

THE DISTRICT COURT
OF NEW SOUTH WALES
CIVIL JURISDICTION

JUDGE TONER S.C.

Date: 24 September 2007

File No: 5509/06

BRAD MASON -v- CITIGROUP PTY LIMITED (ACN 004 325 080)

JUDGMENT

The plaintiff sues the defendant for unpaid annual leave entitlements. In addition, he claims a penalty pursuant to s.719 of the Workplace Relations Act 1996 ("WR Act") together with interest and costs. I should note at the outset that I have indicated to the parties that should I make a determination which might render the defendant liable to a penalty pursuant to WR Act, I will reconvene the Court for a further hearing in relation to that aspect.

There is agreement in relation to the facts pursuant to s.191 of the Evidence Act, and that document is Exhibit 1.

There is a bundle of documents which is agreed bundle and is Exhibit 2.

Within that agreement is an agreement that should the plaintiff be successful he is entitled to what would be the balance of his annual leave entitlements, namely the sum of \$57,245.63. If he is successful in the matter interest will be added to that sum, which will be a matter of separate calculation.

The agreed facts reveal that the plaintiff was employed by the defendant and I need not with any particularity describe the terms of his employment, nor the circumstances whereby he came to be employed by the defendant in its current manifestation.

It is worthwhile relating paragraph 7 of the agreed facts as follows: -

“Throughout his employment with the defendant (including its predecessors) the plaintiff received monthly payments which were the equivalent of \$50,000 per annum. The plaintiff was also entitled to receive commission payments from time to time, in accordance with the provisions of his contract of employment.”

The paragraph refers to Document 3 in the Tender Bundle.

An agreed schedule describes the way in which the plaintiff’s claim is calculated. It shows that within the 12 months prior to termination, the plaintiff received commissions totalling \$282,088.39 and that his average weekly commission was \$5,424.78. Thus, the case is that a very substantial majority of the plaintiff’s income was derived from weekly commissions.

His claim is that he is entitled to payment of holiday pay based upon a calculation applying the provisions of the Annual Holidays Act 1944 (NSW) (“the AH Act”). It is agreed between the parties that if that formulation is applied the plaintiff ought succeed in the sum claimed.

The plaintiff’s employment with the defendant concluded on 28 July 2006.

Within his contract was the following term: -

“You are entitled to annual leave and long service leave in accordance with legislation.”

The plaintiff was originally employed on 19 November 2001 and maintained continuous employment up until the date of his ceasing employment on 28 July 2006. There were a number of employing entities. That fact is irrelevant for the purpose of this litigation.

At the time that the contract was originally entered into and at the time when he was first employed by the defendant, the relevant legislation governing annual holidays was the AH Act.

On 27 March 2006 the Workplace Relations Amendment (Work Choices) Act 2005 (Commonwealth) ("WRA Act") commenced operation.

The AH Act ceased to have legislative force on that date as an Act of the NSW Parliament for persons whose employment became subject to WR Act.

The regime in relation to annual leave under the WR Act is contained within Part 7 Division 4 of that Act, with reference to s.178 definitions in that Act. In practical terms for the plaintiff it meant that his annual leave payment entitlement was calculated on the basis of an entitlement of 4 weeks annual leave paid at the rate determined by his base rate of salary, namely \$50,000 per annum, and ignoring the commissions he was paid. The difference between the two amounts is that claimed by the plaintiff. There is no dispute that the plaintiff has been paid the sum of \$16,914.66, which is the value of his annual leave entitlement based upon the calculation derived from the provisions of the WR Act.

There is no dispute that the effect of the WR Act was to render nugatory the AH Act. The constitutional validity of the WR Act legislation was established by *NSW v The Commonwealth* (2006) 81 ALJR 34.

The plaintiff frames his case in two ways.

Firstly, that after 27 March 2006 to the time of his ceasing employment the plaintiff's entitlements under the AH Act continued to apply as a notional agreement preserving State awards (NAPSA) pursuant to the provisions of Schedule 8, Part 3, Division 1 of the WR Act.

Alternatively, the plaintiff says that at the time this agreement was originally formed back in 2001 the provisions of the AH Act were incorporated referentially as a term of the contract of employment.

