QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Robertson v State of Queensland (Department of Communities, Disability Services and Seniors) (No. 3)* [2020] QIRC 074
PARTIES:	**Robertson, Clare** (Applicant) v **State of Queensland (Department of Communities, Disability Services and Seniors)** (Respondent)
CASE NOS:	B/2018/46 and B/2018/47
PROCEEDING:	Application for unpaid wages
DELIVERED ON:	19 May 2020
DATES OF WRITTEN SUBMISSIONS:	Respondent's written submissions filed: 25 February 2020 Applicant's written submissions filed: 18 March 2020 Respondent's written submissions in reply filed: 1 April 2020
MEMBER:	Merrell DP
HEARD AT:	Brisbane
ORDERS:	**1. Pursuant to s 331(b)(ii) of the *Industrial Relations Act 1999*, the Applicant's long service leave claim is dismissed.** **2. Pursuant to s 331(b)(ii) of the *Industrial Relations Act 1999*, the Applicant's annual leave claim is dismissed.**
CATCHWORDS:	INDUSTRIAL LAW - application for unpaid wages - applications in existing proceedings to dismiss claims for unpaid wages on the basis they were made out of time - decision made that some claims were made out of time - further application in existing proceedings to strike out remaining claims - determination of whether long service

leave and annual leave claims should be dismissed because further proceedings are not necessary or desirable in the public interest - long service leave and annual leave claims dismissed because further proceedings are not necessary or desirable in the public interest

LEGISLATION:

Directive No. 07/08 Leave Without Salary Credited as Service

Directive No. 1/11 Long Service Leave, cl 2.1, cl 2.3, cl 2.4, cl 3.4, cl 13.1 and cl 18.2

Directive No. 2/11 Recreation Leave, cl 2.1, cl 17 and cl 18.1

Directive No. 04/12 Early Retirement, Redundancy and Retrenchment, schedule B, cl 1 and cl 3

Industrial Relations Act 1999, s 3, s 7, s 29C, s 32, s 278, s 331 and sch 5

Industrial Relations Act 2016, s 541 and s 1024

Family Leave Award (Queensland Public Sector) – State 2004, cl 1.7, cl 2.1 and cl 2.6

Family Leave Award (Queensland Public Sector) – State 2012, cl 8.5

Public Service Act 2008, s 125 and s 148

Queensland Public Service Award - State 2012, cl 4.1, cl 4.3, cl 4.6, cl 4.8, cl 7.1 and cl 7.5

CASES:

Automatic Fire Sprinklers Pty Ltd v Watson [1946] HCA 25; (1946) 72 CLR 435

B. Tweddell v Ehle Pty Ltd (1993) 142 QGIG 397

Campbell v Queensland [2019] ICQ 18; (2019) 291 IR 171

Day v Hutcheon [2014] QIRC 084

Robertson v State of Queensland (Department of Communities, Disability Services and Seniors) (No 2) [2019] QIRC 196

APPEARANCES: Ms C. Robertson, the Applicant in person

Ms C. Laird, of Providence HR, for the Respondent

Reasons for Decision

Introduction

[1] The proceeding involves claims for unpaid wages made by Ms Clare Robertson arising out of her employment by the State of Queensland ('the State') in the Department of Communities, Disability Services and Seniors ('the Department') between 2 December 2002 and 19 October 2012. Ms Robertson's employment came to an end on 19 October 2012 following her acceptance of an offer of a voluntary redundancy.

[2] In *Robertson v State of Queensland (Department of Communities, Disability Services and Seniors) (No 2)* ('*Robertson No. 2*'),[1] I made decisions in respect of an application in existing proceedings by the State that contended that certain aspects of the unpaid wage claims made by Ms Robertson were statute barred. The relevant background to Ms Robertson's unpaid wages claims are set out in that decision.

[3] Following on from the decision in *Robertson No. 2*, there are three outstanding unpaid wage claims by Ms Robertson that require determination, namely, Ms Robertson's:

- long service leave claim;
- annual leave claim; and
- incentive payment claim.[2]

[4] By application in existing proceedings filed on 4 February 2020, the State seeks a decision that the Commission '… strike out all the remaining elements of the applications in matters B/2018/46 and B/2018/47'[3] ('the State's application').

[5] The basis upon which the State seeks that relief is:

- Ms Robertson's long service leave, annual leave and incentive payment claims are not referable to work done in accordance with her contract of employment;[4]
- Ms Robertson's remaining claims fall within the meaning of 'wages' in the *Industrial Relations Act 1999* ('the 1999 Act') however, they do not relate to

[1] [2019] QIRC 196 ('*Robertson No. 2*')
[2] As particularised, respectively, in *Robertson No. 2* (n 1), paras. [3], [5] and [6].
[3] Application in existing proceedings filed by the State of Queensland (Department of Communities, Disability Services and Seniors) on 4 February 2020 ('the State's application'), section 4, para. 1.
[4] The State's application, section 4, para. 3.

claims for work done and are therefore excluded from jurisdiction under the principle in *B. Tweddell v Ehle Pty Ltd*[5] ('*Tweddell*');[6]

- Ms Robertson's remaining claims are essentially a claim for breach of contract and not for the recovery of wages which, in accordance with the principle in *Tweddell*, must be for work 'actually done' and there was no work which had been performed which could lead to a recalculation of annual leave, long service leave or the incentive payment;[7] and

- Ms Robertson has been paid for all accrued leave and for the incentive payment on the basis of work 'actually done'.[8]

[6] Although not expressly identified, it seems clear that the State's application is made pursuant to s 331(b)(ii) of the 1999 Act,[9] namely, the State seeks orders that Ms Robertson's outstanding unpaid wage claims should be dismissed because further proceedings are not necessary or desirable in the public interest.

