TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s.29 application for hearing of industrial dispute

Independent Education Union of Australia, Tasmania
(T13392 of 2009)

and

Dominic College

COMMISSIONER T J ABEY HOBART, 30 September 2009

Industrial dispute – emergency leave - application of agreements - admissibility of extrinsic material - tests of "unforeseen" and "requiring immediate attention" not satisfied - unpaid leave - order sought declined

REASONS FOR DECISION

[1] On 6 March 2009, the Independent Education Union of Australia, Tasmania (the applicant) on behalf of Christopher Wright, applied to the President, pursuant to Section 29(1) of the *Industrial Relations Act 1984,* for a hearing before a Commissioner in respect of an industrial dispute with Dominic College.

[2] A hearing (conciliation conference) was listed for 19 March 2009, and a hearing for 21 May, 22 July and 18 August 2009. Ms A Briant and Mr M Upston appeared for the IEU. Mr C Green, solicitor, Page Seager, appeared with Mrs B Gilligan and Mr J Visentin for the College.

[3] This matter concerns the application Part VI - Leave and Holidays with Pay, Clause 8(b) *Emergency Leave* of the *Tasmanian Catholic Education Salaries, Allowances and Conditions Industrial Agreement 2005* (the Agreement). The clause reads as follows:

> *"(b) Emergency Leave*
>
> *(1) This leave may be applied to a serious situation of an unforeseen nature beyond the employee's control impacting on the employee's immediate family or household (as defined in Clause 8 - Special Leave - With Pay, subclause (a)(iii)(1) and (2) which requires the immediate attention of the employee.*
>
> *(2) An employee, other than a relief employee, with sick leave credits, may apply to utilize up to 3 days of any current or accrued sick leave entitlements in any one year of the employee's service, for this leave as defined in (1) above.*
>
> *(3) The annual entitlement to emergency leave is non-cumulative.*
>
> *(4) The employee shall provide a written statement or other evidence supporting the application for emergency leave."*

[4] During the hearing sworn evidence was taken from the following witnesses:

- *Christopher Paul Wright; the applicant.*
- *Angela Briant; General Secretary of the Independent Education Union of Australia, Tasmania.*
- *Jill Holloway; Organiser, Independent Education Union, and member of the 2004 CBA negotiating team.*
- *Christopher Gerard Smallbane; retired, member of the 2004 CBA union negotiating team.*
- *Beth Maria Gilligan; Principal of Dominic College.*
- *Peter John Visentin; Head of Secondary Campus, Dominic College.*
- *Sister Majella Kelly; previously Head of Policy Executive Senior Assistant, Catholic Education Office, member of the 2004 employer CBA negotiating team.*
- *Christopher David Smith; Principal of St Virgil's College, member of the 2004 employer CBA negotiating team.*

[5] Statements from Paul Boutchard, President of the Union in 2004/05 and Dr Dan White, a previous Director of the Catholic Education Office in Tasmania, were tendered.

[6] The key facts are not in dispute.

[7] Mr Wright is a teacher at Dominic College.

[8] On Monday 9 February 2009 the Wright family learned of the death of the father of a close friend of Mr Wright's wife, Louise. The funeral was to be held in Devonport on Friday 13 February.

[9] On either Tuesday 10 February or Wednesday 11 February, Mr Wright submitted an application for "Paid Special leave" for Friday 13 February.[1] The application, which was on a form used for such purposes, contained the following comment under *reasons for leave:*

> *"Louise is attending a funeral in Devonport. I will be looking after Xavier. The funeral is for a former staff member's father (name). Judy and Louise worked here in the 90s and became great friends."*

[10] The application was placed in Mr Visentin's pigeon hole, which was apparently normal practice.

[11] Xavier was six months old at the time. Mr Wright's evidence was that there was no alternative care arrangements which the family could utilise. It was not practical for Xavier to travel to Devonport and consequently the responsibility for caring for the child fell to Mr Wright.

