**TASMANIAN INDUSTRIAL COMMISSION**

***Long Service Leave Act* 1976**

s.13(2) application for hearing of a Long Service Leave dispute

**Stacey Lee Brown**

(T14424 of 2016)

**and**

**Steven Bolter as Trustee for the S & L Bolter Family Trust T/A Kols Cleaning Services**

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| COMMISSIONER M A GAY | HOBART, 30 January 2017 |

***Long Service Leave Act* 1976 – operation of s.8(2) and (3) – pro rata leave when employment terminated for serious and wilful misconduct – such serious and wilful misconduct contested – claimed estoppel consequent upon Deed agreed in Fair Work Commission conciliation – effect of s.8(3)(d) of the *Long Service Leave Act* 1976, serious and wilful misconduct – lawful direction of employer – finding re conduct within s.8 (3)(d) – order issued**

**DECISION**

1. This matter concerns an application made by Stacey Lee Brown (the Applicant) pursuant to s.13(1) of the *Long Service Leave Act* 1976 (the 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.*”

**The Background**

1. The Applicant had been engaged as a Cleaning Services Employee by Kols Cleaning Services (the Respondent, the Employer) from 8 September 2006 until her employment was terminated on 17 August 2015. Ms Brown was employed on a permanent, part-time basis working 23.4 hours per week and at the time of her termination was earning $24.00 per hour.
2. The Applicant worked with a workmate, Ms Cindy Corbett, whose work difficulties seemed to almost mirror those of the Applicant. It seems that Ms Corbett’s employment was also terminated, but those circumstances played significant no role in this case.
3. On 1 July 2013 Mr Stephen Bolter (the Respondent) commenced ownership of Kols Cleaning Services as trustee for the S & L Bolter Family Trust. Following allegations of workplace bullying by Mr Bolter and Ms Tobler, a supervisor, Ms Brown lodged a Workers Compensation Claim and from 2 March 2015 ceased performing her cleaning duties. This position obtained, that is, with the Applicant not at work but remaining in employment, until her employment concluded on 17 August 2015.

**The Department of Justice Investigation**

1. On 2 December 2015 the Applicant submitted a ‘Record of Complaint’ to the Secretary of the Department of Justice (the Department) as provided for in s.13 (1). That Complaint set out aspects of Ms Brown’s employment which will be further considered below and the Complaint was the subject of investigation in the regular fashion by WorkSafe Tasmania, the instrument of the Department charged with the responsibility of ‘review and report’ to the Secretary.
2. In the possession of the parties and appearing in the Commission’s file in T14424 of 2016 are copies of the Investigation then sought to be conducted by an Inspector, Mr P Kitchener, who, as an inspector under the *Industrial Relations Act* 1984, was also an inspector for the purposes of the Act (see s.4 (1)).
3. Following receipt of relevant material from the parties, Mr Kitchener wrote on 9 February 2016 to the Trustee of the S & L Bolter Family Trust setting out the essential facts of Ms Brown’s service with Kols Cleaning Services and the role of WorkSafe in endeavouring to resolve the dispute. Mr Kitchener set out an example of the long service leave calculation which might well constitute payment of Ms Brown’s entitlement. This reflected the Applicant’s service of 8.94182 years resulting in a pro rata entitlement under the Act of 7.74958 weeks pay at Ms Brown’s ordinary pat rate of $561.60 per week resulting in a payment, according to the example, of $4352.16.
4. The Respondent was advised, inter alia, that if the Respondent wished to resolve the matter such attempt should be made within the following 14 days and, further, that should any assistance or information be required of WorkSafe that contact could be made.
5. Subsequently Mr M Cocker, the Director of Industry Safety of WorkSafe Tasmania, referred the unresolved dispute to the President of the Tasmanian Industrial Commission pursuant to s.13 of the Act, providing a copy of Mr Kitchener’s report, which included the advice that “*Kols Cleaning Service have not responded to my letter of 9 February 2016*.”
6. The Report in its Summary set out the Applicant’s claim for a Long Service Leave entitlement pursuant to s.8 (2)(b) of the Act on completion of seven years continuous employment with Kols Cleaning Services and, further, that under s.8 (3)(d) the Applicant had been terminated by the employer for a reason other than the serious and wilful misconduct of the Applicant. The Summary also alluded to the reason given at the time of termination to Ms Brown by the Respondent as being for serious misconduct.
7. The Respondent, in its 29 January 2016 letter to Mr Kitchener, enclosed a copy of Ms Brown’s termination letter of 17 August 2015, commenting, “*Letter (sic) also provides information as to why Ms Brown’s employment contract was terminated*.” Mr Bolter’s 17 August letter recounts aspects of the events which will be set out below in some detail and advises Ms Brown that failing to comply with the employer’s lawful and reasonable direction was “*a serious matter and constitutes serious misconduct*” and further, *“…I hereby advise that your employment has been terminated, effectively immediately, for serious misconduct.*”

**The Allegation of Bullying**

1. On 7 October 2014 a complaint was lodged with the Respondent alleging bullying by Ms Brown’s supervisor, Ms Joanna Tobler. Mr Bolter’s witness statement sets out that Ms Brown and Ms Corbett, “*usually work together either at my request, due to the nature of the cleaning job involved, or of their own choosing.*” (Exhibit Cameron 2, Witness Statement of Stephen Bolter, paragraph 6.) While it has not been necessary for me to consider the position of Ms Corbett, and nor was any great note placed upon the parallel disputation of Ms Corbett in the submissions of either party, the fact of the joint position of the co-workers is noted.
2. An investigation into the allegations which included Ms Brown, Ms Corbett, other employees and clients, was conducted by Mr Bolter. Mr Bolter’s investigation concluded that the allegations were not substantiated.
3. A further complaint was made in writing on 16 February 2015 by Ms Brown claiming that again she had been bullied by Ms Tobler. According to Mr Bolter’s statement he instructed “an independent party” to conduct an investigation into Ms Brown’s claims. (Exhibit Cameron 2, paragraph 12) Ms Brown’s subsequent absence from the workplace on leave and then as part of a claimed Workers Compensation related sickness meant the investigation was unable to proceed.

**The Events of 2 March 2015**

1. There are differing accounts of the meeting of this date between Ms Brown (and Ms Corbett) which occurred upon the resumption of Ms Brown from annual leave. While considerable detail is given in the competing accounts, not all need to be recounted here.
2. In short summary it was Ms Brown’s case that Mr Bolter was critical of her work performance and advised that the workload was to change. It was said that Mr Bolter was loud, angry and that he threw or thrust a large bunch of keys at Ms Brown (and Ms Corbett). Mr Bolter denied such behaviour. (Exhibit Cameron 2, Mr Bolter’s Witness Statement, paragraph 15)
3. The upshot was that contact was made late in the working day by an official of Ms Brown’s union, United Voice. Shortly thereafter Mr Bolter was advised that both Ms Brown and her workmate were planning to visit the doctor the following day.
4. In the Applicant’s account the bullying and harassment she had suffered from Ms Tobler and Mr Bolter led to her becoming

“…*quite ill and I experienced depression and anxiety for several months. I have Dr’s and Phycologist* (sic) *reports confirming this. Following advice from my Doctor Kathryn Roberts I commenced a period of workers compensation leave from the 6 March 2015 until the 4 June 2015.I was then on annual leave from the 5 June 2015 to 5 July 2015 and then sick leave from the 6 July 2015 until the 21 August 2015. (Although I was terminated on the 17 August 2015).All the while I was on leave, I was in receipt of medical certificates certifying me unfit for work*.” (Ms Brown’s Witness Statement, Exhibit B7)

1. Subsequently in March 2015 Ms Brown lodged her workers compensation claim as to which in the Respondent’s account the Chief Commissioner of the Workers Rehabilitation and Compensation Tribunal “*determined that there was a genuine dispute and the weekly payments to Ms Brown ceased*.” (Exhibit Cameron 3, paragraph 21)

**The August 2015 Correspondence and Its Consequences**

1. There then occurred a series of events, including exchanges of email correspondence, involving Mr Bolter and Ms Brown which led to the termination of Ms Brown’s employment for serious misconduct. It is the Respondent’s case that the serious misconduct engaged in by Ms Brown means that the effect of s.8 (3)(b) of the Act is to disentitle Ms Brown from receiving the pro ration of her long service leave. To follow the subsequent arguments it is necessary to outline the sequence of events, particularly as to the parties’ correspondence.