[7] Having regard to the submissions of the parties, the questions for my determination are:

- are the amounts claimed in Ms Robertson's long service and annual leave claims and in her incentive payment claim, claims for 'wages' within the meaning of the s 278 of the 1999 Act?

- was Ms Robertson working on a full-time or part-time basis between 1 September 2012 and 19 October 2012?

- if Ms Robertson was working on a part-time basis between 1 September 2012 and 19 October 2012, should Ms Robertson's long service and annual leave claims be dismissed because further proceedings are not necessary or desirable in the public interest? and

- if Ms Robertson was working on a part-time basis between 1 September 2012 and 19 October 2012, should Ms Robertson's incentive payment claim be dismissed because further proceedings are not necessary or desirable in the public interest?

[8] For the reasons that follow, only Ms Robertson's long service and annual leave claims are incompetent and, for that reason, further proceedings in respect of those claims are not necessary or desirable in the public interest and those claims should be dismissed.

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[5] (1993) 142 QGIG 397.
[6] The State's application, section 4, para. 4.
[7] The State's application, section 4, para. 5.
[8] The State's application, section 4, para. 6.
[9] The 1999 Act applies to the State's application by virtue of s 1024 of the *Industrial Relations Act 2016* – see also *Robertson No. 2* (n 1), [17].

Section 331 of the *Industrial Relations Act 1999*

[9] Section 331 of the 1999 Act provided:

> **331 Decisions generally**
> The court or commission may, in an industrial cause –
> (a) make a decision it considers just, and include in the decision a provision it considers appropriate for preventing or settling the industrial dispute or dealing with the industrial matter, the cause relates to, without being restricted to any specific relief claimed by the parties to the cause; or
>
> (b) dismiss the cause, or refrain from hearing, further hearing, or deciding the cause, if the court or commission considers-
> (i) the cause is trivial; or
> (ii) further proceedings by the court or commission are not necessary or desirable in the public interest;
>
> (c) order a party to the cause to pay another party the expenses, including witness expenses, it considers appropriate.

[10] In my view, Ms Robertson's application for unpaid wages is an industrial cause within the meaning of s 331 of the 1999 Act because it is a claim that affects or relates to an industrial matter, namely, the rights of an employee.[10]

[11] In *Campbell v Queensland*,[11] Martin J, President, considered the scope of the indistinguishable successor to s 331 of the 1999 Act, namely s 541 of the *Industrial Relations Act 2016.* After reviewing the authorities that considered s 331 of the 1999 Act, and, in particular, by considering the requirement that for the exercise of the discretion, further proceedings are to be not necessary or desirable in the public interest, his Honour relevantly held:

> 27 Insofar as it may confine the exercise of discretion under s 541, the purpose of the Act is stated as follows:
>
> 3 Main purpose of Act
> The main purpose of this Act is to provide for a framework for cooperative industrial relations that—
> (a) is fair and balanced; and
> (b) supports the delivery of high quality services, economic prosperity and social justice for Queenslanders.
>
> 28 The process for consideration of an application under s 541 does not require that the respondent's case be taken at its highest. The cognate provisions in federal legislation were frequently considered by Full Benches of the federal tribunal, the Federal Court of Australia and the High Court of Australia. The accepted approach was that the applicant bore the onus of making the claim for relief. But the ascertainment in any particular case of where the public interest lay often depended on a balancing of interests, including competing public interests, and was very much a question of fact and degree.
>
> 29 As the power given to the Commission by s 541 can prevent a party from pursuing relief otherwise available under the Act it is one which is to be exercised with due circumspection on a proper consideration of relevant materials. A "proper consideration" cannot be made where the case for the respondent is simply taken at its highest. While the onus remains on an applicant, the requirement to consider the "public interest" cannot be

[10] *Industrial Relations Act 1999*, s 7(1)(b)(i).
[11] [2019] ICQ 18; (2019) 291 IR 171 ('*Campbell*').

> satisfied if an artificial inflation of the respondent's case is applied. Indeed, to take a respondent's case at its highest would almost always result in the dismissal of an application under this section. On an application of this type, a respondent is not relieved of any requirement to advance a case.
>
> 30 In considering the public interest, regard must be had to the legislative basis of the principal relief sought and the evidence before the Commission. …[12]

[12] Further, Martin J, President in *Campbell,* held that the value judgment incorporated in s 541(b)(ii) of the *Industrial Relations Act 2016* is a broad one.[13]

[13] Relevantly to the unpaid wage claims made by Ms Robertson, the objects of the 1999 Act, that confine the exercise of the discretion under s 331, are that the 1999 Act was to provide a framework for industrial relations that supports economic prosperity and social justice by:

> (a) providing for rights and responsibilities that ensure economic advancement and social justice for all employees and employers; and
>
> …
>
> (m) providing for effective, responsive and accessible support for negotiations and resolutions of industrial disputes; and[14]
>
> …

[14] Having regard to the objects of the 1999 Act referred to above, the evidence before me and the submissions made by the parties, I am required to consider whether it is in the public interest that Ms Robertson's outstanding unpaid wage claims be allowed to proceed. In that regard, the onus is on the State to prove its case that Ms Robertson's outstanding wage claims should be dismissed.

