**TASMANIAN INDUSTRIAL COMMISSION**

***Industrial Relations Act* 1984**
s29(1A) application for hearing of an industrial dispute

**Janelle Cooper**

**(T14381 of 2015)**

**and**

**BUPA Care services Pty Ltd**

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| COMMISSIONER M A GAY | HOBART, 30 JUNE 2016 |

**Industrial dispute – application pursuant to s29(1A)(d) – long service leave – s11 long service leave act 1976 - computation of ordinary pay – nature of continuous employment - order issued**

**DECISION**

1. On 11 December 2015 the Health Services Union, Tasmanian Branch (HSU, the Union) filed an application for a hearing pursuant to s.29(1A)(d) of the *Industrial Relations Act* 1984 (the Act) in relation to the Long Service Leave (LSL) entitlement of its member, Ms Janelle Cooper (the Applicant).
2. Following a teleconference before Acting President Wells on 11 January 2016, directions were issued as to the filing of submissions, the matter was allocated to the Commission as presently constituted and came on for hearing in Hobart on Wednesday, 20 April 2016. Mr J Eddington of HSU appeared for Ms Cooper and Ms A Costello appeared with Mr H Jackman, for BUPA Care Services (BUPA, the respondent).

**The Private Conference**

1. At the commencement of proceedings on 20 April 2016 the parties indicated a preparedness to participate in further conciliation in an attempt to come to an agreement. They did so on the basis that such conciliation conference as was then conducted by the Commission was to be without prejudice to their respective positions in the event it was necessary to continue to argument. Notwithstanding the parties proper efforts in the conference it proved necessary to resume the hearing.

**The Relief Sought**

1. The relief sought by Ms Cooper, which the application reflects was made pursuant to s.29(1A)(d) of the Act, relied upon that sub-section providing the basis for the Commission to deal with a dispute over the LSL properly to be received by a former employee - including the rate of ‘ordinary pay’, or, in the heading of s.11 of the Long Service Leave Act 1976, (the LSL Act) the ‘Computation of “ordinary pay”’. A further aspect of the dispute was an alleged breach of an award or a certified agreement said to fall within s.29(1A)(c). This latter element of the dispute was not pressed by the Applicant and formed no part of the proceedings with which this decision is concerned. To the extent necessary I dismiss that part of the application.
2. s.29(1A)(d) is in the following terms;

“(1A) A former employee may apply to the President for a hearing before a Commissioner in respect of an industrial dispute relating to –

…

(d) a dispute over the entitlement to long service leave, or payment instead of any such leave, or the rate of ordinary pay at which any such leave or payment is to be paid in respect of the former employee.”

1. It will be seen that s.29(1A)(d) provides the jurisdictional basis for the application to be made and considered by the Commission.

**The Background**

1. Ms Cooper was employed in 1996 and her employment (latterly by BUPA as a Personal Care/Extended Care Assistant) concluded upon her resignation on 28 June 2015.
2. Most, if not all, of the relevant aspects of Ms Cooper’s employment are agreed between the HSU and BUPA and are conveniently set out in Exhibit H2, ‘Statement of Agreed Facts/Uncontested Evidence’. A summary of Exhibit H2 is that:
* Ms Cooper was engaged by Vaucluse Gardens Pty Ltd, the operators of a nursing home and Ms Cooper’s employer, which company was bought by BUPA on 28 May 2012, with all employee entitlements transferred.
* the relevant industrial instrument is the *BUPA Care Services South Hobart Enterprise Agreement* 2014 (the Agreement).
* Ms Cooper was employed for 17.46 years but, by virtue of a period during her employment extending from 5 September 2014 to 28 June 2015, the effect of s.5(3) of the LSL Act was that the total period of continuous service was 16.65 years.
* it followed that Ms Cooper was entitled to 14.43 weeks of LSL.
* recent base hourly rates relevant to Ms Cooper were; for the period 1 July to 31 July 2014, $19.64, for the period 1 August 2014 to 31 July, $20.28. From 1 August 2014 until 31 July 2015 an afternoon shift received a 15% penalty, a Saturday shift was paid at time and a half, and Sunday shift double time.
* BUPA had paid Ms Cooper $246.48 on account of LSL on 16 July 2013 and $3472.08 on 20 October 2015.
1. The parties’ agreement did not however extend to the basis for calculation of Ms Cooper’s LSL payment. The issue to be determined is the manner in which Ms Cooper’s agreed entitlement to 14.43 weeks of LSL is to be calculated, or in the terms of s.11 of the LSL Act, the ‘Computation of ordinary pay’ payable under that Act to the Applicant.
2. For the applicant the value of LSL was to be computed (subject to s.11(2)) at the rate of ordinary pay at which the LSL was last, or most recently, accrued. As will be seen this entailed an employee working in the words of s.5(3) “for not less than 32 hours in each consecutive period of 4 weeks….”; hereafter for convenience referred to as the ’32 hour threshold’. For the respondent the rate to be used was that being received by Ms Cooper at the time of taking (or being deemed to have commenced taking) LSL, subject to various provisions for averaging hours or pay.