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[1] Exhibit A1

[12] Mr Wright considered that he had an entitlement to paid *Emergency Leave* in that the circumstances were *"serious"* and "*unforeseen".*

[13] Mr Visentin's evidence was as follows:[2]

> *"Commissioner, Mr Wright put in an application in – on a form that's designated for that purpose, to apply for leave. Staff would usually fill in that form and come and speak with me or the daily organiser, Mr Paul Williams, about circumstances in terms of leave, particularly if they were immediate or pressing matters. The form came to my attention in my pigeon hole. I formed a view that on my understanding of the award and the circumstances that were written on that application, that I didn't feel that it fell under the emergency leave, and I wrote a note to Ms Gilligan and left it in her pigeon hole for us to discuss this, which we subsequently did, and in that discussion we felt that although in our opinion it didn't fall under the – our understanding of the award, that we felt that Mr Wright wouldn't have made that application, he not – felt very strongly about supporting his wife and looking after their child to go to the funeral, so we felt in justice that we ought grant unpaid leave to give him the day that he needed, but we didn't feel that it fell under the award for emergency leave, as it was written."*

[14] The form was returned with the notation *"Approved as leave without pay".* Mr Wright cared for Xavier on 13 February and did not attend work.

[15] Subsequently, Mr Wright submitted a further application, specifically for "Emergency Leave", and with the notation: [3]

> "*John, Beth, I would like you to reconsider your initial decision. My reading of the attached award document appears to meet my recent situation."*

[16] By e-mail dated 4 March 2009, Mrs Gilligan advised:[4]

> *"Dear Chris*
>
> *I have received your application to have your unpaid leave that was granted February 13 to be reconsidered for paid special leave under the emergency category of leave. I can understand the challenges of juggling commitments when funerals of people beyond family occur however this situation does not fall into the category of emergency leave as stipulated in the Award.*
>
> *Kind regards,*
> *Beth*

[17] Mrs Gilligan said:[5]

> *"So it's not a trivial situation, is it?---No, and it wasn't considered trivial. The family made a choice, Mr Upston, to attend a funeral, and the college supported an employee to be able to look after their child. The application didn't fall into the award and therefore it was granted as an unpaid leave day."*

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[2] Transcript p52
[3] Exhibit A3
[4] Exhibit A4
[5] Transcript p48

Admissibility of Extrinsic Material

[18] Mr Upston submitted that the natural and ordinary meaning of words must be seen in context, having regard to the actual circumstances. He referred to a decision of Whelan C in *Australian Federation of Air Pilots*[6], who in turn referred to observations of Lord Hoffman:

> *"I think in some cases, the notion of words having a natural meaning is not a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus the statement that words have a particular meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural."*

[19] In *AFMEPKIU v NCI Packaging*[7], Dangerfield C reviewed a range of authorities governing the interpretation of agreements and concluded that the following principles can be distilled:

> *"While the normal principle of interpretation of awards and agreements is that tribunals must apply the ordinary meanings of words and phrases even if the result is inconvenient - John L Pierce P/L v Kennedy (2001) 50 AILR par 4-477 - it is permissible to have regard to material disclosing the intention of the parties.*
>
> *Tribunals will normally strive to take a more generous construction of industrial instruments than other legal documents in order to accord with the intention of the parties as gathered from a consideration of the entire instrument - Geo A Bond and Co Ltd (in liq) v McKenzie (1929) 28 AR 499 at 503-504.*
>
> *This approach of a more generous construction of industrial instruments is even more appropriate in relation to the interpretation of industrial/enterprise agreements as opposed to awards - AITCO v Federated Liquor and Allied Industries Employees Union 1988 AILR par 382.*
>
> *Evidence of the intentions of the parties must be gathered from the instrument itself, which in turn must be construed as a whole. A bare statement of intention wherever found cannot of itself govern the legal effect when that legal effect is clearly ascertainable by application of the rules of construction to the document itself - per Stanley J in Re Federated Liquor and Allied Industries Union re Interpretation of Hotels, Clubs etc Award 1979 AILR 321.*
>
> *Clearly, where there is an ambiguity, weight must be given to the "industrial realities" in determining which particular meaning ought to be regarded as the one intended by those who made the award - per Sheldon J in Re Crown Employees (Overtime) Award (1969) 69 AR 60.*

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[6] AFAP Bristow Helicopters Australia [Helicopter Pilots] Certified agreement 2004 [2007] AIRC 323 para 79

[7] PR923327

The approach of generously construing an industrial instrument however is not a licence to ignore the actual terms of an award or agreement - Australian Workers' Union v Abbey (1938) 40 CAR 494. The words of the instrument must be taken in their grammatical sense and ordinary usage and this will not be modified unless it is to avoid absurdity, repugnance or inconsistency - Hume Pipes Case 11 SAIR 1 as cited by Stanley J in Re Federated Liquor and Allied Trades Union (supra)."

