

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29 application for hearing of an industrial dispute

Shane Ross Macpherson

(T13757 of 2011)

and

H M Bamford (Tas) Pty Ltd

DEPUTY PRESIDENT TIM ABEY

HOBART, 23 March 2011

Industrial dispute – long service leave – pressing or other domestic necessity – application dismissed

REASONS FOR DECISION

(1) On 16 February 2011, Shane Ross Macpherson, (the applicant), applied to the President, pursuant to s.29(1A) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with H M Bamford (Tas) Pty Ltd (the employer) arising out of the entitlement to Long Service Leave.

(2) A hearing commenced in Launceston on 7 March 2011. At the hearing Mr Macpherson represented himself. Mr S Knapton represented the employer.

(3) Mr Macpherson commenced employment on 28 January 1998 and resigned on 2 March 2011, amounting to slightly over 13 years' service. He claims an entitlement to pro rata Long Service Leave.

(4) Section 8[3][c] of the *Long Service Act 1976* provides that a pro rata entitlement arises when an employee who has completed seven years, but less than 15 years' service, 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.*"

(5) Clearly the requisite length of service is satisfied. The question to be determined is whether the reason/s for termination amount to a "*domestic or other pressing necessity of such a nature as to justify termination.*"

(6) Mr Macpherson said that the reasons for the termination were twofold. Firstly, he was facing extreme difficulty in servicing the mortgage on his home, and secondly, his wife wished to move to South Australia where she had family support. Mr Macpherson explained the situation in the following terms:¹

"The last 12 months or so, the financial situation that I am – has become more of an issue: interest-rate rises, cost-of-living rises and so it's – we've had to put our mortgage repayments on hold, put our house on the market and we've made the decision to move to South Australia where my wife's parents have a rental property waiting for us, which has had a long-term lease on it and has just been vacated in – at the end of next week, which

¹ Transcript p2

they've told us we can rent off them for nothing until we can get back on to our feet.

THE DEPUTY PRESIDENT: Right. When did you decide you were going to South Australia?

MR MACPHERSON: We've been umming and ahing for the last 12 months. We initially planned to stay for as long as we could in the attempt to reach the full 15-year service which entitled me to the long service just so I could take that time off, get across there, find ourselves new jobs, get a feel for the community because I've only ever been there on holiday, as have the children and then we would – if that panned out well, to leave shortly after that. But because it has gotten to the point now where we have had to put the mortgage payments on hold, we don't see any other way out of it and the rental property has come up for nothing, initially, and we decided to do it now.

THE DEPUTY PRESIDENT: Do you have employment in South Australia?

MR MACPHERSON: Sorry?

THE DEPUTY PRESIDENT: Do you have a job to go to?

MR MACPHERSON: I can start out labouring on vineyards and I have put my resume in for positions over there, but I can start labouring pretty much once we're settled.

THE DEPUTY PRESIDENT: Okay. So from your point of view, it comes down to an inability to meet the mortgage repayments, is the fundamental reason why you resigned? Is that what it comes down to?

MR MACPHERSON: That's the majority of it, yes.

THE DEPUTY PRESIDENT: What's the rest of it?

MR MACPHERSON: The rest of it is family support for my wife. She has no other family here. And all her family is there.

THE DEPUTY PRESIDENT: Right.

MR MACPHERSON: She has been suffering through it because she has been finding it difficult here to gain full-time employment that she's happy with and she has only been able to talk to her family about it on the phone. She went back for her mum's 60th birthday earlier in the year to explain the situation to them and they said, "Well, the lease is coming up on the rental property, why don't you move back? Have that support here. Don't pay us rent, initially, and get yourself back on your feet."

(7) And later: ²

"I mean, to say that it's possible to sell his house, move somewhere cheaper, rent something else – I mean, the rental situation as it is at the moment, to find something you're probably looking near enough to what we're paying on

² Transcript p 6

the mortgage, as it is. I see the rental property in South Australia at no cost to us as being the best financial option for my family and myself. I'm not denying that it's not the only option, but I see it as the best one for the financial situation."

(8) Mr Macpherson's wife had also resigned from paid employment. The house had been sold which, Mr Macpherson said, covered the mortgage but not transaction costs.

(9) Mr Knapton said it was his belief that the prime motivation for the resignation was a desire to move to South Australia, driven by Mr Macpherson's wife's wish to be close to family. The financial situation had arisen from an over commitment on the part of Mr Macpherson's family. He said there were other ways to address the financial situation, such as rental.

(10) There have been a number of decisions of this Commission dealing with circumstances with common elements to the instant matter.