[15] The parties are in agreement in relation to one aspect of Ms Robertson's claims.

[16] The State submits that, insofar as it is relevant to Ms Robertson's long service leave and annual leave claims, her claim that there are wages payable and unpaid for 8 August 2012 is misconceived because Ms Robertson was in fact paid for the work she performed on 8 August 2012, albeit not in the fortnight in which the work was performed.[15]

[17] In support of this, the State filed evidence in the form of an affidavit from Mr Scott Findlay. Mr Findlay's evidence is that in relation to the payment of 8 August 2012, Ms Robertson was subsequently paid for that day as an adjustment, in the amount of $336.12, on 22 August 2012.[16] Mr Findlay's further evidence is that Ms Robertson's annual leave and long service leave was calculated and paid taking into consideration that she worked and was paid for 8 August 2012.[17]

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[12] Citation omitted.

[13] *Campbell* (n 11) [32] (Martin J, President).

[14] *Industrial Relations Act 1999*, ss 3(a) and 3(m).

[15] The submissions of the State of Queensland filed on 25 February 2020 ('the State's submissions'), para. 6.

[16] The affidavit of Mr Scott Findlay affirmed on 4 February 2020 ('Mr Findlay's affidavit'), paras. 5-6, Attachment SF1, page 2 of 2.

[17] Mr Findlay's affidavit, para. 6.

[18] Ms Robertson now accepts that she was belatedly paid for 8 August 2012 and makes no further claims in respect of that day.[18]

Are the amounts claimed in Ms Robertson's long service and annual leave claims and in her incentive payment claim, claims for 'wages' within the meaning of the *Industrial Relations Act 1999*?

[19] The Dictionary to the 1999 Act provided:

> ***wages*** means–
> (a) an amount payable to an employee for-
> (i) work performed, or to be performed, by the employee; or
> (ii) a public holiday; or
> (iii) leave the employee is entitled to; or
> (iv) termination of employment; or
> (b) a salary; or
> (c) an amount payable from wages for the employee, with the employee's written consent.

[20] The State did not contend that the amounts claimed in Ms Robertson's long service leave and annual leave claims were not 'wages' within the meaning of the 1999 Act. Clearly, those amounts, as claimed by Ms Robertson, are 'wages' because they are amounts said to be payable to her for leave to which she is entitled, or, in the alternative, they are amounts said to be payable to her for termination of her employment.

[21] The State did submit that the amounts claimed in Ms Robertson's incentive payment claim are not 'wages' because the incentive payment was part of a voluntary redundancy. However, the State further submitted that even if it was wrong in that submission, on the basis of its submissions referred to below, the Commission has no jurisdiction to order the payment of such 'wages'.[19]

[22] Ms Robertson submits that, having regard to the definition of 'wages' contained in the schedule to the 1999 Act, the amounts she claims in respect of long service and annual leave, and for the incentive payment, are wages in that they relate to wages payable to her as leave entitlements and for the termination of her employment.[20]

[23] In my view, the amount claimed by Ms Robertson for the incentive payment pursuant to *Directive No. 04/12 Early Retirement, Redundancy and Retrenchment* ('the 2012 Redundancy Directive') is 'wages' within the meaning of the 1999 Act because it is an amount payable to an employee for termination of employment. There is a clear reason for this.

[24] Sub-clause 4.1.2 of the *Queensland Public Service Award - State 2012* ('the Award') dealt with the notice the State had to give to an employee to dismiss an employee. Sub-clause 4.1.2(c) of the Award provided that payment in lieu of notice shall be made if the appropriate notice is not given, provided that the employment may be terminated by part of the period of notice specified and part payment thereof. It seems to me that such a payment in lieu of notice is an amount payable to an employee for termination of employment.

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[18] Ms Robertson's submissions filed on 18 March 2020 ('Ms Robertson's submissions'), para. 48.
[19] The State's submissions, para. 14.
[20] Ms Robertson's submissions, paras. 1-4.

[25] In *Robertson No. 2*,[21] after examining the circumstances of Ms Robertson accepting the offer of a voluntary redundancy and in considering the terms of the 2012 Redundancy Directive, including giving a purposive construction to cls 3.1 and 3.2 of schedule B to the 2012 Redundancy Directive,[22] I concluded that the purpose of the full amount of the incentive payment, contained in that Directive, was to encourage employees to leave on or by a specified date which led to the inevitable conclusion that the incentive payment was payable on termination of employment.[23] Clause 3.5 in schedule B to the 2012 Redundancy Directive provided that the incentive payment included payment in lieu of notice.

[26] Having regard to the clear words of the definition of 'wages' in the Dictionary to the 1999 Act, if the incentive payment is payable on termination of employment and that amount includes payment in lieu of notice, then for those reasons, the incentive payment was an amount payable for termination of employment.

Was Ms Robertson working on a full-time or part-time basis between 1 September 2012 and 19 October 2012?

[27] In *Robertson No. 2*, from the affidavit material filed by Ms Robertson, I summarised Ms Robertson's contentions upon which her claims are made:[24]

> [27] Ms Robertson's claims are based on the following contentions:
>
> - she worked on a full-time basis in the Department from 2002 and then, on 23 May 2012, following a period of parental leave, returned to work under a part-time agreement, working one day per week;
>
> - on 3 August 2012, she signed a new part-time agreement ('the August part-time agreement') to work two days per week with the August part-time agreement expiring on 31 August 2012;
>
> - for the week commencing on 6 August 2012, she worked two days in that week but was only paid for one day in that she was not paid for her work on 8 August 2012;
>
> - despite her intention to return to her full-time position after the expiry of the August part-time agreement, the Department refused to allow her to resume her substantive, full-time position; and
>
> - for the period 1 September 2012, until the termination of her employment on 19 October 2012, she was only paid for the two days a week that she did work but claims she should have been paid for five days per week given the refusal of the State to allow her to return to full-time employment.

