

Hooley and Comcare [2014] AATA 6 (9 January 2014)

Key Points

- The Tribunal was required to consider whether time in lieu taken instead of overtime payments should be included in the calculation of an employee's NWE.
- The Tribunal was also required to consider whether payments made under an employer's additional responsibilities payment scheme, which the employee had been receiving at the time of his injury, should be included in the calculation of his NWE.

Background

Mr Hooley was employed as a CSIRO Officer Level 5 Maximum by the Commonwealth Scientific and Industrial Research Organisation (**CSIRO**). At the time of his injury, Mr Hooley was employed as Technical Lead on a project within CSIRO.

CSIRO had a policy of paying an Enhanced Responsibility Allowance (**ERA**) to staff requested to take on substantial management responsibilities in addition to, or in substitution for, the responsibilities associated with their usual role. Mr Hooley's responsibilities as Technical Lead involved such additional responsibilities and he was granted a one year ERA from 1 July 2007.

The role of Technical Lead required Mr Hooley to work long hours. Although his contract specified that he was not to be paid for overtime, Mr Hooley was paid for considerable overtime. From the commencement of the 2007/2008 financial year, Mr Hooley's supervisor determined that overtime would no longer be paid and time off in lieu would be taken.

In September 2007, Mr Hooley suffered an injury in the course of his employment with CSIRO. Comcare subsequently accepted liability in respect of that injury, and paid Mr Hooley compensation for incapacity to work during various periods between September 2007 and June 2009.

Comcare accepted liability for Mr Hooley's injury pursuant to section 14 of the SRC Act.

By determination issued in April 2010, Comcare determined that Mr Hooley's incapacity payments should not include any amounts representing overtime or ERA. The determination was varied (although not substantially) by reviewable decision dated 3 August 2012, and Mr Hooley sought review in the Administrative Appeals Tribunal.

It is accepted that Mr Hooley was incapacitated for work as a result of that injury, and that Comcare was liable to pay compensation pursuant to section 19 of the SRC Act. The formula for the calculation of Mr Hooley's Normal Weekly Hours (**NWH**) and Normal Weekly Earnings (**NWE**) is set out in detail in section 19.

The Law

In calculating Mr Hooley's NWE, section 8 provides:

- (1) "For the purposes of this Act, the normal weekly earnings of an employee (other than an employee referred to in subsection (2)) before an injury shall be calculated in relation to the relevant period under the formula:

$$(NH \times RP) + A$$

where:

"**NH**" is the average number of hours worked in each week by the employee in his or her employment during the relevant period;

"**RP**" is the employee's average hourly ordinary time rate of pay during that period; and

"**A**" is the average amount of any allowance payable to the employee in each week in respect of his or her employment during the relevant period, other than an allowance payable in respect of special expenses incurred, or likely to be incurred, by the employee in respect of that employment.

- (2) Where an employee is required to work overtime on a regular basis, the normal weekly earnings of the employee before an injury shall be the amount calculated in accordance with subsection (1) plus an additional amount calculated in relation to the relevant period under the formula:

$$NH \times OR$$

where:

"**NH**" is the average number of hours of overtime worked in each week by the employee in his or her employment during the relevant period; and

"**OR**" is the employee's average hourly overtime rate of pay during that period."

Section 8(10) of the SRC Act further provides that:

- (10) "If the amount of the normal weekly earnings of an employee before an injury, as calculated under the preceding subsections, would exceed:
- where the employee continues to be employed by the Commonwealth or a licensed corporation--the amount per week of the earnings that the employee would receive if he or she were not incapacitated for work; or
 - where the employee has ceased to be employed by the Commonwealth or a licensed corporation--whichever is the greater of the following amounts:

- (i) the amount per week of the earnings that the employee would receive if he or she had continued to be employed by the Commonwealth or the licensed corporation in the employment in which he or she was engaged at the date of the injury;
- (j) the amount per week of the earnings that the employee would receive if he or she had continued to be employed by the Commonwealth or the licensed corporation in the employment in which he or she was engaged at the date on which the employment by the Commonwealth or the licensed corporation ceased;

the amount so calculated shall be reduced by the amount of the excess.”

The term “relevant period” is defined in section 9 of the SRC Act as “*the latest period of 2 weeks before the date of the injury during which the employee was continuously employed by the Commonwealth or a licensed corporation.*”

The case of *John Holland Group Ltd v Robertson*¹ considered the operation of section 8(10)(a) of the SRC Act:

“Clearly, s 8(10) seeks to limit the compensation payable to an injured employee by reference to his or her notional earnings derived from employment with the same employer had he or she not been injured. Section 8(10)(a) demands a notional enquiry which commences with the employee’s actual current employment. The enquiry is as to his or her earnings in that employment had he or she not been injured. Such enquiry would involve consideration of how, in those circumstances, the employee would have been employed, including consideration of whether he or she would have continued to perform the same duties as were being performed at the time of the accident.”

Conclusion

The Overtime Issue

The Tribunal determined that the effect of section 8(2) of the SRC Act is that, where an employee is required to work overtime on a regular basis, the amount of compensation is to be increased to take into account the actual overtime worked in the relevant period.

The Tribunal considered that as Mr Hooley did not get paid overtime for being required to work outside his usual hours, and instead had opted to be given time in lieu, no additional amount for overtime should be included in his NWE. Accordingly, the Tribunal affirmed this part of the reviewable decision.

The ERA issue

Mr Hooley contended that he would have continued to receive the ERA beyond the expiry of the original ERA approval on 30 June 2008, with Comcare arguing that it was more likely that it would not have been approved.

The Tribunal accepted the evidence of CSIRO’s Executive Manager, who stated that Mr Hooley was highly regarded and was likely to continue in his pre-injury role until October 2008, but would then

¹ *John Holland Group Ltd v Robertson* [2010] FCAFC 88; (2010) 185 FCR 566.

have been replaced by someone with more appropriate qualifications. The Tribunal therefore considered that it was likely that Mr Hooley would have received ERA until October 2008, but not beyond this period. Accordingly, the Tribunal set aside this aspect of the reviewable decision.

Lessons Learnt

The decision of the Tribunal provides further guidance on the calculation of incapacity and an employee's NWE. In respect of overtime, an amount for overtime will not be included in an NWE calculation where an employee has not been paid overtime during the relevant period, regardless of whether that overtime was paid as time in lieu. In relation to ERA schemes, whether the Tribunal will deem the ERA to be included in the employee's incapacity payment will depend on the evidence in respect of the likelihood of the ERA payment being continued.

For more information on this article, please contact:

Brett Ablong
Partner
Email: brett.ablong@hbalegal.com
Direct Line: (08) 9265 6001

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.