**4 August**

1. Mr Bolter wrote to Ms Brown on Tuesday, 4 August 2015 noting/advising;
	* 1. -that the Applicant had been “*unable to perform your normal duties for some time due to your illness…*” (Exhibit B7, Ms Brown’s Witness Statement, Attachment A, paragraph 1)
		2. -that medical certificates already received “*clearly indicate*” that Ms Brown will be unable to resume her full duties in the near future. (Exhibit B7, Attachment A, paragraph 2) but that,
		3. -“*If this is not the case and you can provide us with clear medical evidence*” that “*you can return to full duties in the near future we ask that you do so by 12 o’clock, Monday 10th August 2015*.”

-that should Ms Brown not be able to do so and given that there were no other jobs suitable, Kols Cleaning Services would “*accept that the contract of employment is frustrated and look to bring it to an end. If this is the case you will be paid your entitlements to that date. A breakdown of your entitlements is attached.*” (Exhibit B7, Attachment A, paragraph 3)

-that should Ms Brown wish to discuss the matter, before ‘that date’, an appointment (with a support person) could be arranged.

-that in the event of a resumption of duty, operational requirements and contract changes meant that changes in job locations would occur and Ms Brown’s hours may be reduced. (Exhibit B7, Attachment A, paragraph 5) Ms Brown was asked in this connection, “*to meet with me as soon as possible*” to permit Ms Brown “*to have the opportunity to come up with any alternatives to your current hours being reduced.”*

-that as “*this is a matter that may impact upon your future employment*,”…Ms Brown might bring a support person and further that no final decisions had yet been made and would not be made “*until you have had an opportunity to discuss these matters with us.*” (Exhibit B7, Attachment A, paragraph 7 - there being no paragraph 6)

1. The letter concluded with the advice that, in the event that Ms Brown’s position was to be changed, “*then you will be paid in accordance with the attached calculations*.” (Exhibit B7, Attachment A, paragraph 8)
2. The calculations set out in Ms Brown’s Annual Leave and Long Service Leave entitlements providing a figure for the “Total NET Payable” (incorrectly added) of $6842.93 and “TOTAL Gross Pay” of $4636.93. (One notes that it is very likely that these descriptors have been inadvertently transposed.)
3. Also set out on the same page, under the heading ‘PARTIAL REDUNDANCY’, was the following;

Stacey Brown

Start date: 8 September 2006

Length of Service: 8 years 10 months

Change in hours: Current: 23.40 per week

Proposed: 10.00 per week

Change: 13.40 per week

Redundancy Calculation:

16 weeks x 13.40 hours per week x $24.00 per hour = $4180.80

(It may be that this amount is given as the NET figure.)

**The 7 August 2015 Letter**

1. When Ms Brown requested an extension of the time by which she had to respond to the correspondence of 4 August (in which a reply was sought by noon on Monday, 10 August) the request was denied and Mr Bolter wrote a further letter to Ms Brown. The letter of 7 August referred to the 4 August letter, noted that an ‘Independent Medical Assessment’ had indicated that she was fit for normal duties while acknowledging that Ms Brown’s GP indicated otherwise.
2. Mr Bolter’s 7 August letter went on to indicate that it was a reasonable instruction from an employer and that failure to comply constituted serious misconduct under the Fair Work Regulations and justified summary dismissal. In requesting that the medical information be provided in the time frame provided, the letter concluded by advising that, “*Failure to do so will mean that as an employer I will act on the information available to me*.” (Exhibit B7, Attachment B)
3. Later on 7 August, Mr Bolter was contacted by email from a United Voice officer, Ms C Miller, requesting that the ‘deadline’ be extended until Friday, 14 August 2015. In requesting an extension of time to permit Ms Brown (and Ms Corbett) to meet their advisers, Ms Miller’s email advised that the deadline was too tight, writing, *“This was not sufficient time for Cindy and Stacey to meet with their respective doctors and solicitors and to consider the proposal in the light of advice given. They have sought to schedule urgent appointments and still can’t be scheduled until after…*” Mr Bolter agreed to the extension in an email of 11 August. (Exhibit Cameron 2, Witness Statement of Mr Bolter, Attachment D)
4. Mr Bolter’s Witness Statement puts Ms Miller’s email in rather a different light, saying; “*I agreed and extended the time for Ms Brown to provide the medical information until Friday, 14 August 2015. This indicated that the employee was intending to ask her medical practitioner for the information and relevant certificate. No mention was made by the union that I should obtain the medical certificate.*” (Exhibit Cameron 2, Mr Bolter’s Witness Statement, paragraph 25)

**Ms Brown’s First Letter of 13 August 2015**

1. This is the backdrop to Ms Brown writing in the following terms to Mr Bolter on Thursday, 13 August 2015.

*“Mr Steve Bolter*

*Director Kols Cleaning Services*

*PO Box 238, Mowbray TAS 7248*

*Dear Steve*

***Re: Your Continued Absence from Work letter dated 4th August, 2015***

*You have asked me to collect medical evidence from my GP stating a return date to work but I have been informed that you, Steve Bolter, must obtain the medical evidence yourself. You have my doctors’ practice on my medical certificate.*

*Yours Sincerely*

*Stacey Brown”*

1. Ms Brown’s evidence was that “*I was unable to provide this due to my ill health and I requested that Mr Bolter contact my treating practitioner, Dr Kathryn Roberts, directly to get a medical report, as I have been advised by my doctor that this is the normal practice under the circumstances.*” (Exhibit B7, Ms Brown’s Witness Statement, paragraph 13)
2. Mr Bolter’s evidence was that “*On Thursday, 13 August 2015 I received a letter from Ms Brown stating that she was not providing the medical information and that I had to contact the treating Doctor to discuss their condition. I subsequently contacted the doctor’s office and confirmed my understanding that the Doctor would not discuss their patient’s condition.*” (Exhibit Cameron 2, Mr Bolter’s Witness Statement, paragraph 26)
3. In relation to Mr Bolter’s assertion as to contacting the office of Dr Roberts, Ms Brown provided a ‘Medical Certificate’ on the letterhead of the West Tamar Health practice of Dr Kathryn Roberts and signed by Dr Roberts attesting that there had been no such contact.

**Ms Brown’s Second Letter of 13 August 2015**

1. Ms Brown’s second letter of 13 August set out a series of responses to that of Mr Bolter of 4 August. The Applicant’s letter;
	* 1. -welcomed that of Mr Bolter and expressed Ms Brown’s belief that there could be a ‘mutually beneficial arrangement’;
		2. -indicated that the Respondent’s letter had contained errors as to her entitlements which Ms Brown had corrected using her 9 August 2015 payslip;
		3. -expressed appreciation of the partial redundancy offer, but expressed the view that a fairer way to calculate the redundancy would be to use the Applicant’s standard hours ‘over many years’ (23.40 hours per week) rather than ‘future changed hours’.

-expressed a preparedness to sign an Employment Termination offer which included one month’s notice as this “*more realistically reflects my long standing service of 9 years.*” (Exhibit Cameron 2, Witness Statement of Mr Bolter)

1. Ms Brown’s second 13 August letter contained an Appendix B which set out the calculations upon which her proposed ‘Employment Termination offer’ rested. Included were the corrected entitlement figures (Annual Leave, Leave Loading and Long Service Leave) amounting to $6536.65. Additional to this was a redundancy calculation based on Ms Brown’s earnings of some $561.60 per week and applying a redundancy formula of 2.88 weeks pay per year of service. It may be usefully noted that Mr Bolter had arrived at his ‘partial redundancy’ package on the basis of 16 weeks pay calculated according to the number of hours Ms Brown was foreshadowed to lose per week i.e. 13.40 hours. Expressed as a redundancy payment per year of service, Mr Bolter’s proposal amounted to a payment of $464.53 per year of service, or expressed as is usually the case, as a factor of weeks pay, represented a payment of 0.827 of a week’s pay per year of service.
2. The final correspondence in this chain is that of Ms Brown to Mr Bolter of 4 September 2015. In that letter the Applicant puts to Mr Bolter that her failure to provide medical evidence by the stipulated dated (wrongly given in Ms Brown’s letter as 10 August rather than the extended date of 12 noon on 14 August 2015) is misguidedly considered by the Respondent to be serious misconduct.
3. This position was explained in the following way:

“I think has been a misunderstanding regarding what you believe to be *serious misconduct* for not providing medical evidence advising you by the 10th August that I could return to full duties. You have used this failure to supply further medical evidence as grounds for instant dismissal.

