QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Robertson v State of Queensland (Department of Communities, Disability Services and Seniors)* (No 2) [2019] QIRC 196
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:	17 December 2019
HEARING DATES:	18 September 2019 and 20 November 2019
DATES OF WRITTEN SUBMISSIONS:	Applicant's further written submissions filed on 4 October 2019, Respondent's further written submissions filed on 18 October 2019, Applicant's written submissions in reply filed on 25 October 2019 and further written submissions filed by the Applicant and the Respondent on 29 November 2019
MEMBER:	Merrell DP
HEARD AT:	Brisbane
ORDERS:	**1. The Applicant's long service leave and annual leave claims were made within the limitation period.** **2. The Applicant's incentive payment claim was made within the limitation period.** **3. The Applicant's wage claim was not made within the limitation period other than the amounts claimed in respect of 18 October 2012.** **4. The Applicant's wage claim in respect of 18 October 2012 is incompetent and is dismissed.**
CATCHWORDS:	INDUSTRIAL LAW - application for proportionate payment of long service leave - application for unpaid wages - applications in existing proceedings to determine if application for proportionate payment of

long service leave and part of application for unpaid wages within limitation period - determination of whether application for proportionate payment of long service leave and application for unpaid wages is within limitation period - determination of whether claim for unpaid wages is competent

LEGISLATION:

Acts Interpretation Act 1954 (Qld) s 14A

Directive No. 5/05 Hours and Overtime

Directive No. 1/11 Long Service Leave

Directive No. 2/11 Recreation Leave

Directive No. 04/12 Early Retirement, Redundancy and Retrenchment

Directive No. 06/12 Employees Requiring Placement

Taxation Administration Act 1953 (Cth) Sch 1, s 12-35

Industrial Relations Act 1990 (Qld) s 2.1, s 5.3, and s 17.20

Industrial Relations Act 1999 (Qld) s 274, s 278, s 329 and s 393

Industrial Relations Act 2016 (Qld) s 95, s 373, s 475 and s 1024

Industrial Relations (Tribunals) Rules 2011 (Qld) r 20

Public Service Act 2008 (Qld) s 54

Queensland Public Service Award - State 2012 cl 1.5, cl 5.1, cl 6.1, cl 6.4, cl 7.1, cl 7.5 and cl 7.7

State Government Departments Certified Agreement 2009 cl 2.1

Statutory Instruments Act 1992 (Qld) s 7 and s 14

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

Deputy Commissioner of Taxation v Applied Design Development Pty Ltd [2002] FCA 205; (2002) 117 FCR 336

Mount Bruce Mining Pty Ltd V Wright Prospecting Pty Ltd [2015] HCA 37; (2015) 256 CLR 104

R v A2 [2019] HCA 35

Whittaker v Comcare (1998) 86 FCR 532

Ms C. Robertson, the Applicant in person

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

Reasons for Decision

Introduction

[1] Ms Clare Robertson was employed by the State of Queensland ('the State') in what is now known as the Department of Communities, Disability Services and Seniors ('the Department').

[2] Ms Robertson commenced employment with the State on 2 December 2002 and her employment ended on 19 October 2012 because her position was deemed surplus to requirements and, on 24 September 2012,[1] she accepted an offer of a voluntary redundancy.

[3] By application filed on 17 October 2018, in Matter No. B/2018/46, Ms Robertson made an application, pursuant to s 95 of the *Industrial Relations Act 2016* ('the Act'), for proportionate payment of long service leave. Ms Robertson claims unpaid long service leave in the amount of $142.20. In effect, Ms Robertson's claim is that she accrued long service leave:

- in respect of work she performed on 8 August 2012; and
- in respect of the period 1 September 2012 to 19 October 2012, in that Ms Robertson claims she should have been paid for five days per week over that period as opposed to the two days per week she actually worked and for which she was paid over that period ('the long service leave claim').[2]

[4] By application also filed on 17 October 2018, in Matter No. B/2018/47, Ms Robertson made an application, pursuant to s 475 of the Act, for an order for wages said to be payable and unpaid ('the unpaid wages claims'). The unpaid wages claims is comprised of three distinct claims.

[5] There is a claim for unpaid annual leave in the amount of $668.38. Ms Robertson's claim is that she accrued annual leave:

- in respect of work she performed on 8 August 2012; and
- in respect of the period 1 September 2012 to 19 October 2012, in that Ms Robertson claims she should have been paid for five days per week over that period as opposed to the two days per week she actually worked and for which she was paid over that period ('the annual leave claim').

[6] There is a claim for 12 weeks' pay in the amount of $12,100.32 for an incentive payment said to be payable pursuant to *Directive No. 04/12 Early Retirement, Redundancy and Retrenchment* ('the 2012 Redundancy Directive'). Ms Robertson claims she should have been working on a full-time basis at the date of the termination of her employment and that the 12 weeks' pay she received, as a consequence of accepting a voluntary redundancy, should have been calculated and paid to her on the basis that she worked five days per week and not the two days per week she was actually working and for which she was being paid at the date of the termination of her employment ('the incentive payment claim').

[7] There is a claim for unpaid wages and employer superannuation contributions in the amount of $8,115.58. Ms Robertson's claim is that:

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[1] Exhibit 1, exhibit C.

[2] Exhibit 4, paras. 5 and 11.

- she worked on 8 August 2012 and was not paid for that day; and
- for the period 1 September 2012 to 19 October 2012, she should have been paid for five days per week as opposed to the two days per week she actually worked and for which she was paid over that period ('the wage claim').