[28] Ms Robertson does not dispute that between 1 September 2012 and 19 October 2012, she was working on a part-time basis, working two days per week and being paid on that basis.

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[21] *Robertson No. 2* (n 1).
[22] Ibid [43]-[61].
[23] Ibid, [62].
[24] Footnotes omitted.

If Ms Robertson was working on a part-time basis between 1 September 2012 and 19 October 2012, should Ms Robertson's long service and annual leave claims be dismissed because further proceedings are not necessary or desirable in the public interest?

The State's submissions

[29] The State's submissions dealt with all of Ms Robertson's claims together and did not distinguish between her claims for long service and annual leave, and her incentive payment claim.

[30] The State submits that:

- Ms Robertson's claims for unpaid long service and annual leave upon the termination of her employment arise in the context of her assertion that although, at the time her employment ended, she was working two days per week and was being paid for two days per week, she ought to have been allowed to work full-time and, as a consequence, seeks to have her leave, superannuation and redundancy entitlements recalculated as if she had been working and was being paid for five days per week in the period 1 September 2012 to 19 October 2012;[25]

- on the authority of *Tweddell*[26] and the decision of Deputy President O'Connor in *Day v Hutcheon,*[27] Ms Robertson's claims are incompetent in that:

  - on the authority of *Automatic Fire Sprinklers Pty Ltd v Watson,*[28] none of her claims relate to wages payable in respect of work performed or to be performed;

  - her claims are for a lost opportunity to do work; and

  - her claims are, in reality, actions for breach of contract and are not claims for where work has been done for which payment has not been properly and fully provided.[29]

Ms Robertson's submissions

[31] Ms Robertson submits that the Department's refusal to '… acknowledge my right to return to full time work at the expiry of my part time agreement on 31 August 2012' did not extinguish her tenure as a full-time employee with the consequence that her annual and long service leave entitlements (and the incentive payment) were payable, on the termination of her employment, based on that tenure under the *Public Service Act 2008* ('the PS Act') and the 2012 Redundancy Directive.[30]

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[25] The State's submissions, para. 10.
[26] The State's submissions, paras. 15-16.
[27] [2014] QIRC 084 and the State's submissions, para. 18.
[28] [1946] HCA 25; (1946) 72 CLR 435, 465 (Dixon J).
[29] The State's submissions, paras. 19-24.
[30] Ms Robertson's submissions, para. 5.

[32] Ms Robertson also submits that:

- her claims fundamentally differ from those in *Tweddell* in that the claims made in that case were only about wages whereas her claim concerns leave entitlements or termination payments;[31]

- leave entitlements and termination payments are not linked to work performed and '… thus it is tenure and the corresponding rights under industrial instruments that leave entitlements and termination payments are based on.';[32]

- leave accrual is not solely and directly linked to hours worked given that employees continue to accrue leave when they are not working such that:

  – cl 18.1 of *Directive No. 2/11 Recreation Leave,* operative from 17 January 2011, ('the Recreation Leave Directive') and cls 13.1 and 18.2 of *Directive No. 1/11 Long Service Leave* ('the Long Service Leave Directive') make it clear that the entitlement to, respectively, recreational leave on termination and long service leave on termination, '… is based on the employees permanent position';[33] and

  – leave entitlements '… are linked to tenure, unless modified by an agreement that specifically modifies the term of leave entitlements, such as a part time work arrangement or a period of leave without pay greater than 3 months';[34] and

- the Department's prevention of her from working in accordance with her '… full-time tenure should not prevent my entitlements from accruing at the full-time rate.'[35]

The State's submissions in reply

[33] In its submissions in reply, the State submits that:

- the Long Service Leave Directive does not provide that an employee who was working part-time is entitled to accrue long service leave as if the employee was working full-time hours;[36] and

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[31] Ms Robertson's submissions, para. 6. Ms Robertson also submits that the decision of Deputy President O'Connor in *Day v Hutcheon,* is not analogous to her claim because in that case, the wages were found not to be payable as the applicant did not have a contract that required the payment of wages - Ms Robertson's submissions, para. 47.

[32] Ms Robertson's submissions, para. 7.

[33] Ms Robertson's submissions, paras. 9 and 10.

[34] Ms Robertson's submissions, para. 11.

[35] Ms Robertson's submissions, para. 14.

[36] The submissions of the State of Queensland in reply filed on 1 April 2020 ('the State's reply submissions'), para. 8.

- the entitlement to leave is calculated on the hours worked, other than a continuation of accrual of entitlements for the first three months of unpaid leave.[37]

My determination

[34] I will deal with these matters on the basis of the arguments put by the State and Ms Robertson.

Is the accrual of annual and long service leave based on the employee's position or tenure, or on time the employee worked?

[35] The State's principal submission is, in essence, that long service leave and annual leave is accrued on the basis of the time an employee works such that a part-time employee accrues long service leave and annual leave on a proportionate basis compared to that accrued by a full-time employee.

