Division 5 of Part 8 of Chapter 3 of the WorkCover Act 1996 (or any provision enacted in substitution therefor), the weekly rate of wages to which the employee is entitled during the period of such incapacity on account of the engagement of the employee under this Agreement, shall be the rate which is equal to:-
>
> (i) In the case of a Regular Daily Employee - 85% of the classification rate set out in Clause 25 of this Agreement which relates to the position which the employee is engaged; or
>
> (ii) In the case of all other types of employee - the proportion of the rate specified in (i) which is relevant to the employment status of the employee.
>
> Provided that this clause shall not entitle the employee to be paid such wages for any period that the employee receives their full entitlement to weekly payments of compensation under Division 4 or Division 5 of Part 8 of Chapter 3 of the WorkCover Act 1996."[11]

[10] Mr Sofronoff QC, for the appellant, submitted that "the amount payable under the worker's industrial instrument" in s 174(1)(a)(ii) was, in this case, relevantly, the amount fixed by cl 26.1. As I understand the submission it is put in two ways. First, in its simplest form, it is, literally, an amount payable under the worker's industrial instrument, as s 174(1)(a)(ii) appears to require, during the relevant period of incapacity. But to put it in that simple way, Mr Sofronoff QC concedes, would be to ignore s 132(1). So he submits that the amount stated in cl 26.1 is a "weekly rate of wages to which the worker is entitled for the time being under the industrial instrument" because the clause describes it as a weekly rate of wages and the Act permits that to occur.

[11] The difficulty with that argument, it seems to me, is that it ignores the definition of wages, requiring as it does that it be the consideration for work or services performed. And whilst it is true that that definition could be abandoned if the context otherwise required it,[12] I am unable to see anything in the context of these sections which requires that "wages" be given some other broader meaning.

[12] On the contrary, it seems to me that, at the point in time at which compensation replaces wages, s 132(1) ensures that the amount referred to in s 174(1)(a)(ii) is the weekly rate of wages to which the worker is entitled at that time; that is the rate of wages to which he is entitled under the industrial instrument at the time he is

---

[11] Clause 10.1 of the Rockhampton Enterprise Agreement is in similar terms. Clause 28 of the Beef City Enterprise Agreement is in similar terms except that it does not contain the proviso at the end of cl 26.1.

[12] *Acts Interpretation Act* 1954 (Qld) s 32A.

injured. What is not so clear, in my opinion, is what is the weekly rate of wages to which he is entitled from time to time thereafter.

[13] The purpose of the phrase "for the time being" in s 132(1), although by no means entirely clear, is, in my opinion, to ensure that if, at any time after the time of injury, the weekly rate of wages to which the worker was entitled at the time of his incapacitating injury changes, the rate at which the worker is entitled to compensation changes accordingly. That is, to say the least, inelegantly put in the above phrase for once the worker becomes incapacitated he or she is no longer entitled to any weekly rate of wages. But the intention of the phrase is, in my opinion, as I have indicated and I would so construe it.

[14] It was submitted for the appellant that this construction of s 174 would give s 174(1)(a)(i) no work to do because the weekly rate of wages to which a worker is entitled at the time of his injury would invariably be more than the average of his normal weekly earnings in the preceding 12 months. That is plainly not the case. For a variety of reasons a worker, at the time he is injured, may be entitled to a weekly wage rate less than the average of his earnings in the previous 12 months.

[15] It is unnecessary, in the circumstances, to speculate why the parties inserted cl 26 and its analogues in the industrial instruments in question. It may simply be that they assumed that the construction of the Act was as Mr Sofronoff QC contended. Another explanation may be contained in the proviso to cl 26.1, an analogue of which is also contained in the Rockhampton Enterprise Agreement but not in the Beef City Enterprise Agreement which was the first of the three entered into: that cl 26.1 was inserted to cover some situation which the parties envisaged might occur in which a worker did not receive his full entitlement under s 174.

[16] Whatever cl 26 was intended to achieve, it did not, in my opinion have the effect contended for by Mr Sofronoff QC. It follows that the declaration made by the learned primary judge was properly made and the appeal must be dismissed with costs.

Orders

1. Appeal dismissed.
2. Appellant to pay respondent's costs to be assessed.

[17] **WILLIAMS JA:** The background against which this appeal is to be decided is fully set out in the reasons for judgment of Davies JA which I have had the advantage of reading. As is pointed out therein it is not easy to construe s 174(1)(a)(ii) of the *WorkCover Queensland Act* 1996, when read with s 132(1) and the definition of “wages” in Schedule 3. That difficulty is compounded when one endeavours to construe those provisions in the light of Clause 26 of the Dinmore Enterprise Agreement.

[18] In those circumstances the court must approach the question of the construction of s 174(1)(a) in the light of the philosophy underlying the legislation and the object sought to be achieved by the provisions in question. Whilst I am by no means certain that a certified agreement could not define the quantum of compensation payable to an incapacitated worker, I agree with Davies JA that clause 26 of the Dinmore Enterprise Agreement, and its counterpart in the other certified agreements, has not achieved that result.

[19] In my view construing ss 132 and 174 of the *WorkCover Queensland Act* 1996 in the way in which the learned judge at first instance did conforms with the objectives of the legislation and is a construction reasonably open in the circumstances.

[20] I agree with the reasons of Davies JA and with the orders proposed.