**The Submission for Ms Cooper**

1. Mr Eddington’s submission relied in significant part on a review of the authorities relating to principles of construction and interpretation of statutes and awards. It is unnecessary to repeat the HSU survey of these oft-traversed cases in great detail and a summary is sufficient.
2. The Commission was enjoined to bear in mind that the LSL Act is representative of beneficial legislation, so that where the construction of an instrument (no point of distinction was drawn during proceedings by either advocate as between the consideration of statute, award or agreement) was to be considered, an approach is to be preferred which recognises the legislation was designed to confer a LSL benefit and as a consequence “its terms, object and context should be given a beneficial construction.” (Exhibit H1 paragraph 4). Mr Eddington’s submission cited authorities relied upon by Abey P in the President’s broad review of the Commission’s approach to such matters, ranging from that of Koerbin P in T30 of 1985, to that of a Full Bench of the Commission in T13586 of 4/2/2011 and then generally, the consideration of a range of courts and tribunals more contemporarily in *Health and Human Services (Tasmanian State Services) Award*, 1 January 2015 (HHS 2015) in T14366.
3. Reflective of the approach in construction urged upon the Commission was President Abey’s approval of the statement of Sams DP, then in the Industrial Relations Commission of New South Wales, in *Transport Workers Union of Australia NSW Branch v Toll Transport Pty Ltd* (2006) NSWIR Comm 123 (Toll), where it was said; “It is pertinent for the purposes of this decision, to highlight another important principle of award construction - that is, the provisions of an award should be construed beneficially subject to the actual language used and what is fairly open on the words used.”
4. An argument was also developed from the *Acts Interpretation Act 1931* (Cth), (AIA) providing at s.8A that:

“Regard to be had to purpose or object of Act

1. In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.
2. Subsection (1) applies whether or not the purpose or object is expressly stated in the Act.”
3. In the Applicant’s submission it was also said to be important that Abey P, in HHS 2015, had commented upon the conformity of the words of Sams DP in Toll (set out above) and S8A of the AIA. (Exhibit H1, paragraph 5).
4. As to purpose, subsection 8A(2) of the AIA was said to have relevance because, while the LSL Act did not expressly state a purpose or object, its purpose or object was to provide for leave for employees “who work for a long relevant continuous period. We submit that the leave provided is intended to be reflective and proportionate to the time worked and remuneration received over the length of employment. We submit that the Act does not intend to provide for contrivances resulting in an employee either receiving a windfall or shortfall of leave that was not proportionate to the length and time worked.” (Applicant’s written submissions, Exhibit H1, paragraph 5)
5. The Commission was urged to consider the LSL Act in the light of the decision of the High Court in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, (Cooper Brookes). That case was said to support an approach whereby a literal statutory reading might be displaced by an alternative construction where a literal meaning led to absurd or inconvenient results.
6. Particularly relied upon was the passage of Cooper Brookes found in the reasons of Mason and Wilson JJ, where their Honours observed;

“The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.

…

Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.” (1981) 147 CLR 297 at 321

1. It was put that the choice presented in this case “between two strongly competing interpretations should advantage that interpretation that produces a fairer or more convenient operation.” (Exhibit H1, paragraph 6)

**Context**

1. The Applicant’s case was further supported by reference to the familiar observations of Madgwick J in *Kucks v CSR Limited* (1996) 661R182 at 184 (Kucks), to the effect that inconsistencies or infelicities of expression which might tend to a meaning, could be overlooked in favour of reading the instrument in a way which gives effect to its ‘evident purpose’, and further, “…meanings which avoid inconvenience or injustice may reasonably be strained for.” Kucks at 184.
2. It was submitted by Mr Eddington that in determining the correct payment under the LSL Act it was “important to consider the individual provisions in the context of the entire Act and other provisions of the Act.” (Exhibit H1 paragraph 9) This submission was made, the Applicant having relied upon the decision of a Full Bench of the federal Commission, in *Amezdroz & Son Pty Ltd trading as Wettenhalls Group Transport Workers Union of Australia* [2012] FWAFB 8951 (Amezdroz).
3. In Amezdroz (a case requiring the interpretation of an industrial agreement) the Full Bench confirmed the relevance of industrial context and purpose, that regard might be had for a broader context than an immediate provision, that language must be construed in a context which had regard for the subject matter of the agreement and circumstances in which the agreement was made. (Detailed case citations of that Full Bench here omitted.)
4. And finally, as to context, the Applicant’s case relied upon the decision of Burchett J, with Drummond J concurring, in *Short v FW Hercus Pty Limited* (1993) 40 FCR 511 [517-518] as to the obligation, in relevant circumstances, to have regard for the relevant history, rather than peer at some difficulty of language or obscurity.

