

## TASMANIAN INDUSTRIAL COMMISSION

### ***Long Service Leave Act 1976 (Tas)***

S13 application for hearing of a Long Service Leave dispute

**Edward Beacham**

(T14651 of 2019)

and

**Fingal Pastoral Pty Ltd**

DEPUTY PRESIDENT N ELLIS

HOBART, 18 MARCH 2020

**Long Service Leave Act 1976 – whether there was a pro rata entitlement - series of outer limit contracts - effluxion of time – continuous employment- context of the employment relationship - termination of employment by the employer for any reason - order granted.**

### **DECISION**

**[1]** On 23 May 2019, WorkSafe Tasmania (WST) referred, pursuant to section 13 of the *Long Service Leave Act 1976 (Tas)* (the Act), an unresolved dispute regarding Mr Edward Beacham's (the Applicant) alleged entitlement to a payment of pro rata long service leave arising from his employment with Fingal Pastoral Pty Ltd (Fingal Pastoral) (the Respondent).

**[2]** This application was the subject of numerous conciliation conferences. However, it became clear that the matter should be determined by the Commission.

**[3]** The application was subject to a determinative conference following consultation and consent of the parties. This was conducted in a largely inquisitorial manner and given the absence of external representation for either party, appropriate assistance and latitude was provided to facilitate the presentation of each case.

**[4]** Both parties were sworn in at the beginning of the conference. I have accepted that all their evidence was given to the best of their recall and ability.

**[5]** The uncontested facts are:

- a) Mr Beacham was employed as a Farm Manager on a full time basis from 19 January 2010 to 18 January 2019, totalling a period of 8.99 years on three contracts.
- b) His employment was terminated at the end of the third contract on 18 January 2019. A new contract of employment was not offered.
- c) The employment of Mr Beacham was not terminated on the grounds of wilful and serious misconduct.

### The issue in dispute

[6] There is one key issue at the centre of the dispute requiring determination; was Mr Beacham's employment terminated on 18 January 2019 by his employer for any reason other than serious and wilful misconduct.

[7] The Applicant asserts his employment was terminated by his employer due to an employer initiated decision to not offer a new contract due to a restructure resulting in his position becoming redundant. He submits he was entitled to be paid for accrued pro rata long service leave for the period 19 January 2010 to 18 January 2019, a period of 8.99 years.

[8] The Respondent submits that Mr Beacham is not entitled to be paid any long service leave because his employment came to an end by the effluxion of time at the expiration of the term specified in the third contract and he was therefore not terminated by his employer.

### The legislation

[9] The entitlement to long service leave, and where appropriate pro rata payment in lieu of taking of long service leave, is governed by the Act.

[10] It is agreed Mr Beacham meets the definition of an employee<sup>1</sup> under the Act and has 8.99 years of continuous employment. The period of long service leave entitlement is specified in s 8 of the Act. The argument arises pursuant to ss 8(2)(b) and 8(3)(d) of the Act, which provide:

"8. Period of long service leave to which employees, other than mining employees, are entitled

- (1) In this section, *employee* means an employee who is not a mining employee.
- (2) Subject to subsection (4), the period of long service leave to which an employee is entitled under this Act is –
  - (a) on the completion by an employee of at least 10 years' continuous employment with his employer –
    - (i) 8 2/3 weeks' long service leave in respect of the first 10 years' continuous employment with his employer; and
    - (ii) 4 1/3 weeks' long service leave in respect of each additional 5 years' continuous employment with his employer; and
    - (iii) on the termination of his employment, an additional period of long service leave in respect of the number of years' continuous employment with his employer since the last accrual of entitlement to long service leave under the foregoing provisions of this paragraph, such period of long service leave as bears the same proportion to 8 2/3 weeks as that number of years bears to 10 years; or

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<sup>1</sup> Section 7A of the Act.

(b) in the case of an employee to whom this paragraph applies by virtue of subsection (3) who has completed 7 years', but has not completed 10 years', continuous employment with his employer such period of long service leave as bears the same proportion to 8 2/3 weeks as the total period of the employee's continuous employment with his employer bears to 10 years. (emphasis added)

(3) Subsection (2) (b) applies to –

(a) an employee who attains the age for retirement;

(b) an employee whose employment is terminated on account of illness of such a nature as to justify the termination of that employment;

(c) an employee who terminates his employment on account of incapacity or domestic or other pressing necessity of such a nature as to justify the termination of that employment; and

(d) an employee whose employment is terminated by his employer for any reason other than the serious and wilful misconduct of the employee." (emphasis added)

### **Employment contracts**

**[11]** The context of the formation of the employment relationship and the negotiation for each contract was explored.

**[12]** Mr Beacham outlined the process of his original application and his interviews for the role of Farm Manager with Fingal Pastoral Pty Ltd in December 2009. The role was advertised through a recruitment consultant and following a successful interview, he attended further meetings at the agricultural business property of Malahide.

**[13]** Over the following days, there were negotiations for the term and quantum of wages and an offer was confirmed by telephone.<sup>2</sup> A formal contract (first contract) was drafted and Mr Beacham commenced on 19 January 2010.

**[14]** The first contract<sup>3</sup> specified the term which included an initial trial period of three months and a further 21 months to complete the 24 month employment period. Clause 14 of the contract headed 'Termination' outlined the ability for either party to terminate the agreement at any time by giving notice. The contract included a redundancy clause.

**[15]** The annual remuneration was stated, without any increase, however Mr Talbot submitted that Mr Beacham had negotiated a variation salary increase in January 2011 outside the terms of the initial contract.<sup>4</sup>

**[16]** Negotiations for the second contract commenced with separate salary benchmarking processes undertaken by both parties.

**[17]** An email trail from May-June 2011<sup>5</sup> tracks the process of a range of consultant's benchmark Farm Managers remuneration reports from Rimfire Resources, Lucas Group

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<sup>2</sup> Transcript pages 16-18.

<sup>3</sup> Exhibit A3.

<sup>4</sup> Transcript page 19.

<sup>5</sup> Exhibit R5.

and Holmes Sackett provided through Board member, Mr Sandy McEachern, which were used to assist negotiations for the salary package. The Board was active in this process.

**[18]** In September 2011, a five year contract was negotiated which included amongst other conditions, annual salary increases and a bonus structure.<sup>6</sup>

**[19]** Agreement between the parties was reached in early October 2011 and the five year contract, including discretionary bonuses, commenced on 10 January 2012 (second contract).<sup>7</sup>

**[20]** This contract included a clause to enable either party to give 90 days' written notice to terminate the agreement. It included a range of other conditions relating to relevant penalty clauses if either party terminated the agreement early but within specified years of the term of employment.<sup>8</sup>

**[21]** The third contract was negotiated and informed by further benchmarking. Mr Talbot submitted that the Board refused to provide additional remuneration or a discretionary bonus for Mr Beacham following his request in April 2016. In a letter dated 12 June 2016<sup>9</sup> Mr Talbot stated that:

"The board will continue to monitor both the financial performance of the business and your performance, whilst also investigating industry data regarding comparable remuneration levels over the coming months and will consider your remuneration again and any offer that it might be prepared to make regarding any future employment agreement with you at the next board meeting on or about 12 October 2016."

