**TASMANIAN INDUSTRIAL COMMISSION**

***Long Service Leave Act* 1976**

s13(2) application for hearing of a Long Service Leave dispute

**Robert Douglas Boutcher**

(T14451 of 2016)

**and**

**Workforce Development Pty Ltd**

**(ABN 51 009 561 602)**

DEPUTY PRESIDENT N M WELLS

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|  | HOBART, 8 MARCH 2017 |

**Long Service Leave Act 1976 – operation of s8(2) and s8(3) – entitlement to pro rata long service leave – was qualifying period of service completed - was employment terminated for serious and wilful misconduct – effect of s8(3)(d) of the Long Service Leave Act 1976 – order issued**

**DECISION**

1. This matter involves an application made by Mr Robert Douglas Boutcher (the Applicant) pursuant to s13(1) of the *Long Service Leave Act* 1976 (the LSL Act). That section is in the following terms;

“1) A dispute –

(a) as to whether or when an employee is or has become entitled to long service leave or payment in lieu thereof, or a deceased employee's personal representatives are or have become entitled to payment in lieu of long service leave; or

(b) with respect to the rate of ordinary pay of an employee for the purposes of this Act –

shall be referred to the Secretary who shall investigate the circumstances of the dispute and submit a report of his findings to the President of the Commission.”

**Background**

1. The Applicant had been engaged by Mr Kenneth Dorsey, Director of Workforce Development Pty Ltd (the Respondent) in May 2009 until his employment was terminated on 6 May 2016. The Applicant was employed to undertake data entry for the Respondent, which is a privately operated training provider.
2. The commencement date of the Applicant’s employment is in dispute and is relevant to the determination of whether the Applicant has fulfilled the requisite amount of seven years of service to establish an entitlement to pro-rata long service leave (LSL).
3. The Applicant was employed on a permanent basis, initially for 20 hours per week over four days, increasing some time later to 30 hours per week over four days. In June of 2015, due to a downturn in business, Mr Dorsey reduced the Applicant’s work hours to 15 hours per week (or two full days per week).
4. On 29 April 2016, while the Applicant was on annual leave, the Applicant was provided with five weeks’ notice of the termination of his employment via a text message from Mr Dorsey. Subsequently, on 7 May 2016 Mr Dorsey again sent a text message to the Applicant which stated “I paid out your notice and annual leave on Friday. Your final pay has been deposited to your account.”[[1]](#footnote-1) The reference to “Friday” is a reference to 6 May 2016. At the time of his termination the Applicant was earning $22.00 per hour or $330.00 per week.

**Statutory Framework**

1. The long title to the LSL Act provides that the Act is “[a]n Act to amend and consolidate the law relating to the granting of long service leave to employees, and for matters incidental thereto”. For the purposes of this application, which relates to pro-rata LSL, the relevant section of the LSL Act is as follows:

**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 willful misconduct of the employee.

**WorkSafe’s Report**

1. On 27 May 2016 the Applicant claimed an entitlement to payment of pro-rata LSL by lodging a dispute to the Secretary of the Department of Justice, as referred to in paragraph [1] of this decision. The Applicant contended as part of his claim that the commencement date of his employment was Monday 4 May 2009. Ms Amanda Wells, a WorkSafe Tasmania Inspector, conducted an investigation which failed to resolve the dispute. The completed WorkSafe Tasmania Report[[2]](#footnote-2) (the Report) was submitted as a dispute to the Tasmanian Industrial Commission (the Commission) on 17 November 2016 by Mr Mark Cocker, Director Industry Safety with WorkSafe Tasmania.
2. The Report set out in its Summary, the Applicant’s claim for an LSL entitlement pursuant to s8(2)(b) of the LSL Act, on the basis of completing seven years continuous service with the Respondent and also, that pursuant to s8(3)(d), the Respondent had terminated the Applicant’s employment for a reason other than the serious and wilful misconduct of the Applicant.

**The Evidence**

1. Mr Boutcher gave evidence via witness statement[[3]](#footnote-3) and testimony, in support of his dispute. Mr Dorsey also provided evidence both written[[4]](#footnote-4) and oral in opposition to the Applicant’s claims.