[20] In *Short v Hercus Pty Ltd*[8]*,* Burchett J said:

"The context of an expression may thus be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is part, or to other documents with which there is an association. Context may also include, in some case, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colouring its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in the alien ground. True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expressions with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the Court should not deny itself all other guidance in hose cases where it can be seen that more is needed …"

[21] Mr Upston submitted that what is to be decided is the meaning of the words in proper context having regard to what it is designed to remedy. Teachers do not have the flexibility of other industries where emergency situations can be accommodated by other leave provisions. Mr Upston submitted that the clause was intended to remedy the difficulty for teachers who are subject to non negotiable leave provisions.

[22] In *Kucks v CSR Ltd*[9]*,* Madgwick J observed:

"It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand."

[23] Mr Green submitted that the Commission should not make reference to extrinsic material. He referred to the *Acts Interpretation Act* which, Mr Green said, makes it clear

[8] [1993] 40 FCR 511 at 518
[9] [1996] 66IR 182 at 184

that there should not be reference to extrinsic material, unless there is ambiguity or obscurity of some type.

[24] Mr Green referred to *Amcor Limited v CFMEU*[10] in which Gummow, Hayne and Heydon JJ observed that clauses must be read in context and may include a consideration of other provisions in the clause; text and operation of the whole agreement and the legislative background against which the agreement was made.

[25] In the same judgement Gleeson CJ and McHugh J said that the resolution of an interpretation issue turns upon the language of the particular agreement, understood in the light of its industrial context and purpose.

[26] Kirby J said:

> *"The nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it served combine to suggest that the construction to be given to cl 55.1.1 should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement. Approaching the interpretation of the clause in that way accords with the proper way, adopted by this Court, of interpreting industrial agreements and especially certified agreements."*

[27] Mr Green referred to *Kucks* in which Madgwick J observed that it is "*justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading".*

[28] Madgwick J went on to state:

> *"But the task remains one of interpreting a document produced by others. A court is not free to give effect to some interiorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning."*

[29] Mr Green also referred to *Vision Super Pty Ltd v Poulter*[11]*; AMIEU v Coles Supermarkets*[12] and *Hawkins v Commonwealth Bank*[13]*.*

[30] On reading the authorities it seems to me that the predominant consideration is the ordinary and natural meaning of words used. However this must be viewed in proper context having regard to the purpose of the provision. The authorities tend to support a more expansive approach to the interpretation of agreements than that which might apply to statute law, but this does not mean it is permissible to import a meaning into the clause which is simply not available on the ordinary meaning of the words.

[31] In approaching the question at hand I have had regard to the following:

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[10] [2005] 222 CLR 241
[11] [2006] 154 FCR 185
[12] [1998] 80 IR 208
[13] [1996] 70 IR 213

- The clause in question arises from an agreement, rather than an award or statute.

- The application was made pursuant to s29 of the Act (industrial dispute).

- The clause is relatively new, and to the Commission's knowledge, this is the first time its meaning has been seriously in dispute.

[32] In the circumstances I conclude that it is appropriate to take into account extrinsic material. I do so however with a degree of caution. As a general rule employers and employees should be able to rely on the words used without recourse to background documents and/or the parties' recollection of what was intended.

Nature of the Extrinsic Material

[33] The documentary material tendered consisted of a series of "*notes"* of collective bargaining negotiating meetings, draft clauses and internal union documents. This material was supplemented by evidence from a number of witnesses who participated in the meetings. I turn firstly to the documentary evidence.

[34] Notes of a meeting held on 20 December 2004[14] noted that an employer paper of "Pressing Domestic Leave" was to be prepared for the next meeting.