[8] By responses filed on 2 November 2018, the State denies there are any payments due to Ms Robertson.

[9] By applications in existing proceedings filed by the State on 31 May 2019, it sought orders that the long service leave claim and the unpaid wages claims be dismissed on grounds including that the claims are out of time for all but three days ('the out of time claims'). These applications invoke the limitation period that an application for the recovery of wages must be made within six years after the amount claimed became payable. On 21 June 2019, after hearing from the parties, I decided to hear, as separate matters, the out of time claims.

[10] The out of time claims were heard on 18 September 2019.

[11] During the hearing I drew to the parties' attention that the long service claim was made pursuant to s 95 of the Act. That section concerns proportionate payment for long service leave on termination of employment. I indicated that Ms Robertson could not make her long service leave claim under that section, or under the equivalent section in the predecessor to the Act, the *Industrial Relations Act 1999* ('the 1999 Act'). This was because, in reality, the long service leave was a claim for unpaid wages in that Ms Robertson was claiming that the cash equivalent of her long service leave, paid to her on the termination of her employment, was incorrectly calculated.[3] The State was given the opportunity to be heard on the matter and, after an adjournment, indicated that it had no objection to the long service leave claim being considered as part of the unpaid wages claims.[4]

[12] I also drew to the parties' attention, in respect of the wage claim only, the decision of the Queensland Industrial Court in *B. Tweddell v Ehle Pty Ltd*.[5] I gave the parties the opportunity to file and serve further written submissions about that case and the effect, if any, it had on the wage claim.[6]

[13] Following the receipt of further written submissions, I then drew to the parties' attention s 1024 of the Act which had the effect that Ms Robertson's claims had to be heard and decided under the 1999 Act. The parties provided further written submissions about that the effect of that section and what should happen as a consequence. For the reasons I give below, I will continue to hear and determine Ms Robertson's claims as ones to be heard and decided under the 1999 Act.

[14] From the submissions filed by the parties, the issues are:

- whether the long service leave claim was made within the limitation period;
- whether the annual leave claim was made within the limitation period;
- whether the incentive payment claim was made within the limitation period; and
- whether the wage claim was made within the limitation period and, if so, whether it is competent.

[15] In my view:

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[3] T 4-32, line 29 to T 4-34, line 35.
[4] T 4-39, ll 33-37.
[5] (1993) 142 QGIG 397 ('*Tweddell*').
[6] T 4-39, ll 6-24.

- the long service leave and annual leave claims were made within the limitation period;
- the incentive payment claim was made within the limitation period; and
- the only wage claim pursued by Ms Robertson that was within the limitation period was in respect of 18 October 2012 and that claim is incompetent and is dismissed.

[16] My reasons follow.

Section 1024 of the Act

[17] By virtue of s 1024 of the Act,[7] the long service leave claim and the unpaid wages claims must have been started, and then be heard and decided, under s 278 of the 1999 Act.

[18] I drew this section to the attention of the parties and invited them to address me about it at a further hearing on 20 November 2019. Following the hearing, I invited the parties to make any further written submissions they wanted to make about the effect of that section on the present proceedings.

[19] Ms Robertson acknowledges that, by virtue of s 1024 of the Act, her claim can only be heard and decided under the 1999 Act.[8] Ms Robertson further submits that:

- she was and is unrepresented and when she commenced her proceedings the only form available on the Commission website for an application for unpaid wages was for a claim under the Act, and there were no forms available to commence a claim under the 1999 Act;
- because there is no material difference between the relevant sections under the 1999 Act compared to the Act, the State has not been prejudiced in any way by her bringing her claim under the Act; and
- the State, by arguing that she must commence the proceedings again under the 1999 Act, is not adhering to the Model Litigant Principles, namely, not contesting matters which it accepts as correct, in particular by not relying on purely technical defences where the State will suffer no prejudice by not doing so.

[20] Ms Robertson sought leave, pursuant to r 20 of the *Industrial Relations (Tribunals) Rules 2011*, to amend her applications in both matters to, in effect, bring them under the 1999 Act.

[21] The State submitted that:

- by virtue of s 1024 of the Act, because Ms Robertson's applications were made under the Act, her applications are not and have never been valid applications for which the Commission has jurisdiction;

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[7] Section 1024 of the Act (**Proceedings not yet started**) provides:

> (1) This section applies if—
>
> (a) immediately before the commencement, a person could, under the repealed Act, have started a proceeding within a particular period; and
>
> (b) on the commencement, the person has not started the proceeding.
>
> (2) The *Industrial Relations Act 2016* does not apply to the proceeding.
>
> (3) The person may, within the period mentioned in paragraph (1)(a), start the proceeding under the repealed Act, and the proceeding must be heard and decided, as if the *Industrial Relations Act 2016* had not commenced.

[8] T 1-3, ll 26-30 (20 November 2019).

- section 274 of the 1999 Act does not allow the Commission to amend an invalid application to make it valid, particularly in circumstances where if the applicant was required to make a new and valid application, such an application would be statute barred;

- it cannot be in the public interest to allow Ms Robertson to amend her applications, to, in effect, circumvent the limitation period in the 1999 Act; and

- Ms Robertson's applications should be dismissed because they have not been filed under the correct legislation and even if Ms Robertson was given leave to amend her application (of which there is no jurisdiction to do so), the amendments should only take effect from the day which the amendment occurs because to do otherwise would be to facilitate Ms Robertson circumventing the statutory time limit for filing a valid application.

