INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Programmed Integrated Workforce Pty Ltd v Fox* [2022] ICQ 32
PARTIES:	**PROGRAMMED INTEGRATED WORKFORCE PTY LTD** (appellant) **v** **CRAIG FOX** (respondent)
FILE NO/S:	C/2022/15
PROCEEDING:	Appeal
DELIVERED ON:	28 November 2022
HEARING DATE:	19 October 2022
MEMBER:	Davis J, President
ORDER/S:	**1. The appeal is dismissed.** **2. The respondent file and serve any written submissions on costs by 4.00 pm on 5 December 2022.** **3. The appellant file and serve any written submissions on costs by 4.00 pm on 12 December 2022.** **4. Each party have liberty to apply, by application filed and served by 4.00 pm on 19 December 2022, for leave to make oral submissions on costs.** **5. In the event that no application is filed by 4.00 pm on 19 December 2022, the question of costs will be decided on the written submissions without further oral hearing.**
CATCHWORDS:	INDUSTRIAL LAW - QUEENSLAND - GENERAL EMPLOYMENT CONDITIONS - LONG SERVICE LEAVE - CONTINUITY OF SERVICE AND EMPLOYMENT - where a written employment agreement was entered into between the appellant and an employee - where the employee worked as a casual - where the agreement provided that the employee was employed for each period of casual work - where the employee worked under that arrangement for over seven years - where the *Industrial Relations Act* 2016 provides that where an employee's employment is terminated other than for conduct, capacity or performance, an entitlement to long service leave crystallises - where the appellant informed the employee that there would be no further offers of work upon expiry of the employee's

current work period - whether the employee's service with the appellant was terminated - whether the entitlement to long service leave of the employee crystallised

INDUSTRIAL LAW - QUEENSLAND - GENERAL EMPLOYMENT CONDITIONS - LONG SERVICE LEAVE - CONTINUITY OF SERVICE AND EMPLOYMENT - where the appellant had a contract with the Brisbane City Council to provide it labour - where the contract did not oblige the Council to seek labour from the appellant - where the contract only provided the terms of provision of labour by the appellant if the Council chose to request labour from the appellant - where the Council sought new tenders for the provision of labour - where a competitor of the appellant won the tender - where an employee was employed on a casual basis by the appellant - where the competitor employed the employee - where the competitor provided labour to the Council in the same manner as the appellant had previously done - where the *Industrial Relations Act* 2016 provided that the long service leave obligations to the employee shifted to the competitor if there had been a transfer of calling - whether there had been a transfer of calling from the appellant to the competitor

Fair Work Act 2009 (Cth), s 394
Industrial Conciliation and Arbitration Acts 1932 to 1952, s 10B
Industrial Relations Act 1990
Industrial Relations Act 1999, s 69
Industrial Relations Act 2016, s 93, s 95, s 102, s 103, s 105, s 116, s 125, s 130, s 131, s 132, s 341, s 577, s 899
Industrial Relations Bill 2016
Workplace Relations Act 1996 (Cth), s 135, s 149, s 170CB
Workplace Relations Act 1997, s 197

CASES:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Qld, Union of Employees v Wilsons Parking Australia 1992 Pty Ltd (2002) 171 QGIG 323, considered
Broadlex Services Pty Ltd v United Workers' Union (2020) 296 IR 425, cited
Craig Geoffrey Fox v Programmed Integrated Workforce Ltd (No 2) [2022] QIRC 281, related
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, cited
Khayam v Navitas English Pty Ltd (2017) 273 IR 44, considered
Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd (2005) 222 CLR 194, considered
R v Bowen; Ex parte Amalgamated Metal Workers' and Shipwrights' Union (1980) 144 CLR 462, cited
Victoria v Commonwealth (1996) 187 CLR 416, cited

WorkPac Pty Ltd v Rossato (2021) 271 CLR 456, followed

COUNSEL: C Martin for the appellant
A Freeman for the respondent

SOLICITORS: Herbert Smith Freehills for the appellant
GR Cooper, Crown Solicitor for the respondent

[1] On 25 November 2021, the Queensland Industrial Relations Commission (QIRC) ordered the appellant, Programmed Integrated Workforce Ltd (PIW) to pay one of its former employees, Mr Andrew Haining, the amount of $8,099.24.[1] That sum represented a proportionate payment of long service leave pursuant to Division 9 of Part 3 of Chapter 2 of the *Industrial Relations Act* 2016 (IR Act).

[2] The respondent, Craig Geoffrey Fox, is an Industrial Inspector with the Office of Industrial Relations[2] and made the claim on Mr Haining's behalf.

[3] PIW appeals against that judgment.

Background

[4] The proceeding before the QIRC proceeded on the basis of an agreed statement of facts. There is no dispute, either before the QIRC or on appeal to this Court, as to any material fact.

[5] The grounds of appeal are all based upon alleged errors of construction by the QIRC as to the effect of documents and legislation. All grounds of appeal allege errors of law. The appeal to this Court is therefore as of right.[3]

[6] PIW is a labour hire company. From 20 June 2011, it was party to a labour hire agreement with the Brisbane City Council (BCC) whereby it provided labour to the BCC ("PIW's contract with BCC" or "the contract").

[7] PIW's contract with BCC is quite a complicated document which governs the terms upon which PIW was to provide services to the BCC. The contract established a regime where the BCC placed an order for services which PIW then provided. Although the contract is dated 20 June 2011, the commencement date for the contractual arrangements was 10 June 2011.

