

TASMANIAN INDUSTRIAL COMMISSION

Long Service Leave Act 1976

s13 referral to the Tasmanian Industrial Commission

James Edward Tubb
(Applicant)

T14577 of 2018

and

Stefano Lubiana Wines Pty Ltd
(Respondent)

PRESIDENT D BARCLAY

HOBART, 31 JULY 2018

Long Service Leave Act 1976 – entitlement to long service leave – Section 8(2)(c) of Act– definition of pressing necessity – lack of pressing necessity– application dismissed

Background

[1] The Applicant referred a long service dispute to Worksafe Tasmania on 11 November 2018. That referral is authorised by section 13(1) of the *Long Service Leave Act 1976* **(the Act)**.

[2] Upon referral of the dispute the Secretary is to investigate the circumstances of the dispute and submit a report of his findings to the President of the Tasmanian Industrial Commission **(the Commission)**.

[3] A report was received by the Commission. A conference was scheduled to endeavour to settle the matter. The Applicant was unavailable to attend the conference but it was apparent that the Respondent did not propose to make any offer to settle the matter. Accordingly the matter proceeded to hearing before me.

The Law

[4] Section 8 of the Act deals with an employee's entitlement to long service. Relevantly it provides that:

8. Period of long service leave to which employees, other than mining employees, are entitled

- (1) In this section, *employee* means an employee who is not a mining employee.
- (2) Subject to subsection (4), the period of long service leave to which an employee is entitled under this Act is –
 - (a) on the completion by an employee of at least 10 years' continuous employment with his employer–

(i) 8 2/3 weeks' long service leave in respect of the first 10 years' continuous employment with his employer; and

(ii) 4 1/3 weeks' long service leave in respect of each additional 5 years' continuous employment with his employer; and

(iii) on the termination of his employment, an additional period of long service leave in respect of the number of years' continuous employment with his employer since the last accrual of entitlement to long service leave under the foregoing provisions of this paragraph, such period of long service leave as bears the same proportion to 8 2/3 weeks as that number of years bears to 10 years; or

(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.

[5] It was common ground that the Applicant had been employed by the Respondent within the meaning of the Act for more than 7 years and that, subject to s 8(3) of the Act applying to him, he was eligible for pro rata long service leave. The issue in dispute was whether s 8(3), and in particular subsection (c) of s 8(3) of the Act applied to the Applicant.

[6] That is, did the Applicant terminate his employment on account of incapacity or domestic or other pressing necessity of such a nature as to justify the termination of that employment?

[7] The case put by the Applicant was that he resigned his employment on account of domestic or other pressing necessity due to his financial position.

[8] A useful summary of the law relating to the meaning of the phrase *on account of incapacity or domestic or other pressing necessity* is a decision of the Industrial Court of New South Wales where Boland AJ adopted a passage of the decision of Asbury C in *Westbus v Bartush*, a decision of the New South Wales Industrial Commission¹, who said:

¹ See *Stockwell International Pty Ltd v Solyali* [2014] NSWIC 7 at paragraph 24

"In my view, the following questions, which are substantially those posed in *Leslie*, with some reference to the questions posed in *Chance*, including some aspects of the dissenting judgment of McKeon J, are relevant to determining whether an employee has an entitlement to proportionate payment for long service leave under s 43(4) of the Act:

1. Was the reason for the termination one which fell within the section?
2. Was the reason genuine and not simply a rationalisation of another reason which did not fall within the section; or a reason that while having the appearance of truth or right, is in reality a pretence or a deception; or a frivolous reason?
3. Although the reason claimed may not be the sole ground which caused the employee to make a decision to terminate his or her employment, was it the real or motivating reason?
4. Did the reason claimed cause the employee to terminate his or her employment?
5. Did the reason claimed affect the employee in relation to the particular service he or she terminated?
6. Was the situation which the employee was in at the point of the termination, one in which a reasonable person might have felt compelled to seek to resolve by terminating his or her employment?"

[9] It is also clear that the Applicant has the onus of proving that his resignation was from domestic or other pressing necessity. I accept the point made by the Respondent in its written submissions² where it sets out comments of Asbury C as follows³:

"I am also of the view that a claimant should provide clear evidence to the Commission to enable the questions posed above, to be answered in the affirmative. In this regard, it should be noted that the preamble to s 43(4) states that an employee is entitled to proportionate payment for long service leave under that section only if the contingencies set out therein are met. In answering the questions, the Commission should determine what the true facts were at the relevant time, in light of what was said and done, and of the circumstances in which those things were said and done."

