

Gun & Davey

Covered



Vol 1, Issue 23 – March 2001

COVERED CASES

MORE NEWS ON OVERTIME

WORKCOVER v BLOK

[2000] SAWCT 199

Warr v WorkCover

[2000] SAWCT 188

A recent decision of *WorkCover v Blok [2000] SAWCT 199* has clarified the meaning of substantially uniform overtime as arose in the decision *Phillis*.

In *Blok* Deputy Judge President Parsons stated that the qualifying word “substantially” in Section 4(8) is particularly significant. The word assumes that there would be some fluctuation in overtime hours and signals that the required uniformity depends not on an exact or absolute sameness in the hours worked but on a judgment that there is a high level of conformity in the hours within the pattern.

Her Honour stated that the use of an averaging process may be consistent with *Phillis* because it requires consideration of the actual overtime worked. Her Honour stated that a two or three hour variation of overtime hours in particular sessions where the overtime hours in any such session does not exceed four or five hours may suggest that the overtime although regular and established is unpredictable or greatly fluctuating. On the other hand a variation of one or two hours in particular sessions where the extent of the overtime hours usually worked in any session is in excess of nine or ten hours may not be so regarded.

In this case the worker had performed overtime within a span of 9.75 hours and 11.25 hours in 35 out of 49 weeks. Her Honour held that this did not represent a picture of dramatically fluctuating overtime. Rather she held that this was a pattern of uniformity for the majority of overtime sessions.

Her Honour held that in the circumstances it was appropriate to calculate the worker's overtime entitlement based upon the midway point between 9.75 and 11.25 hours, ie 10.5 hours per week (this happens to also be the average of all overtime hours worked rounded of to the nearest half hour).

The decision of *Warr v WorkCover [2000] SAWCT 188* also considers the question of substantial uniformity and whether overtime should be included in the calculation of average weekly earnings. In this case Deputy President Gilchrist held that a period of 9 weeks was sufficient to determine whether overtime worked was regular and establish and substantially uniform. His Honour appears to have used an averaging process when deciding that the overtime worked on Saturdays was regular and established and substantially uniform. The overtime worked by the worker on Saturdays was as follows:

Week	Overtime
1	0
2	3.5
3	4
4	3
5	4.5
6	2.75
7	4.25
8	5.25
9	Disability

Using the above hours His Honour held that overtime was regular and established and substantially uniform and found that the worker had an entitlement to 3.5 hours for Saturday overtime.

His Honour did state that having found that on Wednesdays and Saturdays the worker performed regular and established and substantially uniform overtime, he must now consider whether this overtime would have continued pursuant to Section 4(8)(a)(iii). His Honour did consider the wage records of the worker's replacement to identify that on Saturdays this overtime would not have continued and must be excluded.

In summary, it appears that there has been an easing in the strict approach applied by the Phillis decision when considering whether overtime should be included in a worker's average weekly earnings. A small fluctuation in the hours of overtime worked will have a different impact when the overtime worked by the particular worker generally fluctuates between four and five hours as opposed to nine or 10 hours.