TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1974
s29(1) application for hearing of an industrial dispute

Ai-Ming Wong
(T14831 of 2021)

and

Minister administering the State Service Act 2000 – Tasmanian Health Service

PRESIDENT BARCLAY HOBART, 1 NOVEMBER 2021

Application in relation to Long Service Leave – recognition of interstate long service leave – Victorian State servant resigning from employment in Victoria and commencing employment is Tasmanian State Service

DECISION

[1] This Application relates to a claim for recognition of long service leave upon the employment of Ai-Ming Wong (the Applicant) with the Tasmanian Health Service (Respondent).

[2] The Applicant was previously employed in the Victorian Public Health Sector until she resigned from her employment in Victoria on 2 February 2020. She commenced her employment with the Respondent on 24 February 2020.

[3] The Applicant claims that she is entitled to be credited with long service leave as a consequence of the accrued of long service leave whilst employed in the public health system in Victoria.

[4] The Respondent asserts that the Applicant is not entitled to have any long service leave credited to her.

[5] The matter turns on the proper construction of s 9 of the *Long Service Leave (State Employees) Act 1994* (Tas) (the Act).

[6] The question of construction has been agreed by the parties to be dealt with in writing. I have received detailed written submissions from both parties.

The Law

[7] Section 9 of the Act provides as follows:

> "**9. Employees previously employed by Commonwealth, &c.**
>
> (1) An employee who–

(a) was employed by the Commonwealth or another State or a Territory of the Commonwealth; and

(b) became an employee within 3 months after ceasing to be so employed–

is entitled to be credited with up to 65 days of the long service leave the employee would have been entitled to or eligible for if the employee had not ceased to be so employed and if the employee has not received any payment in respect of that long service leave.

(2) Any period of employment by the Commonwealth or another State or a Territory of the Commonwealth which is prescribed under a law of the Commonwealth or that State or Territory of the Commonwealth as being a continuous period of employment is to be treated as a continuous period of employment for the purposes of this Act.

(3) Any period of long service leave granted to a person referred to in subsection under a law of the Commonwealth or of another State or a Territory of the Commonwealth before the person became an employee is to be treated as a period of long service leave granted under this Act.

(4) In this section,

employment by the Commonwealth or another State or a Territory of the Commonwealth includes employment with a body, organization or authority which is established under an Act of Parliament of the Commonwealth or other State or an ordinance of a Territory of the Commonwealth but excludes employment with a local government authority."

[8] The task of statutory construction is now well understood. I adopt the Respondents summary of the law as follows[1]:

"5. The task of construction must focus on the text to be interpreted, 1 but taken in the context of the provision and bearing in mind its object and purpose.2 The language of the provision is to be construed by reference to the statute as a whole.3 An interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.

6. If a literal interpretation leads to the operation of a statute which would have an incongruous result, would defeat the objects of the statute or would be 'capricious' or 'irrational', that may be grounds for concluding that the legislature could not have intended such an operation and that an alternative interpretation is to be preferred." (Footnotes omitted).

The Dispute

[9] In reality this dispute turns on the meaning and effect of the condition specified at the end of s 9(1) of the Act, that is "and if the employee has not received any payment in respect of that long service leave".

[10] The Respondent submits that as the Applicant is entitled to be paid for her accrued long service leave she is not entitled to be credited with any long service leave as a result of her employment in Tasmania. The Applicant submits that she can elect not to be paid her long service leave and therefore be entitled to credit within the meaning of s 9 of the

[1] Respondent Outline of Submissions 8 April 2021 Paragraph 5 and 6

Act. She also notes that she has not been paid any long service leave which she has accrued in Victoria.

[11] The Applicants employment in Victoria was governed by her Contract of Employment and the AMA Victoria – Victorian Public Health Sector – Doctors In Training Enterprise Agreement 2018-2021 (the EA).

[12] The EA deals with long service leave. As a result of s 5 of the *Long Service Leave Act 2018* (Vic) (the Vic Act), that act does not apply to the Applicant's long service entitlements to the extent of any inconsistency between the Vic Act and the EA. Accordingly the terms and conditions of the Applicants eligibility to long service leave is governed by the EA. However not all aspect of the Applicants long service leave are governed by the EA. I will return to this.

