

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

Liquor, Hospitality and Miscellaneous Union - Tasmanian Branch

(T13528 of 2009)

and

Queenstown RSL Sub Branch and Club

DEPUTY PRESIDENT TIM ABEY

HOBART, 24 June 2010

Industrial dispute - entitlement to long service leave - commencement date - minimum hourly requirement for casual employee - continuity of service - order issued

REASONS FOR DECISION

[1] On 17 September 2009, the Liquor, Hospitality and Miscellaneous Union - Tasmanian Branch (LHMU) (the union) (the applicant), applied to the President, pursuant to s.29(1) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with Queenstown RSL Sub Branch and Club (the employer) arising out of the alleged entitlement to long service leave (LSL) of Mrs V Hine.

[2] A hearing commenced in Ulverstone on 27 October 2009 and continued by teleconference on 18 March 2010. The hearing resumed in Ulverstone on 27 May 2010. Mr P Tullgren appeared for the union and Mr S Wright sought and was granted leave to appear on behalf of the employer. With him was Mr M Moran.

[3] Mrs Hine was employed by the Lyell District Ex-Servicemen's Club (the Lyell Club) and subsequently the Queenstown RSL Sub Branch and Club (the Sub Branch) to perform cleaning duties.

[4] The date of commencement is in dispute but was either 1975 or 1978. The employment terminated on 2 July 2009 when Mrs Hine gave notice.

[5] The Lyell Club and the Sub Branch have always operated from the same premises with separate Management Committees. The Lyell Club was the commercial entity, employing staff and providing bar and related services to members. The Sub Branch dealt entirely with RSL matters and did not employ staff. In August 2008 a general meeting of members voted to close the Lyell Club and transfer all assets to the Sub Branch in settlement of all outstanding liabilities.

[6] Mrs Hine, along with a number of other employees, continued to be employed, performing the same or similar duties without a break in continuity of employment. The parties agreed that there had been a transmission of business and, it follows, service with the Lyell Club is to be counted as service with Sub Branch.

[7] In contentions filed with the Commission prior to the hearing the respondent submitted that the status of Mrs Hine was unclear, and it may well be that she was an

independent contractor rather than an employee. However during the hearing Mr Wright conceded that Mrs Hine was an employee.

[8] The issues to be determined are as follows:

- The commencement date
- Whether the minimum hourly requirement was satisfied.
- Whether there had been a break in continuity of employment.
- The extent of any LSL taken during the period of employment.

Evidence

[9] Sworn evidence was taken from the following witnesses:

- *Vera Hine*, the applicant.
- *Michael Moran*, President of the Sub Branch since March 2009 and an active member since 2008.
- *Kenneth James Hill*, retired, formerly an employee of the Lyell Club.

Commencement Date

[10] Mrs Hine said she commenced employment on 2 August 1975.

[11] In support of this contention Mrs Hine referred to a document which appeared to be a hand written work roster headed 1 August 1975.¹ Towards the bottom of the page are the names of three bar staff together with wages paid. Immediately under those names appear the initials "V.H. 2.8.75." To the untrained eye this entry appears to be in the same handwriting as the remainder of the document. Attached to the document is a further work roster dated 1978 which shows "V Hine" amongst the employees listed.

[12] Mrs Hine said the roster was prepared by Mr Priestley, who managed the club at the time. Mrs Hine said she asked for a copy of the roster when she was first employed as proof of her commencement date.²

[13] The respondent contended that Mrs Hine commenced on 12 July 1978. This contention was supported by the Pay Ledger Book which covered the period 1977 to 1995.³(1977 ledger). This document shows the wages paid for each employee with one complete financial year on each double page.

[14] In 1977/78 there is no reference to Mrs Hine.

[15] In 1978/79 *V Hine* is shown for the complete financial year commencing for the pay period ending on 12-7-78.

[16] The respondent was unable to provide a wages record for any time prior to 1977.