**The Calculation of LSL**

1. The Applicant’s case was that payment for Ms Cooper’s entitlement of 14.43 weeks was necessarily to be made, not at the BUPA favoured rate relevant to the latter service of six hours duty fortnightly (obviously less than the 32 hour accrual threshold), but at the rate referable to Ms Cooper’s service when most recently accruing the LSL. Mr Eddington submitted that this was to be done by calculating the value of Ms Cooper’s entitlement to paid leave by the relevant pay rate, which was $446.16; that being the weekly rate calculated according to Ms Cooper’s pattern of work at the time her “entitlement to long service leave terminated”. (Exhibit H1 paragraph 12)
2. This entailed applying Ms Cooper’s rate of pay derived from the Agreement to the pattern of work she had entered into in what was termed a ‘contract’, dated 28 July 2014. (Exhibit H2, Agreed Facts Annexure C) This reflected a variation in Ms Cooper’s work roster to include 6 hours of Saturday shift, 6 hours of Sunday shift and 20 hours of duty on afternoon shift per fortnight. Clearly such service satisfied that required by the s.5 32 hour accrual threshold, thereby meeting what the parties jointly termed the “test of continuous employment”. (Exhibit H2, paragraph 7) This computation, having regard for the amounts already paid, would require a further total gross payment of $2,719.72.
3. In summary Mr Eddington submitted that:
* the LSL Act entitles an employee to LSL in respect of continuous service;
* s.5 of the LSL Act, ‘Nature of continuous employment’, provides at s.5(3) that “where an employee is regularly employed by the employer for not less than 32 hours in each consecutive period of 4 weeks, the employee shall be deemed for the purposes of this Act to be continuously employed by the employer.”
* the foregoing, when read in conjunction with s.7A, Entitlement to long service leave, providing, “Subject to this Act, an employee is entitled to long service leave on ordinary pay in respect of continuous employment with an employer.” was said, to set “the context, boundaries and parameters for the provisions that follow it. It establishes that an entitlement to long service leave on ordinary pay only relates to continuous employment.” (Exhibit H1, paragraph 15)
* the pivotal moment was when Ms Cooper’s number of hours worked fell beneath the 32 hour threshold. For an employee in Ms Cooper’s position, who had for some considerable time an accrued LSL entitlement and whose employment concluded after their hours fell beneath the 32 hour threshold, it was at “the point of the ending of continuous service upon which the entitlement to long service leave is to be calculated.” (Exhibit H1, paragraph 16)
* when it was necessary to actually determine the ‘ordinary pay’, s.11(1), Computation of “ordinary pay”, has effect. That sub section is in the following terms;

“Where, for the purposes of this Act, it is necessary to determine the ordinary pay of an employee for any period in respect of any employment (in this section referred to as “the relevant period”), that ordinary pay shall, subject to this section, be reckoned as a sum equivalent to the remuneration that he would reasonably be expected to have received in respect of that period from that employment if he had continued throughout that period to have worked therein.” (s.11(1))

1. In summary, it was said that the combined affect of the provisions set out, provided the basis for the Applicant’s claim; rendered thus in HSU’s written submissions;

“Our contention is that the calculation of ‘ordinary pay’ is only required and only relates to calculating remuneration when an employee is entitled to long service by virtue of their continuous service and that any periods of non-continuous employment are removed from the calculation of ordinary pay

It would be inconsistent for the Act to expressly state at s.7A that an employee is only entitled to long service on ordinary pay in respect of continuous employment yet then allow the computation of ordinary pay provision to contemplate including periods of non-continuous employment in a calculation for long service leave. It would also be contradictory for only continuous employment to count toward whether sufficient long service leave has accrued but then use non-continuous employment to influence or dilute the calculation of ordinary pay.” Applicant’s submission, paragraph 17

1. The position advanced was that, consistent with s.7A of the LSL Act, it was necessary only “to establish what the ordinary pay was in respect of the Applicant’s continuous employment.” (Exhibit H1, paragraph 18) It was noted that the period when Ms Cooper was ‘continuously employed’ within the meaning of s.5(3), that is, for the purposes of accruing long service leave, ended on 8 September 2014. It was at that date when her ‘contract’ providing for 32 hours of work per fortnight ceased and was replaced by an agreed pattern of duty providing for 6 hours per fortnight – beneath the 32 hour threshold and thereby clearly insufficient to qualify as ‘continuous employment’ under the LSL Act.
2. It was submitted that this alteration to Ms Cooper’s contact of employment providing “for hours less than the qualifying entitlement, in our view, for the purposes of the Act has no relevance.” (Exhibit H1, paragraph 18) It followed, in the Applicant’s submission, that when Ms Cooper’s employment concluded on 28 June 2015, and s.12(4) required that she be deemed to have commenced her LSL, the payment to which she was entitled, per s11 (1), was the ‘ordinary pay’ relevant to both her September 2014 pattern of work and to the accrual of LSL.
3. s.12(4) provides;

“Notwithstanding anything in this section, where the employment of an employee is for any reason terminated before he takes any long service leave to which he is entitled, or where any long service leave entitlement accrues to an employee because of the termination of his employment, the employee shall be deemed to have commenced to take his leave on the date of the termination of employment and to be entitled to be paid by his employer ordinary pay in respect of that leave accordingly.” s.12(4)

1. HSU contended that the ordinary pay to which Ms Cooper is entitled, “relates to that ordinary pay that existed at the time the employee’s employment was effectively discontinued for the purposes of the Act due to not working continuous employment.” (Exhibit H1, paragraph 20) It was put that in the same way as a period of non-continuous employment (in the terms of s.5(3)) could not count for the accrual of LSL, so too, “it would be incongruous then (sic) use the same non-continuous period as a factor in calculating the period of ordinary pay.” (Exhibit H1, paragraph 20)
2. The Commission was asked to find that Ms Cooper’s entitlement to leave under the LSL Act in the present circumstances, “crystallised or was preserved at the ending of her continuous employment. Whilst this wasn’t then required to be paid until the Applicant either took leave or was terminated, once one of these events occurred, without any intervening recommencement of continuous employment, it was that crystallised ordinary pay, calculated at the termination of her entitlement to accrue long service leave that then was required to be paid.” (Exhibit H1, paragraph 20)