[10] It is to be noted that Asbury C was dealing with a section that provided that pro rata long service leave is payable "only if" the circumstances instanced in the act the Commissioner was considering were present. The scheme of the Act however is that the entitlement to long service leave arises under s 8(2) and that the entitlement to pro rata long service leave arises when the matters referred to in s 8(3) apply. If those instances in s 8(3) do not apply, then there is no entitlement to pro rata long service leave. In this way, while the words "only if" do not appear in the section, the scheme of the Act is to like effect. There are no other circumstances in which pro rata long service leave is payable under the Act and accordingly pro rata long service leave is only payable if s 8(3) applies to an applicant. Accordingly the comments of Asbury C apply to the Act.

² At paragraph 16

³ *AWU v Sunshine Coast Private Hospital* [2003] QIRComm 241

[11] As regards to the meaning of “pressing necessity”, this term invokes considerations of compulsion. The Macquarie Dictionary defines necessity as something necessary or indispensable, an unavoidable compulsion to do something.⁴ Additionally, not only must the resignation be a necessity it must be a pressing necessity. The same dictionary defines pressing as urgent, demanding immediate attention.⁵

[12] It can be seen therefore that the term “pressing necessity” means an urgent and compelling need to take the action under consideration. That is, was there an urgent and compelling need for the Applicant to resign his employment due to financial considerations?

[13] Finally, I accept the Respondents submission⁶ that the time that is relevant for a consideration of domestic or other pressing necessity are the circumstances at the date of resignation.

The Facts

[14] On 25 September 2017 the Applicant resigned by letter of that date. In the letter he said:

“I am resigning from my position because I have had to find a position that I can earn a higher income due to Kylie’s ongoing medical issues and our financial position after having to finance her back surgery.”⁷

[15] The Applicant also provided further written information as follows:

“To Whom it May Concern,

The reason I left my employment at Stefano Lubiana Wines was I believe due to the reasons of domestic and pressing necessity.

My wife has had back surgery about a year ago which we had to finance ourselves and cost us \$65000.00 plus ongoing medical cost to date we also had loss of income approximately to the value of \$30000.00. Plus she has regular days off work due to her ongoing back pain and other joint issues she has been working in large amounts of pain and been pushing herself because we are under such financial stress. I believe that this is unfair and unreasonable for her to have to do this.

We have accumulated a large amount of debt along the way due to our family circumstances.

My situation was that at Stefano Lubianas that I could not earn any extra income above my salary as my employer did not pay overtime and any extra time I worked had to be taken as time in lieu. I had not had a pay rise in a couple of years as my employer believed that I should be happy with what I was being paid.

⁴ 6th Edition p 982

⁵ Macquarie Dictionary, 6th Ed., p. 1162

⁶ Written submissions at page 9

⁷ A1, attachment 5

I believe that due to the situation I and my family are in that I had no other choice other than to find a better paying position so that I could earn a higher income which I have done with my new employer.

In my new position I am getting paid more per hour and I'm working 40hrs per week instead of only 38hrs per week, plus I will be working on call every second week which I will be paid an on call bonus and double time per hour worked. Plus additional over time when required. Plus a commission based on what I sell in my position. My new employer has also indicated that there is potential for an increase in my hourly rate and promotion.

I was happy in my position at Stefano Lubianas but I believe I had no choice due to my domestic circumstances and the position I'm in.

I believe that under these circumstances that I should be entitled to long service pro rata payment.

Signed James Tubb (sic)"

The Applicant also provided a number of pay slips for his new employment together with receipts and accounts for the medical expenses to which I have had regard.⁸

[16] He also provided his bank statement for the period 24 June to 27 September 2017 for the loan which was used to finance the medical treatment⁹ and his Go MasterCard statement of 28 February 2018.¹⁰

[17] In his evidence in chief the Applicant said this:¹¹

WITNESS: "Okay. My - the reason I - the main - it's probably - the main reasons would be that my wife's had a back operation previously, timeframes - I'm not real good with times and dates but 10 anyway - so she had a previous back operation and a few months and maybe a bit longer leading up to my resignation our financial position became, for want of a better word, it started to get a bit dire. We had bills mounting up, I've had to - with our home loan I had to end up taking that back to so we're just paying the basic interest, the 15 minimum that we could afford. Then my wife's had constant ongoing medical issues - well, not issues, but - continuing with her back. I've had to - we've had to pay for ongoing physio, doctors' appointments, all those sorts of bits and pieces and it just got to the point where she was - with her work, she was working, you know, she went back to 20 work after her operation and she tried to work sort of regular hours but that didn't work so she went back at a couple of days at a time and by that time our financial position was getting worse and worse. We were getting to the point where we were struggling to pay for bills and then it got to the point where - like, previously I'd sort of - 25 I'd asked Steve and Monique if there'd be any, like, sort of extra work and stuff available, which they said at the time, "No." So I've sort of not possible to get any extra hours and stuff to make" -

⁸ This material is A2

⁹ A4

¹⁰ A3

¹¹ Transcript p 3, lines 18 to p 4 line 35

PRESIDENT: "Can you tell me when that was?"

