**TASMANIAN INDUSTRIAL COMMISSION**

***Industrial Relations Act* 1984**

s.29 (1A) application for hearing of a Long Service Leave dispute

**Julie Rosemary Cohen**

(T14519 of 2017)

**and**

**Northern Children’s Network Inc.**

PRESIDENT D J BARCLAY 30 October 2017

***Long Service Leave Act* 1976 – entitlement to long service leave – quantum – resignation – operation of s 12 (4) – ordinary pay – application dismissed**

**DECISION**

1. Julie Rosemary Cohen has made an application for the payment of long service leave entitlements said to be outstanding upon her resignation from employment with the Respondent.
2. The entitlement to payment of long service leave in this case is governed by the *Long Service Leave Act 1976* (the Act)*.* Long service leave is a creature of statute. As such the entitlement to long service leave, and where appropriate payment in lieu of the taking of long service leave, is governed by the Act. The High Court has said of statutory construction:

69. *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.*

*70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goal. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.*

*71. Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision]. In The Commonwealth v Baume Griffith CJ cited R v Berchet to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent". (Footnotes omitted).[[1]](#footnote-1)*

1. The purpose and object of the Act is to provide employees who work for lengthy periods of time with one employer additional leave entitlements in recognition of that lengthy service. The object of the Act is not to provide additional financial benefits for long service. Payment of salary or wages is maintained during the period of leave[[2]](#footnote-2). Only in limited circumstances does a person receive payment in lieu of the leave. It is against this background that the Act is to be construed.
2. The Applicant was employed as a Field Worker. She was employed for a period of slightly in excess of 10 years. As such, pursuant to s 8 of the Act the Applicant had accrued an entitlement to long service leave. The Respondent has calculated the entitlement to be 8.74 weeks. As I understand it the Applicant does not dispute this calculation.
3. The issue however is the value of the long service leave as the Applicant did not take the leave, but resigned her employment.
4. The Applicant argues that the value of the long service leave is to be calculated on an accrual basis. That is, for each year of service the number of hour of long service leave accrued is “banked” as is its value. The Applicants submission is as follows:

*Ms Cohen’s entitlement should have been calculated as for any other permanent employee; that is, to calculate each year’s entitlement based on the hours worked in that year and to “bank” those hours to be added to the existing accrual for each subsequent year thus creating an ongoing cumulative accrual. In a year when a roster change means the employee works less hours than the previous year, then the calculation for that particular year will be less than the previous year, and that slightly lesser entitlement will then be added to the existing balance.*

1. The Respondent argues that the Applicant was paid correctly and in accordance with the terms of the Act.
2. In my view the claim by the Applicant fails for the following reasons.

 How is long service leave calculated?

1. Long service leave is calculated on years of service, not hours of service as is suggested by the Applicant. The entitlement to the leave arises upon ”*completion by an employee of at least 10 years’ continuous employment”.[[3]](#footnote-3)*  As such the qualifying criteria is years’ worked continuously and the number of hours worked is not relevant.
2. The only reference to hours worked is in s 5(3) of the Act which requires a minimum of 32 hours in a consecutive four week period to be worked to accrue long service leave entitlements. This provision confirms that the focus is on continuous yearly service and not hours of work.
3. It can therefore be seen that for every year of continuous service, so long as a minimum of 32 hours work is carried out in every continuous 4 weeks period, long service accrues each year.[[4]](#footnote-4)
4. Under the *Long Service Leave (State Employees) Act 1984* (the State Act) the long service leave is said to accrue annually. However there is no link between the quantum of pay for the period of long service leave accrued, rather it is the number of days accrued for the year. The Act does not provide for accrual in that way.