**The Submissions for the Respondent**

1. Ms Costello, in presenting BUPA’s submissions, acknowledged that, having regard for an error in earlier calculation of service, Ms Cooper’s payment for LSL had been erroneously calculated. What was agreed was that the entitlement now stood, by virtue of the application of s.7A and s.8, at 14.43 weeks of long service leave.
2. For BUPA, central to the manner of calculation to be applied to Ms Cooper’s accrual was the deeming provision at s.12(4) of the LSL Act. This required that upon the termination of the Applicant’s employment through resignation on 28 June 2015, Ms Cooper be regarded as having commenced her LSL “on the date of the termination of employment and to be entitled to be paid by his employer ordinary pay in respect of that leave accordingly.” (LSL Act s.12(4))
3. Put simply (and having already set out key sections of the LSL Act in outlining the Applicant’s argument) the BUPA position was that as at the termination date the Applicant’s accrued entitlement had long crystallised by virtue of her continuous employment, so an entitlement arose for her LSL to be paid at the ordinary pay rate applying at the termination date.
4. BUPA contended that to the extent the Application relied on s.5, ‘Nature of continuous employment’, as influencing or affecting the calculation of ‘ordinary pay’, it was misguided, because s.5 was relevant only to the issue of whether an entitlement existed. As such it was argued that s.5 should have no influence on the calculation of ‘ordinary pay’ for the purpose of meeting the LSL entitlement of Ms Cooper.
5. Rather, BUPA drew attention to s.11 as the provision providing for the computation of ‘ordinary pay’. It was submitted that s.11 provided that employees taking LSL are to receive pay at the same rate that they would have received had they continued working through the period, that is to say, their ‘ordinary pay’. (Exhibit 131, BUPA written submissions, paragraph 10).
6. In putting this submission it was acknowledged by the Respondent that the amount of earnings of an employee during the actual period will not always be relevant. This acknowledgement is particularly important in circumstances where an employee has an unchallenged LSL accrual, as in Ms Cooper’s case, and the employee has, as in this case, altered their hours to a monthly total of less than 32 in each consecutive period of 4 weeks.

**The Impermissible Inference**

1. In circumstances such as the instant case, where an employee with a LSL accrual under the LSL Act had, subsequent to accrual, reduced their hours beneath the 32 hour/4 week threshold to three per week, the BUPA argument, here pressed, is that “s.11 of the Act does not impose an obligation on the employer to look back to a period where the employee was continuously employed in order to calculate the “ordinary rate” of pay and to infer this, in BUPA’s submission, would be to “artificially import an obligation in to this section that is not there.” (Exhibit B1, paragraph 11)
2. BUPA highlighted that Ms Cooper’s hours of work, and consequently her rate of remuneration, varied owing to the Applicant’s “preferences and the care home’s operational needs.” (Exhibit B1, paragraph 14) Reference to BUPA pay records reflected that there were fluctuations in Ms Cooper’s earnings so that in the Respondent’s submission, notwithstanding changes in rostered hours, termed ‘contracts’ and tendered in the agreed material, Ms Cooper’s hours were ‘inherently variable’. This in turn meant that the averaging calculation in s.11(4) (relevant when there was no ‘ordinary rate of remuneration’) and s.11(6) (relevant when there were no fixed weekly hours of work) became necessary to calculate the ordinary pay.

**Quantifying the Entitlement**

1. The Respondent acknowledged that the LSL payment resulting from Ms Cooper’s fewer average hours in the last year of employment, compared with earlier years, was “less favourable” to her. (BUPA submission B1, paragraph 15)
2. The consequence for Ms Cooper of applying her three hours weekly/six hours fortnightly pay figure to her LSL entitlement was variously calculated by BUPA as follows;
* if it were considered that the hours worked over the preceding 12 months reflect that no normal weekly number of hours was fixed, s.12(6) has effect and for the purposes of s.11, that is, the computation of “ordinary pay”, the average weekly number of hours worked over the preceding 12 months would have application. BUPA's primary submission was that this was so. This meant that Ms Cooper’s 14.43 weeks of LSL at the average hourly rate of remuneration $27.32 was valued at $2,406.75.
* if it were considered, as per BUPA’s alternative argument, “that the Applicant’s hours were fixed at 3 hours per week..” (Exhibit B1, BUPA Submissions, paragraph 17) consistent with the final 12 January 2015 hours agreement (Exhibit H2, Agreed Statement, Annexure D) which specified that the Applicant would perform six hours of Sunday work on one Sunday only per fortnight, then it was put that s.11(1) had application. This meant that Ms Cooper’s 14.43 weeks of LSL was to be computed at the sum equivalent to the remuneration that she would have expected to receive had she worked throughout that period, i.e., 14.43 weeks at $121.70 or $1,755.85.
1. BUPA submitted that, by the administrative oversight earlier acknowledged, an incorrect calculation of Ms Cooper’s entitlement had meant an overpayment had been made, if the primary submissions were to apply, of $1310.71 and, in the alternative, of $1961.61. BUPA’s position was not to seek a s.31 Order under the Act for reimbursement and, rather, sought only for the Application to be dismissed.
2. As to the relevant calculations, Ms Costello relied upon the decision of Shelley C in the matter of *Leigh Ann Howard v Donald Andrew Patullo*, T8954 of 2000, to reflect the primacy of s.11(6) when it was appropriate to use that sub section. This was emphasised as being so, notwithstanding that the resultant calculation of entitlement was less for Ms Howard (by virtue of a finding that Ms Howard did not have fixed hours of work) than would have resulted in the calculations based on previous years’ hours of duty.
3. For BUPA, the effect of s.11 required that in the calculation of ‘ordinary pay’, Ms Cooper be put in “the shoes she would have stood in should she have continued to work through that period of long service leave which requires us to look at the employment relationship and the hours that were on foot at the time she’s deemed to go on long service leave.” (Ms Costello, Transcript page 20, lines 6-11)
4. Ms Costello’s submission stressed that construing the LSL Act in the fashion contended for by the Applicant was to imply an obligation not clearly expressed by the language of the LSL Act