To clarify, in your letter of 4th August, you Clause 2 is correct. As I was **not** returning to full duties in the near future there was no need to provide any further medical evidence other than my existing medical certificate (as my GP cannot falsify a report to avoid a ‘serious misconduct’ action). It is clear in your Clause 3, that if no medical clearance was forwarded you would **accept** the contract of employment as *frustrated* and pay my entitlements plus your offer a partial redundancy i.e. I did not have to provide medical evidence **unless** I could return to work in the near future. You did not mention that failure to produce a medical clearance, or otherwise, would be a breach of a *reasonable and lawful instruction,* thus, I cannot understand how you can conclude that *serious misconduct* has, indeed, occurred”

**The Evidence**

1. Evidence was given by Ms Brown, Mr Bolter and Ms Tobler. With few exceptions the evidence was consistent with the witness statements and cross examination brief. There was some elucidation. Mr Bolter’s evidence was that he had contacted Ms Brown’s doctor’s rooms, but was told by a receptionist or nurse that private patient information would not be divulged. It was clear from Mr Bolter’s evidence that he regarded Ms Brown’s letter advising that he, the employer, ‘must’ contact the doctor to be wrong and insolent.
2. Ms Brown assured that her doctor, Dr Grayson, had advised “that Mr Bolter had to ring himself” (Transcript P42 lines 25/6) and, “I did ask my doctor and she said that again if Mr Bolter wanted the information he had to contact her directly.” (Transcript, P41, lines 43/4)

**The Submissions**

1. While the parties had provided written submissions consistent with the Directions issued by then Acting President Wells of 6 September 2016, it was agreed that these might be supplemented by further written submissions. Mr Cameron’s supplementary submissions were filed on Thursday, 17 November 2016, and Mr Austin-Stone’s submissions in reply on 24 November.

**The Applicant’s Case**

1. Written submissions for the Applicant contended that;
	* 1. -at the Fair Work Commission conciliation conducted by Lee C on 5 November 2015 it had been agreed that the ground of termination of Ms Brown “for serious misconduct would be withdrawn and that my employment would cease on the basis that I resigned from my employment effective from the 17 August 2015 for health reasons.” (Written outline of Submissions, paragraph 5)
		2. -while the instrument of termination (Mr Bolter’s letter of 17 August 2015, Exhibit B2, Attachment D) purported to dismiss the Applicant for ‘Serious Misconduct’ and it was never claimed by the Respondent that Ms Brown had been guilty of serious and wilful misconduct (a different and more serious ground) the Employer’s response to the application relied on the ground for termination being for serious *and* wilful misconduct.
		3. -this more serious ground, of serious and wilful misconduct, was said to be advanced in order to meet the Act’s exception to the grant of pro rata long service leave set out at s.8 (3)(d).

-it was unconscionable to now give a reason for termination which was not given at the time of termination.

-the Respondent’s reasoning was inconsistent when compared with the Employer’s actual practices, as the Applicant’s co-worker, Ms Corbett, whose termination application on substantially identical terms was dealt with in the same conference proceedings before Lee C and Ms Corbett had had her long service leave paid.

-the ‘carve out’ in the Deed of Release was being sought to be incorrectly applied by the Respondent. It was further put that there can be no contracting out of the terms of the Act and that s.5.1 of the Deed, Explaining the Termination, was not being applied by the Respondent. This was because the Employer was not making it clear that the employment was terminated by the Applicant’s resignation.

**The Estoppel**

1. Considerable time was given to the question whether any form of estoppel, ‘issue’ or otherwise now applied. It was put for the Applicant that;

“*It is settled authority that the doctrine of issue estoppel arises where an issue in the course of an action, has already been decided in a previous action. This doctrine prevents the Respondent from claiming that the issue in dispute now (i.e. how I was terminated), has not already been resolved by a competent Australian tribunal in earlier proceedings.”* (Exhibit B2, Applicant’s Outline of Submissions, Paragraph 19)

1. It was submitted further that during the conciliation proceedings conducted by Lee C in the federal Commission agreement was reached which had the effect of the Respondent withdrawing Ms Brown’s termination for serious misconduct with the amended, agreed basis for her employment concluding being by resignation, effective from 17 August. It was contended in Ms Brown’s written submissions that the agreed resignation included the descriptor, “for health reasons”.
2. The estoppel argument was put as to mean that Kols Cleaning was “estopped by law from having to force me to re-litigate an issue which I have already been to mediation on and which has already been determined in a competent tribunal i.e. the Fair Work Commission, at mediation.” (Exhibit B2, Applicant’s Outline of Submissions, paragraph 21)
3. Ongoing ‘re-litigation’ was said to be now impossible as the limitation for making such applications had passed. (Exhibit B2, Applicant’s Outline of Submissions, Paragraph 22)

**The Submission of the Respondent**

1. In setting out the chronology of events and the reasonableness of its actions, the Respondent’s submission was that the 4 August letter of Mr Bolter to Ms Brown *“…directed the Applicant to advise if and when she may be able to return to work. This was a lawful and reasonable direction from the Respondent as employer*.” (Exhibit Cameron 3, Respondent’s Written Submission, Paragraph 10)
2. Several cases were relied upon to establish that it was reasonable for an employer to require an employee to furnish medical evidence establishing the employee’s continuing fitness to perform their duties. (see, *Blackadder v Ramsey Butchering Services Pty Limited* [2002] FCA 603, paragraph 68 per Madgwick J and *Australian and International Pilots Association v Qantas Airways Ltd* [2014] FCA 32 paragraph 64, per Rares J)
3. It was said that the 4 August letter reflected the Respondent’s entitlement to make such a request, to order its affairs, as Ms Brown had been absent for over five months and “*that the medical evidence available from her GP indicated that the Applicant may never return to work .”* (Exhibit Cameron 3, Respondent’s Written Submission, Paragraph 10)
4. The portended changes alluded to in the Respondent’s 4 August letter, to the location of cleaning jobs, as to reduced hours and that these changes would be discussed with the Applicant was also said to be not unreasonable.
5. The importance was stressed of Mr Bolter’s 7 August letter putting Ms Brown on notice that refusing a reasonable instruction from the employer constituted serious misconduct under the Fair Work Regulations and justified summary dismissal. (Exhibit Cameron 3, Paragraph 15)
6. It was submitted that by Ms Brown “failing to accept a lawful and reasonable direction from management and acting contrary to that direction was wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment.” (Exhibit Cameron 3, Paragraph 18)
7. Particular emphasis was placed on Ms Brown having been guilty of disobeying a lawful order. This is reflected in that a passage from the decision of the High Court in *Adami v Maison de Luxe Limited (Adami)* (1924) 35 CLR 143, per Gavan Duffy and Starke JJ, being twice set out in the Respondent’s submissions. (Exhibit Cameron 3, Paragraphs 21 and 44) The passage reads as follows:

“*Consequently we reach the position that the company gave a lawful order to the plaintiff which for his own purposes he deliberately and intentionally disobeyed. It was the plaintiff’s duty under his contract with the company to obey its lawful orders and directions, and he therefore broke his contract.”*