[8] The term of the contract was from 10 June 2011 to 31 May 2013,[4] but there are provisions allowing for extensions and variations. Although the "maximum term" is "five years from and including the commencement date", it is common ground that the contract was extended into 2019.

[9] Recital A to PIW's contract with the BCC is in terms, "The Council requires the provision of the Services[5] through a panel arrangement". The significance of that

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1 *Craig Geoffrey Fox v Programmed Integrated Workforce Ltd (No 2)* [2022] QIRC 281.
2 Section 899 of the *Industrial Relations Act* 2016.
3 *Industrial Relations Act* 2016, s 557(1).
4 Clause 2 and Schedule A, Item 1.
5 "Services" is a defined term, clause 1.1.

recital is shown by clause 3.7, which explains the concept of a "Panel Arrangement". That clause is in these terms:

> "**3.7 Panel Arrangement - Council not bound to order from the Contractor**[6]
>
> (a) This Contract is part of a panel arrangement established by the Council whereby a number of panel participants (such as the Contractor) have signed contracts similar to this Contract to provide the Council with such Services as the Council may from time to time require and obtain through the placement of an order with a panel participant (including the Contractor).
>
> (b) It is a condition of this Contract (and each Order) that the Council:
>
> (i) is **not** providing any guarantee, promise or undertaking (whether legal or equitable) that it will acquire any Services from the Contractor during the Term of this Contract; and
>
> (ii) may at any time place an order for the provision of Services from:
>
> A. another panel participant; **or**
>
> B. from any third party;
>
> where **either** the Council is of the opinion that none of the panel participants can provide the Services in question as and when required by the Council or where, an Order has been placed with a panel participant and the Council is exercising its rights pursuant to clause 14.6 (or any other provision) of this Contract or that Order.
>
> (iii) may add additional Panel Participants to the Panel Arrangement pursuant to clause 3.8." (emphasis added)

[10] Clause 17.3 limits the right of PIW to assign the benefit of the contract or to sub-contract the work to others. It provides:

> "**17.3 Assignment and Sub-contracting**
>
> The Contractor shall not without the prior written approval of the Council:
>
> (a) assign all or any part of this Contract or any Order or any payment thereunder. Approval to assign shall be on terms and conditions determined by the Council; or

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6 Integrated Group Limited is defined as "the Contractor" (which must, given the agreed Statement of Facts, be a previous name of Programmed Integrated Workforce Pty Ltd).

(b) sub-contract the whole or any part of its obligations or rights under this Contract or any Order. Any approval by the Council to allow the Contractor to subcontract shall not relieve the Contractor from any liability or obligation under this Contract or any Order."

[11] Mr Haining was employed by PIW on a casual basis from 3 October 2011. That employment was pursuant to an agreement (the employment agreement). The legal effect of the employment agreement is a matter of contention.

[12] The employment agreement commences with what I will call, "the operative clause" and then contains 10 terms and conditions. It ends with an acknowledgment as to the legal effect of Mr Haining signing the agreement or accepting "any offer of work".

[13] The operative clause provides:

> "I [Mr Haining] of [Mr Haining's address]
>
> Declare that the information I have provided to Programmed Integrated Workforce is true and correct. I understand that any offer of employment made by the Programmed Integrated Workforce will be subject to the Terms and Conditions of employment as detailed below and agree to abide by Programmed Integrated Workforce or its customers' rules, medical requirements, safety regulations, times of attendances at work etc, and any other conditions currently established on the work site designated for my employment assignment or issued from time to time." (emphasis added)

[14] Clause 1 is headed "Casual employment". It provides:

> "**1. Casual employment**
>
> You will be recorded as being available to accept offers of casual employment with Programmed Integrated Workforce. Being recorded as an available casual employee does not guarantee work, and you acknowledge that:
>
> (a) Any work offered will be in accordance with Programmed Integrated Workforce's needs. Programmed Integrated Workforce may change the quantity and arrangement of any work offered to you as necessary;
>
> (b) There is no obligation on Programmed Integrated Workforce to offer or on you to accept, any assignment. Each offer and acceptance will constitute a distinct contract of employment, on the terms set out in this agreement, which is separate from any subsequent or prior contract of employment; and
>
> (c) You do not have any entitlement to ongoing employment given the casual nature of your engagement." (emphasis added)

[15] Clause 2 is entitled, "Commencement date" and provides:

> "**2. Commencement date**
>
> Consistent with the nature of your employment, each assignment represents a discrete period of employment on a casual basis. Programmed Integrated Workforce does not employ you on a permanent basis." (emphasis added)

[16] Therefore, the structure of the arrangement is that Mr Haining will (or at least may) be employed in a series of rolling contracts of employment equating to each assignment by PIW of his labour to, relevantly here, the BCC.

[17] Clause 3 concerns "Assignments". It provides, relevantly:

> "**3. Assignments**
>
> (a) Programmed Integrated Workforce will use reasonable endeavours to offer you assignments with a client of Programmed Integrated Workforce. Programmed Integrated Workforce may offer you an assignment, from time to time, by advising you of the expected assignment details, namely:
>
> 1. The type of work to be performed;
> 2. When the work is to be performed;
> 3. The work roster; and
> 4. Any other requirements applicable to the particular assignment. …
>
> (c) You may accept or reject any offer of an assignment. On completion of an assignment, whether satisfactory or otherwise, Programmed Integrated Workforce is under no obligation to offer you any further assignments. …
>
> (i) Personal Protective Equipment specific to the risks associated with some work will be provided or replacement Personal Protective Equipment will be provided where Programmed Integrated Workforce has assessed the need for replacement." (emphasis added)

[18] Clause 4 concerns leave. It provides that there is no entitlement to leave. There is an acknowledgement that the wages to be paid include a leave loading.

