

TASMANIAN INDUSTRIAL COMMISSION

Long Service Leave (State Employees) Act 1994

s.21 referral of long service leave dispute

pursuant to the *Long Service Leave (State Employees) Act 1994*

A Referral by the Secretary, Department of Justice for and on behalf of Warwick Alan Butler (T13712 of 2010)

and

The Secretary, Department of Education

DEPUTY PRESIDENT TIM ABEY

HOBART, 16 December 2010

Long service leave dispute - period of scholarship - order issued

[1] On 1 October 2010, pursuant to s.21(2) of the *Long Service Leave (State Employees) Act 1994*, the Secretary, Department of Justice referred a dispute on behalf of Warwick Alan Butler to the Commission for a hearing and determination.

[2] The matter was listed for hearing on 24 November 2010. Appearances: Mr G Williams with Mr L Kieliszek for the Secretary, Department of Justice (Workplace Standards Tasmania); Mr C Johnston, of Australian Education Union, Tasmanian Branch, for Mr W Butler; and Ms D Crespan for the Secretary, Department of Education.

[3] This matter concerns the application of the *Long Service Leave Act [State Employees] Act 1994* [the 1994 Act] to a period of time as a 'holder of a Government scholarship' [scholarship period].

[4] The agreed facts are as follows:

- Mr Butler was the holder of a Bachelor of Teaching scholarship from 1999 to 2000. The terms of this scholarship provided for the Government to pay HECS fees and Mr Butler was effectively guaranteed employment as a teacher upon graduation in a school designated by the Department of Education.
- Mr Butler commenced employment as a teacher at King Island District High School on 12 February 2001. He has been continuously employed as a teacher in various schools since that time.
- In July 2009 Mr Butler applied for a period of LSL. This application was denied by the Department advising that "*your long service leave accrual date is not until 12 February 2011.*" In essence, the Department declined to recognise the scholarship period [two years] as relevant service for LSL accrual purposes.

[5] Government scholarships have been a feature of the Department's employment profile at least since the early 1970s. In the seventies and eighties the practice was common place with 'bonding' an integral element.

[6] Since the early 1990s scholarships have been far less common and appear to have been targeted at areas of skill shortages.[e.g. maths and science teachers]. It would also appear that the concept of 'bonding' has evolved into one of guaranteed employment.

[7] It was readily agreed that at least since 1971, under the terms of the *Long Service Leave [State Employees] Act 1950* [the 1950 Act] a scholarship period counted as service for LSL accrual purposes. This was a consequence of s.2[2] of the 1950 Act which read:

"[2] Notwithstanding anything in the definition of "employee" and "full time employee" in subsection [1], a person who is the holder of a Government scholarship shall be deemed to be a full-time employee within the meaning and for the purposes of this Act."

[8] In 1994 the Act was substantially amended. The Department contends that as a consequence, a scholarship period only counts for LSL accrual purposes in circumstances whereby the holder is an 'employee' immediately prior to taking up the scholarship.

[9] In the table below the relevant sections of the 1950 and 1994 are, so far as is possible, aligned to facilitate a comparison of the changes.

<i>Long Service Leave (State Employees) Act 1950</i>	<i>Long Service Leave (State Employees) Act 1994</i>
<p>2(1) "eligible employee" means any employee who has, at the commencement of this Act, completed at least 10 years continuous service as an employee, or who, at any time after the commencement of this Act, completes at least 10 years continuous service as an employee.</p> <p>"employee" means a person employed in any capacity by the State, or by a State authority, who is employed as a full-time employee or a part-time employee, and includes-</p> <ul style="list-style-type: none"> (a) A person so employed, the terms and conditions of whose employment are prescribed by an industrial award; and (b) an officer appointed under the <i>Parliamentary Privilege Act 1898</i>, <p>but does not include an employee within the meaning of the <i>Coal Mining Industry Long Service Leave Act 1950</i>;</p>	<p>Entitlement to long service leave</p> <p>7. An employee who has completed at least 10 years of continuous employment is entitled to a period of long service leave calculated in accordance with this part.</p> <p>3. Interpretation</p> <p>"employee" means a person who is employed in any capacity by the State, a State authority or a prescribed employer as a full-time employee or a part-time employee and includes -</p> <ul style="list-style-type: none"> (a) a person so employed whose terms and conditions of employment are prescribed by an industrial award; and (b) an officer appointed under the <i>Parliamentary Privilege Act 1898</i>;

"full-time employee" means an employee who is required to devote the whole of his time to the duties of his office or position;

"holder of a Government scholarship" means a person who is studying or training under a scholarship provided by the State or a State authority for the purpose of having his services when he completes his studies or training, and includes a person who, pursuant to the regulations made under the *Education Act 1932*, holds a scholarship or studentship for the purposes of his training as a teacher;

(2) Notwithstanding anything in the definition of "employee" and "full-time employee" in subsection (1), a person who is the holder of a Government scholarship shall be deemed to be a full-time employee within the meaning and for the purposes of this Act.