[22] Neither party identified the existence of or the effect of s 1024 of the Act prior to me raising it with the parties. Up to that time, the State had fully defended Ms Robertson's long service leave and unpaid wages claims, including by seeking orders that Ms Robertson's claims be dismissed on grounds including that the claims were out of time for all but three days. Furthermore, as referred to above, after I pointed out that Ms Robertson's long service leave claim could not have been pursued as a claim for proportionate payment of long service leave on termination of employment, under the Act or under the 1999 Act, the State submitted that it had no objection to the long service leave claim being considered as part of the unpaid wages claim.

[23] It cannot be said that the State, because of its general position in defending Ms Robertson's claims, is prejudiced by the claims being heard and decided under the 1999 Act. The State does not submit that its substantive submissions about the out of time claims or its general response to Ms Robertson's claims need to be changed or amended. There is no dispute between the parties that the relevant provisions concerning claims for unpaid wages in the 1999 Act, in respect of Ms Robertson's particular claims, are materially different from those in the Act including the provisions regarding the six year limitation period and in respect of the definition of 'wages'.

[24] Given the date she commenced proceedings, which was after the commencement of the Act, Ms Robertson's claims could only have been heard and decided under the 1999 Act. For this reason, it is not a question of whether or not to grant Ms Robertson leave to amend her claims to bring them under the 1999 Act. Rather, Ms Robertson's claims can only be heard and decided under the 1999 Act.

[25] The result is that forms used by Ms Robertson to commence her proceedings were wrong. Pursuant to s 329(e) of the 1999 Act, except as otherwise prescribed by the 1999 Act or the *Industrial Relations (Tribunals) Rules 2011*, the Commission has power to waive an error, defect or irregularity in the proceeding whether substantive or formal. Ms Robertson was in error in using the forms she used to commence her proceedings for the long service leave and unpaid wages claims.

[26] Given the absence of any prejudice to the State identified by it in continuing to defend Ms Robertson's claims under the 1999 Act, I will exercise my discretion and waive the formal irregularity being that Ms Robertson used the wrong forms to commence her claims.

Background

[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;[9]

[9] Paragraphs 1 to 3 in the affidavit of Ms Clare Robertson affirmed on 17 October 2018 filed with Ms Robertson's application for a proportionate payment of long service leave filed on 17 October 2018 ('Ms Robertson's 17 October affidavit').

- 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;[10]

- 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;[11]

- 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;[12] 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.[13]

The relevant legislative provisions

[28] 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.
>
> (2) An application can not be made to the commission if the total amount claimed under subsection (1) is more than $50000.
>
> (3) The application may be made by-
>
> (a) for a claim for occupational superannuation-an employee who is an eligible employee on whose behalf an employer is required to contribute to an approved superannuation fund; or
>
> (b) for any other claim-an employee; or
>
> (c) an employee organisation of which the eligible employee or employee is a member, acting for the employee; or
>
> (d) a person authorised by the eligible employee or employee to make the application, acting for the employee; or
>
> (e) an inspector.
>
> (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-

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[10] Paragraph 4 of Ms Robertson's 17 October affidavit.
[11] Paragraph 5 of Ms Robertson's 17 October affidavit.
[12] Paragraph 6 of Ms Robertson's 17 October affidavit.
[13] Paragraph 10 of Ms Robertson's 17 October affidavit.

(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.

[29] The Dictionary to the 1999 Act provided a definition of wages, namely:

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.

The long service leave and annual leave claims

[30] It is convenient to deal with the long service leave and annual leave claims together.

[31] As indicated earlier in these reasons, the State agreed to deal with the long service leave claim as a claim for unpaid wages (like the annual leave claim). The question is whether these claims were made within time.

[32] Ms Robertson, on the termination of her employment on 19 October 2012, was paid the cash equivalent of her accrued but untaken long service leave as at that date. As set out above, Ms Robertson's claim is that the cash equivalent she was paid was incorrect, in part because the State should have accrued her long service leave on the basis that she was working five days per week between 1 September 2012 and 19 October 2012.

[33] In oral submissions, Ms Laird, who appeared for the State, conceded that in respect of the annual leave claim, if Ms Robertson's claim for the period 1 September 2012 to 19 October 2012 was valid, then the accrued annual leave was payable on the termination of Ms Robertson's employment, namely, 19 October 2012.[14]

[34] The concession was properly made.

[35] At the time of the termination of her employment, Ms Robertson and the State were bound by the *Queensland Public Service Award - State 2012* ('the Award'). Clause 7.1 of the Award dealt with annual leave and provided:

> The entitlements for annual leave are prescribed in the Recreation Leave Directive, as issued and amended by the Minister responsible for industrial relations in accordance with section 54 of the *Public Service Act 2008.*

[36] The applicable directive was *Directive No. 2/11 Recreation Leave,* operative from 17 January 2011 ('the Recreation Leave Directive'), which relevantly 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

[14] T 4-14, line 40 to T 4-15, line 16.

> 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*.

[37] Clause 7.5 of the Award dealt with long service leave and sub-cl 7.5.3 provided:

> The entitlements for long service leave are prescribed in the Long Service Leave Directive, as issued and amended by the Minister responsible for industrial relations in accordance with section 54 of the *Public Service Act 2008*.

[38] The applicable directive was *Directive No. 1/11 Long Service Leave*, operative from 17 January 2011 ('the Long Service Leave Directive'), which relevantly provided in its Schedule:

> **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.