[19] Clause 5 concerns "Payment of wages". It provides:

1. that wages will be paid in accordance "with company policy";
2. current policy provides for weekly payment of wages by electronic funds transfer;
3. a bank account must be nominated;
4. in the event of overpayment, a set-off is authorised;

5. each assignment will be offered at a particular wage rate.

[20] Clause 6 concerns superannuation. It has no particular relevance to the current dispute.

[21] Clause 7 is entitled "Your [Mr Haining's] undertakings" in terms:

> "**7. Your undertakings**
>
> You agree:
>
> (a) To notify Programmed Integrated Workforce immediately if an offer of employment (either temporary or permanent) is made to you by a client where Programmed Integrated Workforce has placed you …
>
> (c) To obey all lawful written and verbal health and safety instructions issued by Programmed Integrated Workforce or its client;
>
> (d) To comply with the local site rules and requirements that may be issued, introduced or varied from time to time by Programmed Integrated Workforce or its client;
>
> (e) To adhere strictly to all standard operating procedures and safe systems of work laid down by Programmed Integrated Workforce's client for particular equipment or tasks and to correctly use all personal protective clothing and equipment in the appropriate circumstances …
>
> (g) To abide by the site requirements for wearing Personal Protective Equipment. You will ensure that your Personal Protective Equipment will be kept in good condition …
>
> (k) That Programmed Integrated Workforce may immediately terminate your assignment if you falsely claim to hold a vocational, academic or professional qualification that is necessary to perform the assignment." (emphasis added)

[22] Clause 8 concerns confidential information and it is clear that obligations of confidentiality attach to Mr Haining and those obligations extend "during an assignment and at all times afterwards".

[23] Clause 9 concerns workers' compensation. It has no particular relevance to the current dispute.

[24] Clause 10 concerns termination. It provides:

> "**10. Termination**
>
> (a) In accepting this offer of employment, you acknowledge that your employment is casual and therefore offered

with no expectation of continuity. Integrated will provide you with a minimum of one hour's notice of any change in your work requirements, suspension of work or the termination of your employment.

(b) Programmed Integrated Workforce will be entitled to terminate your employment immediately if any of the following occurs:

(i) serious misconduct, including but not limited to:

i. Wilful or deliberate behaviour by you that is inconsistent with the continuation of the contract of employment;

ii. Conduct by you that causes imminent and serious risk to the health or safety of a person or the reputation, viability or profitability of Programmed Integrated Workforce's business;

(ii) theft;

(iii) fraud;

(iv) assault;

(v) being under the influence of drugs or alcohol at work;

(vi) refusing to carry out a lawful and reasonable instruction that is consistent with your employment;

(vii) failure to observe any safety and specified work practices mandated by Programmed Integrated Workforce or its client; or

(viii) Unlicensed driving (if driving a vehicle forms part of your duties)." (emphasis added)

[25] The final acknowledgment is in these terms:

> "You will be deemed to have accepted Programmed Integrated Workforce's offer of employment on the terms and conditions set out above, by:
>
> - signing a copy of the document and returning it to Programmed Integrated Workforce; or
> - Accepting any offer of work that is made by Programmed Integrated Workforce." (emphasis added)

[26] Mr Haining was offered, and accepted work assignments with the BCC as was contemplated by the employment agreement. Through the employment agreement, Mr Haining's labour was provided to the BCC. His role was as a gardener/general hand.

[27] Randstad Pty Ltd (Randstad) is also a labour hire company and is a competitor of PIW. The BCC, in late 2018, called for tenders to provide the services which were being provided by PIW. Both PIW and Randstad tendered. On 1 July 2019, the BCC awarded the tender to Randstad and wrote to PIW advising it of that fact.

[28] On 5 July 2019, PIW sent an email to its casual employees, including Mr Haining (the 5 July email). The legal consequences of the 5 July email is a matter of contention. However, it indicated clearly enough that Mr Haining would receive no further work from PIW from 4 August 2019. The email is in these terms:

> "It is with regret we write to inform you that Programmed has not been selected as Preferred Supplier to Brisbane City Council.
>
> Brisbane City Council opened up the supply of staffing solutions to their depots and sites in December 2018 through a tender process of which Programmed submitted in the hope to continue our long standing working relationship with Brisbane City Council.
>
> Programmed do not feel as though Brisbane City Council have made the right decision, however, the tender process has been finalised and Randstad have been awarded the tender.
>
> Your health and wellbeing is our priority. Some of you have worked with the Programmed team for many years. We attach our Employee Assistance Program information should you wish to speak with someone about this change. Should you wish to remain in your current role at Brisbane City Council, you will be asked to transition to Randstad. Randstad will be Preferred Supplier from 5th August 2019 which means your last day working with Programmed will be Sunday 4th August or before this date should your last shift be prior to this date. A representative from Randstad will be attending all depots and sites to hand out their paperwork for employees to complete.
>
> Our Account Management team, Ana Kontuzoglus and Ashleigh Salmond will be attending depots and sites as soon as possible to see you all. Should you have any queries or concerns, please do not hesitate to reach out to one of us.
>
> We would like to take this opportunity to thank you for your hard work, loyalty and your professional representation of Programmed. Please reach out to us should you require any assistance in the future.
>
> Wishing you all the very best,
>
> Your team at Programmed Skilled Workforce" (emphasis added)