***Commencement of employment***

1. Mr Boutcher’s evidence was that he commenced employment with Workforce Development Pty Ltd on 4 May 2009 and received his first wage payment on Friday 8 May 2009. He stated that wages were always paid on a Friday for work performed that week. Mr Boutcher received $370.00 gross[[5]](#footnote-5) or $348.00 net into his bank account,[[6]](#footnote-6) which was for 20 hours of work he undertook in his first week of work at $18.50 per hour.[[7]](#footnote-7) The bank statement shows an effective payment date of Friday 8 May 2009 and a “posted” date of Monday 11 May 2009 into Mr Boutcher’s bank account. This payment would accord with the dates of Mr Boutcher’s pay slip for the pay period 10 May 2009.
2. Mr Dorsey’s evidence was that the Applicant commenced employment with the Respondent on 8 May 2009. He said this was so because Mr Boutcher’s tax file number notification was filled out on 8 May 2009 and this was the recorded commencement date on the electronic employee records.
3. When questioned by the Commission as to the first wages payment made by the Respondent on 8 May 2009, Mr Dorsey was unable to give a satisfactory explanation as to why the Applicant would have been paid $370 wages on 8 May 2009 if that was his first day of employment. Mr Dorsey could not confirm that he ever paid wages to an employee in advance of work being undertaken.[[8]](#footnote-8)

***Reason for Termination***

1. The evidence was that on 29 April 2016 at 1:55pm Mr Dorsey, as Director of the Respondent, sent the following text message to Mr Boutcher:

“Sorry Bob, this is weak, I didn’t know you wouldn’t be here today and since I like you it always gets harder. I am giving you 5 weeks notice (as is required). Economic conditions dictate that I need to reduce staff. I appreciate the work you have done, always professional”

1. On Saturday 7 May 2016, Mr Dorsey sent a subsequent text message advising that he had paid out Mr Boutcher’s notice period and finalised his entitlements on 6 May 2016. It was common ground between the parties that termination of Mr Boutcher’s employment had been effected on 6 May 2016. The Report also noted a termination date of 6 May 2016.
2. It was Mr Dorsey’s evidence that he terminated the Applicant’s employment for a number of reasons. When questioned on those reasons, Mr Dorsey stated that one reason was because the Applicant had suppressed information which had been requested of him relating to traineeship data and this had effected the viability of the business. Mr Dorsey also said the Applicant’s performance of some duties was not of a proper standard. I note that in the summary of the Report, Mr Dorsey had advised Ms Wells that he had terminated Mr Boutcher’s employment due to Mr Boutcher’s misconduct.
3. During Mr Dorsey’s verbal evidence, the following exchange took place:

“DEPUTY PRESIDENT: So why did you terminate Mr Boutcher?

K DORSEY: For a bunch of reasons – (1), the company was failing, that still holds true; (2) suppression of information, and – and, you know, I’ve written it in the statement, and I can’t – I can’t make it any clearer. And he said, you know I’d have access to his access database: no, I didn’t. I never did because I never had access on my computer. The way the system changed it – a lot of things changed…

DEPUTY PRESIDENT: So when, Mr Dorsey, did you become aware of – I mean, if – you stated that you think that there was suppression of information or deliberate - ?

K DORSEY: Well, I don’t know, I mean, I – I – that’s one of the things that, you know, I’d usually put a question mark there because I don’t know. I don’t know why you wouldn’t –

DEPUTY PRESIDENT: So, when did you become aware of that?

K DORSEY: Well, primarily when I saw the access database when he left, but before that he had this information all the time and – and there –

DEPUTY PRESIDENT: So, what date was that though?

K DORSEY: I can’t tell you. It was after he left, and I went – I went to his computer…”[[9]](#footnote-9)

1. Mr Dorsey asserted that the Applicant was terminated, not to avoid having to pay out pro-rata LSL, but rather to save the business, at a time when Mr Dorsey was unable to draw a wage himself and having to personally support the business financially.[[10]](#footnote-10) Mr Dorsey’s evidence confirmed all aspects of the hours of work as provided by the Applicant, whilst the Applicant was employed by the Respondent, including the reduction of hours in June 2015 due to business downturn.
2. The Applicant denied that he had withheld information from Mr Dorsey, and stated there were difficulties with the new system introduced by Skills Tasmania.
3. The Separation Certificate[[11]](#footnote-11) completed by Mr Dorsey and provided to Centrelink indicates that the Applicant was terminated due to a shortage of work.