**The Reply**

1. In response, Mr Eddington pressed the influence of s.7A as one approached the meaning properly to be given to s.11(1). It was emphasised that Ms Cooper’s final period of employment with hours fixed at 3 per week or 6 hours per fortnight, was clearly not ‘continuous employment’ within the meaning of the LSL Act and that such a contract for non-continuous employment did not meet the purposes of the LSL Act. (Transcript, page 32, line 21) It was submitted that by the proper application of s.11(1), such period ought not be ‘elevated’, as it would be by an acceptance of BUPA’s position, to serve as the determinant of payment for an existing LSL entitlement already accrued through qualifying service pursuant to s.5. This was because the words within s.11(1) ‘that employment’, “do actually refer to that period of employment in which the employee was actually meeting the requirement as at 7A, that is they were working in continuous service.” Mr Eddington, (Transcript page 32, line 16)

**Consideration**

1. The submissions of the parties have been given in some detail, not only to permit an appreciation of the argument presented, but to also assist in an understanding of the statutory backdrop necessarily considered in this case.
2. In exercising the Commission’s jurisdiction, I have not approached the issues arising in this case as one might in an industrial arbitration at large, that is, weighing considerations including, amongst others, relative fairness as between the parties, having regard for the distinctive and subjective facts of each case, and, when appropriate, exercising a discretionary judgment. While the legislative injunction of s.20 of the Act, requiring the Commission to act according to equity, good conscience and the merits of the case remains, in my view the present task of the Commission is to apply the terms of the LSL Act directly to the facts of Ms Cooper’s employment, mindful of the jurisdiction conferred upon the Commission by s.13 of the LSL Act and ss.3(1)(a)(vi) and 30 of the Act.
3. The parties’ submissions reflect their starkly opposing views as to the LSL Act’s proper construction and application. While the conflicting submissions do not of themselves establish the existence of an interpretive uncertainty as to the operation of the LSL Act, and nor is it necessary that they do, I am of the view that, while not a condition precedent, there is an arguable case available for each of the constructions advanced.
4. It can be acknowledged that determination of this dispute is not without its difficulty, not by reason of sympathy or lack of sympathy for BUPA’s liability or Ms Cooper’s circumstance, but by virtue of some opacity, best reflected in the parties’ mutually exclusive submissions as to the relevant sections of the LSL Act - particularly s.11(1). It is of course necessary to resolve the dispute.
5. The Commission was not taken to any previous occasion when the workings of the LSL Act generally as to ‘ordinary pay’ and s.11 specifically, had been considered. The earlier cases of the Commission, while of interest, are clearly not on point - as was properly acknowledged by Ms Costello. Similarly, a review of the relevant Minister’s annotated Second Reading Notes, available from the Tasmanian Parliamentary Library Bills Register, and varying for each House, do not reveal any commentary bearing on the matter now falling for consideration.

**The Authorities**

1. I turn first to the submission advanced by Mr Eddington, that given the beneficial nature of the LSL Act, a construction or interpretation conducive to that end might reasonably be strained for. (See Kucks case, op cit at 185)
2. While it is common ground that one must, in construction cases such as this, strive to arrive at the meaning intended by the authors of the instrument, the fact that this is undoubtedly beneficial legislation (not, one notes, an award or agreement) cannot, of itself, secure an interpretation of the instrument when that interpretation is not properly available on an objective reading of the text. The difficulty in this case is, (as the advocates’ varying inflections in reading the relevant sections, notably s.11(1), attested) that the text of the LSL Act relevant to Ms Cooper’s circumstance has been read to convey different meanings.
3. The authorities to which the Commission was taken encourage one to be mindful of that benefit the legislation has to confer as its very purpose. Equally though, such instruments’ task is very frequently to not only declare who is in the group affected by, or to benefit by, some provision in the legislation, but in doing so to clearly declare those who are not. In my view, public policy considerations require that the borderline in relation to LSL entitlement available under the LSL Act is to be carefully superintended.
4. What might be considered a properly beneficial interpretation in turn benefiting an employee or class of employees is very likely to be thought of as an outcome less than reasonable to the other party, in this case, the employer. Perhaps surer ground is the guidance gained from s.8A(1) of the AIA providing “In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.” Thus considered, I have not strained for an interpretation, application or understanding and, rather, have thought it reasonable that the Commission should apply a cautiously purposive approach.

