CITATION: *Johnston v The Bagot Community* [2006] NTMC 030

PARTIES:	WILLIAM JOHNSTON
	v
	THE BAGOT COMMUNITY INC
TITLE OF COURT:	Local Court
JURISDICTION:	Appellate
FILE NO(s):	20516065
DELIVERED ON:	28.04.06
DELIVERED AT:	Darwin
HEARING DATE(s):	06.04.06
JUDGMENT OF:	D Trigg SM

CATCHWORDS:

Annual Leave Act – sections 9, 10, 13, 14, 18
Long Service Leave Act – sections 8, 10, 11
Local Court Rule 4.04 – hearing de novo
Expert evidence

REPRESENTATION:

Counsel:

Plaintiff:	Ms Farmer
Defendant:	Mr Johnson

Solicitors:

Plaintiff:	Withnalls
Defendant:	Darwin Community Legal Service

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 030
Number of paragraphs:	90

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

No. 20516065

BETWEEN:

WILLIAM JOHNSTON
Plaintiff

AND:

THE BAGOT COMMUNITY INC.
Defendant

REASONS FOR DECISION

(Delivered 28 April 2006)

Mr D. TRIGG SM:

1. This proceeding commenced on 5 July 2005 when the plaintiff filed a Statement of Claim in this court. The plaintiff claimed statutory entitlements under the *Annual Leave Act* of $30,300, plus $15,600 under the *Long Service Leave Act*, plus costs and interest.
2. This Statement of Claim was served upon the defendant by registered post. However, the defendant failed to file any Appearance or Defence to the claim, and accordingly, the plaintiff sought a default judgment.
3. On 24 August 2005 judgement in default of Defence was given by the court in the sum of $45,900 plus $919.40 costs.
4. On 22 September 2005 the defendant applied to set aside the default judgement and this application was heard before judicial registrar Fong Lim on 3 October 2005. In addition to some procedural orders the learned judicial registrar ordered as follows:

    1. The judgement of 24th August 2005 be set aside only in relation to the amount of the judgement.

    2. The matter set down for an assessment on the 23rd November 2005 at 9:00am.

5. The defendant pay the plaintiff's costs of todays application to be determined at the assessment debt.

5. The assessment actually proceeded before judicial registrar Fong Lim on 7 December 2005, and she delivered her written reasons on 12 December 2005. In accordance with those reasons the judicial registrar then made the following orders:

1. The defendant to pay the plaintiff the sum of $21211.10 for his annual leave entitlements.

2. The defendant pay the plaintiff the sum of $6500 for his long service leave entitlements from the years 2000-2005.

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.

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.

6. Presumably order number 4 was intended to include the interestingly worded order number 5 from 3 October 2005. I note that the learned judicial registrar did not specify a percentage of the Supreme Court scale that should apply to the costs order. Nor does it appear from her judgement or the order that the plaintiff's claim for interest was dealt with.

7. On 23 December 2005 the plaintiff filed an application to appeal the judicial registrar's decision pursuant to *LCR 4.04*. This Rule states as follows:

(1) A person affected by an order made by a Judicial Registrar, acting Judicial Registrar, Registrar, Deputy Registrar or acting Registrar may appeal to the Court.

(2) An appeal under this rule is to be –

(a) by application under Part 25;

(b) heard by a magistrate; and

(c) by way of a hearing de novo.

(3) Unless a magistrate orders otherwise, an appeal does not operate as a stay of the order appealed against.

> (4) Except with the leave of a Registrar or magistrate, an appeal under this rule is to be commenced not later than 14 days after the date of the order appealed against.

8. Accordingly, the appeal herein is de novo which means that all the issues must be retried, and the party succeeding below enjoys no advantage and must, if he can, win the case a second time (*Sweeney v Fitzharding* [1906] 4 CLR 716; *Turnbull v NSW Medical Board* (1976) 2 NSWLR 281 @ 297-8). No error needs to be pointed to in the judgement appealed from (*Allesch v Maunz* (2000) 203 CLR 172 @ 180). In *Gibson v Bosmac Pty Ltd* (1995) 130 ALR 245, Wilcox CJ held in that case that:

> A hearing de novo in this context means no more than a hearing at which the parties are not bound by the course they took before the judicial registrar, further evidence may be adduced and the judge is not bound by the judicial registrar's findings of fact. It is not necessary for the parties to ignore the evidence tendered to the judicial registrar and re-litigate all the issues as if there had never been a hearing before the judicial registrar, although there may be occasions when this will be appropriate.