**[22]** A written offer<sup>10</sup> was made to Mr Beacham on 7 October 2016. This offer included a base salary increase indexed annually with a discretionary bonus for a new three year period of employment from 19 January 2017. There were adjustments to the previous contract's termination clauses.

**[23]** Mr Talbot stated he offered a three year contract as the maximum term to enable him to review how the company's off farm agistment business performed, the impacts of the high cost of employment of both the Farm Manager and Assistant Manager and the cost of resourcing the pending legal trial.<sup>11</sup>

**[24]** He had sought advice from consultants in relation to a contingent recruitment process in the event Mr Beacham did not accept the offer in 2016.<sup>12</sup>

**[25]** Mr Beacham submitted he did not accept the three year term of the contract and instead accepted a two year contract:<sup>13</sup>

"MR BEACHAM: So I – yeah, so I opted for a two year contract, which effectively enabled me to negotiate a future – a future salary at the time, you know, wage – wage movement was fairly flat, and I thought well, rather than enter into a three year deal I thought well it's probably best to yeah take a shorter agreement

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<sup>6</sup> Exhibit R4.

<sup>7</sup> Exhibit R9.

<sup>8</sup> Exhibit R9, clause 15.

<sup>9</sup> Exhibit R17.

<sup>10</sup> Exhibit R23.

<sup>11</sup> Exhibit R2 page 18.

<sup>12</sup> Ibid.

<sup>13</sup> Transcript pages 37-38.

timeframe. So, therefore, I could renegotiate hopefully a better financial outcome for myself –

DEPUTY PRESIDENT: Because it was – you didn't want to lock into three years is that what you're saying?

MR BEACHAM: Yeah that's right."

**[26]** Mr Talbot contested Mr Beacham should have been aware that accepting a three year contract would have enabled him to meet the criteria for his long service leave entitlement. In response to questioning by Mr Talbot, Mr Beacham stated:<sup>14</sup>

"MR BEACHAM: Didn't – didn't consider it, Richard, I didn't know about it at the time, I didn't even consider it at the time, to be honest, because I wouldn't – "

**[27]** Mr Talbot acknowledged that the accrued leave entitlements were not paid out at the conclusion of the first or second. His response was:<sup>15</sup>

"DEPUTY PRESIDENT: Yes. And now I'm going to ask Mr Talbot a question in regards to the previous question I asked Mr Beacham. Why were the um accrued leave not paid out at the end of each contract?

MR TALBOT: Because Mr Beacham was happy because of his continuous period of employment and my understanding was that because we were moving to the next employment that both parties were content for it to role forward..."

## **Circumstances leading to the end of employment**

### **The Applicant's Case**

**[28]** In early October 2018, Mr Beacham commenced the process of negotiation for the new contract by raising the issue at the weekly telephone call with Mr Talbot, who resides in the United Kingdom for most of the year. In his witness statement he stated:<sup>16</sup>

"...I raised my upcoming contract renewal and requested that Mr Talbot give me a timeline for when the discussion/negotiation might take place. Mr Talbot indicated that the discussion/negotiation would take place at the completion of a court trial the company was then involved in..."

**[29]** Mr Beacham stated that when Mr Talbot arrived in Tasmania on 11 November 2018, there was plenty of opportunity to have discussions regarding his employment agreement as a Board meeting was scheduled for 15 November 2018.

**[30]** He noticed some unusual activities: the wool broker staying with Mr Talbot, not with Mr Beacham as was usual practice; not being included in the evening meal; and a request for the Assistant Manager to escort Mr Talbot around the farm tour rather than Mr Beacham.<sup>17</sup>

**[31]** Mr Beacham stated the trial was due to commence in the second week of November to around the 13<sup>th</sup> of December 2018. He stated:<sup>18</sup>

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<sup>14</sup> Transcript page 38

<sup>15</sup> Transcript page 50.

<sup>16</sup> Exhibit A2.

<sup>17</sup> Exhibit A2.

<sup>18</sup> Ibid.

"The trial had nothing to do with my employment, it was obviously just a convenient excuse to delay his discussion with me."

**[32]** Mr Beacham appeared as a witness in the trial on December 10 2018.

**[33]** Mr Beacham said he was not seeking other employment opportunities and gave no indication to Mr Talbot he was looking to leave after 18 January 2019. He stated he expected to negotiate a new contract and continue working at Malahide as the Farm Manager. His evidence was:<sup>19</sup>

"DEPUTY PRESIDENT: Yeah. So, in your view, did you give any feedback to him that you were looking to leave and move on at January the 18th?

MR BEACHAM: No. No.

DEPUTY PRESIDENT: Or give any – what – what indications do you give to him about what you wanted to do after this contract? The current contract being?

MR BEACHAM: Um, I – you know I – I just wanted to – I wanted to have the discussion, hadn't – yeah, I mean, in my view I thought it'd be a matter of, yeah, working at a – working at an agreement going forward and keep moving forward. So that's – that was my expectation.

DEPUTY PRESIDENT: You did expect a new contract to be negotiated?

MR BEACHAM: Yeah, I did. Because I had no other ideas to -otherwise."

**[34]** Mr Beacham stated he had a reasonable expectation of continuing employment and an expectation of an offer of a further employment contract due to the previous conduct of the parties and the use of nominal fixed-term employment agreements.<sup>20</sup>

**[35]** Mr Beacham had held a discussion with a Board Member, Mr Sandy McEachern, where he sought advice on an acceptable level of remuneration to negotiate. Mr Beacham stated that the Board Member said the figure of \$145,000 did not sound "unreasonable". He stated the Board Member did not give any indication there would not be any new contract negotiations. This conversation was held after the Board meeting which endorsed to restructure the management team and not offer a further contract to Mr Beacham, which concluded his employment.<sup>21</sup>

**[36]** His evidence was that he had an expectation that the contract would be renegotiated and renewed and that he had not been given any indication from Mr Talbot that his employment would come to an end at the end of the contract. He said:<sup>22</sup>

"MR BEACHAM: Richard, that was – I had an expectation that it was going to renewed, because I had no reason to think otherwise, and that's where it sits. That's where I sit on it."

**[37]** He received an email from Mr Talbot on 14 December 2018 directing him to meet to discuss his future employment agreement at 10:00 am on 17 December 2018.<sup>23</sup>

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<sup>19</sup> Transcript pages 69-70.

<sup>20</sup> Exhibit A2 page 6.

<sup>21</sup> Transcript pages 80-81.

<sup>22</sup> Transcript page 100.

<sup>23</sup> Exhibit A2 page 3.

