



Workplace Injury Commission

DETERMINATION AND REASONS FOR DETERMINATION

CITATION: [2024] VWIC 8

ARBITRATION REFERENCE NUMBER xx/xxxx

PARTIES

WORKER [Worker's name] (The Worker)

WORKSAFE AGENT [Agent's name] (The Agent)

EMPLOYER [Employer's name] (The Employer)

ARBITRATION OFFICER Katie Valentine

DATE OF HEARING 2 July 2024

DATE OF DETERMINATION 1 August 2024

DETERMINATION

1. I determine that the Agent's decision dated 28 April 2023 under review is confirmed. This means that the determination is in favour of the Agent.
2. I certify that each party is bound by this result.

REASONS FOR DETERMINATION

DISPUTE REFERRED TO ARBITRATION

1. This arbitration is about whether the Worker is entitled to have her phone and car allowances included in the calculation of her pre-injury average weekly earnings (PIAWE).
2. On 27 January 2023, the Worker was injured in the course of her employment as a property manager with the Employer and ceased work. On 3 March 2023, the Worker lodged a claim for compensation which the Agent accepted by letter dated 15 March 2023. On 28 April 2023, the Agent notified the Worker that it had calculated her PIAWE as \$1,419. This is the decision under review.
3. The Worker lodged an application for conciliation disputing the decision and on 22 December 2023, a Conciliation Officer issued a Genuine Dispute Certificate.
4. The Worker lodged a referral for arbitration dated 16 February 2024.
5. On 2 July 2024, an initial hearing was held by video conference, attended by the Worker, the Worker's assistant, the Agent's representative and the Employer. The Worker gave affirmed evidence.
6. No further hearing was required, and on 24 July 2024, I notified the parties that I had concluded the hearing process and would determine the dispute 'on the papers'.
7. In making this determination, I have considered all the material included in the Arbitration Book (pages 1-80), Schedule B of the Arbitration Book (pages 81-317), and the evidence and submissions presented at the arbitration hearing. The relevant evidence is discussed below.

ISSUES

8. The relevant legislation in this matter is the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (the Act).
9. The issue to be determined in this dispute is whether the Worker's car and phone allowances should be included in the calculation of her PIAWE.

CONSIDERATION OF ISSUES

Burden and standard of proof

10. The Worker bears the onus of proof as to the recalculation of PIAWE; *Pobke v Ninth Rischell Pty Ltd* [2015] VMC 23 at [90].

Should the car and phone allowances be included in the calculation of the Worker's PIAWE?

Worker's submissions

11. The Worker's submissions may be summarised as follows:
 - a. The car and phone allowances form part of the Worker's base salary, although they are paid as separate non-taxable entitlements as refunds for expenses incurred. The car

allowance is to pay for expenses such as insurance, maintenance, registration and fuel. This allowance forms part of a salary package to allow the Worker to perform her work duties.

- b. The Worker was paid a car and phone allowance in lieu of a higher salary, resulting in tax benefits to the Employer. The amount of the car allowance was in fact insufficient to meet the costs of using her car for work.
- c. The car and phone allowance do not compare to a tool allowance or uniforms, as those items do not require registration, insurance, fuel or incur depreciation for failure to maintain the asset properly.
- d. It was important to the Worker to have a separate work phone from her personal phone because her work number was posted on the internet.
- e. The Worker now has a significantly reduced income and suffers financial hardship as a result of the car and phone allowances not being included in her PIAWE.

12. In oral evidence the Worker stated:

- a. Prior to accepting the job with the Employer, she received an offer from another employer with a higher base salary. The Employer could not match this base salary but instead offered her an annual salary of \$72,000 plus \$5,000 in non-taxable allowances.
- b. The car is owned and registered in her name. She pays the outgoings and used the car for personal use as well as for work.
- c. She can no longer afford to register, service, insure or keep her car roadworthy, so effectively she has lost this asset because the car allowance did not continue.
- d. She purchased a phone to be used for her work, and it is subject to a three-year contract at a cost of \$120 per month. Whilst she has retained the phone, she cannot exit the contract without making a lump sum payment to the phone provider.
- e. She considers her phone allowance forms part of her regular income as a reimbursement of assets purchased and used for her employment.
- f. She claims \$135.41 per week in addition to the PIAWE assessed by the Agent.