9. I proceed on this basis. The hearing de novo proceeded before me on 6 April 2006.

10. In the course of the hearing Ms Farmer, counsel for the plaintiff tendered and relied upon the following affidavits:

> William Johnston (13.10.05) – ExP1
>
> William Johnston ((6.4.06) – ExP2
>
> Lloyd Nair (22.11.05) – ExP3
>
> Lloyd Nair (28.10.05) – ExP4

11. Ms Farmer did not call any oral evidence, and closed the plaintiff's case. I note that all these affidavits, with the exception of ExP2 were before the judicial registrar.

12. Mr Johnson, counsel for the defendant tendered and relied upon the following affidavits:

> Jacki Garland (26.10.05) – ExD1
>
> Jacki Garland (31.10.05) – ExD2

Earl Johnson (6.12.05) – ExD3

Jacki Garland (4.4.06) – ExD4

13. With the exception of Ex D4, all these affidavits were also before the judicial registrar.

14. In ExD1 Ms Garland states that she "is employed by the Chamber of Commerce as a workplace relations advisor and in that capacity attempted to assist the parties to resolve issues relating to the plaintiff's claim for annual leave and long service leave by perusing documents provided by the parties and calculating figures for inclusion in a settlement proposal". However, no settlement was reached and this action was commenced. In addition, Ms Garland expands upon her training and qualifications in ExD4. I assume that the purpose of this was to qualify her as an expert. In my view, this has not been achieved.

15. The first requirement for the admission of expert evidence is that a relevant field of expertise should exist (JJ Doyle QC – *Admissibility of Opinion Evidence* (1987) 61 ALJR 688 @ 690). A field of expertise has been described as an organised branch of knowledge (*Cooper v Bech (No 2)* (1975) 12 SASR 151 @ 153). This is a question of fact.

16. Whilst employer and union organisations may be more familiar with dealing with issues of leave entitlements of employees, I am not satisfied that a relevant field of expertise does in fact exist. The area is not, in my opinion, so complex that it is beyond the capability of the court to resolve without the assistance of some expert opinion. It is a matter of statutory interpretation, and then applying the facts and financial material to that. This is what courts do on a regular basis. Accordingly, I will not proceed to assess the affidavits of Ms Garland as if they were an expert opinion. However, I will have regard to them as if they were part of the defendant's submissions.

17. It is clear that a number of the factual and other findings made by the judicial registrar are not sought to be re-litigated now before me. The following paragraphs from the judgement of the judicial registrar are

accepted by both parties, and accordingly I will not reconsider these aspects:

> 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.

> 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.
>
> 20. I find that the balance of accrued leave to the Plaintiff at the end of the 2000/2001 year was 353.84 hours.

18. I digress at this stage to note that although neither counsel made any reference to this finding in paragraph 20, it appears to be a typographical error. Mr Nair in paragraph 3 of ExP4 confirms the figures of 113.84 and 239.72 and adds these together to arrive at a figure of 353.56. This calculation is correct. Accordingly, the finding in paragraph 20 is not one that I make. I find that the plaintiff's accrued leave entitlement as at 4 July 2001 was 353.56 hours (as per annexure A to ExP4). I return to the non-disputed matters:

> 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.

19. There appears to be something missing from the second sentence of this paragraph as it does not make grammatical sense.

20. In addition, a number of other findings of the learned judicial registrar are clearly correct on the evidence before me, and I adopt what she has said in the following paragraphs of her decision:

> 22. The Plaintiff originally claimed that from the 1st of January 2000 he was 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".
>
> 23. The leave records produced by Nair Watkins show that the both periods were taken off 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.

21. I will firstly consider the plaintiff's entitlements to annual leave.

22. I note that an employer is obliged to keep and maintain annual leave records for each employee pursuant to *section 16 of the Annual Leave Act*. The failure to keep and maintain records from 1993 until July 2000 may constitute an offence under *section 19 of that Act*.

23. As noted above the starting point is that the plaintiff had accrued annual leave as at 4 July 2001 of 353.56 hours. It is apparent from annexure A of ExP4 that Mr Nair has calculated the plaintiff's entitlement to annual leave to be accruing at the rate of 4.61 hours per week. In paragraph 2 of ExP4 he states "The plaintiff was entitled to 6 weeks annual leave per annum and he worked 40 hours per week. The total hours due per annum were therefore 240 hours which equates to 4.61 hours accruing per week."

Unfortunately Mr Nair does not seek to explain how he has arrived at this figure of 4.61. I therefore need to calculate this for myself.

