

CITATION: *Harris v Top End Group Training Pty Ltd T/as Group Training Northern Territory* [2010] NTMC 018

PARTIES: JON HARRIS

V

TOP END GROUP TRAINING PTY LTD T/AS
GROUP TRAINING NORTHERN
TERRITORY

TITLE OF COURT: Small Claims Court

JURISDICTION: Small Claims

FILE NO(s): 20928005

DELIVERED ON: 16 March 2010

DELIVERED AT: Darwin

HEARING DATE(s): 9 March 2010

JUDGMENT OF: J Johnson A/JR

CATCHWORDS:

LONG SERVICE LEAVE – INTERACTION BETWEEN *LONG SERVICE LEAVE ACT (NT)* AND CERTIFIED AGREEMENT MADE PURSUANT TO *WORKPLACE RELATIONS ACT (CTH)* – INTERPRETATION OF PROVISIONS

REPRESENTATION:

Counsel:

Plaintiff: Mr Matarazzo

Defendant: Ms Hourdas

Solicitors:

Plaintiff:

Defendant: Cridlands MB

Judgment category classification: B

Judgment ID number: [2010] NTMC 018

Number of paragraphs: 24

IN THE SMALL CLAIMS COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20928005

BETWEEN:

JON HARRIS

Plaintiff

AND:

**TOP END GROUP TRAINING PTY LTD
T/AS GROUP TRAINING NORTHERN
TERRITORY**

Defendant

REASONS FOR JUDGMENT

(Delivered 16 March 2010)

Mr J JOHNSON A/JR

The Issue Stated

1. The plaintiff resigned his employment with the defendant after 7 years and 3 months continuous service and asserts that, pursuant to the terms a Certified Agreement (“the Agreement”) made between the parties in accordance with section 170LT(1) of the *Workplace Relations Act 1996* (Cth), upon such resignation he was entitled to payment of his accrued long service leave entitlement.
2. The defendant differs in its interpretation of the terms of the Agreement and says that any entitlement to payment of accrued long service leave entitlements upon the plaintiff’s resignation remains governed by the *Northern Territory Long Service Leave Act* (“the Act”). That Act, other than in certain prescribed circumstances not applicable here, only allows for such

payment upon resignation after the completion of not less than 10 years continuous service.

The Dispute

3. It is important to state at the outset that there is no factual dispute between the parties: both agree the plaintiff's period of continuous employment and that his resignation was voluntary (as to which see section 10(2) of the Act reproduced later in these reasons). Similarly, there is no dispute between the parties as to the application or validity of the Agreement ("Exhibit P1") at the relevant time or, importantly, as to the capacity of the Agreement to modify and, indeed, to prescribe entitlements more beneficial than those in the Act.
4. The heart of the dispute lies in how the Agreement and the Act ought be applied, or not, to the agreed factual circumstances of the plaintiff. That being the case, it is useful to set out the relevant provisions of the Agreement and the Act.
5. The relevant clause in the Agreement is clause 20 which is reproduced below:

20 LONG SERVICE LEAVE

20.1 Long Service Leave Entitlement to be in accordance with the NT Act.

20.2 Any entitlement to long service leave shall be in accordance with the Northern Territory Long Service Leave Act 1981 (as amended from time to time). This Act governs the long service leave rights and obligations of the parties to this agreement except as otherwise provided for by this agreement.

20.3 Cashing in of Long Service Leave

The prohibition contained in the NT Long Service Act 1981 against receiving payment in lieu of long service leave will not apply.

If the parties agree, the Employee may receive payment for a period of long service leave and continue to work during the said period of long service leave. For such an arrangement to be considered by the employer, the employee must submit a written application requesting payment in lieu of leave. (The intention of this sub-clause is to allow the Employee to continue working and receive payment for both the long service leave and the weekly wage).

The Employee cannot take more than 50% of the accrued long service leave in the form of pay in lieu. This arrangement will only apply to employees who have 7 years or more continuous service with the Company.