[35] Draft minutes of the meeting held on 10 March 2005 carries the following notation.[15]:

> *"1. <u>Pressing Domestic Leave</u>*
>
> *The employers referred to a paper they have developed but not yet tabled. This paper allocated 2 additional days in addition to the current <u>Carers Leave</u> etc."*

[36] A document titled *Collective Bargaining 2004/5 – Areas of Close Agreement* was described by Ms Briant as *"an update to members to let them know what had been not yet finalised and what there was some agreement on. So it was kind of a work in progress."* The document has the following comment:[16]

> *"Work/Family Balance*
>
> *1. Pressing domestic leave of 10 days per year to come from current and accrued sick leave.*
>
> *NOTE: to incorporate such needs as relocation, additional bereavement leave etc."*

[37] A document titled "*Emergency Leave"*[17] was described by Ms Briant "*as a working document tabled by the employer and just a clause in progress I suppose you would say".*

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[14] Exhibit A10
[15] Exhibit A11
[16] Exhibit A12
[17] Exhibit A13

[38] A further draft clause[18] prepared by the employer was described by Ms Briant as "*very similar, I believe, to the final clause that went into the agreement".*

[39] The Minutes of the 11 May 2005 meeting contains the following notation:[19]

> *"b. Pressing Domestic Leave*
>
> *The employers are now using the term "Emergency Leave".*
>
> *See employer paper*
>
> *(i) Immediate family.*
>
> *Can be used in addition to carers leave - use carers leave first <u>but</u> not to be encouraged.*
>
> *The employers stated that it is not their intention to extend carers leave to 8 days. In response to the TCEEA question the employers stated that it is not intended to be used for moving house unless this is "beyond the employees control".*
>
> *They don't want it to be used and abused - judgement will need to be exercised.*
>
> *Goodwill to come in."*

[40] The employer notes of the same meeting records:[20]

> *"b. Employer paper on "Pressing Domestic Leave"*
>
> *It was noted that this issue is referred to as "Emergency Leave".*
>
> *The Employers presented the paper for comment. The Employers noted that they had tried to define an emergency as a serious situation of an unforseen nature beyond the employee's control, impacting on the employee's immediate family and which requires immediate attention by the employee.*
>
> *The TCEEA thanked the Employers for the paper presented and for the spirit behind it, they commented that they could appreciate what the Employers are trying to do. The TCEEA will take it on board."*

[41] Notes of the meeting held on 7 June 2005 contains the following notation:[21]

> *"d. <u>TCEEA response re Pressing Domestic Leave</u>*
>
> *The TCEEA recognised on a without prejudice basis that the employer proposal is a way forward in this matter and that the union is pleased to see this going forward."*

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[18] Exhibit A15
[19] Exhibit A16
[20] Exhibit A17
[21] ExhibitA18

[42] The evidence of witnesses who participated in the Collective Bargaining meetings is summarised below.

Union Representatives:

[43] Ms Briant[22]

> *"Can you, briefly, as it's your understanding of the negotiations and then the final drafting of this clause, what was the actual purpose?---It was for the unusual situations that didn't fit into the existing paid leave clause in the award/agreement. It's particularly aimed at teachers, as I said, because they can't take annual leave on a day of their choosing, to cover off on things that arose of all kinds, that it was a kind of urgent matter to be attended to. It might be a day's notice, it might be two days' notice. Unforeseen events that can't be scheduled in set-down school holiday periods. Some events, like the dog dying, don't wait until school holidays."*

[44] Ms Holloway:[23]

> *"Can you provide a brief history to the development of the clause titled Emergency Leave?---The – in the log of claims – the 2004 log of claims, the teachers asked if there would be – we could have some sort of – something in the log of claims, anyway – or something in the agreement pertaining to some sort of leave that wasn't covered in anything else – emergency leave. And that's where it – why we put it forward.*
>
> *As to your understanding of – and during the negotiations and in the final drafting of this clause, what was the actual purpose, more specific purpose of clause 8(b)?---Anything that was unforseen that wasn't covered anywhere else.*
>
> *Was there a primary need for this clause?---Well, there was because in the agreement there wasn't anything in the agreement for anything that was unforseen. Other things were covered in other areas of the agreement, but nothing – for example, if there was a flood underneath your house or if there was somebody in your family had an appointment and you might have needed to look after another child or whatever while they were doing – while they were there.*
>
> *Up to that stage in 2004, was it particularly difficult for teachers who couldn't take annual leave, for example, on a day of their choosing, when a pressing issue arose at home?---Yes, there was because there wasn't anything in the agreement to say that they could take any sort of leave for an unusual situation, for a pressing need."*

