

CITATION: *Johnston v The Bagot Community Inc* [2005] NTMC 079

PARTIES: WILLIAM JOHNSTON

v

THE BAGOT COMMUNITY INC

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20516065

DELIVERED ON: 12th December 2005

DELIVERED AT: Darwin

HEARING DATE(s): 7th December 2005

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Labour Law – Entitlements on termination – Long service Leave – Annual Leave

Long Service Leave Act section 8

Annual Leave Act section 6, 9, 10 and 13

REPRESENTATION:

Counsel:

Plaintiff: Ms Farmer

Defendant: Mr Johnson

Solicitors:

Plaintiff: Withnalls

Defendant: Darwin Community Legal Service

Judgment category classification: C

Judgment ID number: [2005] NTMC 079

Number of paragraphs: 37

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20516065

BETWEEN:

William Johnston
Plaintiff

AND:

Bagot Community Incorporated
Defendant

REASONS FOR JUDGMENT

(Delivered 12th December 2005)

Judicial Registrar Fong Lim:

1. The Plaintiff took action against the Defendant for payment for annual leave and long service leave entitlements that he claims should have been paid to him on termination of his employment. The Plaintiff obtained judgment in default of defence on the 24th of August 2005 for the sum of \$45900 plus costs. The Defendant applied to set aside the judgement and the Court decided to maintain the judgement but set the aside the amount with debt to be assessed. The assessment of debt was argued before me on the 7th of December 2005.
2. The Plaintiff relied upon his affidavit of the 13th of October 2005 and the Defendant relied on the affidavits of Jacki Garland of the 26th and 30th of October 2005, the affidavits of Lloyd Nair of the 28th of October and 22nd of November 2005 and the affidavit of Earle Johnson of the 6th of December 2005.

3. The Plaintiffs claims:
 - (a) Annual leave entitlements for 5 years and 3 weeks of service from the 1st of January 2000 to the 24th January 2005 which he says calculates to -\$30300.00
 - (b) Long service leave entitlements based on employment from 1993 to 24th of January 2005 – 12 years, which he says calculates to -\$15600
4. The Defendant accepts that it owes to the Plaintiff a sum for entitlements pursuant to the Annual Leave Act and the Long Service Leave Act but calculates those entitlements as:
 - (a) Annual leave - \$18045.00
 - (b) Long service leave - \$8604.06
5. The Defendant's calculations were produced by Ms Garland in her affidavit based on pay and leave records provided by the Defendant's accountant. Ms Garland is employed with the Chamber of Commerce as a workplace relations advisor and had tried to assist the parties to resolve this issue. In that role Ms Garland calculation what she thought were the entitlements owed to the Plaintiff based on her understanding of the legislation. Ms Garland was not qualified by the solicitor for the Defendant so I cannot be sure of her expertise in the area of calculating such entitlements.
6. There are several issues this court must rule on before it can calculate the entitlements and they are, the commencement date of the Plaintiff's employment with the Defendant, the date of termination, the hours of annual leave actually taken, and the rate of pay applicable in the calculations.
7. **Commencement date** - the Plaintiff himself is unsure as to the date on which he commenced employment with the Defendant. In his statement of claim he makes calculations of annual leave from the 1st of January 2000. In his affidavit the plaintiff says he commenced part time employment with the Defendant in 1993, with no precise date of commencement (see paragraph 5

of his affidavit). He also claims that he was promoted to housing manager in early 1999 for which he was paid \$25 per hour for a 40 hour week.

8. There is no other evidence supporting a commencement date however the Defendant has accepted in their calculations a commencement date of 1st of July 1993 because they were provided with a notice of assessment from the Australian Taxation Office which showed the Plaintiff as having taxable income in the financial year ending June 1994.
9. The Defendant has not denied that the Plaintiff was employed with it from 1993 and therefore I accept that the Plaintiff's employment commenced in 1993 however as there is no evidence from the Plaintiff when in 1993 he commenced his part time employment it is my view the date of the 1st of July 1993 is an acceptable commencement date to adopt.
10. **Termination date:** The Plaintiff claims that he continued to work until the 24th of January 2005 when he received a letter from the Defendant (annexure "G" to his affidavit) advising him his payments "have been cancelled".
11. The Defendant claims the date of termination to be the 12th of January 2005 as that was the last payment of wages made to the Plaintiff.
12. The evidence shows that the first written notice had of his termination was the letter of the 24th of January 2005 prior to that he had heard rumours however the only formal notification he got was that letter and I accept the 24th of January 2005 as the termination date.
13. **Rate of pay:** The Plaintiff produces a written contract of employment signed in 2003 acknowledging the commencement date of the 1st of January 2000 as when the Plaintiff commenced work on a full time basis. The Plaintiff's claim for Annual leave dates from the 1st of January 2000 because he accepts that prior to that he took ad hoc annual leave and that he had no records to confirm how much leave was taken.