**The Scheme of the LSL Act**

1. Relevant to present purposes in applying the text of the LSL Act to the facts of this case, one must also consider its broader context - as is further developed below. In doing so the varying contexts within the LSL Act require close attention relative to the submissions put, particularly as to s.11(1).
2. It is unnecessary to essay now into each of the many aspects of the LSL Act as throughout it deals with a broad range of contingencies, exceptions and deeming provisions relative to the complex nature of employment as apparent in 1976 and thereafter. No evidence was lead as to the extent of non-casual, permanent part-time employment in that era. What can be accepted for present purposes is that the LSL Act serves to provide for a qualifying employee to accrue LSL in varying circumstances and then, entitling employees to take such accrual when, and after, it has fallen due, upon termination of employment and at death, for the estate to benefit. It so provides in a range of ways which will be further commented upon below.
3. I have accepted as a starting point that s.7A, Entitlement to long service leave, is central to the accrual and conferral of rights under the LSL Act. It provides; “Subject to this Act, an employee is entitled to long service leave on ordinary pay in respect of continuous employment with an employer.” It declares the entitlement by linking LSL with a construct of ‘ordinary pay’ in respect of continuous employment. The concept of being ‘continuously employed’, by satisfying the 32 hour threshold, by being in ‘continuous employment’ within the meanings of ss.5(3) and 7A - can be considered, with service, as the lynchpins of LSL under the LSL Act.
4. It should be borne in mind that the term ‘continuous employment’ has a carefully constructed meaning within the LSL Act by virtue of s.5 defining continuous employment (with its thicket of distinctions, inclusions and exclusions not presently relevant) as contingent upon an employee being regularly employed by satisfying s.5(3).
5. On the other hand, where an employee works fewer than 32 hours in each consecutive period of 4 weeks, such service, while effective for some of the other elements of ongoing employment, does not go to the accrual of LSL. For the purposes of the LSL Act, such periods are of no account. The terms of s.5(3) providing for the 32 hour threshold, deem an employee whose employment meets that requirement, to be “continuously employed by the employer.” It follows in my view (and fortified by the findings below) that, absent a clear indication to the contrary, for the purposes of calculating the benefits of LSL, periods of employment of less than 32 hours in each consecutive period of 4 weeks can have no role to play - absent an explicit direction to the contrary.
6. Where the term ‘ordinary pay’ is to be found in the LSL Act relevant to the pay to be received while an employee is undertaking LSL, as in s.7A, it can, in my view, be taken to refer to the ordinary pay of an employee payable for a period of continuous employment, within the meaning of the LSL Act, that is, regular employment of at least 32 hours in each consecutive period of 4 weeks. Further, for the reasons expanded upon below, in my view the term ‘ordinary pay’ in the sense conveyed by its use in ss.9, 10, 11(1) and 12(4), does not refer to pay arising from a period of non-continuous employment.
7. I am unable to accept, as urged to do by BUPA, that where a section of the LSL Act refers to the computation of the ‘ordinary pay’ to be received by an employee undertaking LSL and does so with the prefatory words, “for the purposes of this Act”, the ordinary pay to which reference is then being made is the ordinary pay rate earned by an employee who is not then in continuous employment, that is, who is engaged for less than 32 hours in each consecutive period of 4 weeks. In my view the scheme of the LSL Act has as its locus, accrual of LSL benefit by such continuous employment and, in turn, providing for payment of accruals by the ordinary pay relating to such periods, that is, of continuous employment as set out above. This is what, in the present context, the term “for the purposes of this Act” in s.11(1) indicates and entails.

**Various sections considered**

1. The authorities commented upon by both parties would seek to ensure that in cases such as this, attention be given to the general purpose and context of the statute being considered. In resolving the dispute before the Commission I have sought to have regard for the LSL Act as an integrated instrument. By this term I mean considering how, as the LSL Act deals with the circumstances of modern employment, its various provisions operate providing for its objects, ensuring that those objects are achieved and, that in so doing, inconsistency or disharmony are avoided. Where, as outcomes of a submission put as to construction and absent some particular justifying rationale, inconsistencies of approach or of valuation of an entitlement arise, or unexplained disparities in treatment become apparent, one would be cautious before accepting that argument or adopting that construction.
2. I have thought this approach to conform with the views expressed by the High Court in *Project Blue Sky v ABA* (1998) 194 CLR 355 when at 381 [69]-[71], McHugh, Gummow, Kirby and Hayne JJ observed,

“The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined by reference to the language of the instrument viewed as a whole.

…

A legislative instrument must be construed on the prima facie basis that *its provisions are intended to give effect to harmonious goals*.” (emphasis mine)