[36] Ms Robertson claims that cl 18.1 of the Recreation Leave Directive and cls 13.1 and 18.2 of the Long Service Leave Directive make it clear that the entitlement to that leave is based on the employee's permanent position[38] and that the leave entitlements are linked to tenure unless modified by an agreement that specifically modifies the term of the leave entitlements.[39]

[37] I cannot accept Ms Robertson's submissions.

[38] As at the date of the termination of Ms Robertson's employment, her entitlement to recreation leave was governed by the combined effect of cl 7.1 of the Award and the Recreation Leave Directive. Clause 18.1 of the Recreation Leave Directive provided:

> **18. Payment upon departure from the service**
>
> 18.1 Recreation leave and/or leave loading payable as a lump sum amount as at the date of termination of employment shall be payable at the rate prescribed for the employee's substantive position. However, where the employee is acting in a higher position on the last day of employment (i.e. date of termination), and has accrued recreation leave and/or leave loading that is to be paid out on termination, payment is at the ordinary rate of pay the employee receives immediately before termination (i.e. the higher duties rate) in accordance with section 14(5) of the *Industrial Relations Act 1999*.[40]

[39] Clause 18.1 of the Recreation Leave Directive says nothing about the lump sum payment of recreation leave and leave loading, payable on termination of employment, as being linked to tenure. In my view, that clause provides that the lump sum amount of accrued annual leave and leave loading, payable as at the date of the termination of employment, is payable or, more precisely, calculated, at the rate of pay for the employee's substantive position at that time.

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[37] The State's reply submissions, para 9.

[38] Ms Robertson's submissions, paras. 9-10.

[39] Ms Robertson's submissions, para. 11.

[40] Contained in the part of the Recreation Leave Directive entitled 'General conditions applying to officers, temporary employees & general employees'.

[40] This is confirmed by cl 17 of the Recreation Leave Directive which sets out how recreation leave and loading is calculated. Sub-cl 17.1 relevantly refers, for employees other than shift workers covered by the Directive, to the '… rate of wage or salary prescribed in the relevant certified agreement plus a loading calculated at the rate of 17.5% of this amount.'

[41] The reference in cl 18.1 of the Recreation Leave Directive to the '… employee's substantive position' has nothing to do with tenure, in the sense used by Ms Robertson, namely, permanent full-time or part-time employment.

[42] As at the date of the termination of Ms Robertson's employment, her entitlement to long service leave was governed by the combined effect of cl 7.5.3 of the Award and the Long Service Leave Directive. The Schedule to the Long Service Leave Directive provided:

> **13. Payment of long service leave**
>
> 13.1 Payment of long service leave is based on the calculation of leave available (see clause 12.1 above) and the full pay to which the employee is entitled in his or her substantive position unless the conditions in the ministerial directive: *Higher Duties* apply.
>
> …
>
> **18 Cash equivalent of long service leave on termination**
>
> 18.1 Subject to clauses 20 and 21, a person who ceases to be an employee and who, at the date of cessation, has an entitlement to long service leave under this schedule, is to receive a payment instead of the long service leave not taken.
>
> 18.2 The calculation of the amount of the payment is based on:
> - the employee's entitlement to long service leave as at the date of cessation;
> - less any long service leave previously taken; and
> - the full-pay rate payable to the employee at the employee's substantive position at the date of ceasing employment, unless the conditions in the ministerial directive: *Higher Duties* apply.

[43] Again, in those clauses, the reference to an employee's 'substantive position' is not a reference to whether the employee is employed on a tenured full-time or part-time basis.

[44] In any event, cl 13.1 of the Long Service Leave Directive is only concerned with the payment of accrued and untaken long service leave when leave is actually taken during the course of an employee's employment. Clause 3.4 of the Schedule of that Directive defines 'full pay' to mean '… the employee's ordinary rate of pay and is inclusive of any fixed allowances that are part of the regular fortnightly pay.' Contrary to Ms Robertson's submissions, the reference to the phrase 'substantive position' in cl 13.1, when that clause is read as a whole, is not a reference to whether or not the employee is employed on a permanent full-time or part-time basis, but is referrable to the employee's ordinary rate of pay, unless the employee's ordinary rate of pay, at the time of the leave, is increased by the Higher Duties Directive.

[45] Clause 18.2 of the Long Service Leave Directive is concerned with the payment to an employee of the cash equivalent of accrued long service leave on termination of employment. However, again, when read as a whole including by reference to the definition of 'full pay' in cl 3.4, that clause provides that the calculation of the cash equivalent of accrued long service leave is not determined by whether the employee is employed on a permanent full-time or part-time basis. Rather, the calculation is made by having regard to the employee's accrued leave and the employee's ordinary pay rate at the date of ceasing employment, unless the employee's ordinary rate of pay, at that time, is increased by the Higher Duties Directive.

[46] Sub-clause 4.3.2(e) of the Award provided that the hourly rate of pay for a part-time employee was the same as that for a full-time employee appointed to, or directed to assume duty, at the same classification level. As such, at the time of the termination of her employment, Ms Robertson's rate of pay was dependent upon the classification of her position and the pay-point in that classification to which she had advanced.

[47] It is true that *Directive No. 7/08 Leave without Salary Credited as Service* provided that particular periods of specified types of leave without salary were recognised as service for the accrual of recreation and long service leave.[41] However, those provisions only apply to an employee in those particular circumstances and do not represent the general rule as to how annual and long service leave, in respect of an employee who is not on leave without salary, is accrued.