¹ Exhibit A5

² Transcript p 16

³ Exhibit R1

[17] The respondent also relied on the pay ledger for the period 1995 to 1998.⁴ (1995 ledger). This is in a different format to the 1977 ledger, with a single page entry for each employee. There are five entries for Mrs Hine. On three of the entries, the space marked "*Employment Commencement Date*" is left blank. On two of the entries the date of 12/7/78 is shown. This I suspect is taken directly from the 1977 ledger, whereby the "*Pay end 12.7.78*" is the first record of Mrs Hine on the payroll.

[18] Of course it is not possible for Mrs Hine to have actually commenced on 12/7/78. The ledger shows that she was paid an amount of \$86.95 for the pay period ending on that day. This is precisely the amount paid for the succeeding five pay periods, suggesting that the payment on 12/7/78 was for the full preceding fortnight. It follows that if I am to accept the ledger entry as determinative, then the actual commencement date was likely to have been fourteen days earlier, ie 28 June 1978.

[19] It is also of interest that the 1977 ledger has "*Stewards Earnings from 1977-78*" written on the cover page. This is consistent with Mrs Hine's evidence that the bar stewards worked variable hours and submitted time sheets accordingly, whereas she did not.

[20] If I am to rely solely on the ledger entries then I must conclude that Mrs Hine commenced on 28/6/77, worked a full fortnight, and as a consequence was paid a full fortnight's wages, which appeared for the first time as the first line entry on the new page for the 1978/79 financial year. Whilst this is possible, it does seem an unlikely circumstance. Had Mrs Hine received less than a full fortnight's pay for the period, or had her name appeared for the first time part way through the year, then the evidence of the ledgers would be compelling.

[21] I believe a more likely outcome, given the unusual nature of Mrs Hine's employment arrangement (flat rate irrespective of hours worked with unusual relief arrangements), is that initially Mrs Hine was not recorded "*on the books,*" notwithstanding that she was performing the work. It is open to conjecture that a decision was taken subsequently to include Mrs Hine in the pay records, and that a convenient time to commence this record was the beginning of financial year 1978/79.

[22] To disregard the roster for 1975 with *V.H. 2.8.75* appearing as a notation at the bottom⁵ would require a finding that the document had in some way been tampered with. There is absolutely no reason to support such a conclusion.

[23] The 1975 roster, coupled with Mrs Hine's sworn evidence leads me to conclude that Mrs Hine commenced employment with the Lyell Club on 2 August 1975. I find accordingly.

Was the Minimum Hourly Requirement Satisfied?

[24] Section 5(3) of the *Long Service Leave Act 1976* reads:

"(3) Without limiting subsections (1) and (2), where an employee is regularly employed by an employer for not less than 32 hours in each consecutive period of 4 weeks, the employee shall be deemed for the purposes of this Act to be continuously employed by the employer, notwithstanding –

⁴ Exhibit R3

⁵ Exhibit A5

- (a) *that any of the employment is not full-time employment;*
- (b) *that the employee was so employed under 2 or more contracts of employment separately entered into;*
- (c) *that, apart from this subsection, the employee would be regarded as being engaged in casual employment; or*
- (d) *that the employee engaged in other employment during that period."*

[25] Mrs Hine described her employment status as *permanent casual*.⁶ Her evidence was that she generally worked 6 or 7 days each week, for two hours each day. Unlike the bar staff who worked variable hours, Mrs Hine said she was never required to complete time sheets. She was paid a flat amount each fortnight, which at the time of termination was \$300.

[26] Mrs Hine said that if she wanted time off, she would arrange for someone else (normally Mr Hill or Mrs Dawn Carlson) to relieve her. This might be for a single day or on odd occasions, up to a week or two weeks. When this occurred, Mrs Hine paid the individual relieving out of her normal wages. Her evidence on this point was:⁷

"Now, when you – if you took some leave, you mentioned that another employee would do that work on a weekend?---Yes.

Were there any other times when you were away from the club that someone did the cleaning for you?---Yes. I went on a holiday, and then I think Ken Hill might have worked it then, but he got paid and I didn't.

Now, you say that – so there was Mr Hill; was there anyone else?---Dawn Carlson.

Yes. Anyone else?---No, not that I can think of.

So to the best of your knowledge Mrs Carlson and Mr Hill?---Mrs Carlson or Ken Hill.

