



TASMANIAN INDUSTRIAL COMMISSION

CITATION: Cooper v Bulk Frozen Foods Pty Ltd t/a No Frills Foodmarket [2024] TASIC 12

PARTIES: Leanne Cooper (Applicant)

Bulk Frozen Foods Pty Ltd t/a No Frills Foodmarket (Respondent)

SUBJECT: *Industrial Relations Act 1984*, s 29(1A) application for hearing of an industrial dispute

FILE NO: T15124 of 2024

DATE REASONS ISSUED: 20 September 2024

COMMISSIONER: Deputy President Ellis

CATCHWORDS: Long service leave – no fixed hours – computation of ordinary pay – deeming provision long service leave taken on date of termination – workers compensation not included in hours worked – no entitlement to payment – application dismissed.

Matter determined on the papers.

**LEANNE COOPER V BULK FROZEN FOODS PTY LTD T/A NO FRILLS
FOODMARKET**

REASONS FOR DECISION

20 September 2024

[1] On 20 March 2024, Leanne Cooper made an application for hearing in respect of a dispute relating to her alleged pro rata long service leave entitlement.

[2] Conciliation conferences were held but did not resolve the issue and the matter proceeded to determination on the papers with the consent of the parties.

[3] On 7 February 2024, the Applicant terminated her employment with the Respondent. The Applicant claims that as she terminated her employment due to work-related injuries, she is entitled to payment of her pro rata long service leave. The Respondent disputes this claim based on the position that there is no entitlement to payment due to her normal number of hours worked being zero for the previous 12 months.

[4] The Applicant resigned from her employment with the Respondent due to chronic back pain and was unable to perform her expected work duties. She worked as a casual Foodmarket Assistant with No Frills Foodmarket, which required manual lifting. She injured herself at work and received workers compensation.

[5] There is no dispute between the parties that the Applicant has worked continuously for the Respondent since August 2015 and resigned due to ill health on 7 February 2024. Nor that she has met the conditions to have a pro rata entitlement to long service leave.

[6] The Respondent's position is that despite having an entitlement to long service leave under s 8(c)(b) of the *Long Service Leave Act 1976* (Tas) (the Act), the entitlement to payment is nil.

[7] The issue for determination is whether there is an entitlement to payment for accrued long service leave.

LEGISLATIVE FRAMEWORK

[8] The relevant section of the Act to determine if there is an entitlement to long service leave is found in s 8 and is set out as follows:

"(2) Subject to subsection (4), the period of long service leave to which an employee is entitled under this Act is –

...

(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.

(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."

[9] The entitlement to payment for long service leave is found in s 11 of the Act and is set out as follows:

"11. Computation of "ordinary pay"

- (1) Where, for the purposes of this Act, it is necessary to determine the ordinary pay of an employee for any period in respect of any employment (in this section referred to as "the relevant period"), that ordinary pay shall, subject to this section, be reckoned as a sum equivalent to the remuneration that he would reasonably be expected to have received in respect of that period from that employment if he had continued throughout that period to have worked therein.

...

- (6) Where no normal weekly number of hours of work is fixed for an employee under the terms of his employment, his normal weekly number of hours of work shall, for the purposes of this section, be taken to be the average weekly number of hours worked by him in that employment during the period of 12 months ending on the commencement of the relevant period."

[10] Section 12 of the Act provides for how and when long service leave shall be taken and clarifies the commencement of long service leave begins on the termination of employment in subclause (4) which states:

"(4) Notwithstanding anything in this section, where the employment of an employee is for any reason terminated before he takes any long service leave to which he is entitled, or where any long service leave entitlement accrues to an employee because of the termination of his employment, the employee shall be deemed to have commenced to take his leave on the date of the termination of employment and to be entitled to be paid by his employer ordinary pay in respect of that leave accordingly."