[48] Clause 2.1 of the Recreation Leave Directive[42] relevantly provided that an employee working in the Southern and Eastern Region of Queensland and who was not a continuous shift worker, accrued recreation or annual leave of 20 working days (calculated in hours depending on the hours of duty prescribed) for each completed year of service and a proportionate amount for an incomplete year of service.

[49] Clause 2.1 in the Schedule to the Long Service Leave Directive provided that an employee who completed 10 years continuous service was entitled to long service leave on full pay. Clause 2.3(b) provided that the qualifying period for a part-time employee was 10 calendar years of continuous service worked on a part-time basis or a combination of full-time, part-time and/or casual service.

[50] Furthermore, sub-cl 4.3.2(c) of the Award provided that subject to the provisions contained in cl 4.3 of the Award, all provisions of the Award applicable to full-time employees applied to part-time employees on a *pro rata* basis.

[51] These provisions meant that a part-time employee accrued long service leave on a *pro rata* basis compared to the rate at which a full-time employee accrued long service leave.[43]

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[41] See the Schedule to the *Directive No.7/08 Leave without Salary Credited as Service.*

[42] Contained in the part of the Recreation Leave Directive entitled 'Additional conditions applicable to officers & temporary employees only'.

[43] Similarly, cl 2.4(b) of the Long Service Leave Directive provided a special method to determine a casual employee's entitlement to long service leave calculated, in part, by the total number of hours worked by the casual employee.

[52] For the period 1 September 2012 to 19 October 2012, as a matter of undeniable fact, Ms Robertson worked on a part-time basis of two days per week. Consequently, Ms Robertson accrued long service and annual leave, over that period of time, on a *pro rata* basis having regard to the time she worked.

[53] There is no dispute that the cash equivalent of Ms Robertson's long service and annual leave claims was calculated on the basis that Ms Robertson was not a full-time employee between 1 September 2012 and 19 October 2012 and *on that basis,* the amount of the cash equivalent of Ms Robertson's entitlement to accrued and untaken long service and annual leave, as calculated by the Department as at 19 October 2012, was correct.

[54] The result is that there are no wages payable and unpaid, as at 19 October 2012, in respect of Ms Robertson's accrued but untaken long service and annual leave.

[55] Section 278 of the 1999 Act relevantly provided:

> **278 Power to recover unpaid wages and superannuation contribution etc.**
>
> (1) An application may be made to the commission for an order for payment of-
> (a) an employee's unpaid wages; or
> (b) an apprentice's unpaid tool allowance under section 138; or
> (c) remuneration lost by an apprentice or trainee because the employer has contravened section 391(2); or
> (d) contributions to the approved superannuation fund payable for an eligible employee that are unpaid.
>
> …
>
> (4) The application must be made within 6 years after the amount claimed became payable.
>
> …
>
> (8) On hearing the application, the commission or magistrate-
> (a) must order the employer to pay the employee-
> (i) the amount the commission or magistrate finds to be payable and unpaid to the employee within the 6 years before the date of the application; and
> (ii) an amount the commission or magistrate considers appropriate, based on the return that would have accrued in relation to the contributions had it been properly paid to the approved superannuation fund; and
> (b) may make an order for the payment despite an express or implied provision of an agreement to the contrary; and
> (c) may order the payment to be made on the terms the commission or magistrate considers appropriate.[44]

[56] Certainly while 'wages', for the purposes of s 278(1)(a) of the 1999 Act, includes an amount payable to an employee for leave the employee is entitled to or an amount payable to an employee for termination of employment - which would include payment of the cash equivalent of any entitlement to annual or long service leave on the termination - they must be wages that are payable and unpaid. As such, Ms Robertson's

[44] Emphasis added.

annual and long service leave claims are not claims that can be the subject of an order made under s 278(8) of the 1999 Act.

[57] For the reasons given above, Ms Robertson's long service and annual leave claims are not competent. The State has discharged its onus under s 331(b)(ii) of the 1999 Act. Ms Robertson's long service and annual leave claims should be dismissed because I consider that further proceedings are not necessary or desirable in the public interest. Ms Robertson's long service and annual leave claims are, in reality, not claims for the recovery of wages, but are claims for alleged breach of contract for loss of opportunity.

If Ms Robertson was working on a part-time basis between 1 September 2012 and 19 October 2012, should Ms Robertson's incentive payment claim be dismissed because further proceedings are not necessary or desirable in the public interest?

Ms Robertson's submissions

[58] Ms Robertson submits that:

- the fact that she did not bring a claim for breach of contract does not preclude her right to bring a claim for unpaid wages under s 278 of the 1999 Act;[45]
- payments for 'termination of employment' are not contingent on work performed;[46]
- the incentive payment is linked to tenure, and not hours worked,[47] because:
  - as cl 3.3 of schedule B of the 2012 Redundancy Directive refers to the offer of an incentive payment to 'Tenured part-time employees', then that '… cannot mean a substantively appointed full time employee who is only temporary part time, as an employee is either tenured as a full-time employee or tenured as a part-time employee' when regard is had to s 125 of the PS Act;[48]
  - the payment of higher duties is made on an employee's substantive position, and not the temporary position;[49] and
  - cl 1.1 in schedule B to the 2012 Redundancy Directive provides that the packages provided by the Directive '… are compensation for loss of job tenure.[50]

[59] Ms Robertson maintains that she was a full-time employee for the relevant period[51] and that the State was in breach of a number of instruments, namely:

[45] Ms Robertson's submissions, para. 16.
[46] Ms Robertson's submissions, para. 17.
[47] Ms Robertson's submissions, para. 17.
[48] Ms Robertson's submissions, paras. 18-20.
[49] Ms Robertson's submissions, para. 21.
[50] Ms Robertson's submissions, para. 22.
[51] Ms Robertson's submissions, para. 26.