What does an employee get paid during a period of long service leave?
5. An employee who takes a period of long service leave is paid his or her “ordinary pay”.[[5]](#footnote-5) Ordinary pay is *“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]](#footnote-6)* (my emphasis).
6. Ordinary pay is therefore the amount the employee would have earned had he or she continued to work and had not taken leave[[7]](#footnote-7). Therefore if an employee would have earned $10,000 had he or she stayed at work instead of taking the period of long service leave, that is the amount to which he or she is entitled whilst on long service leave.

Is the amount any different if the employee resigns and is paid out long service leave entitlements?
7. Section 12 (4) of the Act deals with the situation where employment is terminated and long service leave is due to the employee. It provides:

*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.*

1. It can be seen that s 12 (4) is a deeming provision. It is to the effect that where an employee’s employment is terminated (including by resignation)[[8]](#footnote-8) the employee is deemed to have commenced long service leave and is to be paid ordinary pay.
2. As such an employee whose employment is terminated and who has unused leave entitlements it treated in the same way as an employee who takes leave. They are both paid ordinary pay.
3. In the present case therefore the long service leave to which the Applicant was entitled was to be calculated in accordance with the amount she would have earned had she remained at work.[[9]](#footnote-9) Her entailment was therefore to be paid her ordinary rate of pay at the time of resignation which I note was for a 38 hour fortnight.

Accrual Method
4. It seems implicit in the Applicants submissions that the value of the long service leave for each year is to be banked, and not the hours. That is, if the ordinary pay of the employee was based on 37.5 hours per week, then the 4.3 or 6.3 days accrued in that year is to be calculated as a percentage of the then prevailing weekly rate.
5. In my opinion that is a misunderstanding of what long service is, and also of the nature of the accrual of long service leave.
6. Long service leave is designed to provide an employee with an additional period of leave. It has nothing to do with the accrual of the value of the leave, but rather the period of leave. That this is the case is evidenced by the State Act. Even though that act provides for yearly accrual of leave, what is accrued is the proportion of leave (6.5 days) and not the value of those 6.5 days. That this is the case is confirmed by s 18 of the State Act which provides *“an employee who is granted a period of long service leave is entitled to a salary which would be payable had the employee not taken long service leave during that period”.*
7. As with the Act, an employee is paid that which he or she would have earned had they stayed at work and not taken leave.

Conclusion

1. As such I find that the method of calculation of the Applicants long serve leave on the basis of the hours worked immediately before resignation was the correct method. In this way the Applicant was paid her ordinary pay that she would have expected to receive if she had stayed employed and continued to work.
2. The Applicant pointed out that this may result in a loss for some employees who reduce hours shortly prior to accruing long service leave. That is a consequence of the drafting of the Act. It accords with the policy of the Act. Indeed the other side of the coin is that an employee who increases their hours prior to accruing long service leave will receive a benefit. Again that is a consequence of the drafting of the legislation. The legislation intends that persons taking long service leave or being paid out due to termination of employment are treated as if they remained at work and were paid for their ordinary work while on the leave or when being paid out.
3. If it was thought that this outcome was unfair that is a matter for the legislature. I must construe the Act which in my opinion is clear.
4. Accordingly I dismiss the Application.



D J Barclay

PRESIDENT

1. *Project Blue Sky v ABA* (1998) 194 CLR 355 at [69] – [71]. [↑](#footnote-ref-1)
2. For example, unlike annual leave for many employees no leave loading is applied to long service leave. [↑](#footnote-ref-2)
3. The Act, s 8 (2) (a). [↑](#footnote-ref-3)
4. Based on a 20 day work month. If one has regard to a 7 day week then 6.3 hours each year accrue. [↑](#footnote-ref-4)
5. The Act s 12 (6). [↑](#footnote-ref-5)
6. The Act s 11 (1) [↑](#footnote-ref-6)
7. See s 11 (2) (a) of the Act. [↑](#footnote-ref-7)
8. Is for any reason terminated – s. 12 (4). [↑](#footnote-ref-8)
9. To use the words of the Act: if the Applicant had continued throughout that period to have worked. [↑](#footnote-ref-9)