14. The Plaintiff claims that from the 1st of January 2000 he did not take any leave except when he had time off, unpaid to be with his ill sister in Borrooloola. The Plaintiff also claims that in the last 3 -4 years he had been producing time sheets to the Defendant's accountants Nair Watkins.
15. The Defendant relied on an affidavit by Lloyd Nair, the Defendant's accountant, who states that the his firm took over the running of the accounts for the Defendant at the beginning of the 2000/2001 financial year and were advised at that time that the Plaintiff's accrued leave was 113.84 hours. Nair states that balance was used as the commencing balance in the computer records set up by his company.
16. There is no indication of who told Nair the commencing balance.
17. The Plaintiff's evidence does not address the issue of annual leave for the 1999/2000 financial year in enough detail for this court to calculate any alternative balance and the Plaintiff accepts that no records were kept.
18. Given the above I accept the balance of accrued annual leave to the Plaintiff as at the 1st of July 2000 was 113.84 hours.
19. The Defendant also accepts that at the end of the 2000/2001 financial year the Plaintiff could have accrued a further 239.72 hours as there were no records of him going on leave in that year. I do not understand why there would only be a credit of 239.72 hours when the Plaintiff would have been entitled to 40 hours x 6 weeks for that year ie 240 hours. The discrepancy can possibly be explained by the use of an accrual of 4.61 hours per week.
20. I find that the balance of accrued leave to the Plaintiff at the end of the 2000/2001 year was 353.84 hours.
21. For the balance of the term of employment of the Plaintiff the Defendant then produces a spreadsheet created out of the computer records kept for the

Defendant by their accountants. Those spreadsheets show a contrary situation as claimed by the Plaintiff.

22. The Plaintiff originally claimed that from the 1st of January 2000 he did not take any annual leave. The Defendant produced a leave application signed by the Plaintiff for leave for the 6th November 2002 – 4th of December 2002 and it was conceded by the Plaintiff that leave was taken for that period. The Defendant also produced a leave application dated the 19th of November 2003 which according to the leave application was for “compassionate leave”. The Plaintiff claims that this leave should have been recorded as compassionate leave and not annual leave.
23. The leave records produced by Nair Watkins show that the both periods were taken off the Plaintiff’s annual leave. The Plaintiff’s solicitor argued that the second period should not have been recorded as annual leave it should have been recorded as compassionate leave. There evidence is that the Plaintiff was employed under a contract of employment, in that contract there was no mention of an entitlement to compassionate leave. There is no evidence that any award applied to the Plaintiff. It is my view that the leave was granted on compassionate grounds however the Defendant was entitled to record it against the Plaintiff’s annual leave.
24. The Plaintiff swore affidavit evidence that he did not take any leave after the 1st of January 2000 and yet the Defendant in the production of these leave applications has proved in fact he did take leave. The Plaintiff was careful to confirm that he did have time off in 2000/2001 to look after his sister in Borroloola however claims that he was not paid for that time. If he could remember that period of absence for work it is curious that at the time of his affidavit he did not remember those two periods of leave as evidenced in the leave applications.
25. It is my view that the Plaintiff cannot really recall when he did take leave over the past 5 years and was perhaps relying on the fact that the

association's records were in a mess to make his ambit claim. I accept the records of the accountants as a true record of the Plaintiff's leave accrual for the period from 4th July 2001 through to the date of termination.

26. Therefore the hours of leave owing to the Plaintiff at the date of his termination are 721.80 plus 0.28 hours for the adjustment referred to in paragraph 19 of this decision, a total of 722.08 hours.

27. The annual leave entitlement to be paid to the Plaintiff is:

$$722.08 \times \$25 + 17.5\% = \$21211.10$$

28. **Long service leave:** The Plaintiff's length of employment with the defendant is accepted as having commenced in 1993 however was not made full time until 1st of January 2000. There is clearly over 10 years of service and therefore pursuant to section 8 of the Long Service Leave Act. The difficulty with the calculation of the Plaintiff's long service leave entitlements is that prior to 1 January 2000 there is no real record of the rate of pay or the hours worked by the Plaintiff prior to the 1st of January 2000.

29. Section 11 of the Long Service Leave Act provides the formula for calculating Long Service Leave:

11. Payment for long service leave

(1) In this section –

"hours of work per week" means –

(a) the fixed number of hours per week an employee has worked for an employer during a year of continuous service with an employer; or

(b) where an employee has not worked a fixed number of hours per week, the average number of hours per week the employee has worked for an employer during a year of continuous service with an employer,

but does not include hours of overtime worked by the employee;

"rate of pay" means an employee's remuneration for the hours of work per week worked by the employee calculated –

(a) in the case of an employee who is remunerated in accordance with a rate of pay fixed by the terms of employment of the employee, that rate of pay; or

(b) in the case of an employee –

(i) who is not remunerated in accordance with a rate of pay referred to in paragraph (a);

(ii) who is remunerated partly in accordance with a rate of pay referred to in paragraph (a) and partly in another manner; or

(iii) where no rate of pay is fixed by the terms of employment of the employee,

the average rate of pay paid to the employee during a year of continuous service (to be calculated by dividing the total amount of pay paid, other than any amount paid for hours of overtime worked or as district allowance, site allowance, climatic allowance or penalty rates, by the total number of hours, other than hours of overtime, worked by the employee during the year of continuous service).