[39] Clause 21.1(b) of the Long Service Leave Directive provided that a proportionate payment would be made to an employee (whose employment had been terminated because the employee's position was deemed surplus to the Department's needs or the duties performed by the employee were no longer required) after one year of continuous service.

[40] Having regard to the Recreation Leave Directive and the Long Service Leave Directive, if Ms Robertson's claims about the accrual of her long service leave and of her annual leave, in respect of the period 1 September 2012 to 19 October 2012 (and in respect of 8 August 2012) are valid, then the correct amounts of the accrued but untaken leave were payable on 19 October 2012, being the date of the termination of her employment.

[41] Ms Robertson's long service leave claim was made on 17 October 2018. Ms Robertson's annual leave claim was also made on 17 October 2018.

[42] For these reasons, Ms Robertson's long service leave and annual leave claims were made within the limitation period provided in s 278(4) of the 1999 Act. The amounts claimed are 'wages' within the meaning of the 1999 Act because they are amounts payable to an employee for termination of their employment.

The incentive payment claim

The State's submissions

[43] The State submits that even if the incentive payment was wages within the meaning of the 1999 Act, because Ms Robertson signed the contract for the offer of a voluntary redundancy on 24 September 2012, it is the contract date which gives rise to the incentive payment amount being payable and it is irrelevant that the amount was put into Ms Robertson's bank account at a later date.

[44] As a consequence, the State submits that because that payment became payable on 24 September 2012, the incentive payment claim is out of time.

Ms Robertson's submissions

[45] In summary, Ms Robertson submits:

- while she does not dispute that she signed an offer of redundancy on 24 September 2012, there was no agreement entered into as to what the sum of any redundancy package would be, with the consequence that there was no amount 'payable' at that time;

- the offer was only an estimate and the amount of money to be paid to her, after she signed the offer, was not known and was subject to change prior to the termination of her employment;

- as a consequence, the 'sum of redundancy money' could not become payable several weeks before her separation date as the sum was not known at that time and could only be calculated at the end of her employment and, as a consequence, became payable on 19 October 2012; and

- because her 'redundancy package' included amounts of accrued but untaken long service leave and annual leave that became payable on her termination, and because the redundancy amounts to be paid to her were made up of various components, all components became payable on the termination of her employment.

[46] For these reasons, Ms Robertson submits that the incentive payment claim was within time because it was made on 17 October 2018.

[47] The offer of a voluntary redundancy was made to Ms Robertson by letter dated 30 August 2012 from Ms Kathy Dunning, Deputy Director-General of the Department ('Ms Dunning's letter'). In her letter, Ms Dunning relevantly stated:

> I am now writing to advise you that as a result of recent machinery-of-government changes, the Department of Communities, Child Safety and Disability Services has been restructured.
>
> As a consequence, your position has been deemed surplus to requirements. Unfortunately as we have been unable to identify an alternative role to place you in, you have been designated as an employee requiring placement (ERP).
>
> …
>
> The information below provides further information about the choices available to you. For further information, please refer to Directive 06/12: Employees Requiring Placement and Directive 04/12: Early Retirement, Redundancy and Retrenchment. Copies of these directives are enclosed and are also accessible through the Public Service Commission website at www.psc.qld.gov.au.
>
> **Offer**
>
> In accordance with Directive 06/12: Employees Requiring Placement, I am offering you the opportunity to choose between two options:
>
> 1. Accept a voluntary redundancy; **or**
> 2. Pursue transfer and/or redundancy opportunities.
>
> You need to advise of your decision within 14 days of your date of receipt of this letter. If I do not receive your decision in this timeframe, I will conclude that you have chosen to pursue transfer opportunities.
>
> **Voluntary redundancy**
>
> The offer of a voluntary redundancy is made in accordance with Directive 04/12: Early Retirement, Redundancy and Retrenchment. The redundancy package is made up of:
>
> - your accrued recreation leave;
> - your accrued long service leave (provided you have had at least one year of service);
> - a severance payment (of 2 weeks' salary per year of service - to a maximum of 52 weeks); and
> - an incentive payment of 12 weeks' salary.
>
> An estimate of the redundancy package is enclosed for your information.
>
> In making this offer, I confirm that it is a bona fide redundancy (refer to section 3.2 of Directive 04/12).
>
> Should you elect to accept the voluntary redundancy, your employment with the department will cease on 19 October 2012.[15]

[15] Exhibit 3.

[48] Attached to Ms Dunning's letter was a pro forma document on which Ms Robertson had to indicate whether she accepted or declined the voluntary redundancy offer.

[49] Also attached to Ms Dunning's letter was a schedule setting out an estimate, as at 31 August 2012, of the benefits Ms Robertson would receive if she accepted the offer and her employment ended on 19 October 2012 ('the estimate schedule'). The estimate schedule set out an estimate of the cash equivalent of Ms Robertson's recreation leave and leave loading, long service leave, severance payment and incentive payment.

[50] The 2012 Redundancy Directive relevantly provided:

> **3. Redundancy**
>
> 3.1. When workplace change results in redundant positions or functions and an employee has been declared as surplus ('an employee requiring placement'), an agency may immediately offer the employee requiring placement a voluntary redundancy package.
>
> 3.2. An employee is considered to be genuinely surplus if:
>
> (a) the chief executive has made a definite decision that the job the employee has been doing is no longer required to be done by an employee;
>
> (b) that decision is not due to the ordinary and customary turnover of labour;
>
> (c) the decision led to the proposal to terminate the employee's employment; and
>
> (d) the proposed termination of employment is not on account of any personal act or default of the employee, for example unsatisfactory performance or behaviour.