24. Looking at a four year cycle (to allow for a leap year) there are 1,461 days. If this is divided by seven, there are 208.7 weeks in each four year cycle. If this is then divided by four, there are on average 52.17 weeks in each year over any four year cycle. 240 hours divided by 52.17 weeks equals 4.600345. In the alternative, if you were to simply divide 240 hours by 52 weeks (albeit that there are not actually 52 weeks in any year, as this would only account for 364 days) then a figure of 4.6153846 would be arrived at. Perhaps this is how the figure of 4.61 was arrived at, but I do not know.

25. Ms Garland unfortunately does not assist either. In paragraph 2 of ExD1 she states "the figure I arrived at and included in the draft terms of settlement for annual leave for the last mentioned period, was $17,815.00 being for 712.60 hours multiplied by an hourly rate of $25." She does not explain how she arrived at this other than she calculated this "based on information given to me by the accountants for the defendant." She did not identify what this information was, and therefore I am unable to form any view as the correctness of what she was given. Nor does she set out how she has made her calculations.

26. If Mr Nair and/or Ms Garland were qualified to express opinions as an expert (which I do not find that they were) then it is necessary for them to disclose the facts upon which they rely to express their opinions (*R v Turner* [1975] 2 QB 834 @ 840). Then each of those facts must be proved by the party who seeks to rely upon their opinion. Further, on general principle, if the court does not know or cannot understand the process of reasoning, if it were to adopt the opinion, it would abdicate it's function of deciding the case in favour of the expert (Justice Von Doussa – *Difficulties of Assessing Expert Evidence* (1987) 61 ALJ 615 @ 618). Accordingly, "courts cannot be expected to act on opinions the basis of which is unexplained" (*R v Jenkins; Ex parte Morrison (No 2)* (1949) ALR 468 @ 475-476; *Samuels v Flavel* [1970] SASR 256 @ 260).

27. *Section 10 of the Annual Leave Act* dictates what must be paid to an employee on termination of employment. That section states:

> (1) If –
>
> (a) after a period of one month's employment in the period of the first 6 months employment with an employer – an employee lawfully leaves that employment or the employment is terminated by the employer through no fault of the employee; or
>
> (b) after a period of 6 months continuous qualifying service with an employer or, after a period of 12 months or more continuous qualifying service in respect of the whole of which annual leave has not been granted – an employee leaves that employment or the employment is terminated by the employer,
>
> the employee shall be paid (in lieu of a proportion, for that qualifying service, of the annual leave in respect of 12 months qualifying employment) an amount calculated in accordance with subsection (2).
>
> (2) The amount to be paid to an employee for the purposes of subsection (1) in lieu of annual leave on termination of employment shall be –
>
> (a) if the employee had been employed as a 7-day shift worker for the whole of the period of qualifying service served by the employee referred to in that subsection – at the employee's ordinary rate of pay for 3.85 hours in respect of each completed week of that qualifying period of service;
>
> (b) if the employee had been employed as a 7-day shift worker for part only of the period of qualifying service served by the employee referred to in that subsection – at the employee's ordinary rate of pay for 3.85 hours in respect of each completed week of that qualifying period of service; or
>
> (c) in any other case – at his ordinary rate of pay for 3.08 hours in respect of each completed week of that qualifying period of service.
>
> (3) Where an employee's hours worked in a week are less than 40 the number of hours referred to in subsection (2)(c) shall be calculated in accordance with the following formula:
>
> $$\frac{4 \times B}{52}$$

where B is the average or normal number of hours worked per week.

28. However, this is based upon an entitlement to 28 consecutive days leave annually. Pursuant to his contract (annexure B to ExP1) the plaintiff herein was entitled to 6 weeks per year. *The Annual Leave Act* sets out the minimum requirements, but it is open (as has happened here) for an employer and employee to agree on more favourable terms. *Section 18 of the Act* purports to prevent less favourable terms.

29. Pursuant to annexure B to ExP1 (the plaintiff's employment contract signed on 22/1/03) the plaintiff was employed full time "as per this contract from period 1/1/2000, until aged retirement, 1/1/2007" at the rate of pay of "$25.00 per hour" for "40 per week" hours of work.

