

**TASMANIAN INDUSTRIAL COMMISSION**

**Industrial Relations Act 1984**

s29 application for hearing of an industrial dispute

**Brett Johns**  
(T13713 of 2010)

and

**John Watkins House of Golf**

DEPUTY PRESIDENT TIM ABEY

HOBART, 16 September 2011

**Industrial dispute – pro rata long service leave – transmission of business - found that there was not a termination of employment – application dismissed**

**REASONS FOR DECISION**

**[1]** On 1 October 2010, Brett Johns applied to the President, pursuant to s.29(1A) of the *Industrial Relations Act 1984* for a hearing before a Commissioner in respect of an industrial dispute with John Watkins House of Golf arising out of a claim for payment of pro-rata long service leave.

**[2]** A hearing commenced in Hobart on 8 November 2010 and continued on 29 August 2011. Mr R Clegg appeared for the applicant. The respondent, Mr J Watkins appeared in person.

**[3]** This application concerns a claim for pro rata long service leave.

**[4]** At all material times Mr Johns has been employed in the same business, albeit under different trading names and with different proprietors. Mr Johns' employment history is as follows:

Dates	Title of Business	Proprietors
29/1/1996 to 13/2/1999	Michael Loughlands Hobart Golf Store	Michael and Gabriel Loughland
14/2/1999 to 9/1/2005	Michael Loughlands Hobart Golf Store/House of Golf	John and Dianne Watkins
9/1/2005 to 19/3/2010	T & B Golf	Brian and Patricia Richards

**[5]** It was uncontested that there was a transmission of business on 13/2/1999 and as such, continuity of service was preserved pursuant to s.5(4) of the *Long Service Leave Act 1976* (the Act).

**[6]** The circumstances of Mr Johns' resignation on 19 March 2010 were not pursued as giving rise to a pro rata entitlement.

[7] The question before the Commission relates solely to the transmission of business on 9 January 2005, and specifically, whether Mr Johns' contract of employment was terminated. At that time Mr Johns had been continuously employed for just short of nine years.

[8] The authority for determining this question is found in *Elkin v Barmarco Pty Ltd*.<sup>1</sup>

[9] The relevant section of the Act is 12[4], which reads:

***"12. How and when long service leave shall be taken***

***(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."***

[10] In relation to this section, the Commissioner stated:

***"[33] As an entitlement, albeit a pro rata entitlement, accrued to Mr Elkin "because of the termination of his employment", Mr Gostencnik submitted that s.12[4] deems that the leave commenced on the date of termination and Mr Elkin was "entitled to be paid by his employer ordinary pay in respect of that leave ..."***

***[34] Mr Collinson submitted that "where section 5 of the Act, how so ever arising, creates a transmission and therefore a continuous period of employment, there is no termination for the purposes of Section 8A of the Act for the purposes of pro rata long service leave."***

***[35] He went on to submit that whilst there is clearly a termination at common law, there is no entitlement to pro rata long service leave because the deeming provision says the period of employment is unbroken and the period of service is continuous.***

***[36] Mr Collinson acknowledged that employees of MacMahon who, at the time of termination, had 5 but less than 10 years' continuous service, and who were not subsequently employed by Barmarco, would have a pro rata entitlement at the time of termination. He said that in such circumstances a prudent employer would simply "wait out the eight weeks to see which workers got picked up and which workers didn't".***

***[37] I accept that Mr Collinson is probably correct in the case of a transmission, other than a deemed transmission. There are many instances where a business changes hands and continues as a going concern with employees continuing as if nothing had happened. No accrued entitlements are paid out and continue to accrue with the new owner. Indeed in some instances the employees might not even be aware that there had been a change in ownership, notwithstanding that at common law, there is arguably a termination.***

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<sup>1</sup> T9906 of 2002 Abey C. 19/7/2002

**[38]** *However in the case of a deemed transmission pursuant to s2[2] of the Act, Mr Gostencnik's position is, I think, the correct one.*

**[39]** *Section 12[4] quite clearly states that the leave is deemed to commence on the date of termination and the employee is entitled to be paid by his employer for that period of leave. It is simply not open for the former employer to wait 2 months to see what might happen. To do so would, in my view, be contrary to the obligation to make payment and would constitute a breach of the Act.*