[51] Schedule B to the 2012 Redundancy Directive was headed 'Entitlements' and relevantly provided:

> **1. Entitlement**
>
> 1.1. Packages provided by this directive are compensation for loss of job tenure.
>
> …
>
> Redundancy
>
> 1.4. A redundancy package will comprise the following:
>
> (a) Accrued recreation leave;
>
> (b) Accrued long service leave for employees who have worked for at least one year, on the basis of 1.3 weeks for each year of continuous service and a proportionate amount for an incomplete year of service;
>
> (c) A severance payment of two weeks' full-time pay per full-time equivalent year of service and a proportionate amount for an incomplete year of service paid at the employee's substantive appointed level. The minimum payment is four weeks' pay, and the maximum is 52 weeks, provided that no employee will receive less than the severance payment under the Termination, Change and Redundancy Statement of Policy issued by the Queensland Industrial Relations Commission.
>
> 1.5. A redundancy package may comprise an incentive payment (refer to section 3 below for further information on incentive payments).
>
> …
>
> **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.

> 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.[16]

[52] On 24 September 2012, Ms Robertson advised in writing that she wished to accept the voluntary redundancy offer and to cease her employment with the Department on 19 October 2012.[17] Ms Robertson ticked the box, on the pro forma accompanying Ms Dunning's letter, next to which were these words:

> I wish to accept the voluntary redundancy offer and cease my employment with Department of Communities, Child Safety Disability Services on 19 October 2012. I understand that in the event I am re-employed with any Queensland Public Service entity within the severance period, I will be required to repay a proportion of the redundancy package, in accordance with the directive relating to early retirement, redundancy and retrenchment.

[53] In accepting the offer, Ms Robertson indicated that she had been provided a copy of the 2012 Redundancy Directive and *Directive No. 06/12 Employees Requiring Placement* and that she had the opportunity to consider the information in those directives and the advice provided in Ms Dunning's letter.

[54] On the State's argument, upon Ms Robertson accepting the offer of a voluntary redundancy and a contract being formed, the incentive payment became payable on the date of acceptance which was 24 September 2012. Viewed that way, the matter would be resolved on the basis of the construction of the agreement between Ms Robertson and the State.

[55] However, it appears to me that identification of the date the incentive payment was payable is better approached on the basis of the construction of the 2012 Redundancy Directive. This is because Ms Robertson's entitlements were derived from the application of the 2012 Redundancy Directive.

[56] Section 7(1) of the *Statutory Instruments Act 1992* relevantly provides that an instrument (any document) is a statutory instrument if it is made under an Act[18] and it is an instrument of the type described in s 7(3) of that Act.

[57] The 2012 Redundancy Directive was a statutory instrument because:

- it was made under s 54(1) of the *Public Service Act 2008*; and
- it was an instrument of the type described in s 7(3) of the *Statutory Instruments Act 1992* because it was an instrument of a public nature by which the Minister unilaterally affected the rights of public service employees occupying redundant positions or functions.

[58] By virtue of s 14 of the *Statutory Instruments Act 1992*, certain provisions of the *Acts Interpretation Act 1954* apply to statutory instruments. One of those provisions is s 14A(1) of the *Acts Interpretation Act 1954*. That section provides that in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

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[16] Footnotes omitted.

[17] Exhibit 1, exhibit C.

[18] *Statutory Instruments Act 1992*, s 7(2)(a).

[59] Further, the construction of a statutory instrument is approached in the same way as interpreting a statute.[19] In the recent case of *R v A2*,[20] Kiefel CJ and Keane J, in summarising the principles of statutory construction, stated in part:

> 32 The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.
>
> 33 Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. "Mischief" is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.

[60] The offer of a voluntary redundancy was stated by Ms Dunning to be made '…in accordance with Directive 04/12: Early Retirement, Redundancy and Retrenchment.' Ms Robertson accepted the voluntary redundancy offer and, in doing so, agreed to cease her employment with the Department on 19 October 2012. In accepting the offer, Ms Robertson acknowledged that she considered, amongst other documents, the 2012 Redundancy Directive.

[61] Clause 3.1 to Schedule B to the 2012 Redundancy Directive provided that an incentive payment may be offered only once to encourage employees to exit the department on or by a specified date. Clause 3.2 of Schedule B provided that the incentive payment is reduced by the equivalent of one week's pay for each week the employee delayed leaving the Department after the specified date.

[62] In my view, the purpose of the full amount of the incentive payment was to encourage employees to leave on or by a specified date. This leads to the inevitable conclusion that the incentive payment was payable on termination of employment. That construction best achieves the purposes of cls 3.1 and 3.2 of the 2012 Redundancy Directive.

[63] In the alternative, even if the matter was approached on the basis of the construction of a valid contract said to be entered into between Ms Robertson and the State, the result would be the same.

[64] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose; and, in determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean which requires consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.[21]

[65] The offer made by Ms Dunning and Ms Robertson's acceptance expressly referenced the 2012 Redundancy Directive. The purpose of the incentive payment was to encourage Ms Robertson to cease her employment by 19 October 2012. If there was a contract between Ms Robertson and the State for her to voluntarily resign by 19 October 2012, the only reasonable interpretation is that the incentive payment was payable to her upon her terminating her service with the State on that date.

[66] If the incentive payment was payable on 19 October 2012, then the incentive payment claim was made within the limitation period because it was made on 17 October 2018.