[13] The relevant clause of the EA is cl 68. Relevantly it provides:

> "**68.1 Entitlement**
>
> (a) A Doctor is entitled to Long Service Leave with pay for continuous service as follows.
>
> **68.2 Normal Entitlement**
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> (a) six months of long service leave after 15 years of continuous service then two months of long service leave after each additional five years of continuous service.
>
> (b) The Health Service may grant pro-rata long service leave after 10 years of continuous service.
>
> **68.3 Pro-rata Entitlement**
>
> (a) Pro-rata entitlements accrue on termination of employment as follows:
>
> (i) after 15 years of service; or
>
> (ii) after 10 years of service but before 15 years of service as long as employment ends for any reason other than serious and wilful misconduct pursuant to clause 29 (Termination of Employment).
>
> (b) Pro-rata entitlements are calculated as 1/30th of the period of continuous service since beginning employment, or since the last normal long service leave entitlement became due, whichever is later.
>
> ...
>
> **68.11 Payment on Termination**
>
> (a) On termination of employment Doctors are entitled to receive payment for any outstanding normal or pro-rata long service leave entitlement.
>
> **68.12 Transfer of Entitlement**
>
> (a) Where a Doctor has a pro-rata long service leave entitlement and/or a normal entitlement on termination of employment and they move to the Department, any Hospital, Benevolent Home, Community Health Centre, Society or Association registered under the Health Services Act

within two months, they may elect to transfer the entitlements rather than have them paid out.

(b) A Doctor may, in writing, request that the Hospital defer payment in respect of any pro-rata leave entitlements beyond two months. Unless this notice is given, the leave entitlement must be paid out when six months is exceeded. When the Doctor finally gives notice in writing that they are employed by the Department, any Hospital, Benevolent Home, Community Health Centre, Society or Association that is registered under the Health Services Act, then the Hospital is no longer required to make payment to the Doctor."

[14] It is common ground that the Applicant was employed for in excess of 10 years, but less than 15 years, and has an entitlement to the payment of pro-rata long service leave. The Applicants position is however that she can forgive the entitlement to the pro-rata long service leave payment to which she is entitled from her Victorian employment and instead receive credit in Tasmania. The Respondent says she cannot.

[15] Section 9 of the Act provides an entitlement to credit for long service leave if:

(a) The employee was an employee of another state;

(b) The employee became an employee of this state within 3 months of ceasing the interstate employment;

(c) The employee is entitled to or eligible for long service leave in the other state has they not ceased employment; and

(d) The employee has not received any payment in respect to the eligible interstate long service leave.

[16] In this case the first three matters are not in dispute. It is also common ground that the Applicant has not received any payment in respect to the pro-rata long service leave she has accrued in Victoria. Nevertheless the Respondent submits that the entitlement to payment for the long service leave and, they submit the fact that the Applicant *must* be paid for it is equivalent to receiving payment within the meaning of s 9 of the Act. Effectively the Respondent submits that I should construe s 9(1) of the Act so as to include the situation where that Applicant is entitled to be paid and will be paid the accrued long service leave in Victoria even though she has not yet received it.

[17] To aid the submission that s 9 should be construed in this way, the Respondent relies on the second reading speech of the Long Service Leave (State Employees) Amendment Act 2003 (the second reading speech). The Respondent submits[2]:

"Extrinsic material can be considered to assist in the interpretation of s 9.6 When the Act was enacted in 1994, s 9 was largely in its present form, except that it did not contain the final restriction that now exists at the end of subsection (1): 'and if the employee has not received any payment in respect of that long service leave'; those words were inserted by the Long Service Leave (State Employees) Amendment Act 2003. In the second reading speech of the bill of that amending act, the Minister said:

> The precise wordings of some sections have also been amended for clarification. These sections involve entitlements for employees who transfer from the Commonwealth to Tasmania, or from one State authority to another.

[2] Respondent Outline of Submissions 8 April 2021 Paragraph 18

> The amendments will ensure there is no ambiguity about who is entitled to what. There have been instances of 'double dipping' on long service leave entitlements in the past, and there is also the potential that eligible continuity of service may not be recognised. Mr President, the amendments resolve these potential problems."

[18] It may be seen that parliament intended the additional words to have the effect of ensuring that there could be no double dipping. That is a person would not be both paid out long service leave entitlements and also have in effect the same leave credited to them under s 9 of the Act.

[19] In this way say the Respondent, and to be consistent with Parliaments intention, I should construe s 9 as meaning "has not received, *and is not entitled to receive* any payment in respect of that long service leave".