[11] Section 69 of the *Workers Rehabilitation and Compensation Act 1988* (Tas) is set out as follows:

"(1) Subject to this section, where total or partial incapacity for work results from an injury suffered by a worker and where the existence of such total or partial incapacity is supported by a certificate in a form approved by the Board signed by a medical practitioner or accredited person, the compensation payable to him under this Act is –

(a) in the case of the total incapacity of the worker for work, weekly payments equal to –

- (i) the normal weekly earnings of the worker; or
- (ii) the ordinary time rate of pay of the worker for the work in which, and for the hours during which, the worker was engaged immediately before the period of incapacity –

whichever is greater; or

(b) in the case of the partial incapacity of the worker for work, weekly payments for the period of that incapacity equal to the difference between the worker's weekly payment calculated in accordance with paragraph (a) and the amount that the worker is earning or would be able to earn in suitable employment or business during that period of incapacity"

Applicant's case

[12] The Applicant commenced work for No Frills Foodmarket, which was then known as Country Wide Foodmarket, in August 2015, as a casual employee working approximately 15 hours per week. At her initial interview she stated she was verbally told that her work hours would not be reduced to below 12 hours per week.

[13] She submitted that her work hours increased during COVID. Thereafter, the stores were closed for a deep clean. The Applicant was offered JobKeeper payments with the choice of working either 26 hours per week to cover the \$1500 fortnight payment or only 10 hours per week. She contended that her hours would increase when it suited the employer.

[14] Two "Schedule Posting" rosters¹ were submitted indicating four shifts a week ranging between the hours of 8:30am to 5:45 pm and 9:45 am to 1:30 pm for the roster ending 15 February 2020 and five shifts for roster ending 15 January 2020, with different spread of hours of 8:45 am to 1:00 pm, 12:00 pm to 5:15 pm and 10:00 am to 2:00 pm. It appears two shifts were added in pen as additional shifts indicating flexible shifts.

[15] After 3 months on JobKeeper, the Applicant had some time off due to back pain, at which time she did not receive the JobKeeper payments. She advised her manager that she could not keep working the 26 hours because it affected her back.

[16] The Applicant acquired a back injury at work on 18 March 2022 and required surgery, which was undertaken on 28 September 2022.² She had an accepted workers compensation claim and received weekly payments until 3 June 2023, when payments ceased. She submitted she was cleared for modified duties³ but alleges the employer would not offer her any hours and she remained an employee. Her workers compensation claim was settled as a result of her permanent impairment. She resigned on 7 February 2024.

[17] Her superannuation fund provided income protection which was backdated for the six months she did not receive income. She submitted if the income can be calculated for superannuation payments, then it could be calculated for pro rata long service leave.

¹ Attachment to submission, Work rosters.

² Attachment to submission, Work Cover certificate dated 29 December 2023.

³ Ibid.

[18] The Applicant asserted it would be unfair to not pay her pro rata long service leave and she would be penalised as a result of an injury.

Respondent's case

[19] The Respondent submitted that the Applicant was not entitled to any payment for pro rata long service leave because she had not actually worked any hours in the relevant 12-month period preceding her termination of employment.

[20] The Applicant was a casual employee and her weekly hours were not fixed.

[21] The Offer of Employment⁴ dated 30 July 2015 states the employment offer is for the role of Foodmarket Assistant in a casual position. It states: "It is expected that you will work varying hours as assigned during general business hours."

[22] Further evidence was provided in the form of a detailed payroll report from 7 July 2021 to 7 February 2024 indicating differing hours of work per fortnight.

[23] Section 11(6) of the Act is as follows:

(6) Where no normal weekly number of hours of work is fixed for an employee under the terms of his employment, his normal weekly number of hours of work shall, for the purposes of this section, be taken to be the average weekly number of hours worked by him in that employment during the period of 12 months ending on the commencement of the relevant period.

[24] Section 12(4) of the Act is as follows:

(4) Notwithstanding anything in this section, where the employment of an employee is for any reason terminated before he takes any long service leave to which he is entitled, or where any long service leave entitlement accrues to an employee because of the termination of his employment, the employee shall be deemed to have commenced to take his leave on the date of the termination of employment and to be entitled to be paid by his employer ordinary pay in respect of that leave accordingly.