**[40]** *It follows that MacMahon was obliged to make a pro rata payment to Mr Elkin on 30 September 2000. That obligation remains on foot. Failure to make such a payment [as in this case] when it fell due does not in some way transfer that obligation to Barmenco.*

**[41]** *What does transfer to Barmenco is an obligation to recognise previous service with MacMahon, NMM and Mt Lyell, a point readily conceded by Mr Gostencnik. This obligation to recognise previous service is, however, quite different to an obligation to make a payment for a pro rata entitlement which crystallised on 30 September 2000 as a consequence of an action taken by another employer."*

**[11]** Under the authority of *Elkin*, if the contract of employment terminated on 9 January 2005, then a pro rata entitlement would have crystallised at that point. This is because there was more than seven but less than 15 years' service, and the employment was terminated by the employer for a reason other than the serious and wilful misconduct of the employee.

**[12]** Mr Clegg submitted that the employment contract ceased when the business was sold and a new employment contract commenced when Mr Johns commenced work with Mr Richards as the new proprietor. Mr Clegg submitted that *"at the end of the day you sell the business but you don't sell the employee."*

**[13]** Whilst the parties relied on assertions from the bar table as distinct from sworn evidence, there was no dispute as to the essential facts. As such the following uncontested circumstances are relevant to the question before the Commission:

- Mr Johns ceased working for Mr Watkins on one day and commenced working for Mr Richards on the next trading day.
- It was agreed during the sale negotiations that Mr Johns would continue in employment after the sale. Indeed both the vendor and purchaser agreed that Mr Johns' continuation was a crucial element of the sale.
- Accumulated sick leave transferred to Mr Richards.
- Payment of superannuation into the same fund continued.
- Subject to the comment below, any outstanding annual leave would carry over.
- Mr Johns' length of service would be carried forward.
- Mr Richards carried forward Mr Johns' golf equipment in the business. (est. value \$3500).
- The business transaction took account of accumulated long service leave (\$4207).

- There was neither a letter of termination from Mr Watkins nor a letter of appointment from Mr Richards.

**[14]** A reference from Mr Watkins dated 10/1/2005 stated, inter alia:<sup>2</sup>

*"This reference is issued on sale of my business which will remain as a going concern under new proprietors. Brett will remain in his present position under the new structure."*

**[15]** In relation to annual leave, Mr Watkins said:<sup>3</sup>

*"Mr Clegg hasn't mentioned it, but in a previous hearing you may remember he mentioned that I paid Brett some annual leave in cash. That was done a month before the sale of the business and there were two weeks outstanding. I had a long meeting with Brett, there was two weeks outstanding. I offered him both weeks up until the termination of the business, not himself. I said, "Take your leave if you want to." He said, "No, I'm short of money, I will take a week and pay me a week." I agreed to this. Had I known it was going to be a problem I wouldn't have done it, but however, then he came back to work and his final payment from me, up until the transmission of the business, was just the normal pay. He went to – he came to work – I think he might have worked the weekend. He worked Sunday, started with Mr Richards on the Monday."*

**[16]** The circumstances in this case can be readily contrasted with that of *Elkin*.

**[17]** Mr Elkin was clearly and definitively terminated by the former employer and paid all accrued entitlements. Some weeks later Mr Elkin was engaged by a new employer on the same site. There was no actual transmission of business although there was a deemed transmission pursuant to s2(2) of the Act.

**[18]** In the matter before the Commission there was clearly an actual transmission of business. It was clearly intended by the parties that Mr Johns would continue in employment with the business under the same conditions of employment and without loss of status, accrued entitlements or continuity of employment. This is consistent with the observation at para 37 of *Elkin* above.

**[19]** I find that Mr Johns' employment contract was not terminated at the time of the sale of the business. Accordingly, an entitlement to a pro rata long service leave payment did not arise at that point.

**[20]** The application is dismissed.

Tim Abey  
**DEPUTY PRESIDENT**

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<sup>2</sup> Exhibit R2

<sup>3</sup> Transcript p 5

**Appearances**

Mr R Clegg for the applicant  
Mr J Watkins in person

**Date and place of hearing:**

November 8  
2010

August 29  
2011

Hobart