(11) In *AMACSU v TT-Line Company Pty Ltd*³ the applicant sought a pro rata entitlement in circumstances whereby her spouse had been transferred interstate. The application was successful. However the Commission noted:

*"This decision does not imply that an employee who, of their own free will, moves interstate will have a pro rata long service leave entitlement. The domestic or other pressing necessity on the reasonable person test, is that an individual has no reasonable alternative but to follow a **spouse** who has been transferred in employment."*

(12) This decision can be distinguished from the instant matter in that, whilst there can be no doubt Mr Macpherson's wife desired to relocate to South Australia, it was a voluntary decision and her employment was not dependent on it.

(13) In *DIER v Blockmack Pty Ltd*⁴ the applicant resigned from employment and relocated to Victoria. The applicant said his resignation was driven by his desire to maintain his marriage in circumstances whereby his wife had taken the decision to return to Victoria with their children to care for seriously ill parents. According to the evidence, this decision was immutable, irrespective of whether the applicant relocated with her. Shelley C observed:

"I find that the situation Mr Webb found himself in, that is, his wife leaving Tasmania and taking their children, either with or without him, was a pressing domestic necessity of such a nature as to justify the termination of his employment. This was not an ephemeral or passing problem, which would have been resolved after a short, or relatively short, period of time. I accept that it would have been extremely difficult, if not impossible, for the family relationships to be maintained if Mr Webb had continued to live and work in Tasmania while his family was resident in Victoria. He genuinely believed that he had no option but to terminate his employment, which he did, setting out the reasons for doing so."

(14) There was no evidence that similar circumstances applied in the case of Mr Macpherson.

³ T9829 of 2001 Abey C. 30/10/2001

⁴ T10297 of 2002 Shelley C 18/10/2002

(15) The case of *Oliver v Lochnager Services*⁵ concerned circumstances whereby the applicant resigned to take up a better paying position, motivated by financial stringency arising from a marriage breakdown and the need to find alternative housing with an attendant mortgage. The resignation took effect 15 months after the marriage breakdown, and two months after the sale of the matrimonial home.

(16) The application was granted by the Commission at first instance, but subsequently overturned on appeal.⁶ The Full Bench observed:

"It was submitted by the appellant that Mrs Oliver committed to her financial arrangements whilst still employed by the appellant, she was aware of her income and her outgoings at that time. It was her choice to seek other employment which would provide her with increased earnings.

We agree that in this matter the only time that is relevant for the determination of an entitlement to pro-rata long service leave is at the time of resignation and the circumstances prevailing at that time. The significant events surrounding the changes to Mrs Oliver's personal arrangements were prior to that date and the decisions made as to her financial arrangements were also made prior to her resignation. The financial planning she had implemented was in place before she resigned. The impetus for the resignation was the offer of a better paid job, with the prospect for further wage increases. We make no criticism of that choice but are of the view that the test of a 'pressing necessity' as required by the LSL Act has not been satisfied."

(17) And later:

"It may well have been necessary for Mrs Oliver to purchase a home however the value and type of home she purchased was her choice made in the knowledge of her financial circumstances at the time of doing so, not at the time of her resignation which was some time later.

The choices made by the respondent were made taking into account her financial circumstances at the time of making those choices and cannot be retrospectively construed to support a claim to meet the requirements of the LSL Act."

(18) On the question of whether a reasonable person placed in the same circumstances might have felt compelled to resign, the Full Bench said:

"There is no doubt that (whilst) the offer of alternative employment which may be more attractive and financially beneficial is a reason to resign from employment it is not a circumstance however which would be a compelling reason for resignation."

(19) I have no doubt that the decision taken by Mr Macpherson and his family to relocate to South Australia was convenient, sensible and perhaps even financially prudent.

⁵ T10984 of 2003 Abey C 8/9/2003

⁶ T11081 of 2003 Full Bench 13/1/2004

(20) It would seem however that the financial circumstances that Mr Macpherson found himself in were a consequence of choices exercised some time earlier. There was no evidence that the circumstances had suddenly materialized as a result of some unforeseen event. Indeed according to Mr Macpherson the family had been considering this move for some time, but had hoped to delay the decision until he had served 15 years, at which point an automatic LSL entitlement would crystallise. The offer of rent free accommodation probably brought forward a decision that would have been otherwise taken by Mr Macpherson sometime in the next two years.

(21) Whilst the decision to resign and relocate is understandable, it lacks the element of 'no reasonable alternative' which was found to exist in *T-T Line* and *Blockmark Pty Ltd*. Indeed Mr Macpherson acknowledged that the South Australian choice was not the only option open to his family.⁷

(22) I conclude that the applicant has failed to satisfy the requirements of s.8[3][c] of the *Long Service Leave Act 1976*.

(23) Accordingly the application is dismissed. I so order.

Tim Abey
DEPUTY PRESIDENT

Appearances:

Mr S Macpherson representing himself
Mr S Knapton for H M Bamford (Tas) Pty Ltd

Date and place of hearing:

2011
March 7
Launceston

⁷ Transcript p6