"full-time employee" means an employee who is required to devote the whole of working time to the duties of the position and includes the holder of a Government scholarship;

"holder of a Government scholarship" means a person who is studying or training full-time under a scholarship provided by the State or a State authority;

Length of employment

11. (1) The length of employment of an employee includes employment as a full-time employee, part-time employee or both as a full-time employee and a part-time employee whether that employment occurred before or after the commencement of this Act.

(2) The length of employment of an employee includes –

(a) any period of recreation leave or long service leave taken by the employee; and

(b) any period of sick leave, with or without pay, taken by the employee because of illness or injury which is not caused by misconduct on the part of the employee; and

(c) any period of approved leave of absence taken by the employee for the purpose of serving as a member of any of Australia's defence forces or on a jury; and

(d) any period of paid sick leave not exceeding 61 days taken by the employee

	because of pregnancy and childbirth; and
	(e) any prescribed holidays to which the employee is entitled; and
	(f) any period during which the employee is the holder of a Government scholarship; and
	(g) any period of paid leave taken by the employee on account of special circumstances; and
	(h) any period of paid leave taken by the employee on account of bereavement; and
	(i) any period of approved leave, other than sick leave, taken by the employee without pay for an aggregate period not exceeding 20 days in each year.

[10] From this table the following picture emerges:

- The 'deeming' provision of s2 [2] of the 1950 Act has been deleted.
- The definitions of 'employee' in both Acts are, for relevant material purposes, the same.
- The definition of 'full-time employee' in the 1994 Act includes the expression "*and includes the holder of a Government scholarship.*"
- The definitions of 'holder of a Government scholarship' in both Acts are substantially the same although words which appear to go to the 'bonding' concept in the 1950 Act have been deleted.

[11] There can be no doubt that scholarship period would not satisfy the definition of 'employee' in a traditional industrial sense. Mr Williams submitted that as this was the case, it was unnecessary to go to any definitions other than that of 'employee'.

[12] Mr Lane contended that the definitions of 'employee' under both Acts are substantially the same. The 'deeming' provision of s2[2] in the 1950 Act is clearly captured in the amended definition of 'full-time employee' in the 1994 Act.

[13] Mr Lane referred to the Second Reading speech¹ which lead to the enactment of the 1994 Act. He submitted that this speech by then Minister Beswick was significant in that it comprehensively covered the numerous changes in the legislation, but there is no reference at all to any change to the status of scholarship periods. Had the intention been to modify the previous arrangements, it would have been referred to in the speech, Mr Lane contended.

¹ Exhibit AEU3

Findings

[14] Whilst there have been evolutionary changes in the nature of the Government scholarship scheme, particularly as it relates to the 'bonding' concept, the changes do not in my view impact on the circumstances under which a scholarship period counts for LSL accrual purposes.

[15] Stepping through the definitions in the 1994 Act:

- An employee means, *inter alia*, a person employed as a full-time employee
- A full-time employee includes the holder of a Government scholarship
- A Holder of a Government Scholarship means a person who is studying or training full-time under a scholarship provided by the State or a State Authority.

[16] Section 11 *Length of Employment* makes it clear that a scholarship period counts as a period of employment [subsection [f]] but does not address the question of whether a holder needs to be an employee immediately prior to the scholarship period. It follows that s.11 does not assist in determining the question before the Commission.

[17] It is significant that the definition of 'Holder of a Government Scholarship' refers to a person who is studying....

[18] If employee status was a prerequisite I would have expected the definition to say just that.

[19] Whilst the schematic structure of the 1994 Act is different to the 1950 Act, in my view the changes amount to no more than a rearrangement of the deck chairs. The answer is the same.

[20] On the ordinary and natural meaning of the words used in the statute, it is reasonably clear to me that a scholarship period counts for LSL accrual purposes, irrespective of whether or not the holder of the scholarship was an employee immediately prior to embarking on a course of study.

[21] Section 8A of the *Acts Interpretation Act 1931* allows recourse to extrinsic material "to confirm the interpretation conveyed by the ordinary meaning of the provision."

[22] In this context it seems almost inconceivable that if the construction urged by the respondent in this case was intended by the Government of the day, that there was not even a passing reference in the Second Reading speech. I conclude therefore that there was no intent of the then Government to alter the status quo, a position subsequently confirmed by the Parliament.

Order

Pursuant to section 21[4][f] of the *Long Service Leave [State Employees] Act 1994* I hereby order that the Long Service Leave record applicable to Mr Warwick Alan Butler be amended to show the commencement date as the date in 1999 when he began his period of study as a Holder of Government scholarship.

Tim Abey
Deputy President

Appearances

Mr C Lane of the Australian Education Union, Tasmanian Branch representing Mr W Butler
Mr G Williams and Mr L Kieliszek for Workplace Standards Tasmania
Ms D Crespan for the Secretary Department of Education

Date and Place of Hearing

2010
November 24
Hobart