[29] By agreement, PIW and Randstad entered into an arrangement to transition the work to the BCC. By the agreed statement of facts:

> "10. From 1 July 2019 to 2 August 2019, there was a transition period during which:

a. Programmed continued to provide temporary administration and trades labour hire services to BCC pursuant to its obligations under the Programmed Labour Hire Contract;

b. Programmed and Randstad:

i. attended at a handover meeting with BCC;

ii. made arrangements for:

1. the orderly continuation of business;

2. the orderly transitioning of employees from Programmed to Randstad."

[30] From 8 July 2019, Randstad made contact with PIW employees. Various of them, including Mr Haining, entered into the employment of Randstad. By the agreed statement of facts:

"27. In the week ending 2 August 2019, Mr Haining entered into a casual employment contract with Randstad under which he agreed to perform, from 5 August 2019, the same work he had performed as an employee of Programmed on-hired to, and assigned to perform work for, BCC, for the purposes of fulfilling Randstad's obligations under the Randstad Labour Hire Contract, namely, to be on-hired to, and assigned to perform work for, BCC in the occupation of 'gardener/general hand'.

28. From 5 August 2019 to 27 October 2019, Randstad employed Mr Haining as a casual employee to perform work which was materially the same as the work he had performed as an employee of Programmed on-hired to, and assigned to perform work for, BCC in the occupation of 'gardener/general hand'."

[31] From 3 August 2019, Randstad provided to the BCC the labour hire services which had been provided by PIW. By the agreed statement of facts:

"19. Since 3 August 2019, Randstad has:

a. been engaged in the calling of providing temporary administration and trades labour hire services to BCC, including the provision of individuals employed by Randstad and on-hired to BCC in an occupation described as 'gardener/general hand';

b. had beneficial use of the BCC assets which Programmed previously had beneficial use of, and which related to, or were used in connection with, the work which the relevant Programmed employees performed for Programmed and came to perform for Randstad." (emphasis added)

[32] The BCC provided the following to PIW during its labour hire agreement with PIW:

1. job specific personal protective equipment;
2. tools used by workers on-hired to the BCC in roles requiring the use of tools, such as gardening tools used by workers on-hired to BCC in the occupation of "gardener/general hand";
3. site access guards.

[33] Once Randstad became the labour provider to the BCC, it was given access to those assets.

[34] On 27 October 2019, Mr Haining resigned from Randstad's employment due to ill health.

[35] As will become apparent, there is no doubt that Mr Haining is entitled to long service leave. The real issue is whether the liability falls to PIW or Randstad. Randstad was given the opportunity to appear before the QIRC and protect its interests but chose not to do so.

Relevant statutory provisions

[36] The IR Act provides an entitlement to long service leave after prescribed periods of "continuous service".

[37] Continuous service is defined in s 93 as:

> "***continuous service***, of an employee, means—
>
> (a) in section 107—the period of continuous service the employee is taken to have had with an employer under section 107(2)(b);[7] or
>
> (b) elsewhere—the employee's continuous service with the same employer, whether wholly in the State or partly in and partly outside the State."[8]

[38] The entitlement to long service leave arises by force of s 95 of the IR Act. It provides, relevantly:

> "**95 Entitlement—employees other than seasonal employees**
>
> (1) This section applies to an employee, other than a seasonal employee.
>
> (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

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7 Section 107 is contained in Subdivision 7 of Division 9 of Chapter 2 of the *Industrial Relations Act* 2016 and concerns seasonal employees.

8 Section current as at 27 October 2019; Reprint 1 July 2019.

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—

(a) the employee's service is terminated because of the employee's death; or

(b) the employee terminates the service because of—

(i) the employee's illness or incapacity; or

(ii) a domestic or other pressing necessity; or

(c) the termination is because the employer—

(i) dismisses the employee for a reason other than the employee's conduct, capacity or performance; or

(ii) unfairly dismisses the employee; or

(d) the termination is because of the passing of time and—

(i) the employee had a reasonable expectation that the employment with the employer would continue until the employee had completed at least 10 years continuous service; and

(ii) the employee was prepared to continue the employment with the employer …

(7) In this section—

...

proportionate payment means a payment equal to the employee's full pay for a period that represents the same proportion of 8.6667 weeks that the employee's period of continuous service bears to 10 years." (emphasis added, legislative notes removed)

[39] The term, "casual employee" is relevantly defined as:

"**102 Definition for subdivision**

In this subdivision—

> ***casual employee*** means an employee who is employed more than once by the same employer over a period."

[40] There is no doubt that Mr Haining was a casual employee of both PIW and Randstad.