**[38]** At this meeting, Mr Beacham was advised that there was no offer of further employment, his offer to reduce his salary by \$17,000 in response was declined, and there was no negotiation:<sup>24</sup>

“He advised me that the company was not in a position to offer me a new employment agreement and that he would be terminating my employment at close of business January 18, 2019. I proposed to Mr Talbot that I would accept a substantial pay cut from \$137,000 to \$120,000 but he declined to offer me further employment. This was the first time I had been informed that my employment would not be continuing past January 18, 2019.”

**[39]** He asserted this was the first time that he knew he would not be continuing employment and he did not recall any other discussion. He stated he was not given a reasonable time to inform his wife who worked in Launceston.

**[40]** Mr Beacham stated he was shocked when informed of there being no option for future employment and said:<sup>25</sup>

“But as I’ve said, you know, it hit me like a sledge hammer to be honest but, you know, that’s certainly my interpretation.”

**[41]** He submitted that Mr Talbot held a staff meeting ten minutes after this meeting and announced the restructure, which removed the Farm Manager and Assistant Farm Manager Positions and proposed the implementation of a new management structure.<sup>26</sup>

**[42]** Mr Beacham stated his wife was also completely unaware that there would be no new contract. The result was the family had to vacate the residence within four weeks. He gave evidence that no planning had been undertaken to move out of the residence and this outcome was only revealed at the meeting with Mr Talbot.<sup>27</sup>

**[43]** Mr Talbot had offered ongoing short term house rent for \$1000 per week however, his rent under the contract had been \$10 per week.

**[44]** As an act of goodwill, Mr Beacham stated he offered to work as a consultant to assist the transition. This was not accepted by Mr Talbot. However, he assisted in the transition of the day to day management prior to the conclusion of his employment.<sup>28</sup>

**[45]** Mr Beacham sent an email on 30 December 2018, requesting a termination letter and the calculation of his entitlements. Mr Talbot provided the calculation of annual leave and salary entitlements but noted he had no entitlement to long service leave.<sup>29</sup> A further email was sent on 21 January 2019 requesting payment of his long service leave, legal fees and redundancy entitlements.<sup>30</sup>

**[46]** Mr Beacham’s evidence was that he:<sup>31</sup>

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<sup>24</sup> Ibid page 4.

<sup>25</sup> Transcript page 167.

<sup>26</sup> Exhibit A2 p 4.

<sup>27</sup> Transcript page 86.

<sup>28</sup> Exhibit A6.

<sup>29</sup> Exhibit A4.

<sup>30</sup> Exhibit A7.

<sup>31</sup> Exhibit A2 page 2.

"...delivered a record profit to the Fingal Pastoral business in Financial Year ended 2018 as Farm Manager, my performance reviews were what I describe as well above average.

[47] In response, Mr Talbot conceded it was a good profit year but not a record profit year.

[48] Mr Beacham stated that Mr Talbot had made a positive decision to restructure his position and replace it with four different positions resulting in his position being made redundant. He stated:<sup>32</sup>

"If not for the Respondent's decision to restructure the management of its business, my former position would still exist, and my employment would not have ended as it did. Those actions resulted in the termination of my employment, not the effluxion of time. It was termination by the Respondent."

[49] He relied on *Jones v Department of Energy and Minerals*<sup>33</sup> where Ryan J set out principles relating to restructure and redundancy of positions. Mr Beacham contests that had it not been for the redundancy, his employment would not have been terminated.

[50] Mr Beacham submitted he was employed on successive contracts which he stated constituted ongoing employment, particularly when there was an unqualified right to terminate the contract on notice as set out in clause 15(b).<sup>34</sup> Mr Beacham also relied on *Andersen v Umbakumba Community Council*.<sup>35</sup>

[51] He alleges he is entitled to 7.8 weeks of pro rata long service leave payment due to his nine years of continual service with Fingal Pastoral and his employment was allegedly terminated by the employer based on the reason to not offer a new contract due to a restructure and the redundancy of his position.

### **The Respondent's Case**

[52] There was broad agreement with the Applicant's account of the timeframes of the negotiation for the first three contracts.

[53] Mr Talbot contested the details of the mid contract negotiations and variations particularly around the quantum of salary and bonuses.

[54] He stated that each contract contained materially different terms as agreed in the negotiations. His evidence was that the accrued entitlements were not paid out at the conclusion of each contract and continued to roll on to be taken in the next contract:<sup>36</sup>

"DEPUTY PRESIDENT: Yes. And now I'm going to ask Mr Talbot a question in regards to the previous question I asked Mr Beacham. Why were the um accrued leave not paid out at the end of each contract?"

MR TALBOT: Because Mr Beacham was happy because of his continuous period of employment and my understanding was that because we were moving to the next employment that both parties were content for it to role forward..."

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<sup>32</sup> Exhibit A2 page 6.

<sup>33</sup> (1995) 60 IR 304, 308.

<sup>34</sup> Exhibit A1.

<sup>35</sup> (1994) 126 ALR 121.

<sup>36</sup> Transcript page 50.

**[55]** Mr Talbot's evidence was that the decision to not offer a fourth contract was for a range of reasons:

- a) Mr Beacham may have used the two years during the contract to find alternative employment;<sup>37</sup>
- b) The continued high management costs of employing the Farm Manager and Assistant Farm Manager;<sup>38</sup>
- c) The level of risk taken, the loss in the agistment business, and the price risk management;<sup>39</sup>
- d) The high cost of Mr Beacham's travel expenses;<sup>40</sup>
- e) The decision to cease cropping and the reduced need for cropping expertise;<sup>41</sup>
- f) The opportunity to rationalise the management structure;<sup>42</sup>
- g) He had taken legal advice and was aware of the long service leave entitlement if he offered a new contract; and
- h) The effluxion of time of the contract was an opportunity to make longer term efficiencies, restructure and not re-employ Mr Beacham.<sup>43</sup>

**[56]** Mr Talbot provided reasoning behind his decision. He stated he did not terminate the employee, rather his term of employment expired or came to an end by agreement. He noted that the final contract states the term in Clause 6 under the heading 'Duration':<sup>44</sup>

"The employee's engagement continues for the period specified in the schedule as the term or until determined earlier under this agreement."

In this contract, the Term specified in the Schedule states:

"The employment starts on January 19<sup>th</sup> 2017 and continues for two years until January 18<sup>th</sup> 2019."

**[57]** His evidence in relation to providing his reasoning for not offering a further contract was:<sup>45</sup>

"I met with Mr Beacham at 10am on 17 December 2018 and advised him that the company was not in a position to offer him further employment on completion of his current employment on 18 January 2019."

**[58]** Mr Talbot stated that Mr Beacham's evidence that his employment did not come to an end by agreement, that he was taken by surprise, and that he had an expectation

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<sup>37</sup> Exhibit R2 page 14.

<sup>38</sup> Exhibit R2 page 14.

<sup>39</sup> Exhibit R2 page 15.