1. It was put that the Applicant had been warned of the possible consequences of not complying with the Respondent’s directions and that she had deliberately ‘disobeyed’ the lawful order.
2. It was submitted by the Respondent that by the union seeking an extension of time in the deadline given (to permit the Applicant to see her doctor) indicated that the Applicant was seeking the medical certificate requested.
3. Ms Brown’s 13 August letter to Mr Bolter advising that she had been informed that Mr Bolter had to “obtain the medical evidence yourself”, in the Respondent’s view put Ms Brown beyond the pale. (Exhibit Cameron 3, Paragraph 27) This was so because the disobedience was wilful and deliberate behaviour, reflecting a repudiation of the employment contract by not following a reasonable and lawful direction.
4. In acknowledging that the Respondent had not invoked the term ‘wilful’ in the dismissal charge, it remaining as serious misconduct, the Respondent called up the ‘bewildering array’ of statutory obligations so that, “*To comply with one through use of specific terminology does not mean that the employer has not complied with another just because different words are used.*” (Exhibit Cameron 3, Paragraph 34)
5. Having repudiated the contract of employment by such an act of disobedience the employer was entitled to accept the repudiation. (Exhibit Cameron 3, Paragraph 39)
6. As to the settlement reached before Lee C, it was argued that it was not agreed that Ms Brown’s resignation was for health reasons and, furthermore, this is not to be found in the Deed of Release. It was emphasised that while all claims were settled by the Deed there was an exclusion as to “*any claim you may have in respect to long service leave*.” (Deed of Release, quoted in Exhibit Cameron 3, Part B, Paragraph 5)
7. The wilful element in Ms Brown’s actions was described as her deliberate act, where compulsion, ignorance or accident cannot be said to be an excuse. “*The actions of the Applicant were wilful in that her refusal to carry out the reasonable instructions of the Respondent were deliberate and not accidental. After having her union seek an extension of time in which to provide the medical certificate she then told the employee she refused to do so and told the employer to do so itself*.” (Exhibit Cameron 3, Paragraph 10)
8. The charge of unconscionability levelled against the Respondent for not complying with the Deed (and representing the conclusion of the employment coming about by resignation) was met by the assertion that the Applicant was not entitled to a long service leave payment by statute. (Exhibit Cameron 3, Paragraph 11)
9. As to inconsistency between the treatment accorded Ms Brown and Ms Corbett, it was put that as Ms Corbett had over 10 years’ service the provisions of s.8(3)(d) were not applicable. (Exhibit Cameron 3, Paragraph 12)
10. In response to the argument of issue estoppel the Respondent replied that there had not been a judicial determination by a court or a determination by a tribunal. No relevant determination was made by the federal Commission and, rather, the issue as to long service leave was left open, to be contested and determined by the relevant tribunal. (Exhibit Cameron 3, pages 16 and 17)
11. In relation to the Deed, it was put by the Respondent that, bearing in mind the jurisdictional incapacity of the federal Commission to deal with a dispute as to an entitlement to long service leave under the Act, the fact that such a claim was left open to be made by the Applicant meant that so it was also open to the Respondent to contest the claim before this Commission.
12. It was further put (as an alternative argument as to an estoppel operating) that in this case there were ‘special circumstances’ which can have the effect of denying the estoppel. (References here omitted) The special circumstances were said to be that “the deed of settlement was negotiated in another jurisdiction to resolve an unrelated matter, and that the long service leave was specifically excluded from the deed of settlement on the basis that it would be argued on its merit in a jurisdiction with relevant authority.” (Exhibit Cameron 3, Page 21, Paragraph 22)
13. The Respondent repudiated the suggestion that it had agreed to include in the settlement a suggestion that the employment concluded for medical reasons or on health grounds. (In a byway of the case relating to this latter point, the materials filed reflect that the parties were successful in having Lee C agree to them jointly reviewing the Commissioner’s notes of the case, in the company of the Commissioner’s Associate. I was advised that no such notation was found.) Ms Brown was criticised for having put forward this wrong depiction.

**Supplementary Submissions of the Respondent filed 17 November 2016**

1. It was agreed that as certain matters had been raised during the hearing, written replies would be filed. Consistent with this approach, the Respondent filed further submissions on 17 November 2016.
2. As to T5468, *Spencer v Hawkins & Daly*, per Imlach C, 5 June, 1995, it was put that the present matter was distinguishable as in that case the Applicant had actually resigned their employment. In that case Imlach C was faced with a situation of the Applicant’s doctor advising/recommending that due to illness the employee cease working.
3. The letter of 24 November 2015 (Exhibit B1) from Dr Roberts, Ms Brown’s treating GP was, it was emphasised, not that Ms Brown should resign, but rather, that over the periods indicated, Ms Brown was not able to return to work.
4. Similarly, the handwritten note of 22 August on Clinical Psychologist Helen Bindoff’s ‘With Compliments’ slip, speaks of ‘the long delay’ in resolving the long service leave claim having taken a toll on the Applicant, so that in addition to a pharmacological consequence not here recounted, she was not sleeping well, experiencing low moods and was not herself.
5. The Respondent submitted that this information did not go to the question of Ms Brown having to leave her employment and related to the period since the termination. To counter this medical information, the Respondent relied upon the earlier report of Kol’s Cleaning Service’s insurers consultant psychiatrist (attached to Exhibit Cameron 2), Dr Peter Miller. It was Dr Miller’s view, of 28 May 2015, that Ms Brown *“…does not have any incapacity for employment either with her current employer or with any future employer.*” (Supplementary Submissions, Page 3)
6. As to T6426 of 1996 (*F. A. Rowe v TSE Pty Ltd,* per Watling C. 7 October 1996) it was put that in that case also it was found there was no evidence from the employee’s medical advisers that the employee should resign. As to the circumstances of Ms Brown, there is no medical evidence that Ms Brown was advised, or the subject of a recommendation, that she should resign in the interests of her health.
7. It is not proposed to summarise the submissions as to the estoppel cases. They have all been considered. The essence of the Respondent’s case in this regard is that there has not been a tribunal, seized with the jurisdictional authority to do so, which has heard and determined the matter of the long service leave claimed. Rather, it is put that clearly the question of the claimed long service leave entitlement is a matter for the Commission.
8. It was contended by Mr Cameron, for the Respondent, that the Deed cannot be used to require the Respondent to ‘acknowledge’ before the Commission that the termination was in fact a resignation, “*as it was not the purpose of the deed*.” (Supplementary written submissions of the Respondent, Page 7, paragraph 5)
9. Finally, it was put that Ms Brown’s evidence could not be relied upon due to its untruths and misleading statements.

**The Supplementary Submissions of the Applicant, filed 24 November 2016**

1. These submissions restated the Applicant’s claims as falling under s.8 (2)(b) of the Act, i.e., a pro ration of the entitlement according to the given method of calculation. The basis for the claim was given as alternatively deriving from s.8 (3)(b) - being an employee “whose employment is terminated on account of illness of such a nature as to justify the termination, of that employment” and/or, further to s.8 (3)(c) the incapacity or domestic or other pressing necessity of such a nature as to justify the termination of the employment.
2. As to T5468/95, *Spencer v Hawkins & Daly*, the Applicant argued that, as in that case, the employer did not accept that a practitioner had recommended to Ms Brown that she resign.
3. It was argued that in this case the Respondent had not disproved Ms Brown’s evidence, to wit; “*I have advice from my Psychologist evidencing that this is the case, that I was not fit to work for the employer and that I could not continue worker* (sic) *for Mr Bolter for medical reasons*.” (Exhibit B7, Witness Statement of Ms Brown, Paragraph 24)
4. It was said by the Applicant that this position was supported by the Respondent’s correspondence of 7 August 2015 where it is noted by the employer that Ms Brown has been unable to perform her normal duties for some time. Dr Robert’s certificate to the effect that Ms Brown was not able to return to work and that this, coupled with Dr Robert’s assessment that Ms Brown’s condition was ongoing, constituted it was said, a recommendation that Ms Brown resign her position.
5. Ms Brown’s case as summarised in the final written submissions was that the Respondent had not ‘disproved’ the medical evidence provided by the Applicant (24 November 2016 Written Submissions), that the report of Dr Miller was prepared to a different purpose and months before the events of the termination.
6. A responsive submission was put in relation to the observations of Watling C in T6426 of 1996. In that case the Commissioner commented as to the s.(8)(3)(b) ground that, “*the absence of any recommendation from the doctor does not, of itself, disentitle Ms Rowe to pro rata long service leave on account of illness. But without such medical evidence the onus is on the applicant to establish that the alleged illness, required her to terminate her employment*.” (T6426 of 1996, p4)
7. In accepting that it is necessary for the Applicant to demonstrate that their illness required the employment to be terminated, it was said that the ‘medical evidence’ provided supported Ms Brown’s evidence as to her continued working and “the constructive recommendation” made by the practitioners for Ms Brown to resign from her position. There was also said to be a pressing necessity bearing on the Applicant to resign given that the Respondent had threatened to terminate the employment.
8. The Applicant also submitted that;
	* 1. -as Ms Brown was not fit to return to work she was unable to comply with the request from the employer for a medical certificate attesting to fitness for duty.
		2. -the pressing necessity to avoid an environment potentially harmful to her motivated her resignation.

-the Respondent ought not be permitted (through the *res judicata* doctrine) to ‘re-litigate’ the question of the Applicant’s dismissal.