[41] Section 103 concerns continuity of service for casual employees. That provision is:

> "**103 Continuity of service—casual employees**
>
> (1) This section applies to a casual employee.
>
> (2) The employee's service is continuous service with the employer even though—
>
> (a) the employment is broken; or
>
> (b) any of the employment is not full-time employment; or
>
> (c) the employee is employed by the employer under 2 or more employment contracts; or
>
> (d) the employee would, apart from this section, be taken to be engaged in casual employment; or
>
> (e) the employee has engaged in other employment during the period.
>
> (3) However, the continuous service ends if the employment is broken by more than 3 months between the end of 1 employment contract and the start of the next employment contract. …" (emphasis added)

[42] Section 105 concerns the calculation of long service leave for a casual employee. It provides:

> "**105 Payment for long service leave**
>
> (1) This section applies to an employee who is entitled to long service leave if the employee was a casual employee or regular part-time employee at any time during the employee's continuous service to which the long service leave relates.
>
> (2) The minimum amount payable to the employee for long service leave is worked out using the formula—
>
> $$\frac{\text{actual service}}{52} \times \frac{8.6667}{10} \times \text{hourly rate}$$
>
> *Example—*
>
> An employee who worked 15,600 ordinary working hours over a 10-year period and is being paid an hourly rate of $12 is entitled to be paid—

$$\frac{15600}{52} \times \frac{8.6667}{10} \times \$12 = \$3120.01$$

(3) In this section—

actual service means the total ordinary working hours actually worked by an employee during the employee's period of continuous service.

hourly rate means the hourly rate for ordinary time payable to the employee—

(a) if the employee takes the long service leave—on the day the employee's leave starts; or

(b) if the employee's employment is terminated—on the day the termination takes effect." (emphasis added)

[43] Sections 130-132 are of some significance. They provide:

"**130 Definitions for part**

In this part—

service includes employment.

transferred employee see section 132(1).

131 How part applies

(1) This part applies for working out an employee's rights and entitlements under this chapter, an applicable industrial instrument or a federal industrial instrument by prescribing when the employee's continuity of service is not broken.

(2) An employee is not entitled to claim the benefit of a right or entitlement more than once for the same period of service.

(3) However, when working out the minimum period of notice required to be given under section 123 to a transferred employee, a period of notice previously given in relation to the transfer of the calling, whether given before or after the commencement of this subsection, is to be disregarded.

132 Continuity of service—transfer of calling

(1) This section applies to a person (a ***transferred employee***) who—

(a) becomes an employee of an employer (the ***new employer***) because of the transfer of a calling to the new employer from another employer (the ***former employer***); or

(b) is dismissed by an employer (also the ***former employer***) before the transfer of a calling if—

(i) the person is employed by another employer (also the ***new employer***) after the transfer of a calling; and

(ii) the employee—

(A) was dismissed by the former employer within 1 month immediately before the transfer; and

(B) is re-employed by the new employer within 3 months after the dismissal.

(2) The transfer of the calling is taken not to break the transferred employee's continuity of service.

(3) A period of service with the former employer, including service before the commencement, is taken to be a period of service with the new employer.

(4) In relation to the transfer, the transferred employee is not an employee to whom part 3, division 13, subdivision 2 applies, unless an applicable industrial instrument mentioned in section 125(1)(a) provides otherwise.

(5) In this section—

dismissed includes stood down." (emphasis added)

[44] The term, "calling" is defined as:

"***calling*** means—

(a) a craft, manufacture, occupation, trade, undertaking or vocation; or

(b) a section of something mentioned in paragraph (a)."

[45] The term, "transfer" is defined as:

"***transfer*** of a calling includes the transmission, assurance, conveyance, assignment or succession of the calling—

(a) either by—

(i) operation of law; or

(ii) agreement, including an agreement effected by a third person; and

(b) either before or after the commencement of this Act."

The issues before the Queensland Industrial Relations Commission

[46] Mr Haining completed more than seven years' continuous service with PIW but less than 10.[9] Therefore, if the 5 July email constituted dismissal of Mr Haining by PIW, s 95(4) of the IR Act entitled Mr Haining to a proportionate payment by PIW which both parties accept calculates to $8,099.24.

[47] However, if Mr Haining is a transferred employee for the purposes of s 132 of the IR Act, then his period of "continuous service" continued from 5 August 2019 and the liability for long service leave falls upon Randstad.

The decision in the Queensland Industrial Relations Commission

[48] The QIRC determined that:

1. Mr Haining was a casual employee;[10]
2. his employment was "terminated" by PIW pursuant to clause 10 of the employment agreement;[11]
3. Mr Haining was therefore "dismissed" for the purposes of s 95(4)(c)(i);[12]
4. the liability to pay proportionate long service leave fell on PIW.

[49] The QIRC further found that:

1. the "calling" referred to in s 132 was the calling of the employer;[13]
2. if Randstad had taken a "transfer" of PIW's calling, then it had done so by way of succession to the calling;[14]
3. Randstad did not use any asset of PIW;[15]
4. Randstad did not have the benefit of any goodwill of PIW;[16] therefore
5. Randstad did not succeed to the calling of PIW; so
6. there was no transfer of a calling to Randstad; and
7. Mr Haining was not a "transferred employee";[17] and
8. the liability to pay proportionate long service leave fell on PIW.

The appeal

[50] Six grounds of appeal were raised.

[51] However, all grounds of appeal raised one of two questions, being:

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9 *Industrial Relations Act* 2016, ss 95(2) and 95(3).
10 *Craig Geoffrey Fox v Programmed Integrated Workforce Ltd (No 2)* [2022] QIRC 281 at [42], citing *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456 at [32]-[33], [105]-[106] and [118].
11 At [65]-[66].
12 At [80].
13 At [123].
14 At [129] and following. Definition of "transfer" in Schedule 5 of the *Industrial Relations Act* 2016.
15 At [132].
16 At [132].
17 At [137] and following.