<sup>40</sup> Ibid pages 15-16.

<sup>41</sup> Ibid page 16.

<sup>42</sup> Ibid pages 16-17.

<sup>43</sup> Exhibit R2 page 17.

<sup>44</sup> Exhibit R24.

<sup>45</sup> Exhibit R2 page 18.

of further employment, "has no relevance in law"<sup>46</sup> but may be relevant in the context of unfair dismissal legislation.

**[59]** He referred to the Full Bench decision of the Australian Industrial Relations Commission (AIRC) in *Lunn v Department of Justice*<sup>47</sup> and submitted the intentions of the parties is determined objectively and that the subjective intention of the parties is not admissible in construing the contract.<sup>48</sup>

**[60]** Mr Talbot's evidence was that he had not given any indication to Mr Beacham that he would not be negotiating or offering a fourth contract prior to the final meeting in December 2018:<sup>49</sup>

"DEPUTY PRESIDENT: So did you indicate then, on this phone call in October 2018, when Mr Beacham asked for a meeting with you in regards to the discussion, I'll say, around a new contract, did you indicate to him there will be no new contract?"

MR TALBOT: Absolutely not, I said that we'll discuss the matter after the board meeting.

DEPUTY PRESIDENT: Yes, so you gave no indication at all to him.

MR TALBOT: I gave no indication, absolutely, that there – I just said there'll be a discussion, he never said –

DEPUTY PRESIDENT: And why did you not, why did you not give any indication at that stage that there would be no new contract?"

MR TALBOT: Because I hadn't made my mind up at that stage. If you refer to the minutes of the board meeting, if I go back to –

DEPUTY PRESIDENT: Yes, I think there's one in April, that you actually raised the first issue."

**[61]** Mr Talbot stated that his legal advice was to not address the issue relating to the future of Mr Beacham's employment until after he had appeared as a key witness in a trial involving Fingal Pastoral. This was outlined in the Board Minutes dated 15 November 2018.<sup>50</sup> He accessed further legal advice regarding liability for long service leave.<sup>51</sup> Mr Beacham appeared as a witness in the trial on 10 December 2018.

**[62]** The Board had approved Mr Talbot to advise Mr Beacham of the decision to not offer a new contract as soon as possible after the trial had concluded, unless he had cause to change his mind, in which case he would revert back to the Directors.<sup>52</sup>

**[63]** On Saturday, 15 December 2018, Mr Talbot sent an email requesting Mr Beacham meet with him on Monday, 17 December 2018 to "discuss your employment agreement."<sup>53</sup>

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<sup>46</sup> Transcript page 106.

<sup>47</sup> PR974185 [2006] AIRC 756, para [29].

<sup>48</sup> Exhibit R1 pages 3-4, and Transcript page 107.

<sup>49</sup> Transcript page 60.

<sup>50</sup> Exhibit R34.

<sup>51</sup> Exhibit R2 page 22.

<sup>52</sup> Exhibit R2 page 18.

<sup>53</sup> Exhibit R35.

**[64]** Evidence from Mr Talbot clarified that Mr Beacham was ignorant of the Board's decision to not offer a new contract and stated:<sup>54</sup>

"DEPUTY PRESIDENT: Mr Beacham was completely ignorant of that?

MR TALBOT: Well he was ignorant of the decision at the time – that was a director's decision –"

**[65]** Mr Talbot stated that he told Mr Beacham that the cost of employing him and Mr Woods was not viable. In response to Mr Beacham's offer to reduce his salary by \$17,000.00 at the final meeting, Mr Talbot said it was not enough as a viable alternative. Mr Talbot conceded that he did not open up genuine negotiations for a new contract.<sup>55</sup>

**[66]** Mr Talbot submitted he assumed Mr Beacham was searching for other jobs and the basis of this assumption arose from the information provided in negotiations by Mr Beacham in 2011.<sup>56</sup>

**[67]** In questioning, Mr Talbot gave evidence regarding his reluctance to negotiate a new contract as:

"DEPUTY PRESIDENT: was there an indication to you then, he was actively looking for other employment in 2017/2018, the third contract, during that period?

MR TALBOT: No. We didn't raise it. After my experience with (indistinct words) I just – it would have been such a bruising negotiation to get to that contract we just – I just –

DEPUTY PRESIDENT: Did the fourth contract?

MR TALBOT: - Yeah. I just didn't want

DEPUTY PRESIDENT: Yeah.

MR TALBOT: - you know. I've had – so bruising the process of this is where I see the market, this is where you see, I just didn't want to go down – I know you want more money I just, you know, it's too bruising."

**[68]** Mr Talbot stated that he explained the new proposed structure which would take effect after Mr Beacham left and his expectation that Mr Beacham would support the transition in terms of handover of duties. This expectation was summarised in an email to Mr Beacham at 4.03pm on 12 January 2019 and indicated that aspects of the role would be handed over prior to his cessation of employment:<sup>57</sup>

"I am keen to ensure that we will have covered off the handover of all areas of your duties as Farm manager over the course of this week in order to ensure a smooth transition for the business by the time you finish your employment with the company on Friday (18Jan.)...

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<sup>54</sup> Transcript page 65.

<sup>55</sup> Transcript page 91.

<sup>56</sup> Transcript pages 123-124.

<sup>57</sup> Exhibit A6.

I am assuming that you will have handed over all details of the day to day management of the agistment business to Campbell by close of business Wed 16 Jan...."

**[69]** Mr Talbot confirmed Mr Woods, the Assistant Manager did not know about the restructure and he immediately met with Mr Woods following the meeting with Mr Beacham to make an offer of employment as a new modified Farm Manager. Mrs Woods was offered the role as the Office Manager and Mr McIntosh, the stock agent was offered the role of managing agistment. Following the offer on 17 December 2018, all managers accepted their new roles.<sup>58</sup>

**[70]** In relation to the cost of employment, Mr Talbot provided background information to a series of reports of benchmarking Farm Manager's salaries, the financial position of the business and the increasing costs of employment. In questioning, he conceded he would have considered further employment if the Assistant Manager and Farm Manager were on benchmark salaries.<sup>59</sup>

"DEPUTY PRESIDENT: Yeah, so had Mr Beacham accepted a hundred thousand dollar salary or a hundred and twenty which you believe is more in –

MR TALBOT: Yeah.

DEPUTY PRESIDENT: - he may have been offered another contract.

MR TALBOT: Well the trouble was, is that because Mrs Woods saw the books –

DEPUTY PRESIDENT: Mhm.

MR TALBOT: - you know if Mr Beacham had said to "Well I will work for a hundred a hundred and ten" which is where we see the market –

DEPUTY PRESIDENT: Mhm.

MR TALBOT: I had a very expensive assistant manager and I couldn't then go to Mr Woods and say, well you're on ninety five, I need to – I'm knocking Mr Beacham back to a hundred a hundred ten, I want you to drop back to sixty" which is where we see the market on the evidence, you know, the effect of Mr Beacham seeking the salary, which is – which I understand he's entitled to do and he'd negotiated very well, and Mrs Woods having insight because the – does the HR, meant that the combined cost of Mr Beacham and Mr Woods was becoming a – too high.