**S12 How and when long service leave shall be taken**

1. It can be appreciated that, as in the present case, not all LSL is taken when it becomes available - notwithstanding the clear legislative intention that it should be promptly taken up. S.12(1) provides that upon an employee becoming entitled to LSL, the “leave shall be granted by the employer as soon as practicable… having regard to the needs of the employer’s establishment…”, and goes on to provide at s.12(a) that, inter alia, such leave may be postponed to a date agreed upon by the employer and employee or in default of agreement to a date directed by the Secretary of the Department.
2. In the present case the LSL was not taken and while it was certainly postponed, the Commission was informed of no formal or informal agreement pursuant to s.12, that was arrived at as to its disposal. I have concluded that no such agreement was reached and that the leave taking was tacitly deferred by the inaction of both parties. Insofar as the general scheme of the LSL Act is concerned, it is noteworthy however, that s.12(1)(b) then provides, *“in no case is any entitlement to long service leave lost or in any way affected* by the foregoing provisions of this subsection or by any failure or refusal of the employer to grant the leave.” (emphasis mine)
3. Section 12 can be taken as providing a protection for the value of an employee’s LSL when such an agreed s.12(1)(a) postponement occurs. I have concluded that should an employee with an undisputed LSL entitlement, such as Ms Cooper, reach an agreement to postpone taking their LSL and then subsequently, again like Ms Cooper, have a reduction in hours so that no longer were they ‘continuously employed’ (within the meaning of s.5(3)), the value of the postponed LSL would not be susceptible of reduction in the event of their death or resignation in the fashion now contended for. The s.12(1)(b) protection afforded Tasmanian employees postponing their LSL would, in my view, serve to guarantee that their entitlement was not “lost or in any way affected”. While in this case no such agreement was reached and, at its highest, the parties tacitly decided to defer the taking of leave, the resultant disparity of treatment were the respondent’s argument accepted, as between Ms Cooper and a s.12(1)(a) postponer, is relevant to the task presently undertaken.
4. While there was no evidence on this point, it may be safely observed that some employees and their employers, upon an entitlement to LSL arising, or ‘crystallising', do not pursue the formal postponement course as provided for at s.12(1)(a) of the LSL Act. Rather, whether through employer, employee or joint inaction, the employment is ongoing, with the employee likely to be conscious in a general way, of the value of their accrued benefit - constituting the obverse of the employer’s accounting for their LSL liability as a charge against profit. As an aid to construction, it cannot, in my view, be considered likely that the Parliament would create a schema within the LSL Act providing for such contradictory or inconsistent outcomes. That is, between the protected value of the deferred leave of a s.12(1) ‘postponer’ and that of an employee who accrues an entitlement, does not seek to come to an agreement to take the LSL at a later date, subsequently reduces their hours below the 32 hour threshold (and in this case to a negligible amount) and, a year or so later, dies or resigns.
5. The LSL Act, unlike some LSL legislation elsewhere in the Commonwealth, provides, at s.10, ‘Payment in lieu of long service leave by agreement’, for the payout of accrued LSL. The timing of the payment for LSL is also a matter for the agreeing employee and employer. Ordinary pay is specified, as elsewhere found in the LSL Act, to apply for the leave to be paid out by such election, which leave, it will be appreciated, is for most employees contiguous with their normal work. (Mr Eddington at page 11 of the transcript, estimated without demur from Ms Costello, that, in taking LSL, some 99% of employees work in continuous employment to the date of termination.) It will be readily seen, that on the construction advanced by BUPA, an employee with service identical to that of Ms Cooper who opted successfully for payment of their LSL, would receive a quite different payment than Ms Cooper, an employee who left her accrual in abeyance and, as retirement approached, worked for 3 hours a week (with some variations) for the last eight months or so of employment prior to her resignation.
6. It is important to here note Mr Eddington’s acknowledgment that the value of an entitlement to LSL of an employee with a LSL accrual who remained continuously employed, that is, who worked at least 32 hours in each consecutive period of four weeks, whose hours then permanently lessened but continued at least at the 32 hour threshold, would, under the scheme of the LSL Act, have a consequential diminution of payment. I took this submission to refer to a LSL entitled employee whose hours reduced, say, from 38 per week (or 215 hours per 4 week cycle) to 8 hours per week (or 32 per 4 week cycle). Under the LSL Act such an employee would, upon taking LSL, have their entitlement computed on the basis of their then current hours of ‘continuous employment’, as will be seen below when s.11 is considered. In my view this is a clear function of the LSL Act’s operation.
7. What might also be noted is that Ms Cooper’s employment is, although to a small degree, an example of this occurring, that is, of an eligible employee’s LSL payment reflecting the fact of their reduced hours - while remaining ‘continuously employed’. The agreed material reflects that Ms Cooper’s ‘regular pattern of work’ reduced from 33 hours per fortnight to 32 hours per fortnight in the 28 July 2014 adjustment to the Applicant’s standard hours. (See Exhibit H2, Annexures B and C) Under the LSL Act the value of Ms Cooper’s LSL is, accordingly, reduced. Equally, had Ms Cooper’s hours increased, contingent it must be noted upon mutual agreement, the LSL payment would, consistent with the LSL Act, ultimately reflect such a change. Thus are the interests of employer and employee equally served by the LSL Act providing for LSL payment reflecting the hours worked in the accrual of the leave.
8. Considering the broader context of the legislation, as one is urged to do by the authorities, entails having regard for the working of the LSL Act as, in its various ways, accruals are able to be availed of by employees. Generally in beneficial legislation one would expect constancy of outcome in circumstances where employees have identical qualifying service - absent some particular reason warranting differentiation. Where in a proposed construction there was apparent no legislative remit for a lack of consistent outcome, one would be cautious to adopt such a construction.
9. As some emphasis was given in proceedings to s.12(4) (and its operation in conjunction with s.11(1)) the following comments become necessary. In my view, s.12(4) provides for the deeming (of an employee with a LSL entitlement or to whom a LSL entitlement accrues because of the termination of the employment) of such an employee to have commenced their LSL on the date of the termination of employment. s.12(4) also reiterates the employee’s entitlement to be paid ordinary pay in respect of that leave. That is the only work for s.12(4). It does not influence or overshadow the computation of LSL - that is the function of s.11 of the LSL Act. For an employee in Ms Cooper’s position, that is, with an indisputably established entitlement to 14.43 weeks of LSL by virtue of her qualifying employment under the LSL Act, s.12(4) signals only that she be deemed to have commenced her LSL, thereby triggering the s.11(1) computation.