- ss 3(j) and 3(m) of the 1999 Act which provided, respectively, that the principal objects of the 1999 Act were to promote and facilitate the regulation of employment by awards and agreements and to provide for effective, responsive and accessible support for negotiations and resolution of industrial disputes;[52] and

- sub-cls 4.6.1 and 4.6.2 of the Award and sub-cls 1.7.1 and 1.7.2 of the *Family Leave Award 2003* ('the Family Leave Award')[53] which provided that it was the intention of the parties to those Awards to prevent and eliminate unlawful discrimination and for the parties to take reasonable steps to ensure that neither the Award provisions nor their operation were directly or indirectly discriminatory in their effects.[54]

[60] Ms Robertson also submitted that the State was in breach of its obligations under ss 29C(1)(a) and 32 of the 1999 Act, sub-cls 2.1.1(e), 2.6.3 and 2.1.8 of the *Family Leave Award 2004*, and sub-cl 4.3.2 of the Award because:

- an employee, who is a temporary part-time employee for family reasons, must be allowed to return to their former position;

- the State did not meet its obligations under the 1999 Act to promote and facilitate the regulation of her employment by the relevant awards and agreements and refused to resolve the industrial dispute with her relating to her rights under the 1999 Act, the Family Leave Award and the Award;[55]

- in respect of the incentive payment, the full-time calculation should be applied because her full-time position should have been made available to her and the purpose of the 1999 Act is to promote and facilitate compliance with awards and agreements;[56]

- the relevant part-time work arrangements procedure that applied in the Department, which provided that employees seeking part-time work for a set period of time had to ensure that the return to their full-time position was agreed and recorded on the part-time employment agreement at the commencement of the arrangement, because there was no automatic right to return to full-time duty, did not apply to staff '… who are part-time under parental leave';[57]

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[52] Ms Robertson's submissions, para. 27.

[53] These submissions appear to be referring to the *Family Leave Award (Queensland Public Sector) – State 2004*.

[54] Ms Robertson's submissions, paras. 28-29.

[55] Ms Robertson's submissions, paras. 30-35.

[56] Ms Robertson's submissions, paras. 36-37.

[57] Ms Robertson's submissions, para. 38 and Exhibit 4, Exhibit A, page 1, third dot point.

- the *Flexible Work Practices (Including Part-Time Employment) Policy No. 241* states:

  – at s 2, that employees accessing part-time employment in relation to parental leave have a right to return to their full-time position; and

  – at s 6:

  > The terms of the 'Part-Time Employment Agreement' can be varied if both parties agree but an amended 'Part-time Employment Agreement' outlining the new terms must be completed.[58]

- she was full-time prior to maternity leave and the agreed period of part-time work had ended on 31 August 2012[59] and in an email to her on 21 September 2012, the Public Service Commission, in refencing sub-cls 8.5.1 and 8.5.2 of the *Family Leave (Queensland Public Sector) Award - State 2012*,[60] stated that both provisions provide for, at the end of an agreed period of part-time work, the return to the employment arrangement the employee held prior to commencing the Parental leave;[61]

- s 29C(d) of the 1999 Act stated that an application for part-time work must state the days the part-time work is to start and end, the end date was indisputably recorded on the part-time agreement in question and therefore, once it ended, she should have been allowed to resume full-time hours because the Department did not receive a further application by her to extend the agreement, particularly when the State sought to extend the agreement and she refused this extension;[62] and

- in response to the State's submission that Ms Robertson did not have a contractual obligation to alter her hours for the period 1 September 2012 to 19 October 2012 and that the Department had no need for Ms Robertson to increase her hours at that time,[63] the State has misrepresented the facts because of the fact that the temporary agreement had expired, '… returning me to full-time and this required no approval from the Department, in accordance with the provisions of the relevant industrial instruments outlined above.'[64]

[61] Ms Robertson concluded by submitting:

> **Employment status at end date is basis for Incentive Payment Calculation**
>
> 45. It was the employee's status at the date of termination that determined their entitlement to the incentive payment, the PSC having advised (via email advice) that the IP is based on the employee's work status at their end date.

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[58] Ms Robertson's submissions, para. 39.
[59] Ms Robertson's submissions, para. 40.
[60] These submissions appear to be referring to the *Family Leave Award (Queensland Public Sector) – State 2012*.
[61] Ms Robertson's submissions, para. 41.
[62] Ms Robertson's submissions, para. 42.
[63] The State's submissions, para. 23.
[64] Ms Robertson's submissions, paras. 43-44.

> 46. It is a fact that in 2012 there was confusion and contradiction as to how the Directive would be applied for a tenured full-time employee on a part-time arrangement, however there is no such confusion around the calculation for a tenured full-time employee with no alteration of that arrangement, either in the case of a temporary part-time agreement or higher duties. In the case of Higher Duties, the incentive payment was calculated on the employee's substantive, not their acting, position.