Agent's submissions

13. The Agent submits:

- a. The car and phone allowances are a reimbursement of expenses, not payments for performing her role. As the Worker is not performing her role whilst in receipt of weekly payments, it is therefore not appropriate for them to be included in the PIAWE calculation.
- b. The car and phone allowances are monetary allowances under subsection 156(1)(c) of the Act. Consistent with the decision in *Creagh v MPR Pty Ltd* [2018] VSC, where it was found that a monetary allowance was given its ordinary and natural meaning, the car and phone allowances are additional payments over and above the Worker's wage for the purpose of meeting a requirement of employment.

c. Tax efficiencies are not factors which should be considered when engaging in a factual assessment of whether these payments are caught by section 156(1)(c) of the Act.

14. The Agent submits that I should affirm its decision for the reasons above.

Relevant law

15. Subsection 153(1) of the Act states that a worker's PIAWE is calculated in respect of a relevant period by calculating the sum of the average of the worker's ordinary earnings and the worker's earnings enhancement, if any.

16. Section 155 states that ordinary earnings are, for a worker whose base rate of pay is calculated on the basis of ordinary hours worked, the worker's earnings calculated at that rate for ordinary hours worked in that week, and include any other amount, but do not include amounts referred to in subsections 156(1)(a), (b), (c), (e) and (f).

17. Section 156 defines 'base rate of pay' relevantly as follows:

156 Definition applying to pre-injury average weekly earnings and current weekly earnings—base rate of pay

*(1) In relation to pre-injury average weekly earnings and current weekly earnings, a reference to a **base rate of pay** is a reference to the rate of pay payable to a worker for his or her ordinary hours of work (including any casual loadings) but does not include the following—*

(a) incentive-based payments or bonuses;

(b) loadings (excluding any casual loadings);

(c) monetary allowances;

(d) piece rates or commissions;

(e) overtime or shift allowances;

(f) any separately identifiable amount not referred to in paragraphs (a) to (e).

18. *Creagh v MPR Pty Ltd* [2018] VSC 763 (*Creagh*) is the leading case on this issue. Her Honour, Associate Justice Daly, held that as the appellant had been paid a base salary and motor vehicle allowance to compensate her for the use of her own vehicle for employment purposes, the motor vehicle allowance was a 'monetary allowance' within the meaning of section 156 of the Act, and as such, was not to be taken into account in the calculation of weekly payments.

19. Her Honour found that the phrase 'monetary allowance' should be given its natural and ordinary meaning, and the question of whether the motor vehicle allowance was a monetary allowance is a question of fact.

20. Latham CJ stated in the High Court case of *Mutual Acceptance Co Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 396-397 (*Mutual Acceptance Co*) that an allowance:

... is a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of that service.

Findings

21. I need to determine whether the car and phone allowances referred to in the Worker's contract of employment with the Employer (the Contract) are 'monetary allowances' under subsection 156(1)(c) of the Act.

22. Clause 3 of the Contract states the Employer will pay her an annual salary of \$72,000. Clause 4 of the Contract states:

You are entitled to receive a car allowance for the travel that you are required to undertake for the role that you have. This allowance will be paid in accordance with the Real Estate Industry Award 2010 and will be varied as required by that award.

In addition to the vehicle allowance which has been incorporated into your annual salary, you will receive:

- *Car allowance \$100 per week*
- *Phone Allowance \$100 per month*

23. The Real Estate Industry Award 2010 (the Award) states that '*where the employer requires the employee to use the employee's own motor vehicle in the course of employment, the employee must be reimbursed for the use of their motor vehicle...*'. The allowance amounts are also set out in the Award. Clause 18.6 of the Award states that an employer and employee must agree on the reimbursement payable for the use of the employee's phone up to \$100 per month.
24. The payslips provided from the Employer show that in the 52 weeks prior to her injury, the Worker received a car allowance of \$100 per week and a phone allowance of \$100 per month.
25. I am satisfied that the Worker owned the car and phone herself, and I consider she was paid amounts stated to be car and phone allowances in addition to her salary for their use in accordance with the terms of the Contract. There is no information to suggest that the car and phone allowances formed part of the Worker's base salary or 'actual earnings' as defined by subsection 155(1)(b). I am satisfied they were required, by the Worker's own admission, for the purpose of meeting the requirements of her role. I am therefore satisfied that in accordance with *Creagh and Mutual Acceptance Co*, the car and phone allowances are monetary allowances under section 156(1)(c) of the Act.

Conclusions

26. In light of the above, I find that the Worker's car and phone allowances are not part of the Worker's base rate of pay or ordinary earnings under the Act and should not be included in the calculation of the Worker's PIAWE.

Determination

27. I determine that the Agent's decision dated 28 April 2023 under review is confirmed. This means that the determination is in favour of the Agent.
28. I certify that each party is bound by this result.

[signed]

.....

Katie Valentine
Arbitration Officer