30. Qualifying service is defined in *section 7*. The relevant parts of this section for this decision are as follows:

> (1) The period of qualifying service of an employee with an employer for the purposes of this Act is the period during which the employee has been employed continuously with the employer, including any period that commenced before the commencement of this Act, but not including any period of employment in respect of which annual leave has already been granted or payment in lieu of annual leave has already been made.
>
> (2) For the purposes of this Act, an employee shall be deemed not to break, or to have broken, continuity of service by reason of his or her absence from employment –
>
> (a) brought about by the action of his employer with the intention or result of avoiding an obligation imposed on the employer by this Act; or
>
> (b) on account of leave granted to the employee by the employer for accident or illness to the employee or other reasonable cause.
>
> (3) The period during which an employee is or was absent from employment otherwise than on leave with pay granted by the employer or brought about by the action of the employer with the intention of avoiding an obligation imposed on the employer by this Act does not form part of the period of employment with that employer for the purposes of this Act.
>
> (4) Where an employee is absent from employment for a reason other than a reason referred to in subsection (2), the employer shall

inform that employee in writing that such absence shall be regarded as having broken the continuity of that employee's service.

(5) A notice under subsection (4) may be given by delivering the notice to the employee personally or by posting it to the last recorded address of the employee.

31. In the absence of records before the year 2000, I will proceed on the acceptance by both parties that the plaintiff was entitled as at 4 July 2001 to 353.56 hours of annual leave. Accordingly, multiplying this by his pay rate of $25 an hour produces an entitlement of $8,839.00.

32. What additional amount is the plaintiff entitled to for the period from 4/7/01 until his termination on 24/1/05?

33. I am asked to assume that the leave records being annexure A to ExP4 are correct as these are the only records available, and clearly (as noted above) the plaintiff can not be relied upon to accurately remember when he did or did not take leave. However, there are some flaws on the face of these records. Each entry relates to a one week period only, and therefore should involve a maximum of 40 hours (as this is the hours the plaintiff worked each week). Yet in the week of 5/12/01 some 216 hours of leave were allegedly taken. This is simply not possible. Likewise in the weeks ending 13/11/02, 20/11/02 and 27/11/02 allegedly 80, 40 and 40 hours were allegedly taken respectively. Again, the 80 hours is not possible. This remains unexplained.

34. The only disputed items in those records are the 24 hours taken in the week ending 26/11/03 and the 16 hours taken in the following week. Annexure B to ExD3 is a copy of a leave application completed by the plaintiff and dated 19-11-2003. The application is signed and dated the same date by a person (not identified in the evidence before me) next to “supervisors approval”. In the middle of the document there is provision for five different types of leave. These are recreation, sick, compassionate, cultural/special. Next to “compassionate” there is a “tick”. Next to this is written:

Start 24/11/03 8:00 am

End 28/11/03 4:00 pm

40 hrs

pay as

normal

35. There is no evidence before me as to who wrote this on the document, when or why. It would appear likely however that this was added to the document by somebody in the defendant's employ after it was submitted by the plaintiff. On the face of the added entry it appears that the plaintiff was to be paid "as normal" for this period of leave.

36. Despite the fact that compassionate leave was requested and apparently approved it appears to have been taken off his annual leave entitlements. No explanation as to why this may have occurred is offered by the defendant. Further, in the plaintiff's most recent affidavit (ExP2) he says nothing about this application at all. I do not know what the compassionate leave was for, or what if any discussions occurred at the time. In particular, I do not know if anything was or was not said about taking this leave off the plaintiff's recreation leave. The plaintiff clearly had a large amount of recreation leave that he could have utilised.

37. Part of annexure A to ExP4 is a "Payroll Activity [Detail]" for the plaintiff covering the period 1/07/2003 to 30/06/2004. That document purports to assert that the plaintiff was paid $1,000 holiday pay for this 40 hours of leave, plus holiday leave loading of $175. However, I am not sure that I can place much reliance upon these records. These records (part of annexure A) assert that the plaintiff was paid for 64 hours of "public holidays" in the financial year ending 30/6/03; for 88 hours of "public holidays" in the financial year ending 30/6/04; and for 40 hours of "public holidays" in the financial year ending 30/6/05. Without explanation (of which there was none) this does not make good sense.

38. On the evidence before me the plaintiff requested and was approved to take 5 days compassionate leave in November 2005. This was to be "pay as normal". There was no evidence that there was any discussion with the plaintiff that this might be taken off his annual leave. There is therefore no evidence of any agreement to this effect. Given what the leave application

says on it's face, and absent any other evidence I find that the defendant was not entitled to unilaterally decide to deduct this "compassionate leave" from the plaintiff's annual leave. I therefore find that this 40 hours should be re-credited to the plaintiff.

39. However, as the plaintiff has received leave loading of $175 (which in my view he would not have been entitled to for compassionate leave, as opposed to annual leave) this amount should be credited back to the defendant.