Now, how did you arrange for them to do the cleaning?---Well, Mr Priestly told me at that stage if I wanted anyone to work for me I would just have to pay them out of my wages, because they weren't on the books.

So when you went on leave - - -?---Yes.

- - - or decided you wouldn't do a day, how did you arrange for either Mr Hill or Mrs Carlson to do your work?---I would verbally ask them.

And did anyone else in either – well, particularly the Lyell RSL Club, know that you had asked either Mr Hill or Mr Carlson to come in and clean for you?---Yes, they did.

⁶ Transcript p 18

⁷ Transcript p 14

And how did they know that?---Well, I would just – well, I presume I told them.

And you said that when you started Mr Priestly indicated to you that if you were away, and you got someone else to do the cleaning, that you had to pay them out of your wage - - -?---Yes.

- - - because they weren't on the books?---Mm.

And is that what happened on situations when you asked either Mr Hill or Mrs Carlson to do the cleaning work?---Yes, yes.

So in those circumstances would I be right in understanding that in a particular week you would be paid for seven days work at two hours a day, but that if you were away for one, or two, or three of those days, you would get Mr Hill or Mrs Carlson to do the work, and you would pay them from the money that the club paid you?---Yes.

[27] The substance of this evidence was supported by the evidence of Mr Hill.

[28] Mrs Hine said that apart from when she was absent for a week or more at one time, the least time worked in a week was five days,⁸ but varied up to seven days per week.

[29] Mr Hill said that at some point after 2000, the trading hours were “*cut back to about three days*” per week. He was unable to say when this occurred, or for how long. He did acknowledge that the trading hours per day were reduced at some point, but again was unable to provide more precise detail. Mr Hill agreed that service clubs such as Rotary also used the premises.

[30] Mrs Hine said there was flexibility as to when she did the cleaning. For example she might work two shifts on one day (before and after the trading period) if she intended to have the following day off. When this occurred the days worked per week would be less, but not the hours.

[31] Mr Wright submitted that there was little evidence, apart from Mrs Hine's assertions, that the 32 hour threshold required under the Act, was satisfied. He submitted for example, that if those hours are accepted, according to her Group Certificate, in 1979/80, Mrs Hine was working for less than \$3 per hour. It is of interest that under the *Award of the Licensed Clubs Industrial Board*, the rate (before loadings) at the time for a cleaner was \$3.44/hour. Whilst this matter is not about any alleged underpayment or award breach, the apparent disparity is not of such moment so as to raise suspicion as to the number of hours worked.

[32] On the available evidence I am satisfied that Mrs Hine consistently worked between 10 and 14 hours per week throughout the entirety of her employment. Consistent with s5(1) any short breaks which might have occurred (eg unpaid leave) did not break the continuity of service. It follows that the threshold requirement of 32 hours in each consecutive period of 4 weeks has been met. I find accordingly.

Continuity of Employment.

[33] In the respondent's outline of contentions the following assertions were made:

⁸ Transcript p 10

"2. Investigations of the records of the Club show that in or about the 21st of August, 1990, the employment of Ms Hines was terminated, and the cleaning duties were placed in the hands of other staff on a voluntary basis.

...

4. A search of the records do not show any meeting reinstating Ms Hines employment, and the reinstatement having been ratified by the Committee of the RSL."

[34] In support of this contention an extract of Minutes of a Special General Meeting dated 21 August 1990 was tendered. The minute read:⁹

"After some discussion it was agreed Mrs V Hine had not been given a fair explanation her position as cleaner was terminated. Committee apologized to Mrs Hine for their action."

[35] The evidence of Mrs Hine in relation to this aspect was:¹⁰

"Now, Mrs Hine, there was a record of minutes of a minuted meeting that disclosed – it's indicated in – on 21 August 1990, that your employment had been terminated; can you recall that?---Yes. They – actually my son was working behind the bar at the same time too. He rang me up. He said, "Mum, you had better get down here, because you have been put off," and anyhow, so I went down, and that's the thing I – what I got, so I rang - immediately rang the union the next morning, and the union man came around and told them that they could not – if they had anyone that was going in of a morning to clean, they had to then put in a shower and what not for people to shower, because they could not go and do cleaning work, and then go behind the bar and serve. And that I was reinstated more or less within that week.