-the Deed entered into by the parties “was intended to cease further litigation concerning all points which were the subject of the Applicant’s dismissal.” (24 November submissions, Paragraph 28, emphasis mine)

-the Commission does not have jurisdiction such as to “*re-hear or re-determine any question surrounding the Applicant’s workplace resignation, as the circumstances of the Applicant’s unfair dismissal claim falls squarely under the jurisdiction of the Fair Work Commission.*” (24 November submissions, Paragraph 42)

**Consideration**

1. As will be apparent from this detailed survey of the case, Ms Brown’s application was hard fought and the narrative which gave rise to the termination did not lack in complexity.
2. While it may not prove to be necessary to come to a concluded view on each of the submissions put, I have endeavoured to set out the arguments developed and the events around which the controversy occurred.
3. In reviewing the actions of the principal players from 4 August 2015, it is particularly important to appreciate what is actually contained within the chain of correspondence - rather than what has later been said to have been contained within the correspondence. It is for that reason that it has been set out above as a continuum of events. One notes in this respect that it is the Respondent’s pivotal 4 August 2015 letter to the Applicant which, in addition to dealing with Ms Brown’s medical capacity also introduces what is likely to occur (subject to discussion) should the Applicant be able to resume duty on mandatorily reduced hours. As part of the Respondent’s detailed letter, Mr Bolter sets out that Ms Brown would receive an ex gratia payment of some $4,180 - termed a ‘partial redundancy payment’.

**The Claim**

1. It should be noted that the basis for the application and for claiming relief under the Act has altered and expanded since the Applicant lodged her Record of Complaint on 2 December 2015.
2. In referring the dispute to the Commission on 13 August 2016 the Director of WorkSafe Tasmania, Mr Cocker, sets out in his ‘Summary’ that Ms Brown’s claim was for an entitlement under s.8(2)(b) and s.8(3)(d) of the Act, in that having a pro-rata entitlement, she was terminated by her employer for a reason other than serious and wilful misconduct.
3. In Ms Brown’s written outline of submissions (Exhibit B2) the ‘Grounds of Dispute’ are given as the incorrectly described termination, in that Ms Brown says it to be unconscionable for the basis of her termination to be given for a reason which was not given at the time of the termination. In Ms Brown’s Witness Statement (Exhibit B2) it is put, “*that subsection 3(b) or (c) applies in relation to my case…as the serious misconduct reason has now been retracted by my former employer by agreement at the mediation of the 5th November 2015.*” (Exhibit B2, Witness Statement of Ms Brown, Paragraph 20)
4. In the proceedings in the Commission Mr Austin-Stone for the Applicant, set out that Ms Brown had an entitlement under s.3(c) of the Act, “*as she terminated her employment on account of a pressing necessity with such necessity being her ill psychological health alongside other reasons*.” (Transcript Pages 4/5, lines 45/1) Those reasons are given as bullying at the workplace such as to aggravate the Applicant’s illness and that the employment relationship was irrevocably affected by the Respondent’s accusation of serious misconduct.
5. The Respondent, in acknowledging the varying bases of the claim, relied on the fact that Ms Brown’s employment was terminated for “*serious and wilful misconduct and that at no time, up to and to the termination itself, was there any resignation by the applicant or indication that her health was of such nature she couldn’t return to the workplace*.” (Transcript, Mr Cameron, page 8 lines 6/7)

**The Estoppel**

1. I will first consider the matter of the claimed estoppel. Without repeating the detailed arguments, it is said that, by the effect of the compact reached in the federal Commission before Lee C, the Respondent is unable to represent that the cause of the employment concluding was as a result of a termination at the initiative of the employer.
2. I am unable to accept that carrying out the function which I am obliged to perform pursuant to s.13(2) of the Act constitutes a ‘re-litigation’ of the question of the Applicant’s dismissal. There are a number of associated points necessarily to be made.
3. First, one must consider whether there has been a relevant ‘determination’ in the federal Commission. There was an agreement reached in private conference with the assistance of Lee C some days before the matter was to come on for hearing. I do not regard this as constituting, in any sense meaningful to me, the authoritative resolution of the matters put in issue by Ms Brown in her application in U2015/11532 - certainly in the sense of them being decided finally by the hearing of evidence and the application of reasoning and past wisdom. No submission was put that the case had been heard and determined in conference or ‘off the record’, as is possible under the Fair Work Act 2009 (see ss.397-399), or that evidence had been led. No submission was made to the effect that the Commissioner had made a decision on any of the disputed matters dividing the parties.
4. The Deed of Release put into evidence before me (Exhibit B2, Witness Statement of Ms Brown, Attachment ‘F’) reflects the matters having been agreed mutually, without admission of liability and contains no inkling that there had been, by way of judgement, a decision, adjudication or determination made by Lee C.
5. In my view if the matter had been ‘litigated’ to finality before Lee C, such that I should now not permit it to be ‘re-litigated’ by declining to further hear the case, there would be some instrument reflective of concluded litigation. Given that under s.601(1) of the Fair Work Act a decision of the sort here being considered must be in writing and be published as soon as practicable, (s.601(4)) I do not accept that there occurred in relation to Ms Brown’s application to the federal Commission such an exercise of the federal jurisdiction. I am fortified in coming to this view by appreciating that had any aspect of U2015/11532 been brought to decision, so that it can now be said to be concluded litigation, there would necessarily have been an opportunity of appeal under s.400 of the Fair Work Act. None of these indications of a decided matter were brought to notice. Relevantly the Deed acknowledges that Ms Brown releases the Respondent from any future claim - other than in relation to workers compensation, superannuation or long service leave.
6. Some emphasis was given by both parties to two estoppel cases, *Henderson v Henderson (Henderson)* (1843) 67ER313 and *Port of Melbourne Authority v Anshun Pty Ltd* (1981) HCA 45, so that it is appropriate to acknowledge and comment upon several of the key points argued.
7. It had been maintained that the doctrine of *res judicata* applied, as was said in *Henderson*, “*not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time*.” (*Henderson,* Page 319, as rendered in the Applicant’s written submissions of 24 November 2016, Paragraph 27)
8. The Respondent argued that the matter of the re-litigation of the basis for Ms Brown’s termination was not susceptible to estoppel because the Deed of Release was not an element or constituent feature of a determination made by a competent court or tribunal. In reply the argument was put that the Deed did form part of the ‘subject of litigation’, “as it was intended to cease further litigation concerning all points which were the subject of the Applicant’s dismissal.” (24 November submissions, Paragraph 28) The practical effect was said to be of estopping the Respondent from continuing to make “further representations that the Applicant was terminated for serious misconduct because, if the Respondent had been reasonable diligent, it would have continued to litigate the matter at that time, when it had the opportunity to do so.
9. The submission is misconceived for several related reasons. The first is the argument of the Respondent set out in paragraph immediately above is objectively the case; there being no formed opinion or pronounced judgement by a statutory body acting within jurisdiction. The next is that the Respondent’s denial of Ms Brown’s claim (or its capacity to deny the claim) is, in any event, unquestionably available to it, in my view, under the Deed’s reservations - as the corollary of the Applicant’s agreement therein, that the matter of long service leave lay entirely unaffected.
10. While the Deed operated as a function of the breadth of its Clause 2.1, to ensure that no further employment related actions could be taken (other than the reserved matters), it cannot be considered to operate so as to permit the long service leave action, but to deny the Respondent the opportunity of mounting a full defence to such an action, for example, as to s.8(3)(d). Other than the excepted areas the Deed was to operate as a total bar.
11. In my view, with an eye to Ms Brown’s future employment, the purposive, employment related Deed was drawn to ensure that, as the Deed frankly puts it, “*should anyone ask*”, the employer would make it clear that the employment concluded by resignation “*on the basis that you resigned your position and strictly refer to the statement of service.*” (Deed of Release Clause 5.1) This obligation in my view cannot operate to mean that in the present circumstances where s.8(3)(d) would otherwise have effect, that is, where the employment of an employee is terminated, ostensibly for serious and wilful misconduct, and a dispute over a matter within the scope of the Act arises, the employer is constrained.
12. In my view an obligation arises under the Act for parties to truthfully appraise the Commission of the factual narrative surrounding disputed employment or alleged ‘long’ service or its termination. Similarly, one notes the obligation for employers to disclose information relative to an employee’s long service leave record and to authorise Inspectors, such as Mr Kitchener, to require information to be furnished, including as to the reason for termination, under penalty as provided by s.20 of the Act.
13. Quite apart from the Deed’s affect upon those party to it, in my view the Commission when faced with a referred Dispute from the Secretary has a duty to make the necessary determination of fact under s.8(3). The Commission’s obligation under s.8(3) is entirely distinct from the determinations necessarily made under the employment protection provisions of the Fair Work Act. As is evident in the present case, each Act has its separate role - each to a quite different purpose.
14. For these reasons I have concluded that the Deed is wholly ineffective as to long service leave.