40. I note the problems with accepting annexure A to ExP4 as accurate, but that is all that we have.

41. The period from 4/7/01 to 24/1/05 inclusive is 1,301 days, which equates to 185.85 weeks. The worker is entitled to (as I found earlier) 4.600345 hours for every week that he has worked. Multiplying 185.85 by 4.600345 makes a total entitlement of 854.97411 hours. Deducting the hours of leave that the plaintiff has in fact taken (40+216+80+40+40+24hours=440 hours) leaves a balance of 414.97411 hours. Multiplying this by $25 per hour gives an entitlement of $10,374.35.

42. To this figure needs to be added the $8,839 referred to earlier, less the $175 for leave loading that should not have been paid. This makes a total entitlement of $19,038.35 for unpaid annual leave.

43. The next issue is whether the plaintiff was entitled to be paid leave loading in relation to this annual leave entitlement. Ms Fong Lim allowed 17.5% loading in paragraph 27 of her decision, but she did not say why she did so.

44. Ms Farmer asserts that the plaintiff is entitled to leave loading on the lump sum because in his written contract (annexure B to ExP1) next to "leave loading:" appears "17.5%. The effect of the contract appears to be that the plaintiff is entitled to annual leave of 6 weeks per year with leave loading of 17.5%.

45. Mr Johnson asserts that the plaintiff is not entitled to leave loading because of the combined effect of sections 9 and 10 of the Annual Leave Act. Section 10 is set out in full earlier in these reasons. *Section 9* state as follows:

9. Pay for annual leave

An employee shall be paid by the employer, before the employee goes on annual leave (including leave taken under section 12(2)), an amount equal to the pay (at the employee's ordinary rate) for the period of annual leave together with an amount equal to 17½% of that pay.

46. It is immediately apparent that there is no reference to any additional entitlement in *section 10*, whereas in *section 9* an employee is entitled to an additional amount of 17.5% of the pay at the ordinary rate. Similarly, *section 11* requires that *section 10* applies in the event of the death of an employee.

47. In the CCH loose leaf service, *Australian Labour Law Reporter* at paragraph 39-235 the learned author states in relation to the Northern Territory Act:

> An employee going on annual leave is entitled to receive an additional 17.5% of ordinary remuneration in addition to the ordinary remuneration for the period (sec. 9). It is not clear whether this loading is also to be given if the leave is taken before it is accrued, or on termination or death, but as no restriction is placed by the legislation it may be assumed that loading is payable on any annual leave.

48. With respect to the learned author I do not understand the basis for this "assumption". No authority is relied upon to support it. Yet at paragraph 37-510 of the same volume it is also asserted "an employee is not entitled to any annual leave loading in respect of pro rata annual leave payment on termination".

49. I note that section 9 appears to be concerned with payments made to an employee "before the employee goes on annual leave (including leave taken under *section 12(2)*)". If it were intended to have leave loading apply to all annual leave pay, then *section 9* could clearly have said this. In addition, if leave loading were to apply to payments upon termination, then this could easily have been made clear in *section10(1)* by adding the words "together with an amount equal to 17.5% of that pay", at the end thereof. It does not do so. In my view, I accept the submission of Mr Johnston and find that leave loading is only payable under *the Annual Leave Act* if an employee actually takes leave.

50. In the *Annual Leave cases* (1972) 144 CAR 528, the Australian Commission rejected an application for an annual leave "bonus" of one week's pay. However, this decision did not prevent the spread of leave

loading into awards with employer consent. It is now enshrined into the Northern Territory legislation, but only in *section 9*.

51. As noted earlier, the *Annual Leave Act* sets out the minimum entitlements, and it is open to agree on extra entitlements. The plaintiff does not assert in his affidavits that there was any discussion or agreement as to his entitlements to leave loading beyond what the contract discloses. Upon termination there is nothing to prevent a former employee from taking up fresh employment immediately. In my view, leave loading is only payable on leave that is taken during the subsistence of employment. It is not payable on a lump sum entitlement after an employment has come to an end. There is nothing in the wording of the plaintiff's contract to suggest that he should be paid any leave loading on termination pay.

52. I find that the plaintiff is not entitled to be paid any leave loading on his outstanding annual leave that was not taken prior to his termination of employment.

53. Accordingly, I find that the plaintiff was entitled to be paid $19,038.35 for his unpaid annual leave.

54. Pursuant to *section 14 of the Annual Leave Act* this money should have been paid to the plaintiff on or before the last day that the plaintiff was required to work before his termination. The defendant did not do so. The defendant may have committed an offence under *section 19(1) of the Act*. No good explanation for this failure to pay has been put forward.