[21] **FRYBERG J:** I have had the advantage of reading the reasons for judgment prepared by my colleagues. I agree with them that this appeal should be dismissed, substantially for the reasons given by Davies JA.

[22] In general, a declaration is not made against a party who has no interest in the subject matter of the declaration. In the present case, the appellant had a very significant interest in the subject matter. It is, and was at all material times, a licensed self-insurer under Part 5 of the *WorkCover Queensland Act 1996*.[13] That means that it, not WorkCover, is liable for compensation and damages under the Act.[14] If it can use a clause such as cl 26 of the *Dinmore Enterprise Agreement 2000* to reduce the amount of compensation payable to a totally incapacitated worker under s 174(1) from the full amount of his or her normal wages to 85% of that amount, it reduces not only its own level of liability but also its cost of compliance with s 113 of the Act.

[23] The evidence does not disclose how cl 26 came into the *Agreement*. I venture to infer that it was at the behest of the appellant. Whether the other party to the *Agreement*, the Australian Meat Industry Employees' Union, understood the use which might be made of the clause does not appear from the material, nor is it relevant to the outcome of the appeal.

[24] The epithet "inelegant" applied to s 132 appears to be something of an understatement. I hesitate to be definite about the section because the argument before us did not extend to an overview of the Act, let alone the context provided by other industrial legislation, both State and Commonwealth, within which it must operate. It defines a term which, as far as I can see, is used only in ss 174 and 176 of the Act. It does so in terms of the "rate of wages" to which a worker "is entitled" for the time being. If "entitled" relates to "wages", the terms of the definition would almost always be unsatisfied: a totally incapacitated person will by definition seldom be entitled to wages because he or she cannot work. If it relates to "rate", the semantic problem is reduced but considerable practical problems might still arise, particularly if rates or classifications should change or the employer be wound up. There might also be a difficulty in applying the definition to a worker who was entitled to a monthly or a fortnightly rate of wages. If, as appears to be the case, the policy of the section is to ensure that for the first 26 weeks of incapacity the injured worker continues to receive what he or she was earning at the time of the injury (unless that happens to be less than 85% of normal weekly earnings) it may need parliamentary attention. Otherwise, as Williams JA implies, it may be that clever drafting of a certified agreement might have the effect of reducing the amount of compensation otherwise payable.

---

[13] That Act was repealed and replaced by the *Workers' Compensation and Rehabilitation Act 2003* with effect from 1 July 2003. Sections 105 and 150 of the latter Act are identical to ss 132 and 174 of the repealed Act and the parties have not suggested that the new Act is materially different from its predecessor. For convenience and uniformity I shall refer to sections by their numbers in the repealed Act.

[14] Section 116.

[25] At one point in my deliberations I was inclined to decide this appeal on the basis that cl 26 is a sham. It is arguably so because it confers an entitlement only upon an employee entitled to a weekly payment of compensation under the Act, yet the proviso prevents any such entitlement arising in respect of an employee who receives his or her entitlement to such payments. It is therefore arguable that it does not provide for a rate of wages to which the worker was "entitled" within the meaning of s 132. However there is an incomplete congruity between the condition enlivening the clause (entitlement to compensation) and that disabling it (receipt of compensation). It would be open to a worker not to apply for workers' compensation when totally incapacitated, but to require payment under cl 26. The proviso would not apply in such a case. In practice, that would never happen because the amount provided under cl 26 would never be more than the amount of compensation payable, but arguably the possibility might exclude the doctrine of sham. I prefer not to decide the point.

[26] What I have said about the *Dinmore Enterprise Agreement 2000* applies equally to the *Rockhampton Enterprise Agreement 2000*, cl 10.1 of which is in identical terms to cl 26. The same is not true of the *Beef City Enterprise Agreement 2000*. In that agreement the relevant clause provides:

> "Notwithstanding any other provision of this Agreement, if an employee is incapacitated because of injury in relation to which a weekly payment of compensation is payable under the Workers' Compensation Act, 1990, the *maximum* weekly *amount* to which the employee is entitled (*or would have been entitled if not incapacitated*) under this Agreement during the period of such incapacity, is an amount not exceeding 85% of the employee's average weekly earnings as defined in the said Workers Compensation Act 1990."[15]

[27] There are a number of differences between that clause and those in the other two agreements. First, it does not confer an entitlement to anything. It simply places a ceiling on amounts to which the employee is entitled under the agreement. I have not noticed anything else in that agreement which confers an entitlement to wages during a period of incapacity (for example a provision rewarding work earlier performed with payments during such a period). Second, the words in parentheses seem to accept the absence of any entitlement during incapacity. Third, the clause refers to the weekly amount, not the weekly rate of wages, to which the employee is entitled. Those differences reinforce the applicability in relation to this agreement of the reasons given by Davies JA for dismissing the appeal.[16]

[28] I agree in the orders proposed.

---

15 Emphasis added.

16 Two other differences which are immaterial to the point at issue in the appeal may be noted. First, the proviso is absent from the *Beef City Enterprise Agreement.* Second, under that agreement the relevant amount is fixed at 85% of the employee's average weekly earnings as defined in the *Workers Compensation Act* 1990. That definition was abandoned in the 1996 Act because it did not take into account variations in employment conditions such as peaks and troughs in workflow or seasonal variations. It was replaced by "normal weekly earnings" to prevent a worker receiving weekly payments that were more than would have been received from work: see (1996) Explanatory Notes at pp 772, 787.