...

DEPUTY PRESIDENT: If they were both – if the manager and the assistant manager were on benchmark salaries then the employment potentially would have offered another contract for them to continue on benchmark salaries.

MR TALBOT: I would have looked at it more closely. The thing is it had developed over time."

**[71]** Mr Talbot relied on a range of case law in relation to employment contracts including those relevant to unfair dismissal, and principles relating to a contract of

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<sup>58</sup> Exhibit R2.

<sup>59</sup> Transcript, pages 126-127.

employment and sham contracts. In *QIEU v Educang Pty Ltd*,<sup>60</sup> Commissioner Asbury found that in contracts with a definite outer limit, the employment comes to an end by agreement and the effluxion of time. Commissioner Asbury found that when applying these principles:

"... all provisions of the contract must be considered, together with the context or factual matrix which the contract was made..."

**[72]** He submitted that both parties knew what they were signing up for and the termination of employment is not at the instance of either party. He noted Mr Beacham had previously indicated in a letter, relating to the previous five year contract, that he proposed terms "for the life of the agreement" and was clear in his understanding.<sup>61</sup>

**[73]** Mr Talbot countered the Applicant's position in *Andersen*<sup>62</sup> stating it was not relevant to the dispute at hand as that matter was about a termination of employment prior to the end of the contract specified date.

**[74]** He asserted consideration of representations made to the employee arising from the unfair dismissal legislation and whether there is a legitimate expectation of ongoing employment may include the following factors for consideration, but not be limited to: any failure to definitely state that employment will end on a particular date, inconsistent terms and the nature and duration of the negotiations between the parties.

**[75]** However, he said there was no automatic renewal in the previous three agreements and each contract was negotiated and agreed with different terms. It was submitted the contracts were not an administrative convenience, nor a sham, did not contain inconsistencies or create ambiguity. However, he submitted any expectation of ongoing employment bears no relevance to entitlements under this Act.<sup>63</sup>

**[76]** Mr Talbot submitted that whether or not Mr Beacham's position became redundant was irrelevant to the issue of how his employment came to an end:

"A redistribution of the tasks performed by the Applicant was necessitated by the end of the Applicant's employment by the Respondent, it was not the cause of the Applicant's ending."<sup>64</sup>

**[77]** Mr Talbot submitted the below findings are applicable to the interpretation of the phrase "terminated by his employer" in section 8(3)(2)(d) of the Act.<sup>65</sup> In the High Court decision of *Victoria v the Commonwealth*,<sup>66</sup> the Court considered the phrase "an employer must not terminate an employee's employment" and held that:

"As a matter of ordinary language, an employer does not terminate an employee's employment when his or her term of employment expires. Rather employment comes to an end by agreement..."

**[78]** Mr Talbot stated Mr Beacham's employment was terminated but not by the employer. He asserted that he did not take any action to terminate the contract. The

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<sup>60</sup> [2004] QGIG 89.

<sup>61</sup> Transcript page 111.

<sup>62</sup> (1994) 126 ALR 121.

<sup>63</sup> Exhibit R1 pages 7-9.

<sup>64</sup> Exhibit R1 page 10.

<sup>65</sup> Exhibit R1 page 3.

<sup>66</sup> (1996) 187 CLR 416.

employment came to an end by the effluxion of time at the expiration of the maximum term of the third contract of employment on 18 January 2019.

### **Consideration**

**[79]** The central issue for determination is whether Mr Beacham's employment was terminated by his employer for any reason within the meaning of section 8(3)(d) of the Act. It has been agreed that his employment was not terminated due to wilful and serious misconduct.

**[80]** The purpose of the Act is summarised by President Barclay in *Cohen v Northern Children's Network Inc.*<sup>67</sup> I concur with the President's finding at paragraph [3] that:

"The purpose and object of the Act is to provide employees who work for lengthy periods of time with one employer additional leave entitlements in recognition of that lengthy service."

**[81]** It is uncontested that Mr Beacham was employed by Fingal Pastoral under three successive contracts on a full time basis from 19 January 2010 to 18 January 2019 at the expiry of the last contract.

**[82]** Section 5 of the Act provides for the nature of continuous employment and in subsection 3(b) states that the employee shall be deemed to be continuously employed by the employer where the employee is employed under two or more contracts of employment separately entered into. The parties agreed Mr Beacham was continuously employed.

**[83]** I am satisfied the purpose of the Act recognises continuous employment with one employer based on a series of separate employment contracts which may result in lengthy service. This employment arrangement should not necessarily exclude employees from long service leave entitlements due to the expiration of the term of the final contract. I am satisfied that to meet the purpose of the Act, I must review the context of the entire, continuous employment relationship.

**[84]** The unqualified rights of either party to terminate without a reason was found in *Andersen* to not be a contract for a specified period of time, rather the cessation date recording the outer limit date of the contract. I am satisfied these contracts were "outer limit" contracts<sup>68</sup> which contained unqualified rights of either party to terminate with notice before the specified end date.

**[85]** I note that to be entitled to pro rata long service leave pursuant to the Act, on completion of seven years and without completion of 10 years, the employee must:

- a) Have continuous employment with his employer; or
- b) Retire at the age for retirement; or
- c) Have their employment terminated due to ill health; or
- d) Resign due to incapacity or domestic or other pressing necessity of such a nature as to justify the termination of that employment; or

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<sup>67</sup> T14519 of 2017.

<sup>68</sup> *Andersen v Umbakumba Community Council* (1994) 126 ALR 121.

- e) Have their employment terminated by their employer for any reason other than serious and wilful misconduct.

**[86]** Mr Beacham had 8.99 years of continuous service with Fingal Pastoral. He did not retire at retirement age, he was not terminated due to ill health, he did not resign due to specific circumstances, and he was not terminated by his employer for serious and wilful misconduct.

**[87]** Accordingly, I must determine if Mr Beacham's employment was terminated by his employer for any reason. The Applicant contends that his termination of employment was by reason of him not being offered a further contract due to the restructure of management positions. However, the Respondent contended that the employment was terminated by the effluxion of time.

**[88]** I note each contract of employment contained different conditions and did not contain a clause to renegotiate a further employment contract. Both parties agreed there were robust negotiations for each of the three contracts and negotiations commenced prior to the expiration of the last two contracts. Negotiations included joint benchmarking and research of relevant salary packages. I am satisfied that the negotiations for these contracts were to agree on the prospective terms and conditions rather than if employment would continue.

**[89]** I am satisfied the final contract states the duration and the term of employment under the Agreement with the outer limit as 18 January 2019. The covering letter of appointment states:<sup>69</sup>

"The Board are pleased to be able to offer you a further period of employment as Farm Manager on completion of your current employment agreement on 18<sup>th</sup> January 2017, with the following key changes...