20.4 Pro-rata Long Service Leave

All employees will be entitled to Long Service Leave after 7 years continuous service.

20.5 Long Service Leave and Redundancy

Where an employee is declared redundant, irrespective of their period of continuous service, the Employer will make a payment equivalent to their pro-rate long Service leave entitlement.

Nothing in this clause shall be taken to exclude access to normal LSL entitlements payable in accordance with the provisions of the Award or this Agreement. Entitlements to leave paid out in accordance with the provisions of these clauses shall be deemed to be expended, but shall not affect in any way the continued accrual of Long Service Leave entitlements in the future.

6. Upon a reading of clause 20 in its entirety, a number of matters relevant to the dispute become tolerably clear.
7. Firstly, it evinces a clear intention that the parties to the Agreement be bound by the Act unless the Agreement reveals a specific intention to depart from it.
8. Secondly, it provides for the so-called “cashing in” of long service leave entitlements in certain prescribed circumstances. Importantly though, the clause allowing for such “cashing in” (clause 20.3, under the heading “Cashing in of Long Service Leave”) states at its very beginning that the

prohibition contained in the Act against receiving payment in lieu of long service leave will not apply [my emphasis]. The intention of this sentence in particular, was accorded much force by the plaintiff in submissions in support of his case.

9. Thirdly, it provides an *entitlement to long service leave after 7 years continuous service* [my emphasis], on this occasion at clause 20.4 under the heading “Pro-rata Long Service Leave”. The intention and context of this clause will do much to inform the resolution of the dispute between the parties.
10. Whilst it is important to read the Act in its entirety to glean its overall purpose, in the context of this dispute the critical sections are sections 8(1), 10(1) and 10(2):

8. Long service leave entitlement

- (1) Subject to this Act, where an employee has been employed by an employer for not less than 10 years continuous service, the employee is entitled to long service leave, on pay calculated under section 11, for a period of 1.3 weeks for each completed year of continuous service with the employer.

.....

10. Entitlement for payment for long service leave credit

- (1) Subject to subsection (1A), where an employee who is entitled to long service leave ceases to be an employee otherwise than by death, the employer is to pay to the employee the amount payable under section 11 for a period equal to the period of his or her long service leave credit at the time he or she ceases that employment.

.....

- (2) Where an employee whose period of employment is less than 10 years but not less than 7 years ceases to be an employee of that employer, otherwise than by death –

- (a) on or subsequent to attaining the age at which he or she may retire;
- (b) on the termination of employment by the employer for a reason other than serious misconduct; or
- (c) on account of illness, incapacity or domestic or other pressing necessity of such a nature as to justify so ceasing to be an employee,

the employer shall pay to the employee the amount payable under section 11 for a period equal to 1.3 weeks for each completed year of service of that employment.

.....

- 11. The first reproduced section, 8(1), prescribes an employees “entitlement” to long service leave conditioned upon employment for not less than 10 years continuous service with the employer.
- 12. The second reproduced section, 10(1), prescribes that once an employee has become “entitled” to long service leave (by the operation of section 8(1)), he or she is entitled to payment for any unused accrued long service leave entitlement upon cessation of employment.
- 13. The final reproduced section, 10(2), allows an employee with less than 10 years but not less than 7 years continuous employment (ie, a person not “entitled” to long service leave by force of section 8(1)) to be paid the equivalent of 1.3 weeks salary for each year of completed service upon cessation of employment, but only in the 3 sets of circumstances allowed for by sub-paragraphs (a), (b) and (c).
- 14. Importantly, and notwithstanding the apparently intended beneficial nature of this section, the plaintiff does not seek to rely upon it; rather, he seeks an identical entitlement by force of clause 20 of the Agreement.