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[19] *Whittaker v Comcare* (1998) 86 FCR 532, 543 (Drummond, Cooper and Finkelstein JJ).

[20] [2019] HCA 35 (citations omitted) (Nettle and Gordon JJ at [148] agreeing).

[21] *Mount Bruce Mining Pty Ltd V Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104, [46]-[52] (French CJ, Nettle and Gordon JJ) (citations omitted).

The wage claim

[67] The State submits that:

- the Commission can only make an order for payment of unpaid wages where an application is made within six years after the amount became payable;
- amounts become payable at the time they worked, albeit they may be paid under an award or a contract at a later date in accordance with the pay cycle and the obligation to pay arises when the time is worked; and
- Ms Robertson's application (in respect of the wage claim) can only apply to unpaid wages which became payable on 17, 18 or 19 October 2012.

[68] Ms Robertson submits:

- that s 373(6)[22] of the Act provides that if wages are payable to an employee when the employee stops employment, the employer must pay the wages within three days the employee stops;
- therefore, the wages claimed by her, amounting to the difference between the two days a week the State paid her and the five days per week entitlement she is claiming, became an obligation for the State to pay her upon her employment ending by way of a debt; and
- according to s 373(6) of the Act, those wages were payable to her when she stopped employment on 19 October 2012 and the amounts outstanding should have been paid within three days of that date.

[69] Ms Robertson then submits, given that the debt of underpayment of wages accrued on 19 October 2012, the wages claim is within the six year timeframe.

[70] As set out above, s 278(4) of the 1999 Act provides that the application must be made within six years after the amount claimed became payable. Section 278(8)(a)(i) of the 1999 Act relevantly provides that on hearing the application, the Commission must order the employer to pay the employee the amount the Commission finds to be payable and unpaid to the employee within the six years before the date of the application.

[71] At common law, the general rule is that there is no liability for wages or salary unless earned by the service of the employee.[23]

[72] In 2012, Ms Robertson and the State were bound by the Award. Part 5 of the Award was headed 'Wages and wage related matters' and cl 5.1 was headed 'Salaries.'

[73] Sub-clause 5.1.2 relevantly provided that salaries shall be paid fortnightly. In my view, that sub-clause did not affect the time in which the amounts claimed by Ms Robertson in the wage claim became payable within the meaning of s 278(4) of the 1999 Act. That sub-clause merely meant that the salary payable to an employee was paid at each fortnightly interval.

[74] Ms Robertson's wages, as claimed, became payable upon her rendering service.

[75] As a consequence, any application for wages said to be payable and unpaid must have been made within six years after the date the services were rendered giving rise to the payment of the wages. For these reasons, I reject Ms Robertson's submission that the amounts claimed, as part of her wage claim, became payable on the last day of her employment as a debt to the State. Ms

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[22] I assume that Ms Robertson's reference to s 373(6) of the Act was meant to refer to s 393(6) of the 1999 Act which also provided that if wages are payable to an employee when the employee stops employment with the employer, the wages must be paid to the employee within 3 days after the employment stops.

[23] *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435, 465 (Dixon J).

Robertson's submissions about s 393(6) of the 1999 Act do not assist her. That section sets out the date by which an employer must pay wages to an employee after the employment ends in circumstances where there is no dispute or claim by an employee that there are wages payable and unpaid. If Ms Robertson's submissions on this point were accepted, it would mean s 278(4) of the 1999 Act would have no work to do.

[76] Because of the date Ms Robertson made the application for the wage claim, the only possible claims made within the limitation period are those in respect of 17, 18 and 19 October 2012.

[77] No specific arguments were made by either party about when the employer superannuation contribution component of the wage claim became payable. It seemed to be accepted by both parties that it would have been payable at the time the wages component became payable. On this basis, the amount Ms Robertson claims for the employer superannuation contributions were also made out of time other than in respect of 17, 18 and 19 October 2012.

[78] The State submits that in respect of the wage claim:

- Ms Robertson worked on 17 and 19 October 2012, was paid for all hours worked and has not claimed an underpayment for those days; and

- Ms Robertson did not work on 18 October 2012, has no right to payment for this day and therefore could not be underpaid as there is no amount payable in relation to that date.

[79] This issue gives rise to the potential implications from the decision in *B. Tweddell v Ehle Pty Ltd.*[24]

[80] In her submissions, Ms Robertson only disputes the State's submissions above in respect of 18 October 2012. On this basis, the only issue is whether there are 'wages' payable and unpaid to Ms Robertson in respect of 18 October 2012. Because both parties have made submissions about the competency of Ms Robertson's claim that there are wages payable and unpaid in respect of 18 October 2012, I will deal with the competency of that claim.

[81] In *B. Tweddell v Ehle Pty Ltd*, the question on appeal before the Queensland Industrial Court was whether a claim by an employee which was, in essence, a claim for damages for breach of contract, was competently determined by an Industrial Magistrate exercising jurisdiction under the combined effect of s 5.3(a)(vi) and s 17.20 of the *Industrial Relations Act 1990* ('the 1990 Act').

[82] Section 5.3 of the 1990 Act conferred jurisdiction on Industrial Magistrates to hear and determine proceedings relating to, amongst other claims, claims for wages 'due and payable'. Section 17.20 of the 1990 Act provided for the recovery of wages 'due and payable to an employee, or payable on account of the employee and unpaid'.