**S.8 Considered**

1. For reasons which will become clear, I turn next to consider the s.8(3)(d) ground, that is, that the Applicant was terminated as alleged in these proceedings, for serious and wilful misconduct. Should it be the Commission’s finding that s.8(3)(d) applies to Ms Brown, as an employee whose employment is terminated by their employer for any reason other than the serious and wilful misconduct of the employee, then her entitlement stands; she is not of an excluded class.
2. First, I have thought it significant that the reason given at the time by Mr Bolter for the termination of Ms Brown’s services, which it is appreciated were provided in a considered way in writing and after a period extending for over ten days and during which Mr Bolter was in receipt of advice from his industrial adviser (see Exhibit Cameron 2, Attachment D, Mr Bolter’s email of 12.16pm of 11 August 2015) was for ‘serious misconduct’.
3. The letter of termination of 17 August 2015 (Exhibit B7, Attachment D to Ms Brown’s Witness Statement) provides that Ms Brown’s failure to “*comply with a lawful and reasonable direction from your employer is a serious matter and constitutes serious misconduct.*” After commenting that it was obvious that the Applicant no longer felt bound by her contract of employment the letter continued, *“…I hereby advise that your employment has been terminated, effectively immediately*.” (Exhibit B7, Attachment D)
4. I am of the view that for the purposes of s.8(3)(d) there is a difference of substance between ‘serious misconduct’ and ‘serious and wilful misconduct’. In my view the latter form of misconduct by combining serious misconduct and wilful misconduct is a more serious sub-genus of misconduct than ‘mere’ serious misconduct and proportionally, being a more serious charge, requires to be made out, with both elements clearly established, the seriousness of the misconduct and its wilfulness.
5. It must be borne in mind that the combined affect of s.8(2)(b) and s.8(3)(d) of the Act is to contain the scope of dismissed employees eligible to receive their pro rata long service leave entitlement under the Act by excluding those terminated for serious and wilful misconduct.
6. It will be appreciated too, that paid leave after 7 years’ service under the Act is an entitlement, and forfeit, subject only to s.8(3)(d). The Commission’s task in s.8(3)(d) entitlement disputes is to superintend such forfeiture. So when an employee under the Act whose employment is terminated for serious and wilful misconduct raises a dispute, it will fall to the Commission to determine by the making of a finding, whether the employee is, upon review, properly to be considered of the excluded class.
7. The Commission will do this using its normal powers, and after hearing the parties, by making findings as to matters in issue, on the balance of probability. To avoid uncertainty, it is emphasised that the exercise of judgement required in a s.8(3)(d) determination is not akin to an application made under Part 3-2 of the Fair Work Act, where the harshness, unjustness or unreasonableness of a termination is considered in the context, inter alia, of there existing a valid reason.

**Serious and Wilful Misconduct**

1. In s.8(3)(d) cases the conjunctive exclusion (for terminations based upon serious *and* wilful misconduct) will apply only if the Commission finds in the light of all the evidence and information put at hearing, that the conduct complained of by the employer was serious and wilful misconduct. Misconduct of a serious type which is found to not be wilful would not fall within the s.8(3)(d) rubric and similarly, an employee who engaged wilfully in an act of non-serious misconduct would not fall within that category excluded under s.8(3)(d).
2. The case put by the Respondent is premised on Ms Brown having refused to comply with her employer’s reasonable and lawful direction. There can be no doubt, despite the present era of robust workplace relationships, that when advised finally of their employer’s direction to perform a task, possibly in a certain way or place or time, that they must comply. Should such an employee not promptly comply when it is made plain that the employer is putting the requirement to them as a direction, and is brooking no further discussion or delay, their employment will be imperilled by subsequent refusal.
3. This is because employees are required to perform the duties that they hold themselves out as able, willing and available to perform and for which, accordingly, they are engaged. In such circumstances an employee refusing a reasonable, lawful direction, absent some issue of immediate personal safety or the like, could expect to face a well-founded charge of serious misconduct. In some circumstances it may also be that the conduct will be wilful. Such a subjective description will attach to behaviour which can be concluded to have been planned or deliberate and done in a knowing way, unconcerned for their employer’s operational rules and behavioural norms. There will of course be an infinite number of such circumstances and each case will turn on its own facts. For this reason the findings surrounding such conduct are not readily transformed into rules of general application.
4. What was the nature of Ms Brown’s behaviour in declining to accept what the Respondent repeats was his reasonable and lawful direction? The answer will depend on examining Ms Brown’s response; but only after first establishing the nature of the direction with which, it is said, she was bound to comply at pain of summary dismissal. In the instant case there is the benefit of certainty, given that the communications are in writing.
5. It follows that an appreciation of the correspondence which passed between the parties (and which is set out above in some detail) will assist, particularly Mr Bolter’s letter of 4 August 2015. For convenience it is set out in full below.

“*4 August 2015*

*Stacey Brown*

*1/18 Gray Street*

*Riverside TAS 7250*

*Dear Stacey,*

***Your Continued Absence from Work***

1. *It is noted that you have been unable to perform your normal duties for some time due to your illness, and such have not been able to fulfill the requirements of the position for which you were employed.*
2. *The certificates we have received clearly indicate that you will not be able to return to your full duties in the near future.*
3. *If this is not the case and you can provide us with clear medical evidence that you can return to full duties in the near future we ask that you do so by 12 o’clock, Monday 10th August 2015. If you cannot do so, and as we have no other positions that would be suitable for you, we will accept that the contract of employment is frustrated and look to bring it to an end. If this is the case, you will be paid your entitlements to that date. A breakdown of your entitlements is attached.*
4. *If you wish to discuss this matter before that date please let us know and we can arrange an appointment. As this process may lead to the termination of your employment, you are invited to bring a support person with you to any such meetings.*
5. *If you are able to return to work we do advise that due to operational requirements and changes in contracts your job locations will be different and your hours may be reduced. We ask you to meet with me as soon as possible in order for you to have the opportunity to come up with any alternatives to your current hours being reduced.*
6. *As this is a matter that may impact upon your future employment with us you are welcome to bring a support person with you to that meeting. We confirm that at this stage we have not made any final decisions as to your position and will not do so until you have had the opportunity to discuss these matters with us.*
7. *If after the meeting your position is to be changed then you will be paid in accordance with the attached calculations.*
8. *We look forward to hearing from you.*

*Yours faithfully,*

*Steve Bolter*

*Director*

*Kols Cleaning Services*

*PO Box 238, Mowbray TAS 7248*

*0418 131 492*

*steve@kolscleaningservices.com.au*

***BREAKDOWN OF ENTITLEMENTS***

***Stacey Brown***

***As at 31, July 2015***

*Annual Leave: 78.24 hours $1877.71*

*Annual Leave Loading: 78.24 hours @ 17.5% $328.61*

*Long Service Leave: 193.19 hours $4636.46*

 *Total Net Payable $6842.93*

 *TOTAL Gross Pay $4636.93*

***PARTIAL REDUNDANCY***

***Stacey Brown***

*Start Date: 8 September 2006*

*Length or Service: 8 years 10 months*

*Change in hours: Current: 23.40 per week*

 *Proposed: 10.00 per week*

 *Change: 13.40 per week*

*Redundancy Calculation:*

*16 weeks x 13.40 hours per week x $24.00 per hour =$4180.80*”

1. It is this letter that is said to contain the “lawful and reasonable direction from the Respondent as employer.” (Exhibit Cameron 3, Paragraph 10) It is known too, that the 7 August letter (Exhibit Cameron 2, Attachment B) referring to the 4 August letter indicates that, “It is a reasonable instruction from your employer to provide the evidence *as requested*”, comments on the implication of failing to comply and concludes by saying, “Please provide the necessary medical information *as requested* in the time frame allowed. Failure to do so will mean that as an employer I will act on the information available to me.” (Emphasis mine)
2. One turns then to the 4 August letter to examine the terms in which Ms Brown was requested to provide the medical information and which request was termed a ‘reasonable and lawful instruction’. One expects it to be clear and unequivocal.
3. In my view a careful reading of the 4 August letter reveals there was no such request or direction. The request that is made is entirely contingent, being subject to Ms Brown being able to return to duties in the near future. The available medical evidence and that of Ms Brown in the hearing was that she was not then medically fit to resume duty in the ‘near future’.
4. It is important to consider the actual content as the 4 August letter;

-commences by the Respondent noting that the Applicant had been, through illness, unable to perform normal duties and had therefore been unable to fulfil the duties she was employed to perform.

