

Gun & Davey

Covered



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COVERED CASES

CHENOWETH v TRANSADELAIDE

[2001] SAWCT 29

Catchwords:

Section 39 – variations in the award applicable to the worker.

Facts:

The worker had been employed as a bus operator since November 1976. He originally sustained an injury to his lower back in the course of his employment in October 1984. He then suffered further similar injuries in October 1987, February 1988 and August 1995 after which he was advised to reduce his driving duties. In January 1997 he was removed from driving duties altogether.

At the time of lodging his claim in 1995 the worker was being paid pursuant to the TransAdelaide Bus and Tram Operators Paid Rates 1995 Commonwealth Award. His notional weekly earnings were based upon the rate of pay for a bus Operator Class 7.

In October 1996 the provisions of the Award changed under a new TransAdelaide St Agnes Depot Appendix 4. This involved new career classification structures, new aggregate rates of pay and revised conditions of employment. There was also the introduction of aggregated fortnightly remuneration.

It was the worker's submission that the changes to the Award including the new classification structure, rates of pay and the aggregated fortnightly remuneration should be taken into account for the purposes of a Section 39 review.

The exempt employer submitted that Section 39 only permits changes in notional weekly earnings which reflect changes in the rate of notional weekly earnings as originally determined.

Issues:

Does Section 39 of the Act permit a reassessment of notional weekly earnings to reflect what the worker's earnings would have been had he not been injured by reason of changes in Award application, classification structure, pay rates and methods of payment?

Held (by majority):

1. Section 39(2)(a)(i) does not permit the re-calculation of average weekly earnings. Once pre-injury earnings have been determined, the determination remains immune from challenge (except as provided by the lodgement of a Notice of Dispute).
2. Section 39(2)(a)(i) is merely a tool to adjust weekly payments to reflect increases or decreases in wages payable to "workers generally" or "to workers engaged in the kind of employment from which the worker's disability arose", but only in the hourly rate of remuneration which forms the basis for setting the original notional weekly earnings rate.

Comments:

This decision confirms the limit of the changes to a worker's notional weekly earnings. Any Section 39 adjustments must take into account changes in rates of pay payable for the hours that were used when originally calculating average weekly earnings. A change in the work place from one Award to another is irrelevant.

Arguably it follows from this that a worker is only entitled to changes in rates of pay applicable to the position he or she held at the time of the injury.

For example even if the worker was to change from a level 1 to a level 2 at a time after the disability thus attracting a pay rise, the Section 39 adjustment could only reflect changes in the rates of pay applicable to a level 1 worker. This accords with the terms of Section 39 and reflects changes in the rates of pay payable to workers engaged in the kind of employment from which the worker's disability arose. Here the kind of employment from which the disability arose was a level 1.