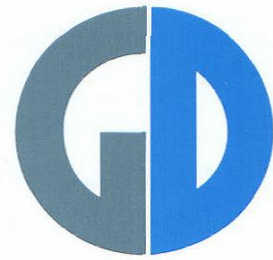


Gun & Davey

Covered



Vol 1, Issue 13 – December 1998

COVERED CASES

OLSEN -v- WORKCOVER

**Decision of a Single Judge of the Workers Compensation Tribunal
DP Gilchrist**

(JD89/1998)

Catchwords:

Ordinary hours or ordinary hours plus overtime. The process of determining whether overtime would have continued.

Facts:

The worker, a carpenter, was advised by his employer prior to commencing that he would be expected to work extended hours of 9.5 hours per day Monday to Friday and 8 hours on Saturdays with the possibility of longer hours and occasional Sundays.

He in fact generally worked 9.5 hours weekdays and 8 hours Saturdays at a Littlehampton site and 10 hours weekdays and 8 hours on Saturdays at a Balhannah site. Occasionally he did not work these hours due to inclement weather, and on such occasions, as well as public holidays, he was paid the base rate of 8 hours per day.

His understanding was that he would be paid pursuant to the Building Trades (SA) Construction Award.

The worker then sustained injury and was incapacitated only three to four weeks before his employment would have normally come to an end (as a result of the employer's inability to secure continuing contracts).

Issues:

1. Whether extended hours worked were ordinary hours or ordinary hours plus overtime?
2. If ordinary hours plus overtime, whether overtime would have continued to be worked in accordance with an established pattern?

This newsletter has been printed by Gun & Davey as a service to clients. All information was accurate at the time of printing and comments made are of a general nature and intended to be for guidance only. No person should rely on the contents of the newsletter without first obtaining advice from an appropriately qualified person.

Held:

1. Ordinary hours plus overtime.

The worker and the employer intended the Award to form the basis of their relationship; this was reflected in the amounts that the worker received when it was not possible for him to work extended hours due to inclement weather or public holidays. The Award contemplated ordinary hours as comprising a 38 hour week and hours beyond that overtime.

The expectation that extended hours would be undertaken was in keeping with usual practice in the construction industry.

The agreement between the worker and the employer as reflected by the hours actually worked demonstrates a flexibility of hours that is an obvious characteristic of overtime work (see WorkCover -v- Kent A113/1995).

2. That if a change in the pattern of overtime is “imminent” when the period of incapacity commences, notwithstanding that overtime would have continued to be worked in accordance with the same pattern for some little time, the requirements of Section 4(8)(a)(iii) will not be met – if the change is not imminent, even though there might be an expectation that the pattern of overtime will change in the not too distant future, overtime, if it otherwise satisfied the relevant criteria, is to be included in the assessment of average weekly earnings (see Muscara -v- WorkCover JD9/1998 and Pizzorno (supra)).

On the facts of this case, the change in the pattern of overtime was not sufficiently imminent that it ought not be included in the assessment of the worker’s average weekly earnings and accordingly the worker can meet the requirements of Section 4(8)(a)(iii) subject to the first two criteria of Section 4(8)(a) being met.

Commentary:

Ordinary Hours / Overtime Hours

If worker and employer can be shown to accept that the contract of employment is to be determined by the provisions of a particular award, and that is borne out by the facts (usually the pay records), then it is by reference to such award that ordinary hours and overtime hours will be determined for the purposes of applying the provisions of Section 4 and in particular Section 4(8) of the Act, irrespective of the amount of overtime undertaken or the regularity of extended overtime hours being worked.

Continuation of Overtime

From the Full Supreme Court decision of Pizzorno we know that changes taking place one day or one week after the first date of incapacity would be taken into account in calculating average weekly earnings. We now know that the Tribunal may consider changes occurring three to four weeks after the first date of incapacity as not being sufficiently imminent to enable those changes to be taken into account in applying the provisions of Section 4(8)(a) of the Act. We sense that this particular case was almost borderline which suggests that changes which are to take place at approximately two weeks after the first date of incapacity may arguably be imminent and therefore can be taken into account for the purposes of applying the provisions of Section 4(8)(a) of the Act.