55. I now turn to consider the question of long service leave.

56. It is not in dispute herein that the plaintiff was employed by the defendant from about 1 July 1993 until his employment was terminated on 24 January 2005. He was therefore employed for over eleven and a half years.

57. Pursuant to *section 11 of the Long Service Leave Act*:

> 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 x HWW x 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 x 40 hours x 1.3 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 x 40 hours x 1.3 weeks) plus ($30 x 40 hours x 1.3 weeks)

plus ($30 x 30 hours x 1.3 weeks) plus ($30 x 25 hours x 1.3 weeks) plus ($30 x 20 hours x 1.3 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.

(7) Where an employee ceases to be an employee on retirement, termination of employment, ill health, death or domestic or other pressing necessity, the employer is to pay the amount calculated under subsection (2) –

(a) to the employee as soon as practicable after termination of his or her employment; or

(b) in the case of a deceased employee, to his or her personal representative as soon as practicable after the death of the employee, but in any case not later than 12 months after his or her death.

(8) An employer and an employee may agree that –

(a) where they have made an agreement under section 8(6) to postpone the grant of long service leave or a part of it, the pay payable in respect of that postponed leave is to be at the employee's rate of pay on the date of the agreement, and payment in respect of that postponed leave is to be made accordingly; or

(b) payment of the employee's pay in respect of long service leave he or she is to take is to be paid at a time other than a day referred to in subsection (6) and that payment be made by cheque, posted to a specified address or otherwise, and payment in respect of that leave is to be made accordingly.

58. The “RP” is easy to calculate as this was the rate of pay for the hours of work per week worked by the employee payable on the day immediately preceding the day he cased to be an employee. This is $25 per hour. This

amount is to applied to each and every completed year of continuous service.

59. It is clear that in order to do the necessary calculations it is necessary for the court to be able to decide what were the hours per week (or average hours per week) worked by the plaintiff in each completed year of continuous service with the defendant. Ms Fong Lim decided that on the evidence before her she was unable to make any finding sufficient to quantify any amount for the period from 1 July 1993 until 31 December 1999.

60. However, the plaintiff has now tendered ExP2. In paragraphs 4-7 thereof the plaintiff swears to the following:

> 4. I commenced as Housing Manager working full time in early 1999 prior to 27 July 1999 when my pay rise was confirmed.
>
> I do not recall the specific dates between 1993 and 1999 wherein my employment became full time. In 1993 for approximately 12 months I worked with Len Tapp and during this period worked 8 hours per day 5 days per week. I cannot recall the date of commencement or cessation when Len Tapp left. He was my supervisor. After Len left I continued to receive CDEP wages which paid me to work 4 hours per day 5 days per week and although I often worked more hours my pay was not increased.
>
> 5. I continued to receive CDEP wages until I was appointed the Housing Manager and received remuneration for the full time work at $25 per hour. I had prior to this worked full time but continued to only receive CDEP wages.
>
> 6. My hours continued to increase as my duties increased from 1993 onwards although my payments from CDEP wages did not increase with the hours that I continued to work. It was not until I obtained the Housing Manager position in early 1999 that I subsequently obtained the pay increase to $25 per hour and was required to work 40 hours per week. Prior to this time my hours were not structured or supervised and I was not remunerated on an hourly basis.
>
> 7. Throughout the period 1993 to approximately 2001 I was not required to complete time sheets, did not have a structured 5 day week or set hours per week.

61. The defendant has not sought to dispute or challenge any of the matters in ExP2.

62. Where does this take the matter? It is not surprising that the plaintiff is unable to offer much more by way of assistance. He shouldn't have to offer any. Pursuant to *section 14 of the Long Service Leave Act*:

> (1) An employer shall, in respect of each employee, keep and maintain or cause to be kept and maintained a record showing particulars of –
>
> (a) the name of the employee;
>
> (b) the date on which the employee commences employment with the employer, the wages, the periods of prior qualifying service, and the salary or commission paid to such an employee;
>
> (ba) the number of hours of work per week worked by the employee;
>
> (c) the accrued long service leave credit of the employee;
>
> (d) each period of long service leave, or payment in lieu of long service leave, made to the employee;
>
> (e) each other occasion of 2 months or more on which the employee has been absent from that employment; and
>
> (f) where the employee ceased to be employed by the employer – the date on which the employee ceased to be so employed.
>
> (2) An employer shall retain a record referred to in subsection (1) –
>
> (a) after the date on which the employee to whom the record relates ceased to be employed by the employer – until the expiration of 3 years; and
>
> (b) in the case of an employee whose employment is terminated by death – 6 years after the date on which all moneys owing to the legal personal representative are paid.
>
> (3) A person shall not make a false or misleading statement in or a material omission from a record that is required to be kept under this section.