[20] I note the Respondent submits that it is the object and purpose of the provision to ensure that employees who do not have an accrued right to long service leave (in this case service of less than 10 years) do not lose that entitlement so long as the other requirements of the Act are met. Where however the entitlement to long service leave has accrued then, it is submitted, the responsibility for that long service leave should fall at the feet of the employer who has had the benefit of the service of the employee.

[21] Further the Respondent submits that such an approach is consistent with the context and purpose of the Act and long service leave schemes generally. That is, the legislative scheme rewards continuous service with the same employer. The mechanism of pay out either after the period required for pro-rata long service leave or accrual of the full amount of long service makes it clear that the employer who had the benefit of the service of the employee should pay the long service leave entitlement.

[22] Having regard to that purpose and context of the Act and long service schemes generally the Respondent submits I should construe the provisions by reading in the words "and is not entitled to receive".

[23] Am I permitted to read those words into the section?

[24] The leading authority is *Taylor v The Owners – Strata Plan No 11564*[3]. In that case the majority had this to say about construction and reading in words[4]:

> "The principles
> 35. In *Young* Spigelman CJ suggested that the authorities do not warrant the court supplying words in a statute that have been "omitted" by inadvertence per se. Construing the words actually used by the legislature in "their total context", Spigelman CJ suggested that the process of construction admits of reading down of general words or giving the words used an ambulatory operation. His Honour cited *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* as an instance of the former and *Bermingham v Corrective Services Commission (NSW)* as an instance of the latter. In *R v PLV* his Honour expanded on his analysis in *Young*, observing:
>
> "The authorities which have expressed the process of construction in terms of 'introducing' words to an Act or 'adding' words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am unaware of any authority in which a court has 'introduced' words to or 'deleted'

[3] [2014] 253 CLR 531
[4] Ibid pp 547 to 549

words from an Act, with the effect of *expanding* the sphere of operation that could be given to the words actually used. ... There are many cases in which words have been *read down*. I know of no case in which words have been *read up*." (emphasis in original)

36. In *Leys* the Victorian Court of Appeal was critical of Spigelman CJ's characterisation of purposive construction as a process of construing "*the words actually used*" (emphasis in original). Their Honours said that the process requires the court to determine whether the modified construction is reasonably open in light of the statutory scheme and against a background of the satisfaction of Lord Diplock's three conditions. Their Honours questioned the utility of the distinction between "reading up" and "reading down" and rejected the proposition that a purposive construction may not result in an expanded operation of a provision.

37. Consistently with this Court's rejection of the adoption of rigid rules in statutory construction, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in *Carr v Western Australia*, the question of whether a construction "reads up" a provision, giving it an extended operation, or "reads down" a provision, confining its operation, may be moot.

38. The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

39. Lord Diplock's three conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution (a firm)* accord with the statements of principle in *Cooper Brookes* and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. However, it is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that "the modified construction is reasonably open having regard to the statutory scheme" because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour's further observation, "[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances."

40. Lord Diplock's speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation. In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock's conditions are met, the

court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of Parliament: the alteration to the language of the provision in such a case may be "too far-reaching". In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the Constitution".

[25] Further the minority added the following:

> "65. Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always." Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.
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> 66. Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies."

[26] Keeping in mind Gageler and Keane JJ's admonition not to repair any perceived defect and that any addition is to be explanation and to not make an insertion that is too big or at variance with the language used in the statute, as a matter of judgment I am prepared to read in the words.

[27] It is clear that the provision is intended to prevent the situation where an employee both is credited with long service leave and receives payment for the long service from the former employer. So much is clear even without recourse to the second reading speech.

[28] Parliament could not have intended that an employee could delay receipt of payment from the interstate employer so as to obtain credit for long service leave and then receive payment for it subsequently.

[29] Further the addition of the proposed words is explanatory of situations in which payment for the long service leave is available but has not yet occurred.

[30] I also accept the Respondents submissions as to the purpose and context of the Act and long service schemes generally to which I have referred at paragraphs 20 and 21.

[31] Before proceeding to consider whether in fact the applicant is entitled to be paid for her Victorian long service, I should say something about the other submission made by the Respondent namely that the Tasmanian Health Service has a discretion as to when it can credit any entitlement to long service leave pursuant to s 9 of the Act.

[32] The Respondent puts it in this way:

> "14. Section 9(1) does not specify when the State is to credit the employee with the long service leave that the employee would have been entitled to. It is

submitted that this allows for the exercise of reasonable discretion, so as to avoid unfair and unreasonable results that would be against the public interest. What is reasonable will of course depend on the circumstances.

