

## *Barrington and Comcare [2015] AATA 29* (21 January 2015)

### Key Points

- The meaning of 'relevant period' for the purposes of calculating an applicant's normal weekly earnings (**NWE**) pursuant to section 8 of the SCR Act
- The meaning of 'required' and 'regular' overtime

### Background

Mr Barrington is employed by the Australian Federal Police. He sustained an injury on 2 November 2010 for which Comcare accepted liability under s 14 of the Act. Mr Barrington applied for time off work to access incapacity payments, and submitted a claim on 4 April 2011 for overtime amounts to be included in the calculation of his NWE.

Comcare issued a reviewable decision on 31 July 2013 which affirmed a previous determination not to include overtime amounts within the NWE. Comcare noted in review of its decision that Mr Barrington had only performed five weeks of overtime from 27 September 2010 to 30 October 2010 out of a 52 week period prior to injury.

The Tribunal was required to consider whether overtime should be taken into account when determining Mr Barrington's NWE, and the meaning of 'required' and 'regular' overtime within the Act.

### The Law

Section 8(1) of the Act states NWE of an employee before an injury shall be calculated in relation to the relevant period. Section 9(1) defines the 'relevant period' as the latest period two weeks before the date of injury during which an employee was continuously employed.

Section 8(2) of the Act states "*where an employee is required to work overtime on a regular basis, NWE...shall be the amount calculated in accordance with subsection (1) plus an additional amount calculated in relation to the relevant period*".

### Conclusion

In considering whether overtime should be taken into account the Tribunal considered three issues:

- i) what is the 'relevant period' for the purposes of calculating Mr Barrington's NWE in accordance with s 8 of the Act?
- ii) was Mr Barrington required to work overtime on a regular basis during the 'relevant period'?

- iii) whether the NWE when calculated in relation to the relevant period would not fairly represent the weekly rate at which Mr Barrington was being paid in respect of his employment before the injury.

#### *'Relevant Period'*

On this issue Mr Barrington submitted evidence of overtime served from March 2009 to October 2009 and argued less overtime was served in 2010 due to the birth of his child and his injury. He referred to the five weeks of regular overtime he contributed in 2010 as evidence to be taken into account when considering the relevant period and his NWE.

Comcare contended that a two week period was too short to fairly represent the NWE prior to injury. They submitted the relevant period ought to be modified to a period of 12 months or an alternative period. Comcare further submitted that less overtime was required during Mr Barrington's incapacity, and hence, would not have occurred regardless of injury.

The Tribunal distinguished Mr Barrington's case from the decision of *Re Bradford and Comcare* [1944] AATA 285 which notes casual, seasonal, or temporary overtime immediately before date of injury may make it unfairly representative to apply the statutory period.

The Tribunal determined it was reasonable to accept Mr Barrington's evidence as a fair representation of his earnings, especially considering the legislation is beneficial to the employee. Hence, the two week 'relevant period' outlined in the Act stood.

#### *'Required' to work overtime*

Comcare submitted that the overtime process was voluntary as employees were invited to put their names down based on a spreadsheet system which allocated work to those who had done the least overtime.

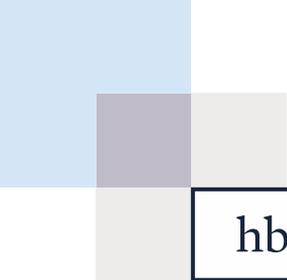
The Tribunal determined this evidence was contrary to *Telstra Corporation v Peisley* [2006] FCAFC 79, where the Federal Court held 'available' overtime included contexts such as informal Australian workplace relations where the language of request and agreement is employed. Employees can be under obligations not legally enforceable but which '*constitute an authority to work the additional hours*'.

#### *'Regularity' of overtime*

The Tribunal considered payments, dates and hours worked in the five week period prior to injury showed regularity and/or a pattern of overtime payments which can be said to be 'regular' within the meaning of s8(2) of the Act.

## Lessons Learnt

This decision suggests that strong evidence demonstrating why it is unreasonable to rely on the 'relevant period' to calculate NWE is required. Further, overtime doesn't necessarily have to be legally enforceable to be considered 'required'. The definition of 'required' rests on the nature of the relationship between the employees undertaking duties and functions and their employers.



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