WITNESS: "Yes."

PRESIDENT: "When you had that discussion about overtime, when was that?"

WITNESS: "It was at random times, I've asked Steven Lubiana when he was passing and a couple of times I asked Monique at the winery whether there was anything that they needed extra help with."

PRESIDENT: "Okay. Thank you."

WITNESS: "And then it just slowly but surely things got to the point where, like, to be honest with you, I felt no - I sort of didn't really have any option other than to find other work that was a higher 45 paying job so I could get more money so which I could then relieve my wife's medical condition so she could work less. So she was working a couple of - like, she sort of - to make up where she was unable to go to work at times then we were just getting further and further behind because we were led to believe that she was going to be a lot better earlier on than what she was. So then it just, yes, slowly but surely it got - we had less and less money and we got to the point where I was trying to get - my mum's old and sick so I was trying to get someone to help out when - to look after my son, so that wasn't working either and we had an ongoing bill of child care which was going - prices of that, it's just astronomical and then as I say, I just got to the point of no return, I sort of thought if we go any further into debt then we're not going to - ever possibly going be able to get out of it in any short term, full stop. So I just sort of - I thought well, if I can't get any extra overtime, I can't earn any more money then I'm going to have to look for work somewhere else to be able to make that money to be able to keep us afloat financially. Yes, like, and I loved my job at Lubiana Wines, which I did and I thoroughly - you know, I really appreciate everything that Steve and Monique did for me while I was there but it just got to the point where I felt like a - I don't know, cornered and I had nowhere to go so I thought I had to look for other employment. Like, I sort of looked at a second job and then the second job I was going to be away from home a lot longer - a lot more than I would be just doing a few extra hours overtime working for somewhere and getting paid for overtime. Yes, and like I say, I just got to that point where I thought I didn't really have any option so I looked for another job, a higher paying job. And then I - I got the job at Pirtek, which I was paid more money per hour plus I got paid overtime rates. I got a company vehicle where I could use the company vehicle at my own leisure basically, which was, you know, another added benefit for us as a family so it was a saving as far as fuel and cars and -"

PRESIDENT: "So you got a fuel card with the car?"

WITNESS: "No, a vehicle, which is fuel supplied."

[18] The Applicant also gave evidence that he was paying for ongoing medical treatment in the form of physiotherapy for his wife. However, he gave no evidence (beyond saying each session costs about \$120.00) how much he was paying for physiotherapy on a weekly, monthly or yearly basis. He also stated that he had to reduce his loan repayments, but gave no oral evidence to what amount and what effect that had on the overall loan.

[19] He gave evidence that he also occasionally sought to be paid out annual leave to help him financially. He said he told his employer on at least one such occasion that he was struggling and could do with the money.¹² I note however that at resignation he had some 270 hours of annual leave owing.

[20] He noted difficulty in being paid overtime. He also noted that he would not have been successful in obtaining a better paid job with the Respondent. The Respondent's witness Monique Lubiano ultimately agreed with that proposition.¹³

[21] From the materials it is clear that the Applicant is earning more than he was while working for the Respondent.

[22] In cross examination it was clear that the loan for the surgery was obtained prior to his wife's surgery which was in July 2016. He also had the MasterCard prior to the surgery. He was also not in default of his home mortgage account.¹⁴

[23] It was clear that the Applicant was paying his accounts as they fell due, and that he was not in arrears on his personal loan or his credit card account.¹⁵ His wife was also working the majority of the time around the time of resignation.¹⁶ The difference in work hours for his wife was in the order of 1 or 2 days per week less in comparison to work before she underwent her surgery.

Consideration

[24] Having regard to the evidence I consider the matters which I set out in paragraph [8] above.

Was the reason for the termination one which fell within the section?

[25] The reason claimed falls within the section namely, section 8(3) (c) of the Act.

Was the reason genuine and not simply a rationalisation of another reason which did not fall within the section; or a reason that while having the appearance of truth or right, is in reality a pretence or a deception; or a frivolous reason?

[26] I find that the Applicant held the belief that he had to change jobs due to his financial circumstances. That is, he needed to earn extra money to more comfortably service his liabilities. It was not put to him that he had another reason for his resignation. The real question is whether, objectively, the circumstances were such as to constitute pressing necessity. That issue is not addressed by this criterion. The question for this criterion requires a subjective assessment of the reasons given for the resignation.

Although the reason claimed may not be the sole ground which caused the employee to make a decision to terminate his or her employment, was it the real or motivating reason?