63. Hence, the defendant had a statutory obligation to keep and maintain such records (or cause them to be kept or maintained) and appears not to have done so. The defendant may well have committed an offence under *section 18(1) of the Act*.

64. In my view, the plaintiff in this (and any action) bears the legal and evidentiary onus to prove what he asserts. However, where a defendant has a statutory duty to keep and maintain records which go to the very issue the subject of dispute, and fails to do so, the court should be very careful not to give a defendant a benefit for doing so. No explanation has been offered to the court as to why the defendant has failed to comply with it's statutory duty. If the defendant had done so, then records would be available from which calculations could be made to enable the plaintiff's entitlements to be calculated. The absence of these records is through no fault of the plaintiff.

65. If records had been kept but were lost in a fire then the defendant would be less open to criticism. However, it is not even suggested that the defendant ever made any such records, let alone maintained them.

66. Given the unexplained failure of the defendant in relation to such records the court should, in my view, take a fairly robust approach to ensure that the plaintiff is not denied justice as a result of the defendant's failings.

67. For the period from 1 July 1993 until 30 June 1994 I proceed on the basis that the plaintiff worked an average of 40 hours per week with Len Tapp.

68. For the period from 1 July 1994 until 30 June 1995 I proceed on the basis that the plaintiff worked an average of 20 hours per week (CDEP).

69. For the period from 1 July 1995 until 30 June 1996 I proceed on the basis that the plaintiff worked an average of 25 hours per week (as I find that his hours of required work on CDEP was increasing and continued to do so). It is clear, and I find, that after Mr Tapp ceased employment the plaintiff continued to work and his hours continued to increase until the stage was reached in 1999 that he went to 40 hours full time. This appears to have been an acknowledgement of the hours the plaintiff was actually working, at that time, rather than what he was being paid. This is born out by the back-dating of the contract of employment. If one looked simply at the plaintiff's tax returns for the 2000, 2001 and 2002 financial years, these documents would suggest that the plaintiff wasn't working 40 hours per week. The employment contract clearly acknowledges the fact that the plaintiff had increased his hours to 40 per week by 1.1.00.

70. For the period from 1 July 1996 until 30 June 1997 I proceed on the basis that the plaintiff worked an average of 30 hours per week (as I find that his hours of required work on CDEP was increasing and continued to do so).

71. For the period from 1 July 1997 until 30 June 1998 I proceed on the basis that the plaintiff worked an average of 35 hours per week (as I find that his hours of required work on CDEP was increasing and continued to do so).

72. For the period from 1 July 1998 until 30 June 1999 I proceed on the basis that the plaintiff continued to work an average of 35 hours per week (even though he was supposedly still on CDEP hours of 20).

73. For the period from 1 July 1999 until 31 December 1999 I proceed on the basis that the plaintiff worked 40 hours per week as he was now the Housing Manager (see minutes of meeting held 27/7/99 – annexure A to ExP1). And for the period from 1 January 2000 until 30 June 2000 I find that the plaintiff worked 40 hours per week (as per his contract – annexure B to ExP1).

74. For each of the four completed years of continuous service from 1 July 2000 until 30 June 2004 I find that the plaintiff worked 40 hours per week in each of those years (as per his contract – annexure B to ExP1).

75. Accordingly, the calculations are as follows:

PERIOD	RP x HWW x 1.3 x No of years	TOTAL
1/7/93-30/6/94	$25 x 40 x 1.3 x 1	$1,300
1/7/94-30/6/95	$25 x 20 x 1.3 x 1	$ 650
1/7/95-30/6/96	$25 x 25 x 1.3 x 1	$ 812.50
1/7/96-30/6/97	$25 x 30 x 1.3 x 1	$ 975
1/7/97-30/6/98	$25 x 35 x 1.3 x 1	$1,137.50
1/7/98-30/6/99	$25 x 35 x 1.3 x 1	$1,137.50
1/7/99-30/6/04	$25 x 40 x 1.3 x 5	$6,500

76. These various amounts for long service leave total $12,512.50.

77. In accordance with section 11(7) of the Long Service Leave Act (set out supra) the defendant was obliged to pay this amount as soon as practicable

after the termination of his employment on 24 January 2005. It has failed to do so.