**The Submissions**

1. Both the Applicant and the Respondent provided oral submissions at the conclusion of witness evidence. Those submissions are as follows.

***The Applicant***

1. The Applicant contended that:
* He commenced employment with the Respondent on 4 May 2009 working four days a week for five hours each day;
* He was terminated by Mr Dorsey on 6 May 2016 due to a shortage of work;
* He was employed to enter data and not to undertake managerial duties;
* For the last 11 months of his employment he had only worked two full days per week, that his computer was not password protected, and therefore others within the business would have been able to access all of the information on his computer;
* He was not surprised to have lost his job due to lack of work, given that his hours had been reduced in June 2015;
* Mr Dorsey had changed the reason for termination to one of misconduct and had attempted to reduce Mr Boutcher’s length of service to avoid having to pay pro-rata long service leave.

***The Respondent***

1. Mr Dorsey, for the Respondent, asserted that:
* Workforce Development Pty Ltd is in financial difficulty and was so before he terminated the Applicant;
* The Applicant had all of the information that had been requested from him but he had chosen not to provide it;
* There were issues with the Applicant’s paperwork that was submitted to Skills Tasmania and this meant delays in payments to the Respondent;
* The Applicant had not completed seven continuous years of service, as all of the Respondent’s information showed that Mr Boutcher commenced employment on 8 May 2009;
* The actions of the Applicant have hurt the business and he should have terminated the Applicant one year earlier.

**Consideration**

1. In reviewing the actions of the parties it is particularly important to consider the real date of the commencement of the Applicant’s employment and the actual reason for termination.
2. In referring the dispute to the Commission on 17 November 2016 the Director of WorkSafe Tasmania, Mr Cocker, sets out in his ‘Summary’ that Mr Boutcher’s claim was for an entitlement under s8(2)(b) and s8(3)(d) of the Act, in that he was continuously employed for a period of seven years and was terminated by his employer for a reason other than for serious and wilful misconduct.

***Commencement of employment***

1. In order for an employee to be entitled to pro-rata LSL, they must establish that they have completed seven years’ continuous employment with their employer, pursuant to s8(2)(b) of the LSL Act.
2. Having considered the evidence of both parties, that is the oral evidence of Mr Boutcher and Mr Dorsey, the pay slip for the pay period to 10 May 2009 and the bank statement of Mr Boutcher showing the receipt of wages from the Respondent for the relevant pay period, I have determined, on the balance on probabilities, that Mr Boutcher was employed on 4 May 2009. He then undertook four days of work for the Respondent, and the payment processed on 8 May 2009 was for wages for the work undertaken between 4 and 8 May 2009.
3. I do not accept that the date of completion of the Tax File Number notification form by Mr Boutcher should be the preferred date of the commencement of employment. Whilst Mr Dorsey gave evidence that the electronic records of the Respondent provided that 8 May 2009 was the commencement of Mr Boutcher’s employment, Mr Dorsey provided no verification of this via documentation. Accordingly, for the reasons given above, the evidence of the Applicant is to be preferred.

***Period of continuous service***

1. As I have determined that the Applicant’s employment commenced on 4 May 2009 and it is common ground that he was terminated on 6 May 2016, Mr Boutcher has established that his period of continuous service with the Respondent totalled seven years and two days.
2. Accordingly, Mr Boutcher fulfills the criterion established under s8(2)(b) of the LSL Act, that is, he completed 7 years, but did not complete 10 years, continuous employment with his employer.
3. In my opinion, the Applicant was terminated on 7 May 2016 as a result of the text message from Mr Dorsey as this is the first notification he had that his employment had come to an end. As the Applicant would have established seven years continuous service on 3 May 2016, nothing turns on this point.