The State's submissions in reply

[62] In reply, the State submits that:

- the incentive payment under the 2012 Redundancy Directive is directly linked to the employment status of the employee at the relevant time and that Ms Robertson was a tenured public service employee who was working part-time hours as at the date of the termination of her employment;[65]
- Ms Robertson was a tenured part-time employee and was not a temporary employee employed under s 148 of the PS Act;[66]
- Ms Robertson had no entitlement to payment for hours she did not work, nor calculation of entitlements calculated on hours not worked;[67] and
- the matters Ms Robertson disputes, namely the interpretation of her employment contract and breach of contract, are not matters relating to the underpayment of wages.[68]

Determination

[63] Clause 4.8 of the Award relevantly provided:

> **4.8 Redundancy**
>
> The provisions of clause 4.8 will not apply to employees of Queensland government departments and agencies to the extent that the provisions of the redundancy arrangements are contained in a Directive issued by the Minister responsible for industrial relations pursuant to section 54 of the *Public Service Act 2008*, where the Directive provides for entitlements that are superior to clause 4.8.

[64] The 2012 Redundancy Directive provided for entitlements that were superior to those in cl 4.8 of the Award. In that regard, schedule B to the 2012 Redundancy Directive was headed 'Entitlements' and relevantly provided:

> **3. Incentive payment**
>
> 3.1. In addition to the severance payment, an incentive payment may be offered once only to encourage employees to exit the department on or by a specified date. The payment will be $6,500 or 12 weeks' pay at the employee's substantive level, whichever is the greater.

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[65] The State's reply submissions, paras. 12-13.
[66] The State's reply submissions, paras. 13-15.
[67] The State's reply submissions, para. 16.
[68] The State's reply submissions, para. 17.

> 3.2. The incentive payment reduces by the equivalent of one week's pay for each week the employee delays leaving the department after the specified date.
>
> 3.3. Tenured part-time employees who are offered an incentive payment will be entitled to a portion of the incentive payment, which will be adjusted to reflect the proportion of full-time hours worked by the employee. For example, if .5 is the proportion of full-time hours worked by an employee for the position, the incentive payment applicable would be $3,250 or 12 weeks' salary, calculated at the employee's usual part-time rate (i.e. in this example .5), whichever is the greater.
>
> 3.4. Incentive payments may apply to early retirements and redundancies, but do not apply to retrenchments.
>
> 3.5. The incentive payment includes payment in lieu of notice.[69]

[65] Ms Robertson submitted that she did not meet the description of a 'tenured part-time employee' referred to in cl 3.3 because she was a substantively appointed full-time employee, she was only a temporary part-time employee, and when regard is had to s 125 of the PS Act, an employee is either a tenured full-time or a tenured part-time employee.

[66] In terms of whether there are wages payable and unpaid to Ms Robertson in respect of the incentive payment, I am not convinced that the submissions made by the State compel the conclusion that Ms Robertson's incentive payment claim is not competent.

[67] As Ms Robertson succinctly identified in her submissions, her claim is that the Department's '… refusal to acknowledge my right to return to full time work at the expiry of my part time agreement on 31 August 2012, did not extinguish my tenure as a full time employee and thus, both leave entitlements and the incentive payment are payable based on this tenure' under the PS Act and the 2012 Redundancy Directive.[70]

[68] It is true, as Ms Robertson submits,[71] the entitlement to an early retirement, redundancy or retrenchment package under schedule B to the 2012 Redundancy Directive is for compensation of loss of job tenure.[72]

[69] Exhibit 4, exhibit C is the letter confirming Ms Robertson's appointment, in December 2006, to the predecessor to the Department. That letter provides that the basis of Ms Robertson's employment was 'Tenured Full-Time'.

[70] Exhibit 1, exhibit A includes a document headed 'Part-time Employment Agreement' that concerned Ms Robertson's part-time arrangement under parental leave provisions for the period 25 May 2012 to 25 May 2013. During that period, Ms Robertson worked one day per week. Exhibit 1, exhibit B includes a document also headed 'Part-time Employment Agreement' that concerned Ms Robertson's part-time arrangement under parental leave provisions for the period 3 August 2012 to 31 August 2012. During that period, Ms Robertson worked two days per week. There is no dispute that Ms Robertson continued to work on a part-time basis from 1 September 2012 to 19 October 2012.

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[69] Footnotes omitted.

[70] Ms Robertson's submissions, para. 5.

[71] Ms Robertson's submissions, para. 22.

[72] The 2012 Redundancy Directive, sch B, cl 1.1.

[71] There is a real question to be determined as to whether, at the termination of Ms Robertson's employment on 19 October 2012, Ms Robertson met the description of a tenured part-time employee within the meaning of cl 3.3 of schedule B to the 2012 Redundancy Directive.

[72] If she did not, then by the combined effect of cl 4.8 of the Award and cl 3.3 of schedule B to the 2012 Redundancy Directive, there may be wages payable and unpaid in respect of the incentive payment.

[73] The question is, even though Ms Robertson was working on a part-time basis between 1 September 2012 and 19 October 2012, does that fact mean Ms Robertson was a tenured part-time employee within the meaning of cl 3.3 of the 2012 Redundancy Directive?

[74] In my view the determination of that question is not dependant on the application principle in *Tweddell*, but whether, on the facts, Ms Robertson met the description of a tenured part-time employee.

[75] For these reasons, in respect of Ms Robertson's incentive payment claim, I do not consider that further proceedings are not necessary or desirable in the public interest.

Conclusion

[76] Ms Robertson's long service and annual leave claims are incompetent. As such, further proceedings about those claims are not necessary or desirable in the public interest. Ms Robertson's long service and annual leave claims are dismissed pursuant to s 331(b)(ii) of the 1999 Act.

[77] I will proceed to hear Ms Robertson's incentive payment claim.

[78] That matter will be mentioned on a date to be fixed.