[83] Section 2.1 of the 1990 Act provided the following definition of 'wages':

> "wages" means moneys (whether called wages or salary) payable to an employee in respect of-
>
> - work performed, or to be performed, by the employee;
> - any public holiday;
> - any leave to which the employee has an entitlement;
>
> and includes monies payable from wages, with the employer's consent in writing, on account of the employee;

[84] The Court found that the claim was not within the jurisdiction conferred by the 1990 Act on the Industrial Magistrate and held:

> For wages to be due and payable they must have been earned by work done in accordance with the contract of employment. The claim in this case is really for the loss of an opportunity to earn wages in the future, the loss being due, on the appellant's case, to the respondent's wrongful repudiation of the contract before performance became due; i.e. it is an action for breach of contract; see for example the discussion in The Law of Employment by Macken & Ors 3rd ed. p. 283 as to the distinction.[25]

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[24] *Tweddell* (n5).

[25] *Tweddell* (n5), 397 (Moynihan P).

[85] In her submissions about the effect of *Tweddell* on her wage claim, Ms Robertson seeks to distinguish that case by having regard to the definition of 'wages' in the 1999 Act. That definition is referred to earlier in these reasons. Ms Robertson submits that because that definition provided that 'wages' meant, amongst other things 'a salary' then:

- as she was a tenured full-time employee under an award that fixed the salary for her pay level and pay-point, and under the definition provided by the Act in force at the time (and currently), she was entitled to the wages, as salary, for the period claimed;
- a salary was payable to her regardless of whether the work was performed or not; and
- the definition of 'wages' in *Tweddell* in the 1990 Act was different to that provided in the 1999 Act in that the latter definition included 'a salary' as distinct from 'an amount payable to an employee for work performed'; and in differentiating these two separate items under the definition of wages, 'salary' did not bring any requirement for work to necessarily be performed in order to constitute 'wages' in that the components of the definition are separate items that are not tied to each other.

[86] Ms Robertson also submits that she was guided by a Member of the Commission, in a conciliation conference in 2012, that the appropriate avenue for her claim was under s 278 of the 1999 Act.

[87] The State submits that:

- on the authority of *Tweddell,* Ms Robertson's wage claim is outside the jurisdiction of the Commission because the facts in that case are analogous with the facts in Ms Robertson's case in that:
  - the 'wages' claims relate to periods of time when Ms Robertson did not actually perform any work; and
  - Ms Robertson's claim should rightly be one for breach of contract which, if proven, could result in payment of damages to be calculated on the basis of time not worked; and
- in response to Ms Robertson's submissions that she was paid a 'salary', those submissions are misconstrued because:
  - Ms Robertson's employment was at all relevant times covered by the Award and the *State Government Departments Certified Agreement 2009* ('the certified agreement'), her remuneration was calculated on an hourly basis, based on hours worked and although colloquially referred to in the Award as 'salary' was in fact 'wages' as defined in the 1999 Act;
  - Ms Robertson was not on a 'salary' and that the remuneration she received was calculated based on the hours worked and not as an all-encompassing 'salary' not directly tied to actual hours worked;
  - cl 6.4.1 of the Award provided for overtime to be paid which was wholly inconsistent with a genuine 'salary';
  - the inclusion of the noun 'salary' in the definition of 'wages' in the legislation merely expanded the scope of the provision to apply to those people who are generally paid a salary and did not alter in any way the application of the relevant legislation to employees who receive 'wages';
  - Ms Robertson was paid for all hours actually worked and, at the relevant time, was working part-time hours; and

– notwithstanding anything stated by the Industrial Commissioner in the conciliation conference, a reference to a section of an Act which may apply does not create jurisdiction which otherwise does not exist.

[88] In her submissions in reply, Ms Robertson submitted:

- she was not paid by the hour, but paid a (pro rata) salary which is a fixed amount not subject to variation;
- the salary schedule to the Award outlines her 'annualised salary';
- overtime pay or time off in lieu of payment does not change the fact that an employee is in receipt of salary, and in her case she was not entitled to paid overtime due to the classification level of her position (which was PO4, pay-point 4) and instead she accrued time off in lieu on time for time basis (TOIL) for any additional hours that she worked; and
- cl 7.7.5 of the Award contemplated employees being paid a salary even where no work was performed.

[89] I do not think it is accurate to describe Ms Robertson's remuneration as 'a salary' in the sense she uses it and then attributes that use in an attempt to distinguish her circumstances from *Tweddell.*

[90] In *Deputy Commissioner of Taxation v Applied Design Development Pty Ltd*,[26] consideration was given to the meaning of the nouns 'salary' and 'wages' in s 12-35 to the Schedule 1 to the *Taxation Administration Act 1953*. In this regard, Mansfield J held:

> [8] There are no statutory definitions provided for the other elements of s 12-35. Of particular importance in the present application is the absence of statutory definitions of the words 'salary' or 'wage'. In the absence of statutory definitions, meaning should be given to those words according to the ordinary meaning conveyed by the text of the provision, and taking into account their context in the legislative scheme and the objects of the Act. The words 'salary' and 'wage' denote an amount of money payable, the consideration for which is the performance of work or services. That meaning is reflected in the definitions provided for the terms in the *Oxford English Dictionary, 2nd ed*:
>
> *Salary*: fixed payment made periodically to a person as *compensation* for regular work.
>
> *Wage*: a payment to a person *for* services rendered.
>
> I adopt those definitions in the determination of these proceedings.[27]

[91] Similarly, there was no definition of the phrase 'a salary' in the 1999 Act and accordingly, the noun 'salary' should be given its ordinary meaning conveyed by the text of the provision and considering its context in the 1999 Act.