[25] To determine the commencement of the relevant period, the deeming provision set out in s 12(4) of the Act results in the commencement of the Applicant's long service leave on the date of her termination of employment, which was 7 February 2024.

[26] Further, to calculate the 12-month period, the relevant period includes the average number of hours worked from 7 February 2023 to 7 February 2024. It was stated that the Applicant was on workers compensation since 21 March 2022 and had not worked until her resignation on 7 February 2024. It was noted she has received workers compensation payments pursuant to the *Workers Rehabilitation and Compensation Act 1988* (Tas). These payments ceased on the fortnight ending 16 July 2023. It was contended the Applicant did not work for 8 of the 12 months as she was in receipt of workers compensation payments.

[27] The Respondent submits that during the first four months of the relevant period, she did not work any hours and the workers compensation payments should not be counted as

⁴ Attachment to submission, Offer of Employment dated 3 May 2024.

they were not hours worked. The payroll report⁵ from 7 February 2023 to 7 February 2024 indicates no worked hours, only payment of workers compensation for 37 hours per fortnight.

[28] The payment is compensation for not being able to work due to workplace injuries as set out in the objects of the *Workers Rehabilitation and Compensation Act 1988* (Tas). Section 69 provides for compensation payable to the employee. The ordinary definition of compensation is an amount given or received for a loss suffered. These payments are compensation for not being able to work. They are not worked hours and should not be regarded as hours worked for the purpose of calculation of ordinary pay. They are compensation for hours not worked.

[29] The Respondent stated long service leave is a creature of statute and is governed by the Act. The meaning of the provisions must be determined by reference to the language viewed as a whole. The meaning of the word “work” which is specifically used, cannot include periods of compensation payments and if Parliament intended these hours to be counted as time worked for ordinary pay, it would have been provided for in the Act.

[30] Section 11(1) of the Act defines computation of ordinary pay. Sections 11(2) through to s 11(9) of the Act provide additional guidance and definitions as to what constitutes ordinary pay and how it applies to specific employment relationships. It was submitted that s 11(1) does not supersede the application or operation of s 11(6) of the Act.

[31] Countering the Applicant’s position that she should be paid a sum equivalent to what she could have reasonably expected to be paid had she worked in this period, her condition of being a casual employee on no fixed hours means subsection 11(6) of the Act must apply.

[32] Referring to case law, the Respondent relies on decisions relating to the word “work” in *Williams v Collier International (Victoria) Pty Ltd*,⁶ where Magistrate Lauritsen stated ordinary pay relates to working normal hours. It was submitted that the only the hours worked may be counted in the calculation under s 11(6) of the Act.

[33] The Respondent refers to the application of the *Superannuation Guarantee (Administration) Act 1972*, which provides minimum superannuation contributions must be paid by employers on ordinary time earnings. In *Superannuation Guarantee Ruling SGR 2009/2*, ordinary time earnings include any workers compensation payments received by an injured employee for the hours that he attends work and performs duties, which then form part of salary and wages.

[34] The Respondent states that workers compensation payments are not considered salary for providing services and are therefore not included as hours worked for the purpose of calculating the average number of hours worked. There is no entitlement to payment of pro rata long service leave as there are no hours worked during the 12 months prior to the termination of employment by the employee.

Findings

[35] The Act sets out the law relating to the granting of long service leave for employees. The parties agree that the Applicant has worked the required continuous employment for

⁵ Ibid.

⁶ Case Number A12595772.

over 7 years,⁷ resigned on account of incapacity⁸ and was therefore, entitled to pro rata long service leave. However, the issue is the computation of “ordinary pay” for the relevant period.

[36] In determining this matter, the task of statutory construction must consider the ordinary meaning and context and apply the relevant sections of the Act.