You were reinstated?---No, not reinstated, I was – I was off for, you know, a couple of days until they sorted it out, and that's when - - -

But you were casual at that time, were you not in employment?---And then they had to say that – they had to – they apologised to me.

They apologised, because I want to suggest to you that you weren't reinstated at that time?---Reinstated? No, I wasn't reinstated, because I hadn't – it wasn't – I wasn't sacked. I wasn't put off. It was only just that the couple of days, then they – until a union man came around and sorted it out.

That was around the time when the hydro shut down, wasn't it, the Hydro-Electric plant? I mean, that was the reason the decision was made at that time to terminate your employment, wasn't it - - -?---No.

⁹ Exhibit R4

¹⁰ Transcript p 20

- - - because the RSL couldn't afford it?---No, it wasn't that. Oh, they were – they weren't real crash hot in their – their money and things were down a bit, but they still never shut the place down.

Okay. I suggest to you that you were terminated in 1990 and reinstated in 1993?---No.

Would you agree with that?---Oh, no. No."

[36] A perusal of the 1977 ledger shows that Mrs Hine's continuity of employment was unbroken during 1990/91.

[37] In addition the applicant tendered a Group Certificate showing that Mrs Hine earned \$7142 in F/Y 1991/2.

[38] I have no hesitation in concluding that the continuity of employment was not broken by any event occurring on or shortly after 21 August 1990.

The Extent of any LSL Taken During the Period of Employment.

[39] Mrs Hine said that she had taken two weeks LSL which she felt might have been in 1985. Later she agreed that the leave was probably taken in February 1993. Mrs Hine said that she had not taken any other LSL during the period of employment.¹¹

[40] The respondent relied on entries in the pay ledgers which purported to show that Mrs Hine had taken LSL on a number of occasions. Mrs Hine denied that she had taken LSL on these occasions.

[41] Mr Tullgren submitted that Mrs Hine had never seen the ledgers, did not fill them in and had no control over them. Whilst I daresay that this submission is correct, it does not of itself render the ledgers invalid.

[42] Regulation 7 of the *Long Service Leave Regulations 2000* prescribes that an employee may, at any reasonable time, inspect the LSL record relating to his or her entitlement. There is no suggestion that Mrs Hine was denied access to the pay ledgers.

[43] In all the circumstances I accept the accuracy of the ledgers where it is clearly shown that LSL has been taken. References to A/L, whatever that may mean, have been disregarded. For the sake of consistency, and in light of Mrs Hine's somewhat irregular work pattern (5,6 or 7 days/week), references to "days," wherever appearing, have been converted to weeks or part weeks.

[44] In accordance with the ledger record, I determine that the following periods of LSL have been taken.

17/2/93	1 week
3/3//93	2 weeks
14/3/93	1 week
16/3/94	1 week
15/2/95	0.6 week
1/3/95	2 weeks
24/3/99	1 week
Total	8.6 weeks.

¹¹ Transcript p 13

Finding

[45] In light of the above findings I conclude that Mrs Hine has an entitlement to a Long Service Leave payment consequent on the termination of her employment contract. The entitlement is calculated as follows;

Length of service: 2 August 1975 to 2 July 2009 = 33.9 years

Entitlement $33.9 \times 13/15 = 29.38$ weeks LSL.

Less: LSL already taken = 8.6 weeks

Entitlement owed 20.78 weeks @ \$150 wk = \$3117

Order

Pursuant to s31 of the *Industrial Relations Act 1984* I hereby order that the Queenstown RSL Sub Branch and Club pay to Vera Hine an amount of \$3117 by way of a Long Service Leave entitlement, such payment to be made not later than close of business on 15 July 2010.

Tim Abey
DEPUTY PRESIDENT

Appearances:

Mr P Tullgren of the Liquor, Hospitality and Miscellaneous Union - Tasmanian Branch with Mrs V Hine

Mr S Wright representing the Queenstown RSL Sub Branch and Club with Mr M Moran

Date and place of hearing:

2009

October 27

2010

March 18 (teleconference)

May 27

Ulverstone