[45] And later:[24]

> *"Ms Holloway, can you allude to the court why the pressing domestic necessity clause was eventually omitted?---Well, in good faith we all agreed that it was all encompassing - emergency leave encompassed the pressing domestic leave.*

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[22] Transcript p13
[23] Transcript p30
[24] Transcript p33

Okay. So it was implied, implicit?---Yes. I mean, it was no – it was no big deal, we just – we all knew that that's what it covered."

[46] Mr Smallbane:[25]

"Can you please provide a brief history to the development of the clause titled Emergency Leave?---Prior to that date there was a lot of to-ing and fro-ing with our members as to what their needs were. They came up with a variety of situations where they were not covered by any annual leave because as teachers they have no accrual of annual leave, it's the term breaks that is taken up with that, and they are set times each year, so there were various situations which arose during work time that they couldn't apply for special leave, paid leave, and so we, as part of our log of claims, we developed a clause which would try to cover this. Then in negotiations with the employers they too saw the need for a catch-all kind of clause which would cover the situation.

Excellent. Was it at that preliminary stage being called pressing domestic necessity, rather than emergency leave?---Yes, pressing domestic, that's right.

Were the different terms, emergency leave or pressing domestic necessity leave, interchangeable?---In my belief, yes, yes."

[47] And later:[26]

"Mr Smallbane, can you allude to the court why the pressing domestic necessity clause was eventually omitted?---I believe that just for purposes of simplicity in which the catch-all phrase would – of emergency leave would give, was - in the eyes of the employer would give a better understanding of what we were trying to do. Yes.

Was it implicit that the term "emergency" would cover pressing domestic necessity?---I believe so.

Is it your recollection that the clause evolved from "pressing domestic necessity" to the term "emergency leave" but was to cover situations of pressing domestic necessity?---Absolutely."

[48] Mr Boutchard (statement):[27]

"The Emergency Leave clause was one of many conditions of service that was discussed at this time. This particular clause was not contentious and the agreed understanding by all parties was that it was for unforseen serious situations such as a pressing domestic need. It therefore enabled an employee access to paid leave via accessing accrued sick leave because access to annual leave for a teacher is not possible."

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[25] Transcript p34
[26] Transcript p35
[27] Exhibit A28

Employer Representatives:

[49] Sister Majella Kelly:[28]

> *"There's a number of references in the documents about pressing domestic leave and emergency leave and I'll come to that in a moment but what was your understanding of the context in which these discussions were taking place?---The notion of emergency leave arose out of a number of applications for people for leave that was not covered in the award as it stood and one that I particularly recall was leave to – when a person was moving house. We didn't think that that was in fact something that could come under the heading of Emergency, which is why we were careful when it came to the agreement that the definition of Emergency Leave was quite specific in that was something of a serious nature that it was unforseen and outside the employee's control. So it was envisaged that emergency leave would be applied for in a very limited number of situations.*
>
> *Notwithstanding those parameters the employer was amenable to the clause being included in the – in the agreement?---Yes."*

[50] Mr Smith:[29]

> *"What was your understanding of the process of the negotiations that led to the agreement insofar as it related to these types of documents?---Well, I think the first thing to say is that this was one provision in a very complex list of matters that were being discussed at the time.*
>
> *Yes?---And probably one of the less major items in the negotiating process. My memories are that there were some discussions around what was meant by "emergency leave" and "special leave," and in line with the wording on the document here, that the wording "immediate" seemed to be an important part of that emergency provision."*

[51] Dr White (statement):[30]

> *"In relation to the emergency leave clause, I am adamant that the spirit of that clause was that it would provide for something that was serious and unforeseen.*
>
> *As an example of how the emergency leave clause would have application, it would apply in circumstances where a family member had to be taken to hospital after a fall, or a child had had an accident at school. These are things that happened suddenly and cannot be planned for, but require an employee to have leave.*
>
> *…*
>
> *During the negotiations the parties recognise that there were other circumstances where an emergency would arise beyond the employee's control where it was important and significant to the household.*

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[28] Transcript p60
[29] Transcript p70
[30] Exhibit R1

The employer wished to make provision for an employee to take leave where there was no opportunity to make alternative arrangements."