1. Did PIW dismiss Mr Haining by the 5 July email?

2. Was Mr Haining a transferred employee from 5 August 2019?

[52] If the first question is answered in the negative, or the second question is answered in the positive, the appeal must be allowed.

Did PIW dismiss Mr Haining by the 5 July email?

[53] PIW's argument, both before the QIRC and on appeal, was that Mr Haining was employed on a series of rolling contracts of employment each of which came into existence upon Mr Haining's labour being assigned to the BCC and each of which ended upon the expiry of the assignment. That much can be accepted.

[54] The employment agreement operates so that, upon acceptance of an assignment, a distinct contract of employment comes into existence for the period of the assignment. Therefore, PIW is correct when it submits that the last contract of employment, which was constituted by Mr Haining's acceptance of his last assignment, expired. It was not terminated.

[55] The issue under s 95(4) is the termination of "service", not termination of a contract of employment. For a casual employee, "service", at least as far as the IR Act is concerned, is a different concept to a contract of employment. By s 103(2), an employee's service is "continuous service" even though "the employee is employed by the employer under 2 or more employment contracts".

[56] The parties here cited various cases which have considered the relationship between a contract of employment and the notion of a broader employment relationship.

[57] Mr Fox relies upon the statement of the Full Bench of the Fair Work Commission in *Khayam v Navitas English Pty Ltd*:[18]

> "(1) the expression 'termination of employment at the initiative of the employer' in s 170CB of the WR Act as it then was bore its 'ordinary meaning' and referred to the termination of a contract of employment, not the termination of the employment relationship;"[19]

[58] Section 170CB of the *Workplace Relations Act* 1996 (Cth) concerned unfair dismissal. The case before the Full Bench in *Khayam* concerned s 394 of the *Fair Work Act* 2009 (Cth), also dealing with unfair dismissal. The question for the Full Bench was as to the meaning of the term, "terminated on the employer's initiative" where the employment consisted of a series of contracts of limited duration and the last was allowed to expire without a replacement being put in place.

[59] The issues raised in *Khayam* arose under different legislative provisions to the present and the decision ultimately turned upon the proper construction of those provisions.

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18 (2017) 273 IR 44; see also *Victoria v Commonwealth* (1996) 187 CLR 416.

19 At [31].

[60] PIW submit, in reliance upon *R v Bowen; Ex parte Amalgamated Metal Workers' and Shipwrights' Union*[20] and *Broadlex Services Pty Ltd v United Workers' Union*,[21] that there can be no employment without an employment contract, although contractual obligations may persist after termination of the contract.[22] So much can be accepted, but the issue here is as to the impact of particular provisions of the IR Act on the particular facts at hand which includes the terms of the employment agreement.[23]

[61] The focus on "service" in s 103 is understandable. Long service leave was not originally available for casual employees who are subject to short rolling contracts of employment. That explains the existence now of ss 102, 103 and 105.

[62] The employment agreement identifies a "contract of employment" as something which comes into existence upon acceptance of an assignment. It is clear, in my view, that the employment agreement does not bring a contract of employment (as that concept is understood in the employment agreement) into existence. The operative clause refers to "any offer of employment made by [PIW]". Clause 1 speaks of accepting offers of casual employment. By clause 1(b), there is "no obligation on [PIW] to offer or on you to accept, any assignment". Further, "each offer and acceptance will constitute a distinct contract of employment". Clause 3(c) is in similar terms.

[63] What is envisaged is a "contract of employment" (as that concept is understood in the employment agreement) coming into existence and incorporating the terms in the employment agreement upon the acceptance by Mr Haining of an assignment.

[64] Even though the employment agreement is not, of itself, a contract of employment as that concept is understood in clause 1(b), it is undoubtedly a contractual agreement. It is also undoubtedly a contractual agreement about Mr Haining's employment relationship with PIW.

[65] Clause 3(a) of the employment agreement places an obligation upon PIW to "use reasonable endeavours" to offer Mr Haining assignments, even though, by clause 3(c), it is under no obligation to make offers of assignments. Further, clause 1 provides that Mr Haining would be "recorded as being available to accept offers of casual employment …". Therefore, the employment agreement effects a contractual arrangement beyond the "contract(s) of employment" which are effected upon acceptance of an assignment.

[66] Even if a "contract of employment" only comes into existence upon acceptance of an assignment, the agreement by PIW and Mr Haining, to the broader contractual arrangements of the employment agreement, define Mr Haining's "service".

[67] Both clauses 10(a) and 10(b) contain the term, "employment". Both clauses refer to termination of "employment". Generally, where the same word or phrase appears more than once in a document, the word or phrase is taken to have the same meaning throughout; but that is not necessarily so.

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20 (1980) 144 CLR 462 at 475.
21 (2020) 296 IR 425 at [61],
22 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [3].
23 *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456 at [62]-[65].

[68] "Employment" in clauses 10(a) and 10(b) could mean Mr Haining's employment pursuant to contracts of employment, or could mean his employment in the sense of his "service", ie his broader contractual arrangement effected by the employment agreement

[69] Clause 10(a) refers to PIW providing Mr Haining "… with a minimum of one hour's notice of … the termination of [his] employment". Clause 10(b) entitles PIW "to terminate [Mr Haining's] employment immediately" in the event of certain behaviour. The QIRC concluded that, on a proper construction of the employment agreement, Mr Haining was employed as a casual employee and clause 10 provided a mechanism for that employment to be terminated. In other words, the "employment" referred to in clause 10 was something other than the "contract(s) of employment" which came into existence upon Mr Haining's acceptance of an offer of an assignment. It was his "service" as that term is understood in s 95 of the IR Act.