Proposition 1

NAPSAs are established by Clause 3 Part 3 -- Notional agreements preserving State awards of Division 1 of Part 3 of Schedule 8 of the WR Act. That clause reads as follows: -

“Notional agreements preserving State awards:-

If, immediately before the reform commencement, the terms and conditions of employment of one or more employees in a single business or a part of a single business:

- (a) were not determined under a State employment agreement; and
- (b) were determined, in whole or in part, under a State award (the original State award) or a State or Territory industrial law (the original State law);

a notional agreement preserving State awards is taken to come into operation on the reform commencement in respect of the business or that part of the business.”

A “State Industrial Law” is defined within s.4 of the WRA as follows:-

- “(a) any of the following State Acts:
 - (i) the Industrial Relations Act 1996 of New South Wales;
 - (ii) the Industrial Relations Act 1999 of Queensland;
 - (iii) the Industrial Relations Act 1979 of Western Australia;
 - (iv) the Fair Work Act 1994 of South Australia;
 - (v) the Industrial Relations Act 1984 of Tasmania; or

- (b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
 - (i) regulating workplace relations (including industrial matters, industrial disputes and industrial action, within the ordinary meaning of those expressions);
 - (ii) providing for the determination of terms and conditions of employment;
 - (iii) providing for the making and enforcement of agreements determining terms and conditions of employment;
 - (iv) providing for rights and remedies connected with the termination of employment;
 - (v) prohibiting conduct that relates to the fact that a person either is, or is not, a member of an industrial association (as defined in section 779); or
- (c) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or
- d) a law that:
 - (i) is a law of a State or Territory; and
 - (ii) is prescribed by regulations for the purposes of this paragraph.”

This part of the argument has turned upon the question as to whether the AH Act is a “State Industrial Law”. It is conceded by Mr West Q.C., on behalf of the defendant, that if I determine that it is a State Industrial Law within the definitions of the WRA then the plaintiff’s entitlements would be governed by the AH Act in that it would constitute for him a NAPSA.

In determining that question the argument seems to distil to an interpretation of the meaning of “State Industrial Law” (b)(ii).

Clause 34 of Schedule 8 plays upon this question. Subsections 2 and 3 are in the following terms:-

(2) "If, immediately before the reform commencement, a provision of a State or Territory industrial law would have determined, in whole or in part, a preserved entitlement of a person employed in the business or that part of the business who was not bound by or a party to a State employment agreement, or whose employment was not subject to such an agreement, then to that extent, that provision, as in force at that time, is taken to be a term of the notional agreement.

(3) In this clause:-

"Preserved Entitlement" means:

(a) an entitlement to:

- (i) annual leave and annual leave loadings; or
- (ii) parental leave, including maternity leave and adoption leave; or
- (iii) personal/carer's leave; or
- (iv) leave relating to bereavement; or
- (v) ceremonial leave; or
- (vi) notice of termination; or
- (vii) redundancy pay; or
- (viii) loadings for working overtime or shift work; or
- (ix) penalty rates, including the rate of payment for work on a public holiday; or
- (x) rest breaks; or

(b) another prescribed entitlement. “

To complete the statutory provisions which have immediate relevance to this question, Clause 45 of the Schedule reads as follows: -

“Preserved notional terms of notional agreement

- (1) A preserved notional term is a term, or more than one term, of a notional agreement preserving State awards that is about any or all of the following matters:
 - (a) annual leave;
 - (b) personal/carer's leave;
 - (c) parental leave, including maternity and adoption leave;
 - (d) long service leave;
 - (e) notice of termination;
 - (f) jury service;
 - (g) superannuation.”

It should be noted that s.16 of the WRA Act provides in s.16(1)(a) as follows:-

“This Act is intended to apply to the exclusion of the following laws of a state or territory so far as they would otherwise apply in relation to an employee or employer:

(a) a state or territory industrial law;

... ”

The essence of the defendant's case is contained in paragraph 49 of its submissions as follows:-

“Implicit in section 16 is the distinction between a law such as the AH Act that provides an entitlement to leave from a law that provides for the determination

of what that entitlement should be. The latter is an Act which itself provides the machinery for such a purpose. The AH Act provides actual obligations in respect of annual leave rather than a determination of the terms and conditions of employment. Accordingly the AH Act is not a State or Territory Industrial Law”

“Terms and conditions” is not a hendiadys. Thus the provision is broad. In other words, it covers terms of a contract and conditions of a contract.