***Reason for Termination***

1. I now turn next to consider the s8(3)(d) criterion, that is, that was the Applicant was terminated for a reason which would preclude him from being entitled to pro-rata LSL. Under s8(3)(d) of the LSL Act, the only reason for termination that would preclude an employee’s entitlement to pro-rata LSL is that of “serious and wilful misconduct”.
2. In the Applicant’s submissions the Applicant asserted Mr Dorsey as incorrectly describing the termination of his employment for a reason which was not given at the time of the termination. I concur with this submission.
3. Mr Dorsey provided his evidence in an exchange with me at hearing which evinced that at the time of terminating the Applicant, Mr Dorsey was not aware of any issue of the Applicant suppressing information. If in deed the Applicant suppressed information, and there is no supporting evidence before me to suggest that he did, this could not have formed the reason for termination on 6 May 2016, as Mr Dorsey was not aware of this until after he effected the termination.
4. It is relevant that the reason given by Mr Dorsey at the time of termination of the Applicant’s employment, and which was provided in writing and in a considered way, was for economic reasons.
5. The text message sent to the Applicant on 29 April 2016 from Mr Dorsey clearly indicates that the termination of his employment was due to economic conditions and a need to reduce staff. As this was the reason contemporaneously given at the time of termination and on the Separation Certificate, it is to be preferred to other reasons given subsequent to the claim for LSL, which were said to relate to performance and misconduct.

***Serious and Wilful Misconduct***

1. It is relevant that the combined effect of s8(2)(b) and s8(3)(d) of the Act is to limit the scope of employees that have been terminated that are eligible to receive their pro rata long service leave entitlement, by excluding those terminated for serious and wilful misconduct.
2. Section 8(3)(d) involves a conjunctive exclusion in that an employee terminated for serious and wilful misconduct will not be entitled to pro-rata LSL if the Commission makes findings that, having considered all of the evidence at hearing, the Applicant had misconducted themselves in a serious and wilful manner.
3. For the reasons given above I am satisfied that Mr Boutcher was terminated from his employment with Workforce Development Pty Ltd for economic reasons and because the business needed to reduce staff.

**Conclusion**

1. I have determined that the dispute raised by the Applicant on 27 May 2016 and which was referred to this Commission by the Secretary of Justice between Robert Douglas Boutcher and Workforce Development Pty Ltd in relation to pro-rata long service leave should be resolved by the Commission's determination that s8(2)(b) of the Act applies to Mr Boutcher, and s8(3)(d) also has application to the Applicant because the termination of his employment is found to be for a reason other than for serious and wilful misconduct.
2. I therefore propose to make a s13(3) Order that a payment be made of the pro ration of Mr Boutcher’s service in the amount of $2,004.42, that being the detailed calculation provided to the President of the Commission by Mr Cocker in his reference of the dispute (the Report) on 17 November 2016.

**ORDER**

1. Pursuant to s13(3) of the *Long Service Leave Act* 1976, I order that Workforce Development Pty Ltd (ABN 51 009 561 602), pay Mr Robert Douglas Boutcher the sum of $2,004.42 being the pro rata long service leave due to him under the above Act within 21 days of this Order issuing.

**DEPUTY PRESIDENT**

***Appearances:***

*Mr R Boutcher,* the Applicant

*Mr K Dorsey,* for the Respondent

***Date and place of hearing:***

2017

24 February

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1. Exhibit A1 – Witness statement of Robert Boutcher, paragraph 1 [↑](#footnote-ref-1)
2. Exhibit WS1 – WorkSafe Tasmania Report dated 27 September 2016 [↑](#footnote-ref-2)
3. Exhibit A1 [↑](#footnote-ref-3)
4. Exhibit R1 – Witness Statement of Kenneth Dorsey [↑](#footnote-ref-4)
5. Exhibit A1, attachment 4, payslip showing pay date of 10/05/2009 [↑](#footnote-ref-5)
6. Exhibit A1, attachment 5, bank statement for period 11/11/2008 to 05/06/2009 [↑](#footnote-ref-6)
7. Exhibit A1, attachment 4 [↑](#footnote-ref-7)
8. Transcript – Mr Dorsey, page 16 line 38 [↑](#footnote-ref-8)
9. Transcript – Mr Dorsey, page 19 - 21 [↑](#footnote-ref-9)
10. Exhibit R1, paragraph 4 [↑](#footnote-ref-10)
11. Exhibit A1, attachment and Transcript – Mr Dorsey, page 19 line 1 to13 [↑](#footnote-ref-11)