

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Nielsen v Sunshine Powder Coatings Pty Ltd*
[2024] QIRC 088

PARTIES: **Nielsen, Daniel Duane**
(Applicant)

V

Sunshine Powder Coatings Pty Ltd
(Respondent)

CASE NO: B/2022/80

PROCEEDING: Application for proportionate payment of long
service leave

DELIVERED ON: **22 April 2024**

MEMBER: Power IC

HEARD AT: On the papers

ORDER: **Pursuant to s 45 of the IR Act, the Respondent is to pay the Applicant's entitlement to proportionate payment for long service leave pursuant to s 95(4)(b)(ii) of the IR Act with respect to the Applicant's former employment with the Respondent.**

CATCHWORDS: INDUSTRIAL LAW - RECOVERY OF PRO
RATA LONG SERVICE LEAVE - applicant
resigned from employment - whether applicant is
entitled to payment of proportionate long service
leave - whether applicant terminated employment
because of a "domestic or other pressing
necessity"

LEGISLATION: *Industrial Relations Act 2016* (Qld), s 45, s 95,

s 475

CASES:

Ma'Aelopa v State of Queensland (Queensland Police Service) [2024] QIRC 029**Reasons for Decision****Introduction**

- [1] Mr Daniel Nielsen ('the Applicant') was employed by Sunshine Powder Coatings Pty Ltd ('the Employer').
- [2] The Applicant commenced employment with the Employer on 17 November 2014.
- [3] On 11 October 2022, the Applicant resigned from his employment following a period of service greater than 7 years but prior to 10 years.
- [4] The Applicant filed an application pursuant to s 475(1) of the *Industrial Relations Act 2016* ('the IR Act') for pro rata long service leave.

Relevant legislation

- [5] Chapter 2, Part 3, Division 9 of the IR Act provides for an entitlement to long service leave in the following terms:

95 Entitlement – employees other than seasonal employees

...

- (2) The employee is entitled to long service leave, on full pay, of—
 - (a) if the employee has completed 10 years continuous service—8.6667 weeks; and
 - (b) after 10 years service, if the employee has completed at least a further 5 years continuous service—a period that bears to 8.6667 weeks the proportion that the employee's further period of continuous service bears to 10 years.
- (3) An employee who has completed at least 7 years continuous service is entitled to a proportionate payment for long service leave on the termination of the employee's service.
- (4) However, if the employee's service is terminated before the employee has completed 10 years continuous service, the employee is entitled to

a proportionate payment only if—

...

(b) the employee terminates the service because of—

(i) the employee's illness; or

(ii) a domestic or other pressing necessity; or

...¹

[6] In *Ma'Aelopa v State of Queensland (Queensland Police Service)*, Deputy President Hartigan summarised consideration of the term 'domestic necessity' -

In *Franks v Kembla Equipment Co*, Sheldon J applied the following test when dealing with a case of "domestic necessity" as follows:

"The test, I would suggest, is whether there is a really serious problem in the home, although not necessarily a crisis. On the one hand, the colourable and frivolous should be rejected but on the other, over-exacting standards should not be adopted. After all, what is being dealt with is not a sphere-shaking issue but a reason for terminating employment and a material consideration must be whether the domestic situation is such that a reasonable man might feel compelled to seek its solution by terminating his employment. If a really sick spouse, coupled with economic worries and difficulty in coping with small children, falls short of creating a domestic necessity, then it is hard to imagine what domestic chaos must exist before the test is satisfied."

In *Oscar Budai v Bartercard Australia Pty Ltd* it was relevantly held that:

"... The authorities indicate that the concept of a domestic necessity is an extremely wide one. I am satisfied that the term "domestic or other pressing necessity" is even broader."²

Consideration

[7] It is not in dispute that the Applicant satisfied s 95(3) of the IR Act in that he has completed at least 7 years continuous service with the Employer. The question to be considered is whether the Applicant satisfies s 95(4)(b)(ii) of the Act as a consequence of terminating his service because of a "domestic or other pressing necessity".

[8] The Applicant contends that he tendered his resignation because of domestic necessity. In the Application, the Applicant outlined the following –

Seeking pro-rata payment of long service due to employees incapacity [sic] because of domestic necessity.

With little help available with my childs [sic] care requirements, I have to be available for

¹ *Industrial Relations Act 2016* (Qld) s 95

² [2024] QIRC 029 at [27].

hospital/ op Appointments and other such ahead appointment [sic] that will be needed over the next 12 months.

- [9] The Applicant annexed to his application a medical certificate from Dr Noman Unar confirming that the Applicant's son had a number of medical conditions along with confirmation of appointments scheduled for the Sunshine Coast Hospital and Health Service.
- [10] Also annexed to the Application was a letter from the Applicant's partner stating that the Applicant's decision to leave his employment was made to ensure their son obtained the support he needed.
- [11] In the Applicant's submissions to the Commission, he stated that he was now the full-time carer for his children along with the following –

My family and I had chosen to make this decision to work around our family needs of our kids, especially our 6 yr old who has had ENT issues since he was 12 months. He will be having surgery in a couple of months, as his last appointment letter has been added to the list of documentation provided. My partner has been working on her own business for 5yrs and worked hard to get herself where she is, the business was expanding with consistent level of work, and she required me to take on more parental duties. My partner was making more then me and it is only the wisest choice to support her now as her income was more financially supportive for our circumstances.³

- [12] The Applicant's resignation was outlined as follows –

To John/Ben

I am writing to formally notify you that I am resigning from my position as an employee of Sunshine Powder Coating, this is effective four weeks from today – 13th October 2022.