(2) Where an employee is entitled to a payment for, or in lieu of, long service leave under this Act, the amount payable to the employee is the sum of the amounts calculated under subsection (3) for each completed year of continuous service that comprises the period of service from which his or her entitlement to long service leave is derived.

(3) An amount calculated for a completed year of continuous service under subsection (2) is to be calculated in accordance with the formula $RP \times HWW \times 1.3$, where –

"RP" means an employee's rate of pay payable on the day immediately preceding the day on which he or she ceases to be an employee or takes a period of long service leave, or on the day as agreed in accordance with subsection (8)(a), as the case may be;

"HWW" means the number of hours of work per week an employee worked for an employer during a year of the continuous service;

(4) For the purpose of giving an example of the calculation of a payment under subsection (2) in respect of 10 years of continuous service, where –

(a) an employee works 40 hours per week during the whole of the period of 10 years of continuous service; and

(b) the employee's rate of pay on the day immediately preceding the day on which he or she ceases to be an employee or takes a period of long service leave is \$15 per hour,

then the amount payable to the employee is \$7,800, being the sum of $\$15 \times 40 \text{ hours} \times 1.3 \text{ weeks}$ for each of the 10 years of continuous service.

(5) For the purpose of giving a further example of the calculation of a payment under subsection (2) in respect of 5 years of continuous service, where –

(a) the employee worked –

(i) 40 hours per week during the first year of continuous service;

(ii) 40 hours per week during the second year of continuous service;

(iii) 30 hours per week during the third year of continuous service;

(iv) an average of 25 hours per week during the fourth year of continuous service; and

(v) an average of 20 hours per week during the fifth year of continuous service; and

(b) the employee's rate of pay on the day immediately preceding the day on which he or she ceases to be an employee or takes a period of long service leave is \$30 per hour,

then the amount payable to the employee is \$6,045, being the sum of $(\$30 \times 40 \text{ hours} \times 1.3 \text{ weeks})$ plus $(\$30 \times 40 \text{ hours} \times 1.3 \text{ weeks})$ plus $(\$30 \times 30 \text{ hours} \times 1.3 \text{ weeks})$ plus $(\$30 \times 25 \text{ hours} \times 1.3 \text{ weeks})$ plus $(\$30 \times 20 \text{ hours} \times 1.3 \text{ weeks})$.

(6) Subject to subsection (8), where an employee is to take a period of long service leave, his or her employer is to pay the amount calculated under (2) to the employee in respect of the whole of the period –

(a) on or before the last day on which the employee is required to work before he or she commences the leave; or

(b) on the pay day immediately before he or she commences the leave,

as agreed between the employer and employee.

30. It is clear from that section that to calculate the long service leave entitlement for the plaintiff the part time hours between 1993 and 2000 need to be established.

31. The formula should read as follows:

(a) 1st January 2000 – 1st January 2005 :- $5 \times \$25 \times 40 \times 1.3 = \6500

(b) 1993 – 1999:- $6 \times \$25 \times ?(\text{amount of hours worked part time per week}) \times 1.3 = ?$

32. The Plaintiff calculated the earlier years at the same rate of the later years.

33. The Defendant's calculations for the years prior to 2000 were based on the Plaintiff's Notices of Assessment. The Defendant divided the Plaintiff's taxable income by 52 weeks and then divided it by the current pay rate to arrive at the average weekly hours for each of those years.

34. The Plaintiff agrees that he worked part time at first but does not give any evidence of how many hours he worked per week. He also gives evidence that he received a pay rise when he signed his contract for full time work (see paragraph 10 of the Plaintiff's affidavit).

35. I cannot accept the Plaintiff's calculation as it is clear that he hasn't taken into account the fact that between 1993 and 2000 he was not working a 40 hour week for those years. I cannot accept the Defendant's calculations either as they have assumed an hourly rate of \$25 for the earlier years as well when it is clear from the Plaintiff's evidence that he was only put on that rate from 2000. The Plaintiff claims the payment of \$25 per hour was a pay rise so therefore it would be important to ascertain what the actual rate

of pay was for those years before any averaging exercise can be done for the purposes of Long Service Leave.

36. It is for the Plaintiff to prove his case for the amount he is claiming and in my view he has not provided enough evidence for the court to make any safe calculation as to his entitlement for Long Service Leave payment for the period from 1993 – 2000.

37. **Assessment:** This court's orders are as follows:

37.1 The Defendant pay the Plaintiff the sum of \$21211.10 for his annual leave entitlements

37.2 The Defendant pay the Plaintiff the sum of \$6500 for his Long service leave entitlements accrued from the years 2000 – 2005.

37.3 The Defendant is liable to pay the Plaintiff a sum for Long service leave entitlements for the period 1993 – 2000 however there is not enough evidence before the court to quantify that amount.

37.4 The Defendant pay the Plaintiff's costs of and incidental to the proceedings and this assessment of damages to be taxed in default of agreement.

Dated this 12th day of December 2005

Tanya Fong Lim
JUDICIAL REGISTRAR