...

All other conditions of employment would remain the same as our current arrangement including your involvement in the agistment business."

**[90]** This offer was for a three year contract. Mr Beacham provided evidence to explain why he opted for a two year contract rather than the offered three year contract. He said he thought he would be in a better position to renegotiate a higher wage deal after the two year period, as wages were flat at the time of signing the agreement. I am satisfied that Mr Beacham signed the third agreement on the understanding that he would be able to renegotiate a better deal for a fourth agreement to continue the employment relationship. However, this did not eventuate.

**[91]** I support the submissions of Mr Talbot and find that there were no vitiating factors in relation to the contract. All contracts were drafted in response to the agreement of the parties following negotiations. I am satisfied Mr Beacham entered into the contract understanding the terms, there was no serious mistake about the contents, nor unconscionable conduct associated with the making of the contract, it was not made under duress or coercion, he had legal capacity, and the contract was a not a sham or administrative convenience.

**[92]** I am satisfied that there was an understanding between the parties that this contract had an outer limit date for employment under this contract.

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<sup>69</sup> Exhibit R23.

**[93]** However, following a pattern of three successive contracts for the same role, I am not satisfied the stated duration of employment under the final contract was a genuinely understood end date for the entire employment relationship. The Board offered a “further period of employment” in the previous contracts, despite the expiration of the outer limit date which was set in each contract in the Schedule under the ‘Term’ section.

**[94]** Clause 12 of the final Agreement differentiated termination of employment under the agreement by the employee with relative penalty provisions. It also lists a range of conditions that the employer may terminate the agreement, i.e., grave misconduct. It provides redundancy clauses relative to each year of employment, including the final year of the term of employment. None of the described conditions for the termination of employment were present. The contract progressed to the full term.

**[95]** The evidence demonstrated that Mr Beacham was not paid out the accrued entitlements at the completion of each contract and I note the resultant rollover of entitlements from contract to contract. In my view, this contrasts with the Respondent’s contention that they were stand-alone contracts and separate periods of employment as there is a rollover of accrued entitlements due to the continuous employment relationship.

**[96]** There is an abundance of case law reflecting decisions arising from interpretation and application of section 386(1)(a) the *Fair Work Act 2009* (FW Act), with reference to employment being “terminated on employer’s initiative” in relation to unfair dismissal.

**[97]** I note the relevant section of the Tasmanian Act states: “terminated by his employer for any reason”. Both Acts need a determination of whether the employer terminated the employment of the employee for either entitlement to unfair dismissal review or to access long service leave entitlements in the Act. However, there are some useful guiding principles and a review of relevant cases may assist this determination.

**[98]** The word “initiative” indicates the implementation of some preliminary action to bring the employment to an end. The term “any reason” gives a broader approach and I refer to the Macquarie Dictionary definition of “any” being one, a, an, or (with plural noun) some, whatever or whichever it may be: in whatever quantity or number, great or small: every: a great or unlimited (amount).

**[99]** I am satisfied that the analysis of whether there was a termination by the employer for any reason must be conducted by reference to the termination of the employment relationship, not just by reference to the terms in the contract of employment immediately before the cessation of employment.

**[100]** While I have found that there was genuine agreement to the term in the outer limit term of the final contract, the employment relationship is more than the terms expressed in the isolated single final contract. I am satisfied there was no genuine agreement the employment relationship would terminate on that date based on the previous conduct which I am satisfied, demonstrated the negotiations were primarily to set the prospective terms and conditions, not whether there would be ongoing employment or not.

**[101]** In *Khayam v Navitas English Pty Ltd*,<sup>70</sup> the Full Bench of the Fair Work Commission determined a recent appeal where Mr Khayam was a teacher employed on a series of time-limited contracts. At the end of the term of the last of those contracts, he

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<sup>70</sup> [2017] FWCFB 5162.

was not offered a further contract due to concerns with his performance. The employer contended his contract was terminated through the effluxion of time.

**[102]** This decision refers to consideration of the termination of an employment relationship rather than the reference to the termination of the contract in consideration of whether there has been a termination at the initiative of the employer. At paragraph [74], the Full Bench stated the following:

“However where the employment contract has a defined contractual term but does not exhibit an agreement that the employment relationship will come to an end when the term expires (as in *D’Lima* situation of a series of short-term standard-form contracts), a decision by the employer to not offer a further contract may become a relevant consideration as to whether there has been a termination at the initiative of the employer.”

**[103]** In a dissenting judgement, Deputy President Coleman found that an employment relationship is a relationship of employment and relied on *Brackenridge v Toyota Motor Corporation Australia Limited*<sup>71</sup> to find:

“...ordinarily the conceptual difference between the contract of employment and the employment relationship does not matter; dismissal will ordinarily terminate both the particular contract of employment and the employment relationship.”

**[104]** Mr Talbot relied on *Lunn* to emphasis the features of general law of contract noting the intention of the parties is determined objectively and the subjective intentions are not admissible. I note the terms of each of the contracts state an outer limit term period. The *Lunn* decision has since been considered by the Full Bench in *Navitas* and found to be incorrect in its application relating to a series of time limited contracts.

**[105]** The Full Bench found that paragraph 65 of the *Lunn* decision did not state:

“...in a correct or complete way the proper approach to the interpretation of the expression ‘termination of employment at the initiative of the employer’ in s 170CD(1) of the WR Act and its application to the circumstances of an employee employed pursuant to a time-limited contract or contracts.”

**[106]** The majority of the Full Bench in *Navitas* summarised the principles to be applied in relation to s 386(1)(a) of the FWAct as follows:

“[75] Having regard to these propositions and the court decisions to which we have earlier referred, we consider that s 386(1)(a) should be interpreted and applied as follows:

(1) The analysis of whether there has been a termination at the initiative of the employer for the purpose of s 386(1)(a) is to be conducted by reference to termination of the employment relationship, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment. This distinction is important in the case of an employment relationship made up of a sequence of time-limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts. In that situation, the analysis may, depending on the facts, require consideration of the circumstances of the

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<sup>71</sup> (1996) 142 ALR 99.

entire employment relationship, not merely the terms of the final employment contract.

(2) As stated in *Mohazab*, the expression "termination at the initiative of the employer" is a reference to a termination that is brought about by an employer and which is not agreed to by the employee. In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry is whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.

(3) In *Mahony v White* the Full Court stated that a termination of employment may be done at the initiative of the employer even though it was not done by the employer. In circumstances where the parties to a time-limited contract have agreed that their contract will expire on a specified date but have not agreed on the termination of their employment relationship, it may be the case that the termination of employment is effected by the expiry of the contract, but that does not exclude the possibility that the termination of employment relationship occurred at the initiative of the employer - that is, as a result of some decision or act on the part of the employer that brought about that outcome.