¹² Transcript p 9 lines 8 - 10

¹³ Transcript p 33

¹⁴ Transcript p 15 line 23

¹⁵ Transcript p 11

¹⁶ Transcript p 12 line 2

[27] I find the sole reason for the change in jobs was the Applicants financial position. No suggestion was made that there was another reason.

Did the reason claimed cause the employee to terminate his or her employment?

[28] I find that the financial position in which the Applicant found himself, subjectively, was the reason for the resignation.

Did the reason claimed affect the employee in relation to the particular service he or she terminated?

[29] I accept the Respondent's submission that the reason for the resignation did not relate to the service the Applicant was providing to the Respondent. However, in my view nothing turns on that in a case of claimed financial imperatives to change jobs not associated with physical incapacity. This criterion is more germane to cases of claimed physical incapacity as causing an inability to perform the duties of the employment at all, or partially (in which latter case issues of financial impacts may also be relevant).

Was the situation which the employee was in at the point of the termination, one in which a reasonable person might have felt compelled to seek to resolve by terminating his or her employment?

[30] This is the crux of this case. Objectively, was the Applicant justified in resigning his employment due to domestic or other pressing necessity, such that the Respondent should be obliged to pay long service leave?

[31] In the Computer Sciences Case¹⁷ the Full Court referred to the decision of Franks v Kembla Equipment Co Pty Ltd [1969] AR [NSW] 17 at 18, a judgment of Sheldon J, which related to the test of 'domestic or other pressing necessity'. In that decision, Sheldon J said:

"The test, I would suggest, is whether there is a really serious problem in the home, although not necessarily a crisis. On the one hand the colourable and frivolous should be rejected but on the other over exacting standards should not be adopted. After all what is being dealt with is not a sphere-shaking issue but a reason for terminating employment and a material consideration must be whether a domestic situation is such that a reasonable man might feel compelled to seek its solution by terminating his employment."

[32] The situation may be summarized as the Applicant being in a financial position which was less satisfactory than before his wife's surgery. I infer from his evidence that the Applicant and his family went on family holidays together and that was no longer the case, at least not as regularly as before the surgery. It seems there were other financial impacts as well. For example he gave evidence that his children wore second hand clothes. However he gave no further evidence on that issue.

¹⁷ Computer Sciences of Australia v Leslie [1983] AR (NSW) 828

[33] I note that the Applicant was not in default of any of his loan facilities. I note his financial position seems to have remained the same from about the time of taking on the loan prior to July 2016 and the resignation in September 2017.

[34] The Applicant gave evidence of having to alter the repayment on his personal loan. However, the statement he tendered into evidence shows that he was meeting the loan payments in respect to both principal and interest and that the loan account was reducing. In light of that document and the absence of any further detailed evidence of having to alter the terms of the personal loan facility I do not accept the Applicants evidence that the Applicant had to change the terms of his loan facility.

[35] I do not regard his financial position as being dire. I do not have any evidence to support a proposition that the Applicants financial position was deteriorating at around the time of his resignation. Indeed he said he had used some annual leave to assist with his finances, however at the date of ceasing to work he had accumulated over 270 hours or (based on a 38 hour week) 7 weeks annual leave.

[36] I note that the Applicants last day of work was 25 October 2017¹⁸ and that his first pay slip with his new job shows he commenced employment of 8 November 2017. I am prepared to infer that he knew he was going to that job when he resigned. To do otherwise having regard to his claimed financial position makes no sense. I note his financial position was also to improve, not only by way of increases in salary but in the provision of a motor vehicle.

[37] In my opinion the situation here is that the Applicant was no longer prepared to stay in his employment with the Respondent if he could get a better paying job which he was able to do. There is no evidence that he spoke to his employer about being in particularly dire financial straits. He did not give any evidence of being in dire financial straits. His loan facilities were in order.

[38] Put simply the Applicant found himself a better paying job and took it. He was not facing a pressing necessity. There is certainly no evidence of deteriorating financial circumstances from the time of his obtaining the personal loan and the resignation. Indeed his domestic circumstances improved (to what level I do not know as the Applicant led no evidence of his wife's earnings) as his wife increased her hours of work during the course of her recovery from surgery.

[39] I conclude that there was no urgent and compelling need for the Applicant to resign his employment due to his financial position when he resigned his employment on 25 September 2017, effective on 25 October 2017.

¹⁸ Resignation letter A1 attachment 5

Outcome

[40] As I have found there was no pressing necessity for the Applicant to resign as a result of his financial position he is not entitled to pro rata long service leave.

[41] The Application is dismissed.



David Barclay
President

Appearances:

The Applicant, J Tubb
Mr A Cameron for the Respondent

Date and place of hearing:

2018
22 March
Hobart