The statute therefore can provide for the determination of terms whether they be conditions or not.

Within (b) are two pre-conditions, namely firstly that the law applies to employment generally (it is conceded that the AH Act does) and, secondly, it has as its main or one of its main purposes one of the matters mentioned within (i)-(v)

That term and/or condition of the contract was: -

“You are entitled to annual leave and long service leave in accordance with the legislation.

What does the AH Act do?

The long title of that Act reads:-

“An Act to provide for annual holidays for workers; to amend the Industrial Arbitration Act 1940 and certain other Acts; and for purposes connected therewith.”

Section 53 of the Act provides:

“Annual holidays with pay

- (1) Except as otherwise provided in this Act, every worker shall at the end of each year of the worker's employment by an employer become entitled to an annual holiday on ordinary pay.

Such annual holiday shall:

- (a) where any such year of employment ends upon or before 30 November 1974, be of three weeks,
 - (b) where any such year of employment ends after 30 November 1974, be of four weeks.
- (2) An annual holiday shall be given and taken either in one consecutive period or two periods which shall be of three weeks and one week respectively, or if the worker and the employer so agree, in either two, three or four separate periods and not otherwise.
 - (3) If the worker and the employer so agree, the annual holiday or any of such separate periods may be taken wholly or partly in advance before the worker has become entitled to the annual holiday.
 - (4) The annual holiday shall be given by the employer and shall be taken by the worker before the expiration of a period of six months after the date upon which the right to such holiday accrues: Provided that the giving and taking of the whole or any separate period of such annual holiday may, with the consent in writing of the Industrial Registrar, or Deputy Industrial Registrar appointed under the Industrial Relations Act 1996, be postponed for a period to be specified by such Registrar in any case where he or she is of opinion that circumstances render such postponement necessary or desirable.
 - (5) Except as provided in section 4 or section 4A, payment shall not be made by an employer to a worker in lieu of any annual holiday or part thereof to which the worker is entitled under this Act nor shall any such payment be accepted by the worker.

- (6) (a) The employer shall give each worker at least one month's notice of the date from which the worker's annual holiday shall be taken.
 - (b) The employer shall pay each worker in advance before the commencement of the worker's annual holiday, the worker's ordinary pay for the holiday period.
- (7) Where the annual holiday or any part thereof has been taken before the right to the annual holiday has accrued the right to a further annual holiday shall not commence to accrue until after the expiration of the year of employment in respect of which the annual holiday or part has been so taken.
- (8) Where any special or public holiday for which the worker is entitled to payment under any Act, award or agreement or under the worker's contract of employment, occurs during any period of an annual holiday taken by a worker under this section, the period of the holiday shall be increased by one day in respect of that special or public holiday."

The Act provides a definition of "ordinary pay" (s.2(1)) and provides a method of calculation of the rate of pay in particular cases, including the type of remuneration the plaintiff received (s.2(2)(a2)).

There is no doubt that the contractual term here dealt with the question of annual leave. No other provision in the contract referred to the topic.

The word "determination" in the contract means "ascertainment, or the fixing or settling of an amount" (Macquarie Dictionary, Third Edition).

In my opinion the clear and obvious purpose of the AH Act is as the long title says:-

"...to provide for annual holidays ... and for purposes connected therewith."

and within it the mechanism for calculating both the duration of and payment for those holidays.

It was rightly conceded that had the contract been entirely silent in its express terms about holidays one would have looked to this Act prior to the commencement of the WR Act to determine both the duration and monetary value of the plaintiff's annual holiday entitlement.

A trite canon of statutory interpretation is to give the words of the statute their obvious meaning in their context. In *Colquhoun v Brooks* (1889) 14 App Cas 493 at 506 Lord Herschell said:-

"It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."

See also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 and *South West Water Authority v Rumble's...* [1985] AC 609 per Lord Scarman at 617.

In *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 AT 397 Dixon J said: -

".. the context, the general purpose, and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is construed."

It is difficult, without reverting to semantic gymnastics, to find that the AH Act is not within the definition of "State Industrial Law".