The Plaintiff's Argument

15. The plaintiff's argument was urged upon me as "an open and shut case" which, as I understood, founded upon:
 - Clause 20.4 of the Agreement being clear in its terms that all employees will be entitled to long service leave after 7 years of continuous service;
 - Clause 20.3 of the Agreement being clear in its terms that the prohibition contained in the Act against receiving payment in lieu of long service leave will not apply (I took such "prohibition" to be a reference to section 10(4) of the Act but I may be wrong about that);
 - A subsequent Certified Agreement, which came into effect immediately after the subject Agreement expired and post the resignation of the plaintiff, materially changing the first sentence of the previous clause 20.3 by the addition of the words "for cashing in purposes while remaining an employee of the Company" ("Exhibit P2", clause 40.2.1). This, it was said, was done in recognition of the fact that clause 20.3 in the subject Agreement "gives an automatic right to employees to be paid out pro rata long service leave after seven years if and when they resign their employment" and to "close off [this] loophole in the subsequent certified agreement".
16. There were a number of other strings to the plaintiff's argument (eg, that the Agreement was contractually binding upon both parties and was wholly capable of modifying the Act to provide more beneficial terms) but I will not repeat them all here as they were either conceded by the defendant or did not impinge upon my views as to the nub of the dispute between the parties as outlined earlier in these reasons.

The Defendant's Argument

17. The defendant's argument, shortly stated, was that:
 - Clause 20.3 of the Agreement must be read in its entirety and in the overall context of the heading under which it appears. Clause 20.2 is the overriding clause in terms of the Act and clause 20.3 is intended only to provide for the specific circumstance therein contained, ie, the ability to effectively "cash in" long service leave entitlements whilst continuing to work and be paid normal wages.
 - Clause 20.4 refers only to pro-rata long service leave being able to be utilised after 7 years continuous service. It is beneficial in that it allows employees to accrue an "entitlement" to long service leave and to avail themselves of it at an earlier time than allowed for in the Act. However, the critical word in the heading is "leave" and the clause does not create a specific entitlement to be paid out upon resignation after 7 years service, only an entitlement to take long service leave after 7 years continuous service.
 - Thus, it is said, payment of accrued long service leave entitlements upon resignation by a person with less than 10 years of continuous service continues to be governed by clause 20.1 and, specifically, section 10(2) of the Act.

Conclusion

18. The terms of the Agreement, and in particular the opening sentence of clause 20.3 and the heading of clause 20.4 are, in my opinion, somewhat loosely worded and pose some difficulty in objectively determining the intention of the parties.
19. There is much force in the defendant's arguments going to the heading of clause 20.3, and how the intention of that clause ought be interpreted in its

overall context. In particular, I observe that in the second paragraph of clause 20.3 the last sentence, which appears in brackets, states: “The intention of this sub-clause is to allow the Employee to continue working and receive payment for both the long service leave and the weekly wage”. In its context, I take that sentence, and the heading of the clause, to be determinative of its overall intention.

20. I therefore specifically reject the plaintiff’s argument in relation to that clause. In my view, read in its context it does not disclose the purpose contended by the plaintiff.
21. However, in my opinion and on the balance of probabilities, clause 20.4 of the Agreement effectively creates an “entitlement” [*All employees will be entitled to Long Service Leave after 7 years continuous service*] to long service leave after 7 years continuous service.
22. Whilst I again accept that there is some force in the defendant’s argument going to the heading of the clause, the words used in the sentence immediately following are sufficiently clear in my opinion to be determinative of its intention.
23. In creating such an “entitlement”, and again in my opinion, clause 20.4 thereby modifies the provisions of section 8(1) of the Act by substituting “not less than 10 years continuous service” with “not less than 7 years continuous service”. (It also, I should note, effectively renders section 10(2) of the Act otiose).
24. That being the case, such “entitlement” then becomes subject to section 10(1) of the Act, that is to say, an entitlement for the employee to be paid the amount payable under section 11 for his or her long service leave credit at the time he or she ceases that employment.

Orders:

24.1 The plaintiff is entitled to payment of his long service leave credit upon resignation calculated in accordance with section 11 of the *Long Service Leave Act* (NT).

24.2 No order as to costs.

Dated this 16th day of March 2010

Julian Johnson
Acting Judicial Registrar