Unfortunately is due [sic] to family circumstances which are unavoidable at this time.

I do appreciate the opportunity of full time work you have given me over the past eight years, and I wish you all the best for the future.

Thank you for your understanding.

Yours sincerely

Daniel Nielsen

- [13] The Employer provided submissions to the Commission, summarised as follows –

- The original reason given by the Applicant for terminating his employment was a domestic issue, with the Application stating that his father was diagnosed with

³ Paragraph has been quoted in full, [sic] has not been included.

Parkinson's disease, and he was required to give him full time support.

- When pressed to supply supporting documentation, the reason became the need to help his child attend doctor appointments from time to time.
- The Applicant gave four weeks notice of his termination but the Employer granted the Applicant leave immediately with pay so as to allow him to deal with his domestic issues.
- The Applicant's employment history shows that he was given immediate leave at the 'drop of a phone call' to deal with domestic issues, generally on a Friday morning.
- The Employer had always worked with employees to support their personal / domestic needs.
- The Employer would have supported the Applicant with his child's need for doctor's appointments.
- These appointments would most likely have required notice to accommodate, but if circumstances required immediate release, then this would have been granted.
- The Employer previously had on quite a few occasions granted the Applicant leave without notice to look after family matters on full pay.
- The Employer had also offered the Applicant the opportunity to have highly flexible hours to allow him the extra time he may require. This would have been easily facilitated given that his partner was the current cleaner with full access afterhours. This was refused by the Applicant as an option.
- Nothing had been shown that full time caring required the Applicant not to work. Other families have a stay at home parent who also works part time.
- The Employer had not been given any information that confirmed that the Applicant's was required to provide full time care to the level that required resignation.
- The Applicant wanted to work out the 4 weeks notice period despite not being required to in accordance with the Employer's policy.

[14] The Employer submits that they declined payment of the Applicant's long service leave claim following receipt of advice that 'the wording of the resignation letter was not sufficient to qualify', as the phrase could indicate that the circumstances could change

in a short period of time which would nullify the claim.

- [15] The continuity of the circumstances necessitating the resignation is not a consideration under the statutory criteria. Whilst each application is considered based upon their particular circumstances, it is not necessary to demonstrate that the circumstances that may be considered "domestic or other pressing necessity" continue for a particular period of time following the resignation.

- [16] The Employer submits that the Applicant indicated that he wanted to work out his 4 weeks notice period. This does not indicate that the Applicant's resignation was not for a domestic necessity. As determined in *Ma'Aelopa v State of Queensland (Queensland Police Service)*, the terms 'domestic necessity' should not be conflated with 'other pressing necessity'.⁴ It is not necessary to demonstrate that the domestic necessity is pressing or urgent.

- [17] The Employer submits that the Applicant was granted leave immediately with pay to allow him to deal with his domestic issue and the Applicant's employment history indicates that he was given immediate leave to deal with domestic issues as they arose. The Employer contends that they have always worked with employees to support their domestic needs, but the Applicant declined an offer to work flexible hours to allow him the extra time he required. These arrangements reflect well upon the Employer; however the conduct of the employer is not the matter in issue in an application of this type. The statutory test is not whether the Applicant was able to continue working when afforded flexible working conditions. The statutory test requires an assessment of the reasons for the Applicant's resignation.

- [18] The Employer submits that it has not been given information confirming that the Applicant's domestic circumstances required resignation, noting that other families have a 'stay at home parent who also works part time'. It is not the role of the Commission, nor the employer, to assess the caring arrangements made by employees. It is beyond the scope of the statutory criteria to examine whether the Applicant could have structured a part time role alongside his caring responsibilities, particularly in circumstances where the Applicant's son has ongoing medical needs.

- [19] I note the statutory declaration provided by Mr John Murray stating that the Applicant had advised that he was resigning to care for his father who had Parkinson's disease before 'changing' his story to becoming the carer for his son. These two scenarios are not mutually exclusive, and in my view, both fall within the category of "domestic or other pressing necessity". Whilst the requirement to care for his father may have formed part of the Applicant's decision, the material before the Commission indicates that the motivating reason for the decision was the increase in the Applicant's parental duties.

⁴ [2024] QIRC 029

[20] I am satisfied on the material before the Commission that the Applicant resigned from his employment to be available to bring his child to medical appointments and take on a greater proportion of parenting duties. As the Applicant's partner's business was expanding, there was a necessity for the Applicant to resign from his employment to enable him to undertake the increased parenting duties. I am satisfied that these circumstances fall firmly within the definition of 'domestic necessity'. Accordingly, I am satisfied that the Applicant's decision to resign was made for a "domestic or other pressing necessity".

Conclusion

[21] For the reasons outlined above, I have determined that the Applicant resigned from his employment because of a "domestic or other pressing necessity" within the meaning of s 95(4)(b)(ii) of the IR Act and is entitled to proportionate long service leave.

Order

[22] I make the follow order:

Pursuant to s 45 of the IR Act, the Respondent is to pay the Applicant's entitlement to proportionate payment for long service leave pursuant to s 95(4)(b)(ii) of the IR Act with respect to the Applicant's former employment with the Respondent.