[70] Clause 10(b) seems to refer to the individual "contract(s) of employment". Clause 10(b)(i)i. expressly does so. The behaviours prescribed in each of clauses 10(b)(v) and (vii) concern behaviour when working which must mean when performing an assignment. The behaviours prescribed in clause 10(b)(ii), (iii), (iv), (vi) and (viii) are most likely to occur during performance of an assignment. Therefore, clause 10(b) probably refers to termination of an assignment, namely a "contract of employment".

[71] Clause 10(a) probably also refers to termination of contracts of employment. These subject matters are prescribed in clause 10(a):

1. "work requirements"
2. "suspension of work"
3. "termination of your employment"

[72] "Work requirements" and "suspension of work" both only arise in the context of performance of an assignment. That tends strongly to suggest that the "employment" which may be terminated under clause 10(a) is an assignment.

[73] The final acknowledgment uses the term, "employment". The "offer of employment" can be accepted "upon signing and returning" the employment contract. No "contract of employment" (as that concept appears in the employment agreement) comes into existence at that point. That only occurs once an assignment is offered and accepted. The acceptance is of the offer of employment "on the terms and conditions set out [in the employment agreement]". As explained, the employment agreement contains covenants beyond the "contract(s) of employment" which come into existence upon acceptance of an assignment.

[74] Ultimately, it does not matter, in my view, whether clause 10 authorises the termination of Mr Haining's "service".

[75] The email of 5 July purported to bring the employment agreement to an end. By the email of 5 July, Mr Haining was told:

1. The arrangement whereby PIW would contract Mr Haining's services to the BCC was to end on 9 August 2019.

2. By inference, the arrangement whereby PIW would, for example, "use reasonable endeavours to offer [Mr Haining] assignments"[24] was over. PIW would no longer use such endeavours.

3. By inference, the arrangement whereby Mr Haining would be recorded as available to accept offers of casual employment was over. PIW would not have Mr Haining recorded in that way.

4. Any future assignments would come from Randstad.

[76] It is unnecessary to finally determine the operation of clause 10 of the employment agreement or the breadth of the meaning of "service". PIW purported to terminate the employment agreement and Mr Haining accepted it was over. Therefore, Mr Haining's service was terminated and he was dismissed.

[77] The Deputy President was correct to find that Mr Haining was dismissed for a reason other than that prescribed by s 95(4)(c)(i).

Was there a transfer of calling?

[78] It was submitted by PIW that the relevant "calling" could be that of either PIW or Mr Haining.

[79] The definition of "calling" in the IR Act admits of both the calling of an employer or the calling of an employee. Whether, in a particular provision, the reference to "calling" is that of the employer or employee or both, is a question of construction of that particular provision.

[80] Some provisions refer specifically to "employer's calling"[25] or "employee's calling".[26] Predecessors to s 132 of the IR Act expressly identified the employer's calling. Section 10B(13) of the *Industrial Conciliation and Arbitration Acts* 1932 to 1952 used the term "the calling carried on by a person who is an employer". Section 241 of the *Industrial Relations Act* 1990 referred to "transmission … of the calling in which the employer is engaged from the employer to another person". Section 197(1) of the *Workplace Relations Act* 1997 referred to "the employer's calling".

[81] The purpose of long service leave is to reward continuous service by an employee to a particular employer. The legislative purpose of s 132 is to preserve the right where, for practical purposes, the service has continued even though the identity of the employer has changed because the enterprise in which the employee was been employed has changed hands.[27] The plain words of s 132, in my view, reflect that policy.

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24 Clause 3(c).
25 Example s 116(4).
26 See note to s 125 and s 341(3).
27 Explanatory note to the *Industrial Relations Bill* 2016 replicated in *Craig Geoffrey Fox v Programmed Integrated Workforce Ltd (No 2)* [2022] QIRC 281 at [125].

[82] As to the transfer of a calling by PIW, the parties seemed in agreement that the "calling" is PIW's commercial "undertaking" pursuant to the labour hire agreement with the BCC. PIW submits that there has been a "transfer" of that calling as Randstad has succeeded to it.

[83] President Hall, in *Australian Liquor, Hospitality and Miscellaneous Workers Union, Qld, Union of Employees v Wilsons Parking Australia 1992 Pty Ltd*,[28] considered whether a car parking attendant was a "transferred employee" for the purpose of s 69 of the *Industrial Relations Act* 1999. Section 69 is a close equivalent of s 132 of the IR Act.

[84] In *Wilson*, a company (the first employer) had leased car parking areas in a city building and was operating a car parking business. The owner of the building did not renew the lease but instead leased the area to another company (the second employer). An employee, who had worked for the first employer and was then employed by the second employer, claimed that he was a transferred employee.

[85] In *Wilson*, it was held that:

1. the business conducted by the second employer was identical to that conducted by the first employer;

2. there was continuity in that the second employer commenced business immediately upon cessation of business by the first employer;

3. the succession of the second employer to the business of the first employer was done through "an agreement effected by a third person", namely the owner of the building who leased the area to the second employer.