That conclusion is supported contextually. Clause 34 nominates "annual leave" as a "preserved entitlement" which would have been "determined" by a "State Industrial Law" immediately before the commencement of the WR Act.

There was no other legislation in force in New South Wales at that time which had as its main purpose, or one of its main purposes, provisions for determining an entitlement to annual leave other than the AH Act.

Clause 45 nominates annual leave to be a potential term of preserved notional term. I find that the AH Act was at the commencement of the WR Act a State Industrial Law.

Is the entitlement more generous under the preserved notional term than the plaintiff's entitlement under the Australian Fair Pay and Conditions Standard (Clause 46(2))?

Clause 47(1) reads:-

“Meaning of more generous

- (1) Whether an employee's entitlement under a preserved notional term in relation to a matter is more generous than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard:
 - (a) is as specified in, or as worked out in accordance with a method specified in, regulations made under this paragraph; or
 - (b) to the extent that regulations made under paragraph (a) do not so specify--is to be ascertained in accordance with the ordinary meaning of the term more generous.”

Regulation 3.2 is made pursuant to that clause. Regulation 3.2(1) & (2) read as follows:-

- “(1) For paragraph 47 (1) (a) of Schedule 8 to the Act, this regulation explains how to determine whether an employee's entitlement under a preserved notional term in relation to:
 - (a) annual leave; or

- (b) personal/carer's leave; or
- (c) parental leave, including maternity and adoption leave;

is more generous than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard.

- (2) The entitlements are to be compared on the basis of their effect on the employee alone, rather than on the basis of their effect on employees generally.

Note 1 The comparison between entitlements will focus on the individual employee's entitlements.

Note 2 A type of employee may have an entitlement under a preserved notional term, but not a corresponding entitlement under the Australian Fair Pay and Conditions Standard. For example, a casual employee may have an entitlement to annual leave under a preserved notional term, but is not covered by the Australian Fair Pay and Conditions Standard. In this example, the casual employee would retain the entitlement under the preserved notional term.”

Subsection 3 reads:

“However:

- (a) if the total annual quantum of a kind of leave permitted under the preserved notional term is greater than the total annual quantum of that kind of leave permitted under the Australian Fair Pay and Conditions Standard, the entitlement specified under the preserved notional term is taken to be more generous; and
- (b) if the total annual quantum of a kind of leave permitted under the preserved notional term is less than or equal to the total annual

quantum of that kind of leave permitted under the Australian Fair Pay and Conditions Standard, the entitlement under the Australian Fair Pay and Conditions Standard has effect.”

I have paused between Sub Regulation 1 and 2 and Sub Regulation 3 because of the way the argument developed before me.

It was said by the defendant that Clause 47, as developed by Regulation 3.2, only dealt with the temporal period of annual leave and nothing else. Thus, it was said that the provision for annual leave within the WR Act was not different to the AH Act, namely 4 weeks, thus, the AH Act was not more generous than the WR Act.

The reason this is significant is because of s.46(2) which reads:-

“If:

- (a) the preserved notional term is about a matter referred to in paragraph 45(1)(a), (b) or (c); and
- (b) the employee's preserved notional entitlement in relation to the matter is more generous than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard;

the employee's entitlement under the Australian Fair Pay and Conditions Standard is excluded, and the employee's preserved notional entitlement has effect in accordance with the preserved notional term. Otherwise, the employee's entitlement under the Australian Fair Pay and Conditions Standard has effect.”

Clause 45(1)(a) refers to annual leave and if one concedes, for the purpose of part of the argument, that the plaintiff had a preserved notional term by virtue of the AH Act, being a State Industrial law, then the “more generous” question arises.

When looking at Regulations 3.2(1), (2) and (3) it is notable that the language changes.

Sub Regulation (1) speaks of:-

“an employee’s entitlement under a preserved notional term in relation to:-

(a) annual leave

...”

The word “entitlement” is referred to in Sub Regulation (2) picking it up from Sub Regulation 1

There is no qualification on the scope or meaning of “preserved notional term” relating to annual leave. It means all of the preserved notional term. Thus, here the relevant provisions of the AH Act are as they applied to this plaintiff.

