DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Construction, Forestry, Mining and Energy Union
and
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
v
Carter Holt Harvey Woodproducts Australia Pty Ltd T/A Carter Holt Harvey
(C2017/4529) (C2017/4791)

DEPUTY PRESIDENT GOSTENCNIK MELBOURNE, 16 JANUARY 2018

Alleged dispute about any matters arising under the enterprise agreement and the NES [s.186(6)]; whether period an employee is locked out pursuant to employer response action is "service" within the meaning of s. 22 of the Act; whether lock out period is "unpaid authorised absence"; whether lockout arises directly or indirectly from an industrial dispute concerning industrial matters or an interruption arising directly or indirectly from an industrial dispute.

[1] The Construction Forestry Mining & Energy Union (CFMEU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia (CEPU) (collectively "the Unions") have each applied under s.739 of the *Fair Work Act 2009* (Act) for the Fair Work Commission (Commission) to deal with a dispute about the entitlement of certain employees (relevant employees) of Carter Holt Harvey Woodproducts Australia Pty Limited (CHH) to accrue certain forms of leave during a period in which these employees were locked out by CHH. Each dispute arises following a 74 day period (concluding on 1 July 2017) during which employees of CHH were 'locked out' from the workplace pursuant to s.411 of the Act (the lockout period). The lockout action was industrial action that was "employer response action" and was protected industrial action within the meaning of s.408 of the Act. None of this is in dispute.

[2] Until 11 September 2017, when an agreement titled the "*Carter Holt Harvey Wood Products Australia Pty Limited Myrtleford Enterprise Agreement 2016"* commenced to operate, the relevant enterprise agreement covering and applying to the relevant employees, CHH, the CFMEU and the CEPU was the *Carter Holt Harvey Wood Products Australia Pty Limited Myrtleford Enterprise Agreement 2013* (Agreement). The applications, the subject of this decision, were lodged on 16 and 29 August 2017 respectively. There is no dispute that the jurisdiction of the Commission has been properly invoked and that I am able to resolve the dispute by exercising arbitration power for which provision is made in clause 13 of the Agreement.

[3] Although the initial dispute about leave entitlements that would accrue during the lockout period included the accrual of personal leave, by the time the dispute was heard it was common ground that the areas of dispute which remained concern the accrual of annual leave during the lockout period and the recognition of the period of the lockout for the purposes of long service leave entitlements.[1]

Consideration of the issues in dispute

Annual Leave

[4] Clause 40 of the Agreement makes provision for annual leave. It provides that annual leave will accrue pro rata in accordance with the provisions of the National Employment Standards (NES). It seems common ground that the accrual of annual leave for the purposes of the Agreement is dealt with by the NES, specifically s.87 of the Act, and that the question of the qualifying "service" described therein is determined by reference to s.22 of the Act. The resolution of the dispute concerning accrual of annual leave during the lockout period in respect of all relevant employees therefore turns on whether that period was "service" within the meaning of s.22, and specifically whether the lockout period was an excluded period because it was a period of an "unpaid authorised absence" within the meaning of s. 22(2)(b) of the Act.

[5] The Unions contend that on a proper construction of s.22(2)(b) of the Act, the lockout period, though unpaid, was not an authorised absence. They contended that the ordinary meaning of "authorised" does not include an imposed absence and that an authorisation is an empowerment or the conferring of a right in a person to do or not to do a thing the person would otherwise be obliged to do or not do.[2] They contended that a lockout is a direction to employees not to attend for work rather than authorising employees to be absent from work.[3]

[6] The Unions also point to other contextual matters to support their construction. They point out that "*Employer response action*" does not have the consequence that all employment obligations are negated.[4] They contend that whilst an employer is entitled to take employer response action in the prescribed circumstances, that only has the effect that when employees are locked out from their employment no action lies (as provided for in s.415), that the employer can refuse to pay the employees (s.416), but, by s.416A, the lock out does not affect continuity of employment for those matters proscribed by the Regulations.

[7] Relevantly, Regulation 3.09 provides:

> "**Purposes prescribed for continuity of employment when employer response action occurs**
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> For section 416A of the Act, the following purposes are prescribed:

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[1] Transcript PN10

[2] *Construction, Forestry, Mining and Energy Union v Rio Tinto Coal Australia Pty Ltd* (2014) 232 FCR 560; (2014) 244 IR 62; [2014] FCA 462; (2014) 232 FCR 56; (2014) 244 IR 62 at [53]-[54] and
Director of the Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors [2014] FCCA 721 at [37]-[38]

[3] Transcript PN35 – PN37

[4] Applicant's Outline of Submissions dated 5 October 2017 at [28]

(a) superannuation;
(b) remuneration and promotion, as affected by seniority;
(c) any entitlements under the National Employment Standards.

Note: Section 416A of the Act deals with employer response action. Under the section, employer response action for a proposed enterprise agreement does not affect the continuity of employment of the employees who will be covered by the agreement for such purposes as are prescribed by the regulations."