[37] The plurality in *SZTAL v Minister for Immigration and Border Protection* (SZTAL) succinctly described the contemporary approach to statutory construction:⁹

“The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.”

[38] Once the criteria are satisfied to an entitlement to pro rata long service leave, s 11 of the Act sets out provisions for the computation of “ordinary pay”.

[39] Section 11(1) provides that the ordinary pay shall be equivalent to the remuneration the employee would have reasonably expected to receive for that period of employment if he had continued to work throughout the period. Section 11(2)(a) to (h) sets out specific provisions, e.g. travelling, lodging, meal provisions, which are to be disregarded. Section 11(3) covers results driven remuneration and s 11(4) covers employees where no ordinary rate of remuneration is fixed. Section 11(5) provides application to part of remuneration.

[40] Section 11(6) provides that an employee who under the terms of his employment has no fixed normal weekly hours of work will have the average weekly hours worked in that employment during the period of 12 months ending on the commencement of the relevant period, being the date of termination.

[41] Section 12(4) is a deeming provision giving effect that on the date of the employee’s termination, which includes resignation, it is deemed that the employee has commenced long service leave.

[42] Applying the Act, I am satisfied the Applicant was employed as a casual with no fixed normal weekly hours, as demonstrated by her rosters and employment contract, which results in her long service leave entitlement being calculated in accordance with s 11(6) of the Act based on the period from 7 February 2023 to 7 February 2024.

[43] This section is distinct from s 11(1), which states the determination of ordinary pay shall be equivalent to that the employee would have expected to receive. Section 11(1)(a) assumes this is based on the employee continuing to work his normal weekly hours. However, s 11(6) is not subject to any other subsections and in my view stands alone to cover employees with no fixed weekly number of hours with the intent that the average hours worked over the previous 12 months would be calculated to ensure a representative sample.

⁷ *Long Service Leave Act 1976* (Tas) s 8(2)(b).

⁸ *Ibid* s 8(3)(d).

⁹ *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [14]; also see *Australian Mines and Metals Association Inc v CFMMEU* [2018] FCAFC 223 at [76] – [86].

[44] The key requirement in s 11(6) of the Act is the normal weekly hours of work, which is taken to be the average weekly number of hours worked in that employment. The emphasis is on the word “worked”, and the requirement is to consider only worked hours for the purpose of this calculation.

[45] I find the Applicant did not perform any hours of work during the period due to a work-related injury sustained on or around 18 March 2022 and subsequently receiving workers compensation pursuant to the *Workers Rehabilitation and Compensation Act 1988* (Tas). The evidence indicates that from pay fortnight 7 February 2023 to her cessation of workers compensation payments on the fortnight ending 16 July 2023, the Applicant did not work any hours, and therefore she was not paid for any hours worked. She was paid workers compensation payments to compensate for not being able to work. She was on leave without pay for the remaining four months until her resignation on 6 February 2024 and received some form of income protection payments.

[46] I concur with the Respondent that hours for which compensation is paid under *Workers Rehabilitation and Compensation Act 1988* (Tas) are not hours worked. Rather, compensation is paid for being unable to work due to injury.

[47] Similarly, the income protection payment received from the superannuation fund cannot be considered weekly hours of work.

[48] The ordinary meaning of the words of s 11(6) give clear direction as to the method of calculating the payment of a long service leave entitlement for a casual employee without fixed hours. The calculation of the hours worked in the preceding 12 months would normally provide a fair payment of long service leave.

[49] However, while a period of workers compensation does disadvantage employees if taken within the twelve months prior to resignation, the Act is unambiguous and must be applied as written, noting this is a consequence of the drafting of the Act.

[50] I find that there is an entitlement to long service leave. However, due to the nature of her casual employment with no fixed hours and applying s 11(6) of the Act, the fact that the Applicant did not work any hours in the 12 months preceding her resignation results in a calculation of zero average weekly hours and no entitlement to any payment.

[51] Accordingly, the matter is dismissed.



Neroli Ellis
Deputy President