It is said that Sub Regulations (3) and (3A) qualify that full meaning to restrict it to only the quantum of annual leave which I take to be the time permitted.

It is hard to see why this should be so. The obvious purpose of Sub Regulation (3) is to deal with an aspect of annual leave, namely duration – in other words the length of time for holidays allowed as part of the entitlement.

It is absurd to conclude that on simply looking at the difference in monetary outcomes to the plaintiff, between applying the formulae for leave entitlements under the WR Act and the AH Act, that one could conclude that the AH Act result is not more generous than the WR Act result.

The structure of the legislation bespeaks preservation of the pre-existing entitlements. (See for instance Division 3 of Part 10).

In fact, in each part of the WR Act which relates to pre-existing mechanisms, whether they be State or Federal awards or statutory entitlements which are effected by the Act, the legislation uses the word “preserve” or a participle or tense of it where appropriate.

The defendant’s argument here means that an obvious entitlement under the AH Act as it applied before 27 March 2006 is taken from him by operation of the WR Act.

That entitlement is \$57,245.63.

As was properly conceded by Mr West of Queen's Counsel for the defendant that answer means that the plaintiff is entitled to a verdict which I will come to at the end of these reasons.

If I am wrong about my conclusions I now deal with the plaintiff's alternative argument.

The plaintiff's second proposition is that the relevant terms of the AH Act were incorporated into the contract by reference. That statute applied to the parties at the time of the formation of the contract.

It is common ground that the "... legislation" referred to in the relevant term of the contract was the AH Act. It is conceded that if it is referentially included in the contract the plaintiff is entitled to succeed in the sum claimed.

There is no suggestion that the contract was varied in its terms from its original formation.

There is no doubt that up until 27 March 2006 the relevant legislation governing annual leave allowed for within the contract was the AH Act. It is the only Act that could have been invoked to that time by the contractual provision: -

"You are entitled to annual leave ... in accordance with legislation."

It was the applicable legislation when the contract was formed.

This is conceded.

The task here is to ascertain the character of the words "in accordance with legislation". No doubt the purpose of the term was to deal with the question of the plaintiff's full entitlements relating to annual leave.

There is a marked difference in asserting that a statutory provision is an implied term of a contract or imported into a contract, a concept considered in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 420 and an incorporation of a statutory provision by reference.

The task of interpreting this contractual term is conveniently set out in the judgment of Weinberg J in *Riverwood International Australia v McCormick* (2000) 177 ALR 193. At para 129 he concurred with the principals identified by the trial judge as follows: -

“The appellant accepted that the learned primary judge correctly identified the relevant legal principles in his approach to ascertaining the meaning of the policy clause in the letter. In particular, his Honour said:-

- the contract of employment was made in good faith with the object of at least potential mutual benefit by due performance: cp. *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1970) 144 CLR 596; 26 ALR 567 at CLAR 607 per Mason J;
- the court’s task is to ascertain the meaning of the parties’ expressions from an objective point of view: *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834 at 840 per McGarvie J;
- the parties may be bound by the meaning reasonably to be inferred in the circumstances, even though the meaning does not confirm to the interpretation advanced by either of them: *Life Insurance Co of Australia v Phillips* (1925) 36 CLR 60;
- if the language of the contract is ambiguous or susceptible of more than one meaning, evidence of surrounding circumstances is admissible to assist in its interpretation: *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; 41 ALR 367 (*Codelfa*) at CLR 352 per Mason J.”

At the time the contract was made or renewed the only legislation that could have been within the contemplation of the parties was the AH Act. The change in legislation to the outcome to the plaintiff effect a dramatic reduction in the amount payable for annual leave. No objective assessment of that outcome could conclude that that was what was intended by the parties when they made the contract, or

intended by them or the meaning to be inferred to the term from the circumstances in which the contract was made.

Thus, in my opinion, s.3 of the AH Act is incorporated into the relevant term of the contract by reference and the plaintiff is also entitled to succeed on this basis of his claim.

Accordingly, there will be a verdict and judgment for the plaintiff. I direct the parties to bring in a short minute to reflect the appropriate interest calculation.

Unless there are further matters to be put the defendant is to pay the plaintiff's costs

The matter of any penalty to be paid by the defendant as claimed by the plaintiff is adjourned for hearing to