[8] The Unions contend that the entitlements under the NES, to which Reg. 3.09(c) is directed, include those in s.87, which refer back to s.22 and the meaning of service, and the excluded periods of service.

[9] CHH contends that s.22 of the Act expressly excludes from the NES entitlement to annual leave any period of unpaid authorised absence. There is no issue taken by the Unions that the lockout period was valid employer response action within the meaning of s.411 of the Act. Accordingly, there being no issue with the validity of or entitlement to take employer response action and lock out employees for the lockout period, that period constituted an unpaid authorised absence for the relevant employees within the meaning of s.22 of the Act.[5]

[10] CHH contends that s.416A of the Act is directed to ensuring that whilst an employee might not be paid in relation to the period of the action, the employee is nevertheless protected with respect to the continuity of employment for such purposes as are prescribed by the regulations, relevantly "any entitlements under the National Employment Standards." Therefore, having regard to the ordinary language of the statutory provisions, upon a proper construction there cannot be any entitlement to annual leave (an NES entitlement) for the lockout period when it is valid employer response action under the Act. The entitlement to annual leave in s.87 is for *service*. Such period of the lock out does not count as employee *service* by virtue of the definition in s.22(2)(b).[6]

[11] CHH contends that the purpose of s.416A is not to expand or change the defined meaning of *service* set out in s.22, rather it is directed at a different mischief. That is, that an employee's continuity of employment is not affected because the employee was excluded from the workplace when employer response action is taken in accordance with s.411 of the Act.[7]

[12] In support of its construction of s.416A, CHH advances the following example: ". . . if one was to consider the notice provisions set out in the NES, one would not reset the employee's continuity of employment back to zero by virtue of an extended lock out. The period of the lock out is *excluded* from the calculation of continuous service but one does not reset the clock and *break* the continuity of employment such that the period of continuous service is reset to zero at the end of the lock out period. Such continuity of service is a requirement for various NES entitlements such as requests for flexible working arrangements (s.65(2)) and parental leave (s.67(1))."[8]

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[5] Respondent's Outline of Submissions dated 25 October 2017 at [20]

[6] Ibid at [22]

[7] Ibid at [23]

[8] Ibid

[13] As should be apparent from the above, the resolution of the annual leave accrual dispute is essentially an exercise of statutory construction. The task of ascribing meaning to the words of the statute is concerned with interpreting the relevant statutory provision(s) consistently with the intended purpose or objects of the legislature as disclosed by the text of the statute and begins with an examination of the ordinary grammatical meaning of the words used in the context of the statute as a whole in which they appear. This point was made clear in the joint judgment of (McHugh, Gummow, Kirby and Hayne JJ) *Project Blue Sky v Australian Broadcasting Authority*[9] wherein their Honours said:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397, Dixon CJ pointed out that "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 constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed."[10]

[14] The point was also made long ago, as is clear from the following passage of the judgment of Dixon J (as he was then) in *R v Wilson; Ex parte Kisch*:[11]

> "The rules of interpretation require us to take expressions in their context, and to construe them with proper regard the subject matter with which instrument deals and the objects it seeks to achieve, so as to arrive at the meaning attached to them by those who use them."[12]

[15] Section 15AA of the *Acts Interpretation Act 1901*[13] (AI Act) also makes it clear in interpreting a statute, regard must be had to the purpose or object underlying the statute (whether that purpose or object is expressly stated in the statute or not) and that a construction that would promote its underlying purpose or object is to be preferred to a construction that would not promote that purpose or object. The AI Act also deals, in s.15AB, with the extent to which extrinsic material may be called upon to aid the interpretation of a statute.[14]

[16] In their joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd* [15], Brennan CJ and Dawson, Toohey and Gummow JJ observed:

> "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901 (Cth)*, the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are

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[9] (1998) 194 CLR 355

[10] Ibid at [69]

[11] (1934) 52 CLR 234

[12] Ibid at [244]

[13] As in force on 25 June 2009; see s.40A of the Act

[14] Ibid

[15] (1997) 187 CLR 384

> numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."[16]

[17] A summary of the relevant principles is contained in the joint judgment of Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[17] as follows:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[18] [19] [Footnotes omitted]

[18] Section 87 provides a NES entitlement for annual leave. Relevantly, s.87(2) provides for the method of accrual of annual leave, that is that annual leave accrues progressively during a year of service according to the employee's ordinary hours of work and that it accumulates year to year.

[19] As earlier noted, the meaning of "service" is set out in s.22 of the Act. It is common ground that s.22 in its application to s.87 of the Act is determinative of the issue of whether the relevant employees were entitled to accrue annual leave during the lockout period.