Other Submissions

Mr Upston, for the applicant:

[52] The inability of teachers to access leave options available in other industries is fundamental to understanding the context of the clause.

[53] The choice exercised by Mrs Wright has nothing to do with the college and should have no bearing on whether Mr Wright had an entitlement to paid leave. Mr Upston submitted:[31]

"Mr Wright's wife is an independent woman, she exercised her independent right to attend a funeral and required that Mr Wright care for the child on one specific day. Reiterating, Commissioner, in simple terms, Mr Wright was left with the baby and the issue has nothing to do with the reasons Mrs Wright left Mr Wright with the child. Mrs Wright could have exercised her freedom of movement and gone to Melbourne shopping. Whatever the reason, it has no bearing on Mr Wright's responsibility for the child. The fact is Mr - - -

THE COMMISSIONER: Well, that was a question I was going to ask, so you're putting to me that the decision or choice of Mrs Wright is totally irrelevant, and as you say it could have been a shopping trip to Melbourne - - -

MR UPSTON: Absolutely.

THE COMMISSIONER: - - - or an afternoon at the movies?

MR UPSTON: Absolutely."

[54] Welfare for a child is a shared responsibility. Mr Upston submitted that the *Family Law Act* dictates:[32]

"That where parental rights exist, there is a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child. Generally each parent has all the duties and the responsibilities of parenthood. Such duties may be exercised unilaterally or in consultation with one another."

[55] The focus should be on Mr Wright's emergency, not the circumstances which led to it. Mr Wright was required and duty bound by law to care for the child. That constitutes an emergency and the criteria for the grant of paid leave existed.

[56] The evidence supports a conclusion that in the minds of the negotiating teams, the notions of *pressing domestic circumstances* and *emergency* are interchangeable.

[57] The emergency of Mr Wright to care for his eight month old child did not pass with the passage of time. It remained an emergency requiring immediate attention.

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[31] Transcript p76
[32] Transcript p75

Mr Green, for the respondent:

[58] The logical extension of the notion of *independent rights,* as advanced by the applicant, would lead to an extraordinary proposition which should not be endorsed:[33]

> *"But the point that I emphasised in opening, Commissioner, that, as a matter of logic, if Mr Upston's submission that – regarding parental choices is correct, any teacher who has a child and a spouse or partner, chose to leave a child unattended for any reason, would mean that that teacher is automatically entitled to paid leave to care for the child, regardless of the circumstances."*

[59] The submission that no consideration be given to anything that Mrs Wright does is naïve and ignores both the industrial and practical reality of shared parenting.

[60] The ordinary and natural meaning of the word *"emergency"* is not consistent with the facts of this case.

[61] There was no evidence of an emergency. The family made a decision that Mrs Wright would attend the funeral. The need for Mr Wright to care for the child was not "*unforeseen".*

[62] The circumstance of the funeral did not relate to the "*immediate family or household".*

[63] The situation did not require Mr Wright's immediate attention.

Findings

[64] For reasons previously outlined I have taken into account the extrinsic material presented. I have however concluded that the material has provided only limited assistance in understanding the intent of the parties to the Agreement when drafting the clause.

[65] The material presented indicated that a number of drafts were considered during the negotiation process and viewed as "work in process". This of course is the norm rather than the exception in any negotiation process. Importantly it is the final draft which finds its way into the registered agreement which is binding, not what might have appeared in an earlier draft. It is not unusual for parties to record on transcript understandings which might assist parties in the future, but nothing of this nature was put to the Commission.

[66] Mr Upston invited the Commission to read some significance into the evolution from *"pressing domestic leave"* to *"emergency leave"* which apparently occurred during the negotiation process. The notion of pressing domestic circumstance is well understood in Long Service Leave matters whereby circumstances such as the transfer in employment of an employee's spouse has been found to amount to a pressing domestic necessity justifying resignation and hence a pro rata long service leave entitlement.