(4) Where the terms of an operative time-limited contract reflect a genuine agreement on the part of the employer and employee that the employment relationship will not continue after a specified date and the employment relationship comes to an end on the specified date, then, absent a vitiating or other factor of the type to which we refer in (5) below, the employment relationship will have been terminated by reason of the agreement between the parties and there will be no termination at the initiative of the employer. Further, in those circumstances a decision by the employer not to offer any further contract of employment will not be relevant to the question of whether there was a termination of employment at the initiative of the employer. The decision not to offer further employment is separate and distinct from the earlier agreement between the parties to end the employment relationship on a particular date (*Griffin/Fisher*). However if the time-limited contract does not in truth represent an agreement that the employment relationship will end at a particular time (as, for example, in *D'Lima*), the decision not to offer a further contract will be one of the factual matters to be considered in determining whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.

(5) In some cases it will be necessary to go further than just examining the terms of any contract in which the parties have ostensibly agreed to terminate the employment relationship at a particular time. It is not necessary or appropriate that we attempt to identify exhaustively all relevant matters, but the authorities to which we have earlier referred indicate that the following are likely to be relevant and may in some cases be determinative:

(a) The time-limited contract itself may be vitiated by one of the recognised categories by which the law excuses parties from performance of a contract. The categories potentially relevant in an employment context include the following:

- the employee entered into the contract as a result of misrepresentation or misleading conduct by the employer;
- the employee entered into the contract as a result of a serious mistake about its contents or subject matter;
- there has been unconscionable conduct associated with the making of the contract, which may relevantly include that the employer took advantage of a disability affecting the employee such as lack of education, lack of information, lack of independent advice or illiteracy;
- the employment contract was entered into by the employee under duress or coercion (which might include the types of coercion prohibited in ss 343(1)(a), 348 and 355) resulting from illegitimate pressure on the part of the employer;
- the employee lacked the legal capacity to make the contract; or
- the contract was a sham in the sense that it was not intended by the parties to give legal effect to its apparent terms or in the broader sense dealt with in Pt 3-1 Div 6 of the FW Act.

If any of the above applies there will be no legally effective time-limit on the employment (*Fisher*).

(b) The time-limited employment contract may be illegal or contrary to public policy (for example, it contains relevantly objectionable terms as defined in s 12 of the FW Act or has the purpose of frustrating the policy or operation of the FW Act or preventing access to the Commission's unfair dismissal jurisdiction 82). Whether the employment was constituted by successive short term contracts or the use of time-limited contracts was appropriate in the relevant field of employment may be some of the considerations relevant to an examination of the employer's purpose for entering into such contracts (*D'Lima/Fisher*).

(c) The contract may have been varied, replaced or abandoned by way of a separate agreement, whether in writing and/or orally, such that its ostensible time limit no longer applies (*Fisher*).

(d) The employment contract may not be limited to the terms of a written document and may, for example, be one of a series of standard-form contracts which operated for administrative convenience and did not represent the reality or the totality of the terms of the employment relationship (*Fisher/D'Lima*).

(e) During the term of the employment relationship the employer may have engaged in conduct or made representations (for example, representing to the employee that the employment will continue subject to conduct and performance notwithstanding a

contractual time limit on the employment) which provide a proper legal foundation to prevent the employer from relying upon the terms of the contract as the means by which the employment relationship has been terminated (*Fisher*).

(f) The terms of the contract time-limiting the employment may be inconsistent with the terms of an award or enterprise agreement given effect by the FW Act which prohibit or regulate fixed-term employment, in which case the terms of the award or agreement will prevail over the contract (*Fisher*)." (emphasis added, citations omitted)

**[107]** Commonly, the contract of employment and the employment relationship will end at the same time as one another, and in the same manner, either at the initiative of the employer or the employee, or by agreement. In this case, there was no agreement by the Applicant that the employment relationship would end. I am satisfied the termination of employment in this context means the end of their employment relationship.

**[108]** The Full Bench found that in cases:<sup>72</sup>

"...involving outer limit contracts, all of the circumstances should be considered to determine whether the employer terminated the employment relationship. ... In short, there may be more to the employment relationship than the outer limit contract."

**[109]** Mr Talbot relied on the High Court's finding in the *State of Victoria v Commonwealth*. However, this consideration was not in relation to termination of employment at the initiative of the employer. I concur that without any other significant factors, employment will end at the conclusion of an outer limit contract. In this matter, there are significant factors and no genuine agreement that the employment relationship will terminate at the outer limit date.

**[110]** I am persuaded by the approach in *Navitas* to consider the context and the circumstances of the entire employment relationship, not merely the terms of the final employment contract in applying an objective test to the facts to determine the real reason for the termination of Mr Beacham's employment and if the employment was terminated by the employer.

## Findings

**[111]** In this case, I consider that the matters requiring consideration include:

- a) The circumstance and context of the entire employment relationship;
- b) Whether Mr Beacham's employment was terminated by his employer; and
- c) Whether any reason provided by Fingal Pastoral Pty Ltd resulted in the termination of Mr Beacham's employment.

**[112]** I am satisfied the employment relationship was characterised by three successive contracts and his employment ended at the expiration of the third contract. There was a continuous employment relationship for 8.99 years between Mr Beacham and Fingal

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<sup>72</sup> *Navitas* para [128].

Pastoral. The end date of the final contract brought about the end of the employment relationship and the termination of his employment.

**[113]** I am satisfied that there was a pattern of conduct and process of negotiation and agreement of three successive contracts, despite there being no express provision for re-negotiation in any contract. I am satisfied that at each of these negotiations for new contracts, the parties were conducting negotiations relating to the prospective terms and conditions of each contract rather than negotiating whether his employment would continue or not.

**[114]** In October 2018, Mr Beacham requested a meeting to commence discussion for a new contract at a routine weekly telephone call with Mr Talbot and there was no clear indication provided that there would be no negotiations or in fact no offer of a new contract.

**[115]** I am satisfied that based on this context, there would be an objective expectation there would be negotiations relating to the terms of conditions for a further contract and continuation of the employment relationship. In other words, unless something happened, his employment would continue.

**[116]** In the event these negotiations did not result in a mutually agreed new contract, then the employment relationship would have ended by mutual agreement. However, there were no negotiations for a new contract due to the employer's decision not to offer a contract to continue the employment relationship.

**[117]** The evidence of both parties supports the position that Mr Beacham had no indication from his employer that his employment would end at the expiration of the term of the third contract. Furthermore, both parties provided evidence that there was not genuine agreement by Mr Beacham to the termination of employment and the employment relationship through the expiry of the term of the final contract.

**[118]** I am satisfied that from Mr Talbot's evidence, Mr Beacham was ignorant about the decision to not offer a new contract.

**[119]** Mr Beacham's consistent evidence was that he was blindsided by not being offered a further contract, resulting in the termination of his employment. He had made no plans to move his family from the house nor seek alternative employment. He did not know his employment was about to cease, despite the outer limit date stated on his contract.