78. In summary therefore I find that the plaintiff is entitled to a judgement against the defendant in the sum of $19,038.35 for unpaid annual leave; and for a further $12,512.50 for unpaid long service leave. This makes a total judgement of $31,550.85.

79. In addition, the plaintiff has claimed interest. Both the *Annual Leave Act* and the *Long Service Leave Act* are silent on the question of interest. Hence there is no statutory right to interest under either Act. However, it is clear from both Acts that they expect employers to pay their obligations promptly.

80. Rule 39.03 of the Local Court Rules states as follows:

> (1) In a proceeding, the Court may order that interest is to be included in the sum for which judgment is given at the rate it considers appropriate on the whole or a part of the sum for the whole or a part of the period between the date when the cause of action arose and the date of the judgment.
>
> (1A) Subrule (1) applies subject to Part 4 of the *Personal Injuries (Liabilities and Damages) Act*.
>
> (2) Subrule (1) does not –
>
> (a) authorise the giving of interest on interest;
>
> (b) apply in respect of a debt on which interest is payable as of right, whether by virtue of an agreement or otherwise; or
>
> (c) affect damages recoverable for the dishonour of a bill of exchange.
>
> (3) Where –
>
> (a) a claim is made for a debt or liquidated demand (whether or not another claim is also made in the proceeding); and
>
> (b) the plaintiff is entitled under Part 11 to an order for default judgment on that claim,
>
> unless the Court orders otherwise, the plaintiff may enter final judgment against the defendant for an amount not exceeding the amount claimed in the statement of claim together with interest from

the commencement of the proceeding up to and including the date of judgment –

(c) on a debt that carries interest – at the rate it carries; or

(d) on any other amount – at the rate payable on a judgment debt during that time.

81. As Mr Johnston correctly points out that the awarding of interest is discretionary. However, in my view, the defendant should pay interest in this case. The defendant had a statutory obligation to pay the plaintiff his entitlements to annual leave and long service leave and has failed to do so. The plaintiff has been obliged to pursue his statutory entitlements through this court. If the defendant has had difficulty calculating the plaintiff's entitlements then this is a direct result of the defendant not complying with it's statutory obligations in relation to records. At no stage has the defendant ever suggested that it doesn't owe money to the plaintiff, rather the question has been how much. In those circumstances I would have expected a genuine defendant to have paid what it accepted was due immediately, and then dispute any balance.

82. The cause of action herein arose on the day the plaintiff was terminated, namely 24 January 2005. The defendant chose when it terminated the plaintiff, and accordingly they should have presented him with payment of all his entitlements at the same time as the letter of termination was delivered. The defendant was not taken by surprise. The defendant had time to make the necessary calculations.

83. I understood Ms Farmer to have asked (in her submissions) for interest at the rate of 10.5% from the date that the Statement of Claim was filed. I do not understand why she has chosen this date. In my view, unless there is some reason of which I am aware, the plaintiff is entitled to interest from 24.1.05 until the date of judgement herein, being 28.4.06. I will hear from the parties as to whether there is some reason why interest should only commence from the date the claim was commenced before I finalise this question.

84. If there is no good reason then I would allow interest on the amount of $31,550.85 at the rate of 10.5% (as allowed in the Supreme Court) from

24.1.05 until 28.4.06. This is a period of 15 months and 5 days. I would therefore calculate interest for this period to be $4,186.43.

85. If the plaintiff is only seeking interest from 5.7.05 then this would calculate to $2,702.45.

86. In addition, the plaintiff seeks an award for costs, and seeks at least 80% of the Supreme Court scale.

87. Before the judicial registrar the plaintiff received an award of $27,711.10. The appeal herein has been successful, as the plaintiff's judgement has been increased by either $6,542.20 or $8,026.18 (depending upon which date is chosen for the start of interest). There is no suggestion of any offers having been filed in court by the defendant, or any money paid into court.

88. The quantum herein is within the range suggested in Local Court Rule 38.04(3)(b)(ii) that 80% of the Supreme Court scale should be the guide.

89. I therefore find that the plaintiff should receive his costs of the whole claim, including this appeal, to be taxed or agree at 80% of the Supreme Court scale.

90. I will hear the parties on the date interest should be calculated from, and on the form of the final orders herein.

Dated this 28th day of April 2006.

_____

DAYNOR TRIGG SM
STIPENDIARY MAGISTRATE