[67] It is not difficult to envisage a situation whereby a pressing domestic circumstance would also qualify as an emergency. It does not follow however, that all instances of pressing domestic necessity amount to an emergency. There is nothing in the evidence which suggests that the parties intended that every *pressing domestic circumstance* would qualify for paid leave, irrespective of circumstances. Indeed there is evidence that

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[33] Transcript p91

the clause was not intended to cover predictable domestic situations such as moving house, unless there was a genuine emergency beyond the control of the employee. [34]

[68] Mr Upston tendered a considerable amount of material relating to the legal responsibility of parents to care for a child coupled with the notion of shared parenting. This point is readily accepted. It is axiomatic that the Wrights are jointly responsible for the care of their child, and that if Mrs Wright was not available through circumstances, then this responsibility fell to Mr Wright. The reverse would be equally true.

[69] It was never in any doubt that Xavier Wright required care on Friday 13 February. If there were no alternatives available, that responsibility clearly fell to Mr Wright, who in turn fulfilled that responsibility by caring for the child and, as a consequence, not attending for work. Leave was granted for that day. The only question to be determined is whether the leave is to be paid or unpaid. It was never at issue that Xavier required care, and that care was to be provided by Mr Wright.

[70] I note that both paid and unpaid leave is also available under the Agreement for both Personal and Bereavement leave.

[71] Mr Upston makes the point that decisions taken by Mrs Wright have nothing to do with the employer and should have no bearing on Mr Wright's entitlement to emergency leave. I accept that the first part of this contention is correct. However to slavishly accept the second part of the proposition is in my view to ignore the realities of shared parental responsibilities and the employment relationship. The scenario painted by Mr Upston concerning an entitlement to paid leave should an employee's partner or spouse embark on a shopping trip or the like sheets home to me that the notion of independent rights must be seen in the context of industrial reality, for which no amount of enlightenment can be unreasonably stretched.

[72] Having considered all the material put to the Commission, I consider that the facts must be tested against the words used in the relevant clause.

[73] To meet the requirements of the clause the circumstances must meet <u>all</u> of the following tests:

1. The situation must be "*serious*".

   I am prepared to accept that in the absence of alternatives, the need to care for the child amounts to a serious situation.

2. The situation impacts on the employee's immediate family or household.

   Whilst the funeral did not pertain to a family member, the situation, being the need to care for the child, did. I am satisfied that this test is met.

3. The situation was of an unforeseen nature beyond the employee's control.

   Whilst the death giving rise to the funeral was unforeseen, the need to care for Xavier was not. The parents had at least four days notice that, as a consequence of choice the family made, there would be a need to provide care for the child. This requirement was both anticipated and predictable, and could not in my view be categorised as "*unforeseen".*

[34] Exhibit A16

4. The circumstance requires the immediate attention of the employee.

The *Macquarie Dictionary* defines *"immediate"* as:

"1. occurring or accomplished without delay; instant: 2. pertaining to the present time or moment: 3. having no time intervening."

In my view the requirement for "*immediate attention*" means just that. The employee must take action there and then. In the instant case Mr Wright had at least four days notice of the requirement to care for his child. I acknowledge Mr Upston's submission that the need to take action on Friday 13 did not pass with the passage of time. But what if the requirement had been in two weeks' time, as it easily could have been under the various scenarios put forward? In my view the test is whether the employee's immediate attention is required the moment the circumstance is brought to his or her attention, not whether attention is required when a predictable circumstance manifests several days or weeks later.

I conclude that Mr Wright's circumstances do not satisfy this test.

[74] I find that the decision taken by the employer to deny paid emergency leave and grant unpaid leave reflected a proper application of the relevant clause. I decline to make the order sought.

Tim Abey
COMMISSIONER

Appearances:
Ms A Briant and Mr M Upston for the Independent Education Union of Australia, Tasmania, with Mr C P Wright

Mr C Green, with Mrs B Gilligan and Mr J Visentin, for Dominic College

Date and Place of Hearing:
2009
March 19
May 21
July 22
August 18
Hobart