**[120]** In relation to Mr Beacham's telephone discussion with board member, Mr Sandy McEachern, after the November 2018 board meeting, I prefer the evidence of Mr Beacham, namely that he had discussed his potential future salary range with Mr McEachern, who acknowledged it sounded reasonable. The Board Member did not indicate at that time, his employment would be terminated at the end of the contract.

**[121]** I have considered the evidence from Mr Talbot that as early as April 2018, he considered whether or not to negotiate a new contract or terminate Mr Beacham's employment at the end of the contract. The Board approved his decision to consider to not offer a new contract and redistribute the roles. Based on legal advice, the Board also approved Mr Talbot to delay advising Mr Beacham of the decision to not offer a new contract until after the completion of the trial, unless he had cause to change his mind.

**[122]** I am satisfied that Mr Talbot and the Board strategically withheld this intent based on legal advice and their desire for Mr Beacham to remain in employment until he appeared as a key witness in the trial. This reduced the risk of Mr Beacham not

appearing as a witness in the court trial, which may have arisen by informing him of the impending decision to not offer him a new contract and any further employment.

**[123]** Mr Talbot and his Board had implemented a considered decision making process commencing in April 2018, ten months prior to the end of the contract outer limit period. There were many reasons relied on to inform the decision to not offer ongoing employment and terminate the employment relationship as follows:

- a) Mr Talbot provided evidence that the current salaries were not commercially viable and if the salaries were in line with benchmarking, he may have considered it;
- b) Mr Talbot had considered whether to offer a further contract or not prior to the Board meeting in April 2018, when he proposed a potential restructure of Mr Beacham's position which resulted in his position becoming redundant with no further contract being offered;
- c) There was no offer of a fourth contract due to Mr Talbot not being in a position to offer further employment;
- d) The duties associated with Mr Beacham's position were required to be transitioned prior to Mr Beacham's last day of employment;
- e) Mr Talbot did not accept the offer of consultancy work by Mr Beacham to assist in the ongoing transition period. This was an active decision by the employer; and
- f) Mr Talbot did not consider the offer from Mr Beacham to continue to work and reduce his salary by \$17,000 at the final meeting.

**[124]** I find Mr Talbot's evidence that he may have looked at offering a further contract "more closely" if the two management positions were on benchmark salaries, further indication that it was an active unilateral management decision that the company chose not to offer a further contract. The concern of the commercial viability resulting from the high salaries of the two interrelated management positions was one of the principal contributing factors which resulted directly in the termination of Mr Beacham's employment.

**[125]** I am satisfied that the active decision of Mr Talbot which was endorsed by the Board to restructure the Farm Manager role with no consultation with Mr Beacham, was a reason for Mr Talbot to be in a position to not be able to offer him further employment. The employer was active in determining the course of employment for Mr Beacham.

**[126]** I am not satisfied this is a true effluxion of time situation. Many reasons were considered and a unilateral active decision by the company had been made before the effluxion of time occurred, which effectively ended the employment relationship. It was the employer who decided not to continue the employment relationship and Mr Beacham did not leave the employment relationship voluntarily. The termination of employment was caused through the decision to not offer a new contract, hence any continuing employment.

**[127]** In summary, I find that while the outer limit contract terminated in accordance with the terms of the contract, there was no mutual agreement that the employment relationship would end with the expiry of the employment contract. It was a unilateral decision of Mr Talbot to end the employment of Mr Beacham.

**[128]** In *Galbraith v Wilmar Sugar Pty Ltd t/a Wilmar Sugar*,<sup>73</sup> the Full Bench of the Fair Work Commission considered engagement for sugar crushing seasons and seasonal work and found that there was an end to the employment relationship as a consequence of the nature of seasonal work and differentiated the findings in *Navitas*. I concur that employees working on contracts for seasonal work are aware there is no more work at the expiration of the contract, and it is clear the employment comes to an end. This is an example of genuine agreement that the employment relationship ends with the expiry of the employment contract term at the end of the season. This employment terminates with the effluxion of time. I am satisfied this is not the case in this matter.

**[129]** It is an uncontested fact that Mr Beacham was first informed by Mr Talbot of his termination of employment at the meeting in December after the court trial when Mr Talbot stated he was not in a position to offer him a new employment agreement or further employment. Mr Talbot had avoided the invitation from Mr Beacham in October to meet to have discussions around his upcoming contract renewal.

**[130]** It is my view the decision to terminate his employment would not be required to be stated if there was genuine mutual agreement that the contract and the employment relationship would expire on 18 January 2019. Mr Beacham would not have requested a meeting as he would be clear that the term date would be the end of his employment. The employer was not transparent with such an important decision and did not discuss this openly with their long term employee, contradicting acceptable employment practices.

**[131]** Additionally had it been made clear, both parties would have been planning for the termination of employment at that end point. Mr Beacham would have been seeking alternative employment and living arrangements. He was not and I am satisfied he was blindsided by the exclusion of negotiations and an offer of a new contract and continuing employment, effectively resulting in a four week termination notice. Effluxion of time condition requires no notice of termination of employment.

## **Conclusion**

**[132]** I find that the employer terminated Mr Beacham's employment at the meeting on 17 December 2018 based on the reason stated and endorsed by the Board, that "the company was not in a position to offer him further employment on completion of his current employment on 18 January 2019."

**[133]** I am satisfied that Mr Beacham's employment was terminated by the unilateral act of Fingal Pastoral. There was no genuine agreement or common understanding that there would not be continuing employment and Mr Beacham's employment would cease on 18 January 2019.

**[134]** In my view, if this was an effluxion of time condition, there would not need to be any reason given to Mr Beacham as the expiration date of the contract would have been clear to all and termination of employment would have been by mutual genuine agreement. This was not the case.

**[135]** To meet the criteria set out in section 8(3)(d) of the Act, I am satisfied there must be one reason to comply with the definition of "any reason". I find so.

**[136]** Accordingly, Mr Beacham had his employment terminated by his employer for any reason other than serious and wilful misconduct of the employee. I find he has an

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<sup>73</sup> [2018] FWCFB 6713.

entitlement to pro rata long service leave under section 8(2)(b) on the completion of 7 years of continuous employment but not completed 10 years employment with Fingal Pastoral.

**Order**

I determine that the Applicant is entitled to the outstanding pro rata long service leave. At the time of termination the Applicant had accrued 7.79971 weeks at \$2642.88 ordinary rate of weekly pay. I order that the Respondent pay the sum of \$20,613.69 to the Applicant. Such payment is to be made not later than 21 days from the date of this decision.



N M Ellis  
**Deputy President**

**Appearances:**

Mr Edward Beacham the Applicant  
Mr Richard Talbot for the Respondent

**Date and place of conferences:**

2019  
27 June  
LAUNCESTON

2019  
10 July  
BY TELECONFERENCE

**Date and place of hearing:**

2019  
November 26  
LAUNCESTON