-then observes that the certificates received by the Respondent “clearly indicate” that the Applicant will be unable to return to duty in the near future.

-then puts to the Applicant that, “If this is not the case and you can provide us with clear medical evidence that you can return to full duties in the near future we ask that you do so by…” It is this courteous request, ‘we ask..’, that subsequently is termed a ‘direction’.

-then goes on to deal with the more likely contingency, that supported by the employer’s understanding of the then current medical certificates. Accordingly, Ms Brown is advised that should she be unable to return to full duties, that as there were no other positions available, her contract of employment would end through frustration and her entitlements would be paid (notably including a long service leave calculation of $4636.46.)

-then invites Ms Brown to come in to discuss this, with a support person, in the knowledge that the ‘process’ may lead to the termination of her employment.

-turns then to the unlikely contingency in which the Applicant was capable of a resumption of duty to advise that due to operational factors given Ms Brown’s hours may be reduced and places of work changed. A request was then made for the Applicant to meet with Mr Bolter to give Ms Brown an “*opportunity to come up with any alternatives to your current hours being reduced*.” (Exhibit Cameron 2, Mr Bolter’s Witness Statement, Attachment A, 4 August letter)

-advises Ms Brown that she might bring a support person should there be a meeting to discuss alternatives and that no final decisions had been made.

-refers finally to the ‘attached calculations’ in commenting that should, after they have met, Ms Brown’s hours change “…*you will be paid in accordance with the attached calculations*,” (Exhibit Cameron 2, Mr Bolter’s Statement, Attachment A, 4 August letter)

1. The attachment, discussed earlier, also included a “Partial Redundancy’ reflecting the reduction in hours from 23.40 per week to 10 hours per week and the scale of payments provided in the National Employment Standards contained at S.119 of the Fair Work Act. That Breakdown of Entitlements calculated Ms Brown’s 16 week redundancy payment as a factor of her eliminated hours, i.e. 13.4 hours, rather than her standard hours
2. The upshot of these considerations is that, by the construction of the Respondent’s letter of 4 August 2015, Ms Brown could only be considered under an obligation to respond, *if it was not the case* that she was unable to perform her “full duties in the near future.”
3. Put another way, the Applicant was obliged to provide medical advice to the Respondent if she was able to provide the Employer with ‘clear evidence’ that she was sufficiently well or medically capable to return to duty in the near future.
4. The carefully considered construction of the 4 August letter, did not obligate Ms Brown to provide a medical certificate by the date set, other than if medically cleared, as set out above. It follows that Ms Brown’s failure to provide such a medical clearance deriving from the 4 August 2015 letter could not ground a charge that she had misconducted herself by a refusal to obey a direction of her employer.
5. In the light of this finding and mindful of its implications for the application, I have considered whether the 7 August letter (Exhibit Cameron 2, Attachment B), cast in different terms, can be taken as issuing an instruction to Ms Brown, of remedying the deficit of the 4 August letter. I have concluded it does not. This is because, by paragraph;

-Paragraph 1 commences by invoking the 4 August letter, noting its “reasonable timeframe”.

-Paragraph 2 comments generally as to the inconsistency between the Applicant’s then current medical certificates and the May 2015 medical advice deriving from the Workers Compensation matter, saying, “…therefore your current incapacity must be addressed in terms of your availability to return to work.”

-Paragraph 3comments again on the reasonableness of the employer’s instruction to provide the evidence “as requested.”, which I have taken to be a further reference to the 4th August letter endorsed in paragraph 1.’The paragraph then comments generally of the need to comply with reasonable and lawful instructions to avoid summary dismissal for serious misconduct. It issues no new instruction.

-The final paragraph 4, requests the Applicant to provide the medical information “…as requested and in the timeframe allowed.” I have taken these as undoubtedly being references to the request and timeframe as set out in the 4 August letter. It continues as do the earlier parts of the communication in being subordinate to the 4 August letter.

- The letter concludes not by re-iterating that termination would be likely to accompany non-compliance but by stating that failure to do so would see the employer ‘act on the information available to me’.

1. During the period after 4 August Ms Brown did seek medical advice. In that respect I have accepted Ms Brown’s evidence that over that period she was not cleared by her doctor for duty. I have also accepted as genuine the 24 November 2015 Medical Certificate of Dr Kathryn A Roberts, the Applicant’s treating General Practitioner (Exhibit B7, Attachment G)
2. Ms Brown’s evidence was that she had been under the care of Dr Roberts for some time prior to August as is reflected in Dr Robert’s medical certificate advising that Ms Brown was “off work” from 2 March 2015 until 17 August 2015 owing to a medical condition specified in the Certificate. The Certificate reads that in this regard “*It was my recommendation that she was not able to return to work during that time period due to her health condition.”* (Exhibit B7, Attachment G, Dr Roberts, 24 November 2015 certificate) The certificate goes on to say, “*Her ill health has been ongoing and she has not been able to return to work from 17 August onwards*.”
3. While Mr Cameron objected to the admission of the Certificate, I determined to admit it as the certificate disclosed the nature of Ms Brown’s incapacity for duty and Ms Brown was to give evidence. Additionally I was not advised of an application to summons Dr Roberts had been made by the Respondent pursuant to s.21 (2)(b) of the *Industrial Relations Act* 1984. In coming to this view I have also been mindful of Mr Cameron’s artful argument developed to counter the problem for the Respondent that Ms Brown was terminated not for ‘serious and wilful misconduct’ as required by the Act at s.8 (3)(d) but, rather, was terminated for ‘serious misconduct’.
4. Mr Cameron relied on the Regulations within the *Fair Work Act* 2009 where, at Regulation 1.07(2)(a) the definition of ‘serious misconduct’ was taken to include wilful or deliberate behaviour by an employee that is inconsistent with the continuation of employment. One notes too in the Regulations’ outline of behaviours, a range of employee offences, which might be borne in mind in assessing comparative gravity relative to Ms Brown’s letter - advising Mr Bolter that she had been told that he had to obtain the medical evidence. These include theft, assault, intoxication at work and causing serious and imminent risk to the health and safety of a person.
5. In noting Mr Cameron’s point, it remains true, as was put by Mr Austin-Stone for the Applicant that I am not bound in any strict sense by the *Fair Work Regulations*. In my view they are apposite and of interest in a general sense. Definitions notwithstanding, I consider the real nature of the offence of the Applicant said to incorporate a wilful element, as being of central importance in satisfying the proscribed termination ground of s.8(3)(d). One notes the fact that the Employer, even one expertly advised as in the present case, seemingly mischaracterised the objectionable behaviour by using an incorrect, less severe appellation, as in ‘serious misconduct’ rather than ‘serious and wilful misconduct’. But this case should not turn on semantics. It should turn on what Ms Brown was told and whether her reaction constitutes serious and wilful misconduct.
6. Such technicalities aside, Ms Brown was not put on notice by the 4 August 2015 letter in the way alleged, and could not as a consequence be considered to have so misconducted herself in the manner described in s.8(3)(d).
7. I should like to also take up, in the interests of completeness, several elements of the case raised by the Respondent.
8. The first is Ms Brown’s letter requesting Mr Bolter to obtain the medical information per medium of her doctor. (Exhibit Cameron 2, Attachment F) For convenience it is set out below.