15. For example, if the State had to give the credit provided for by s 9 on the day that the employee started employment then an employee who had not yet been paid out by their former employer due to some delay on that employer's part or some other issue (e.g. a banking error) would ultimately receive both the credit from the State and the pay out from the former employer. It would be against the public interest for the State to give credit to an employee in such situations. It is reasonable for the State to delay in doing so in cases when it is aware that the employee is entitled to receive a pay out from the former employer."

[33] It is true that the Act does not say anything about when a decision needs to be made regarding the crediting of the long service leave. No construction question arises as to the time within which a decision must be made in that there are no words in the section nor the statue as a whole which might be said to engage the proposition that the time at which the decision about the long service leave credit is to be made is ambulatory. Having said that however it seems that the decision can be made at any time after an applicant seeks the credit. If there is delay in making the decision which is unreasonable that failure to make a decision may be reviewable as a State Service Action pursuant to Division 4 of Part 7 of the *State Service Act 2000.* Where for example there are outstanding issues as to entitlement to payment for leave delaying the decision to credit the leave may be appropriate, although if the delay becomes significant it may be prudent for the employer to bring an application to the Commission for determination of the issue. Each case will of course turn on its own facts.

[34] I must now deal with the issue whether the Applicant is entitled to be paid for her long service leave by her Victorian employer.

[35] It can be seen from cl 68 of the EA that the Applicant has an entitlement to payment for pro-rata long service. Again I do not apprehend that this is in dispute. The Respondent contends that the Victorian employer is bound to make the payment for long service leave. The Applicant submits that she can reach agreement that she is not paid.

[36] Clause 68.11 of the EA provides that upon termination of employment doctors are entitled to receive payment for any outstanding normal or pro-rata long service leave. Clause 68.12(a) of the EA provides for the transfer of the long service leave entitlement to a number of described entitles registered under the Victorian Health Services Act. The Tasmanian State Service is not one of them. As such there can be no transfer of those entitlements.

[37] Clause 68.12(b) of the EA allows for the payment of the long service leave entitlement can be deferred. If the employee is then employed by one of the listed entitles the obligation to pay the long service leave is extinguished. Here obviously the Applicant was not employed by one of those entities. As such the obligation to make payment for the long service leave is not extinguished.

[38] The Respondent submits that as a result of the above the Victorian employer must pay the long service leave and the Applicants cannot elect not to receive that payment. The Respondent also refers to s 9 of the Vic Act which provides:

"(1) If an employee's employment ends (other than because of the employee's death) before the employee has taken all the long service leave to which the employee is entitled—

(a) the employee is taken to have started long service leave on the day on which the employment ends; and

(b) the full amount of the employee's long service leave entitlement, calculated as at the day on which the employment ends, is due and payable to the employee on that day.

(2) The employer of an employee referred to in subsection (1) must pay the employee the full amount of the employee's long service leave entitlement.

Penalty: In the case of a natural person, 12 penalty units for each day during which the offence continues;

In the case of a body corporate, 60 penalty units for each day during which the offence continues."

[39] It may be seen that any agreement not to pay the accrued entitlement to long service leave may amount to an offence.

[40] The Applicant submits that the Vic Act does not apply. I do not agree. The Vic Act does not apply to the extent of any inconsistency with the EA. As the EA does not deal with such issues there can be no inconsistency. Indeed if provisions such as these in the Vic Act did not apply then the regulation of the scheme under the EA would be problematic as much of the matters usually provided for by a long service leave scheme would not be so provided. Recourse may be had to the Vic Act for matters which are not inconsistent with the EA.

[41] I find therefore that the Applicant has an entitlement to be paid the pro-rata long service leave, and that consistent with the Vic Act and the EA no agreement is capable of being reached whereby the Applicant forgoes her entitlement to the pro-rata long service leave.

[42] For these reasons I determine that s 9 of the Act extends to a situation where an employee seeking credit for long service leave is to be paid the long service leave from the previous employer but has not yet received it. As such the Applicant is not entitled to credit for her pro-rata long service leave accrued in Victoria. There may be cases where the obligation for the former employer to pay for the long service leave is not clear. Obviously those cases will have to be dealt with on their individual merits. In this case however it is clear that the applicant will be paid for the accrued long serviced leave in Victoria.

[43] Accordingly the Application is dismissed.

D J Barclay
President

Decided on the papers