**s.11 Computation of “ordinary pay”**

1. In turning now to s.11(1) it is, in my view, helpful to also bear in mind the terms of s.5(3), ‘Nature of continuous employment’, and s.7A, ‘Entitlement to long service leave’, as these three sections, although clearly to different purposes, nevertheless integrate closely in giving effect to the object of the LSL Act. As the submissions focused attention upon s.11(1) it is proposed to first deal with this important section in its relationship with the statute more generally and then consider the terms within s.11.
2. It will be recalled that when employees fall beneath the s.5(3) 32 hours threshold, they do not accrue LSL, and that, in my view, their ‘sub 32 hour’ pay rate is not that referred to in s.11(1) when reference is made to “a sum equivalent to the remuneration that he would reasonably be expected to have received in respect of that period from that employment if he had continued throughout that period to have worked therein.” The basis for forming that view will be further set out below.
3. While not every part of the LSL Act is concerned with service within the meaning of s.5(3), qualifying an employee to be ‘continuously employed’, I have formed the view that s.11(1), in its dealing with the computation of “ordinary pay”, is concerned with periods of paid LSL solely deriving from an employee being ‘continuously employed’ as provided for under the LSL Act, not some other period/s. This is because there is no other section of the LSL Act where it is necessary to determine the ordinary pay of an employee for the purpose of computing the value of a LSL accrual and because that is the effect of the prefatory words, “Where for the purposes of this Act...” In this context I do not regard this latter term as having an innocuous general meaning and rather, I have preferred to conclude that when s.11(1) refers to the determination of “the ordinary pay of an employee for any period”, it is referring to the determination of pay for LSL periods relevant to ‘continuous employment’.
4. When s.11(1) sets out the basis for calculating the ‘ordinary pay’ to be received by an employee undertaking a period of LSL under the LSL Act, the period of such an entitlement is termed ‘the relevant period’. Many aspects of the calculation to be undertaken as to ‘the relevant period’ are provided for in s.11(2), for example, subsection (2)(a) provides that for this period it is to be assumed that normal hours of work are worked and it is to be assumed that the employee does not receive any payments by way of overtime.
5. I have taken the term ‘any employment’ in s.11(1) to refer to service relevant to the accrual of LSL both as to mining employees (with their separate and markedly different entitlements provided for in this substantially bifurcated statute) and to all other Tasmanian employees coming within the scope of the LSL Act.
6. Where s.11(1) provides “…that ordinary pay shall, subject to this section, be reckoned as a sum equivalent to the remuneration that he would reasonably be expected to have received in respect of that period from that employment if he had continued throughout that period to have worked therein.”, I have taken it that both references to the phrase, ‘that period’, refer to the accrued LSL absence about to be taken and requiring payment.
7. Where s.11(1) provides “...that ordinary pay shall, subject to this section, be reckoned as a sum equivalent to the remuneration that he would reasonably be expected to have received in respect of that period from that employment if he had continued throughout that period to have worked therein.”, I have taken the phrase ‘that employment’ to be a reference to the continuous employment from which the LSL derives. For employees who are in continuous service, the s.11(1) phrase, ‘that employment’, understood in context, means an employee’s most recent employment and read having regard for the provisions of s.11(2). For employees like Ms Cooper with an existing LSL entitlement, who are not, by virtue of the 32 hour threshold ‘continuously employed’, it refers to their most recent employment as a continuous employee or, in the terms of s.5, when last ‘continuously employed’.
8. While for the great preponderance of employees availing of LSL the BUPA construction has application, for employees in Ms Cooper’s position it does not. For the great majority, who take up their LSL contiguous with ‘continuous employment’ as per s.5(3) of the LSL Act, their LSL pay is a construct of their immediate past pay - not unlike a projection for the purpose of annual leave. For a full time or part-time employee like the Applicant with an entitlement deriving from their earlier continuous employment but whose hours subsequently diminished beneath the 32 hour threshold, perhaps like Ms Cooper to a mere couple of hours per week, s.11(1) operates to distinguish between continuous and non-continuous service.
9. In Ms Cooper’s case s.11(1) operates to ensure her LSL pay reflects, not the three hours per week of her non-continuous employment, but the ordinary pay referable to her most continuous employment, from which service the accrued right which is the LSL entitlement derives.
10. I do not accept that so construing the somewhat labyrinthine s.11(1) is to unnecessarily/illegitimately import or imply a term. Rather, I have come to the position outlined having regard for the ordinary meaning of the words and terms, the purpose of s.11(1), the need to construe the section having an appreciation for the harmonious operation of the LSL Act overall and for the interconnectedness of ss.5, 7A, and 11 - together with the other provisions of the LSL Act to which reference has been made.

**The S.13(3) Order**

1. As a consequence of the considerations and findings set out above, and in settlement of the dispute brought, I have concluded that the application must succeed, which is to say Ms Cooper’s LSL entitlement is to be re-calculated having regard for the operation of s.11(1) as determined in this decision and as set out below. It follows that I propose to make an Order pursuant to s.13(3) of the LSL Act requiring BUPA to make a further payment to Ms Cooper.
2. The HSU written submissions (Exhibit H1) set out the calculations, stemming largely from the agreed statement of facts, reflecting the base rate, normal number of weekly hours and various loadings referable to the rostered work performed by Ms Cooper when last ‘continuously employed’ within the meaning of s.5 of the LSL Act, that is, at 8 September 2014.
3. As I understood the submissions, this material reflects a total weekly pay rate of $446.16. As it is agreed that the LSL entitlement is 14.43 weeks, a LSL entitlement of $6438.28 results. When the amount already paid by BUPA, namely $3718.56 is deducted, the amount to be paid of $2719.72 results - less taxation as may be necessary. An Order to this effect appears below:

**s.13(3) ORDER**

BUPA Care Services Pty Ltd is ordered, within 14 days of the date of this Order, to pay Ms Janelle Cooper the sum of $2719.72 - less the appropriate taxation deduction.

The date of this Order is 30 June 2016.



Michael Gay

**COMMISSIONER**

**Appearances:**
Mr J Eddington for the applicant

Ms A Costello and Mr H Jackman for the respondent

**Date and place of hearing:**
Hobart

2016

11 January - Deputy President Wells

20 April - Commissioner Gay