“*13 August, 2015*

*Dear Steve,*

 ***Re: Your Continued Absence from Work letter dated 4th August 2015***

*You have asked me to collect medical evidence from my GP stating a return date to work but I have been informed that you, Steve Bolter, must obtain the medical evidence yourself. You have my doctor’s practice on my medical certificate.*

*Yours Sincerely*

*Signed*

*Stacey Brown”*

1. Whatever might have been the motive for dispatching such an unhelpful communication as Ms Brown’s letter, I note that it is entirely courteous, business-like in its proper construction and openly relies on what Ms Brown has been ‘told ‘is the case. While remaining unsatisfactory from the employer’s perspective, the letter does contain a helpful concluding inflection in identifying the doctor’s practice. The veracity of the letter’s main point (that the employer had to obtain the medical evidence) was supported by Ms Brown’s evidence and unshaken in cross-examination. I have also noted Dr Roberts’ letter (Exhibit B4) of 4 November 2015 in the following terms, “This is to certify that I Dr Kathryn Roberts have received no phone calls or messages from Steve Bolter in regards to Stacey Brown. In particular no contact on 17 August 2015. Dr Kathryn A Roberts”
2. Notwithstanding this Exhibit, which I accept at face value, I have accepted Mr Bolter’s vive voce evidence that he contacted the surgery. It was abundantly clear from his evidence, which I considered to be conscientiously given, that the Employer was most displeased to be ‘told’ by an employee to take such an action which he justifiably felt was a responsibility of Ms Brown. Clearly Mr Bolter felt the letter to be an insolent encroachment upon his authority and Mr Cameron strongly emphasised the insolent tone said to characterise the letter in putting his submission.
3. Notwithstanding the unwisdom of its dispatch, taken at face value it does not reflect a repudiation of the contract. It does not reflect a denial of duty, is not, in terms, insolent and, pertinently, does not reflect a failure to accept the need for an updated medical assessment with the result to be divulged to the employer and rather, is the Applicant’s relay of opinion received by the Applicant as to how the medical advice can be examined by Mr Bolter. It will be seen that having come to this view I have not been able to accept Mr Cameron’s forceful submission that there is a ‘tone and subject matter’ about the letter which calls up the description of wilful behaviour. (Transcript, P12, lines 38/39; P13, lines1-4)
4. I do not accept, as is put in the Respondent’s written submission (Exhibit Cameron 3, paragraph 10, page 14) that the Applicant’s letter of 13 August (Exhibit Cameron 2, Attachment F) reflects that having asked “her union (to) seek an extension of time in which to provide the medical certificate *she then told the employee she refused to do so* and told the employer to do so itself.” (Emphasis mine)
5. Had Ms Brown been given a direct instruction to provide medical evidence within a reasonable time Ms Brown would be under a distinct obligation to show that she had been acting under legal or medical advice in acting in the fashion she did, that is, in advising the employer to collect the medical evidence or certificate from the Doctor.
6. I now turn to the Applicant’s further letter of 13 August (Exhibit Cameron 2, Attachment E) which responded to that part of Mr Bolter’s 4 August letter advising the likelihood of reduced hours for the Applicant should she be fit to return and proposed the payment of a ‘partial redundancy’ of $4180.80 (calculated on the Applicant’s proposed hours of 10.00 per week).
7. It seems that this letter (Exhibit Cameron 2, Attachment E) caused less personal reaction than Ms Brown’s other letter of 13 August 2015. (Exhibit Cameron 2, Attachment F) It is clear though, from the instrument of termination, (Exhibit Cameron 2, Attachment G) that in reference to the offer of a departure agreement, the Respondent drew a serious conclusion, writing;

“*It is obvious that you no longer feel bound by your contract of employment. As such, I hereby advise that your employment has been terminated, effective immediately, for serious misconduct.”*

1. To the extent that Ms Brown’s letter of 13 August (offering an Employment Termination Offer) is said to have contributed to or formed part of her misconduct, such position cannot be supported. While it is clear enough from a review of all that had then occurred that the employment seemed to be foundering, it must be recalled that it was Mr Bolter in his wide-ranging communication of 4 August 2015 (Exhibit Cameron 2, Attachment A) who had opened the subject/discussion of redundancy and had provided his calculations. Mr Bolter asked Ms Brown to meet with him ‘as soon as possible’ (should she be able to return to work) to discuss the matter of her hours being reduced and to come up with “*any alternatives* to your current hours being reduced,” (Emphasis mine) (Exhibit Cameron 2, Attachment A, Paragraph 5) The Applicant was not constrained against putting her priorities openly to the Respondent.
2. Ms Brown’s letter and the attached detailed calculations reflect a properly structured, courteous response to Mr Bolter’s suggestion and offer to discuss the matter of reduced hours. Although marred (against Ms Brown’s interests) by over-ambitious ambit, it is, in my view, not to be seen as a contributory element in misconduct by an employee in Ms Brown’s position.
3. In support of its case that disobedience of a lawful and reasonable order will ground dismissal, reliance was twice placed on the High Court’s decision in *Adami*. It is an instructive case. Mr Adami was engaged to manage an entertainment arena/dance hall. When the directors determined to change the standard opening hours of the dance hall to permit dancing on Saturday afternoons, Mr Adami sought to have his new Saturday duties performed by an agent. This was because at that time on Saturdays he was engaged in his auxiliary calling, working as a bookmaker at horse racing tracks. It was Mr Adami’s case that the Directors knew and approved of this position at engagement.
4. Perhaps unsurprisingly the High Court found against the enterprising Mr Adami, holding that he had broken his contract of employment by virtue of his non-acceptance of the direction to attend at all times to his duties in superintending the dance hall. It should however be noted that in that case Mr Adami had also written to his employers contesting their position.
5. In giving his decision in Adami, Acting Chief Justice Isaacs commented famously that, “The word “wilfully” is a very inexact word, and its connotation depends largely upon the occasion of its use and upon its collocation.” (Adami, 35 CLR 143 at 150) And further, “It is no doubt a correct principle that, once the relation of employer and employee is established, obedience to lawful orders is, if not expressly, then impliedly contemplated by the contract creating the relation and mere disobedience of such orders is a breach of the bargain. But whether disobedience in a given case is of such a character as to justify a complete dissolution of the contract by one of the parties and, as here, a forfeiture by the other of valuable accruing rights, together with some degradation - altogether a severe penalty - is, in my opinion, quite a different matter … it must be not merely a breach but a radical breach of the relation, and inconsistent with its continuance.” (Adami, 35 CLR 143 at 151)
6. I have found in this case that there was not a direction in the requisite sense and, further, I have concluded that Ms Brown did not, in either of the letters of the 13 August 2015, understood in context, reflect an intention not to be bound by the contract of employment, that she had or intended to breach the contract or that in some wilful way she had or would, given a clear, specific direction, act in disobedience to reasonable, lawful instruction.
7. Should I be wrong in these respects and that in fact Ms Brown was obliged to follow the direction to literally provide Mr Bolter with the required medical information, in my view her failure to do so in that she instead communicated in the 13 August ‘medical certificate’ correspondence, is not, objectively considered, a radical breach which could, without more, be the justifiable cause of the summary termination which followed. This is because there had not been an act of serious and wilful misconduct. Although capable of more diplomatic wording, Ms Brown’s ‘medical certificate’ letter did not reflect a deliberate design or intention to derogate from her duty. If, after Mr Bolter’s unsuccessful approach to the clinic, Ms Brown had been directed to provide the material she would have been obliged to comply.
8. And certainly, the second 13 August 2015 letter (responding to Mr Bolter’s offer of ‘partial redundancy’, together with Mr Bolter’s offer to further discuss) could not, in my view, be reasonably taken as a repudiatory action. It reflected instead Ms Brown, clumsily through her advisers, offering to treat as to her terms by which her employment might conclude.
9. As Isaacs ACJ pointed out in *Adami*, an employee in disagreement with the employer as to their contractual obligations who respectfully communicates with their employer is not, on that ground, to be considered wilfully insubordinate. (35 CLR 143 at 152/3) It will, one expects, remain the case that an employee who after such communications exhibits a steadfast refusal to accept a reasonable, lawful direction will be in breach of the contract of employment and face summary dismissal.
10. For all these reasons I have found that the dispute raised by the Applicant on 2 December 2015 in relation to pro-rata long service leave should be resolved by the Commission's determination that s.8 (2)(b) of the Act applies to Stacey Brown, as s.8(3)(d) also has application to the Applicant because the termination of her employment is hereby declared to be for a reason other than for serious and wilful misconduct.
11. As a consequence of this finding and determination, I propose to make a s.13 (3) Order that a payment be made of the pro ration of Ms Brown’s service as her entitlement under the Act in the amount of $4,355.26, that being the calculation (together with its detailed basis) provided to the President of the Commission by Mr Cocker in his detailed reference of the dispute on 13 July, 2016.
12. The Order appears below.



Michael Gay

**COMMISSIONER**

**APPEARANCES**

*Mr Austin-Stone* for the Applicant

*Ms Brown* for the Applicant

*Mr Cameron* for the Respondent

*Mr Bolter* for the Respondent

**DATE AND LOCATION OF HEARING.**

10 November

2016

Hobart

*Long Service Leave Act* 1976

ORDER

1. Further to the Decision given at Hobart on 31 January 2017 in T14424 of 2016, I hereby order that Stephen Bolter, as Director of S & L Bolter Pty Limited for the S & L Bolter Family Trust, pay Ms Stacey Brown the sum of $4,355.26 being the pro rata long service leave due to her under the above Act within 21 days of this Order issuing. The date of this Order issuing is 31 January 2017.



Michael Gay

**COMMISSIONER**

31 JANUARY 2017