[92] In my view, the phrase 'a salary' in the definition of 'wages' in the 1999 Act means a fixed payment made periodically to a person as compensation for regular work. This is because:

- the phrase is included at paragraph (b) in the exhaustive definition of 'wages' in the 1999 Act; and
- having regard to the description given in paragraph (a)(i) of the definition, the phrase must mean a payment to an employee which is different to an amount payable to an employee for work performed or to be performed by the employee, which seems to encompass the ordinary meaning of 'wages'.

[93] I have concluded that Ms Robertson did not receive 'a salary'. There are a number of reasons for this.

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[26] [2002] FCA 205; (2002) 117 FCR 336.

[27] Ibid [8].

[94] First, Ms Robertson and the State were bound by the Award. While it is true that the fortnightly amounts payable to employees, who were bound by the Award, were described in the Award as 'salaries' - for example, see sub-cls 1.5.1, 5.1.2 and 5.1.3 of the Award and the heading to Schedule 1 to the Award - the word 'salaries' is used interchangeably with 'wages' in the Award and also in the certified agreement. For example, sub-cls 5.2.1 and 5.1.3 are found in pt 5 of the Award which was headed '**WAGES AND WAGE RELATED MATTERS**'. Similarly, pt 2 of the certified agreement was headed '**WAGES**' and cl 2.1 was headed '***New Wage Rates***' but that clause referred to 'salary' and 'salary-based allowance increases' payable under that agreement.

[95] Secondly, cl 6.4 of the Award provided that employees who performed authorised overtime in excess of their ordinary daily hours of duty or outside their ordinary span of hours were to be paid at the rate of time and a-half for the first three hours in any one day and double time for all time worked thereafter. Increased rates of remuneration were also prescribed for overtime performed on weekends. Clause 7.7 prescribed increased rates of remuneration for work performed on public holidays. True, *Directive No. 5/05 Hours and Overtime* provided that an employee whose position was classified at the same level as Ms Robertson's (described as a 'salary limit' in that Directive) was not entitled to an overtime payment. However, such an employee was entitled to TOIL which could be paid out after 12 months in certain circumstances. Further, pursuant to pt B of the Schedule to that Directive, the Director-General of the responsible Department could exclude certain classes of employees from that salary limit. In addition, pt 5 of the Award provided for the payment of certain allowances including higher duties allowance, motor vehicle allowance and on call allowance. All these provisions suggest that payments to an employee bound by the Award were not fixed.

[96] Thirdly, it is inaccurate to describe, as does Ms Robertson, that the salary schedule to the Award outlines her 'annualised salary'. Schedule 1 to the Award sets out the fortnightly award rate for each pay-point in each classification level for each stream.[28]

[97] Finally, and most importantly, there is nothing in the Award that suggests Ms Robertson would be paid under the Award whether she worked or not. Sub-clause 7.7.5 of the Award, referred to by Ms Robertson in support of this submission, deals with payments to employees when rostered to work on a public holiday but who are not required to work. That clause relevantly provided:

> 7.7.5 All Employees shall be entitled to payment for rostered ordinary hours to be worked for each of the public holidays referred to in clause 7.7.1 above notwithstanding that no work is required to be performed.

[98] That clause did not provide that an employee, who is bound by the Award, was entitled to wages prescribed by the Award whether or not the employee worked. Indeed, the provisions of the Award suggest the opposite. Part 6 of the Award dealt with, amongst other things, hours of work. Sub-clause 6.1.2 dealt with day work and provided that the 'ordinary hours of duty' for most employees were 36.25 hours per week and that the ordinary spread of hours for such employees was generally 6.00 a.m. to 6.00 p.m., Monday to Friday. The provision, in cl 6.4 of the Award, for additional payments for the performance of work in excess of an employee's ordinary daily hours or outside their ordinary spread of hours and in cl 7.7 for increased remuneration for work performed on public holidays, suggest that employees, bound by the Award, were paid for the work they performed.

[99] For these reasons, it seems to me that Ms Robertson was not paid a salary in the sense of a fixed payment made periodically to a person as compensation for regular work. In my view, Ms Robertson was paid for the work she performed.

[100] I accept the submissions made by the State about any guidance given by the Industrial Commissioner during the conciliation conference in 2012. Any claim made that is incompetent cannot be made competent on the basis of comments made by a Member of the Commission during a conciliation conference.

[101] Because Ms Robertson did not perform any work on 18 October 2012, there can be no wages payable to her in respect of that day.

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[28] I do note that in Appendix 3 to the certified agreement, the rates of payment for each pay-point in each classification for each stream, having regard to the pay increases awarded, were set out on a fortnightly basis and as an 'Annualised Salary'.

[102] Ms Robertson's wage claim, including the claim for superannuation, in respect of 18 October 2012 is incompetent and is dismissed.

Conclusion

[103] For the reasons given above, Ms Robertson's:

- long service leave and annual leave claims were made within the limitation period;
- incentive payment claim was made within the limitation period;
- wage claim was not made within the limitation period, other than the amounts claimed in respect of 18 October 2012; and
- wage claim in respect of 18 October 2012 is incompetent and is dismissed.

[104] In coming to these conclusions, I have not considered the competency or the merits of the claims which were made within the limitation period, other than the wage claim in respect of 18 October 2012.

[105] The hearing and determination of the claims made by Ms Robertson, that were made within the limitation period, will be the subject of a mention before the Commission on a date to be fixed.