[86] Later, the High Court decided *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd*.[29] That case concerned provisions of the *Workplace Relations Act* 1996 (Cth) and statutory provisions with a different purpose to s 132 of the IR Act. The High Court there considered s 149(1)(d) of the *Workplace Relations Act* 1996 which provided that where an industrial dispute had been resolved by an award, that award was binding upon a "successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute".

[87] Region Dell Pty Ltd conducted a number of medical clinics. Part of the premises of some of the clinics were devoted to use for radiology. Region Dell supplied radiology equipment and the premises to Southern Radiology. The radiographers and consumables were provided by Southern Radiology. When Southern Radiology's licence expired, the premises were then licensed to another entity, MDIG. An industrial dispute had arisen between Southern Radiology and MDIG and its employees. That was the subject of an award. Gribbles Radiology Pty Ltd took a licence of the radiology practice once MDIG's licence had expired. Gribbles was not a party to the award but would be bound if it was a "successor of the business [of MDIG]". It was found that Gribbles was not a successor to any part of the business of MDIG.

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28 (2002) 171 QGIG 323.

29 (2005) 222 CLR 194.

[88] The court held:

1. The "business" of the former employer is the actual business which was conducted, not the type of business. In *Gribbles* then, it was the radiology business conducted in Region Dell's premises, not radiography generally.[30]

2. To succeed to the business, the new employer must enjoy some part of the business of the first employer.[31]

3. That may be discerned by considering any transaction between the first employer and the second employer where any part of the business was acquired.[32]

4. Otherwise, it is necessary to consider the assets "both tangible and intangible" which constitute the business to identify any part of the business to which the second employer has succeeded.[33]

5. It is not sufficient that the second employee is conducting the same type of business. It must succeed to a part of the first employer's business.

[89] *Gribbles* concerned the construction of a particular provision of the *Workplace Relations Act* 1996. The court did not attempt any general definition of the term, "successor". The question for the High Court was whether Gribbles had succeeded to the "business" of MDIG, not its "undertaking", although, there is, in my view, no substantial difference between the notion of a "business" and that of an "undertaking". Section 132 of the IR Act envisages a commercial undertaking, namely an undertaking involving the employment of workers. A commercial undertaking is a business.

[90] Having regard to the legislative purpose of s 132 and the legislative purpose behind s 149 of the *Workplace Relations Act*, the concept of "successor" in both sections is the same. The policy behind s 135 is to preserve an interest of an employee in long service leave where there has been a practical continuation of the business and the employee's employment. The policy behind s 149 is to bind the second employer to an award where there has been a practical continuation of the business.

[91] It is necessary to identify the relevant features of the "undertaking" conducted by PIW, which are:

1. the identification and employment by PIW of staff with skills to do the work which PIW's client, the BCC, wished to have done;

2. the entering into by PIW of agreements with the staff to secure their labour. As already explained, this involved two agreements, namely the employment agreement and the individual contracts of employment which come into existence upon acceptance of an assignment;

3. the identification of assignments and the allocation of staff to fill those assignments;

4. administrative functions associated with organising and paying the staff.

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30 At [37].
31 At [35].
32 At [38].
33 At [39] and [40].

[92] No capital equipment of PIW's undertaking was identified. Equipment used by PIW's employees in the field was owned by the BCC. Some capital equipment, such as used to establish an office, must be in existence, although, presumably, that was not exclusively used to fulfil PIW's commitments to the BCC. PIW had a broader business.

[93] On a proper construction of the labour hire agreement, the BCC was under no obligation to request the provision of services and was free to acquire services from other parties.

[94] The mechanics whereby PIW ceased its relationship with the BCC, and Randstad began its relationship with the BCC are:

1. The labour hire agreement was not terminated; it just expired.
2. The labour hire agreement was not assigned by PIW to Randstad.
3. Randstad entered into its own contractual arrangements with the BCC.
4. PIW was not a party to any contractual arrangements between the BCC and Randstad.
5. No contractual arrangement existed between PIW and Randstad. At most, there was some cooperation between the two companies to ensure continuity of service to the BCC.
6. There has been no transfer of property from PIW to Randstad.
7. PIW terminated the employment of its employees who were used to fill its obligations to the BCC under the labour hire agreement before any of them were employed by Randstad.
8. While the BCC terminated its arrangements with PIW and made new arrangements with Randstad, none of its property was transferred and it did not cause a transfer of any property or rights from PIW to Randstad. It acquired services from Randstad and made its field equipment, which was previously made available to PIW, available to Randstad.

[95] While, as the parties seemingly agreed, the supply of labour to the BCC by PIW was a calling, that calling has not been transferred to Randstad. No assets, either tangible or intangible, have been transferred from PIW to Randstad. Indeed, PIW's rights under the labour hire agreement were very limited. It had no right to insist, for instance, that the BCC utilise its services. The BCC was always entitled to obtain the labour services from a company other than PIW and that is what it did.

[96] It follows that the appeal ought to be dismissed.

[97] I will make orders to facilitate the determination of the issue of costs.

Orders

[98] It is ordered:

1. The appeal is dismissed.

2. The respondent file and serve any written submissions on costs by 4.00 pm on 5 December 2022.

3. The appellant file and serve any written submissions on costs by 4.00 pm on 12 December 2022.

4. Each party have liberty to apply, by application filed and served by 4.00 pm on 19 December 2022, for leave to make oral submissions on costs.

5. In the event that no application is filed by 4.00 pm on 19 December 2022, the question of costs will be decided on the written submissions without further oral hearing.