[20] As is apparent from the terms of s.22, it deals with the meanings of "service" and of "continuous service" and differentiates between them. Section 22 relevantly provides as follows:

> "(1) A period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period ***(an excluded period)*** that does not count as service because of subsection (2).
>
> (2) [**Exceptions to meaning of service**] The following periods do not count as service:
>
> (a) any period of unauthorised absence;
>
> (b) any period of unpaid leave or unpaid authorised absence other than;

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[16] Ibid at [408]

[17] [2009] HCA 41; (2009) 239 CLR 27

[18] Ibid at [47]; Ibid at 46 – 47

[19] The High Court has even more recently reiterated these principles in *Commissioner of Taxation v Consolidated Media Holdings Ltd (ACN 009 071 167)* (2012) 293 ALR 257; [2012] HCA 55 at [39]; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [23]–[26] and *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 at [22]–[23]

(i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or

(ii) a period of stand down under Part 3-5, under an Enterprise Agreement that applies to the employee, or under the employee's contract of employment; or

(iii) a period of leave or absence of a kind prescribed by the regulations;

(c) any other period of a kind prescribed by the regulations.

(3) [**Excluded period does not break continuous service**] An excluded period does not break a national system employee's continuous service with his or her national system employer, but does not count towards the length of the employee's continuous service."

[21] It is uncontroversial that there are no regulations prescribing a period of leave or absence of a kind, for the purposes of s.22(2).

[22] Section 22(1) defines a "period of service" as a period, "during which the employee is employed by the employer". However, it is apparent that not every period during which the employee is employed by the employer is a period of service. Section 22(2) identifies those periods during which, though the employee is employed by the employer, the periods do not count as service. Relevantly, s.22(2) excludes from a period of service any period of unpaid leave or unpaid authorised absence other than the absences enumerated therein.

[23] I consider that on a proper construction of a s.22(2) of the Act, the period during which the relevant employees did not attend for work by reason of CHH engaging in employer response action, was a period of unpaid authorised absence within the meaning of s. 22(2)(b) of the Act with the consequence that the period is excluded from a period of service within the meaning of s.22(1) of the Act. Consequently, that period was not a "service" for the purposes of s.87 of the Act and so relevant employees did not, during the lockout period, accrue annual leave in accordance with the NES and it follows for the purposes of clause 40 of the Agreement. My reasons for the conclusion may be shortly stated.

[24] Although there is some superficial attraction to the Unions' contention that by simply applying that which the Unions contend is the ordinary meaning of "authorised" to the use of that word in s.22(2)(b), it is plain that a lockout is not something in which an employee is authorised or empowered to engage. Rather, a lock out is an absenting from work at the direction of the employer. However, in my view, that construction does not stand up to scrutiny when the words "unpaid authorised absence" are read having regard to their ordinary grammatical meaning used in the context of the provision as a whole and other provisions of the Act having a bearing on that provision.

[25] First, as is very often the case, the use of the word in a sentence will take its meaning from the context in which it is used. In s.22(2)(b) "authorised" is used to describe or condition the "absence", that is, it is the absence from work by a person that is authorised. In that sense it is used as an adjective to connote that the "absence" has official permission or approval or is sanctioned. In other words, it is the "absence" that is endowed with authority or approval. It seems to me to matter not that the person who is absent agreed to be absent or wished to be absent. It is relevant only that the absence from work is authorised, and in this connection,

relevantly by the employer. It follows that I reject the narrow meaning of "authorised" for which the Unions contend.

[26] Secondly, s.22(2)(b) excludes from the excluded periods, a period of stand down under Part 3-5, under an Enterprise Agreement that applies to the employee, or under the employee's contract of employment.

[27] It seems to me uncontroversial that a stand down involves the employer exercising power derived from statute, an industrial instrument or a contract permitting the employer in certain circumstances to stand down employees from work without being required to make payment to employees. It seems to me that a stand down of an employee for which provision is made in s.22(2)(b)(ii) does not involve the employee taking a period of unpaid leave. It is usually the case that a stand down will occur when an employer has no work for the employee to perform by reason of certain intervening events, which the employer did not organise or for which the employer cannot reasonably be held responsible. In effect, employees are invariably sent home and thus are absent from work at the direction of the employer.

[28] In this respect a stand down has features in common with a lockout. It seems to me that the purpose of excluding a stand down from the excluded periods is to ensure that the period during which an employee is stood down in accordance with the Act, an enterprise agreement or a contract of employment is regarded as a period of service under s.22(1). This would only be necessary if a stand down would otherwise fall within the description "unpaid authorised absence". A stand down does not otherwise comfortably fall within the description of "unpaid leave". This suggests strongly that, but for the exclusion in s.22(2)(b)(ii), the period during which an employee is stood down would otherwise be regarded as a period of "unpaid authorised absence", even though the employee is not during the stand down period empowered or has conferred on him or her a right to do or not to do a thing the employee would otherwise be obliged to do or not do. In this regard, it is the absence from work by reason of the stand down that is authorised by the employer. This tells against the application of the narrow meaning of "authorised" for which the Unions contend and support the broader construction I prefer.

[29] Thirdly, that the legislature has determined to exclude one form of employer imposed unpaid absence in the form of a stand down from the types of absences that would otherwise be excluded from a period of service suggests that the legislature turned its mind to employer imposed absences and so intended that a lockout in the form of employer response action would be an excluded period. The legislature could simply have, but did not, include for example a provision as s.22(2)(b)(iv) to the effect of "a period during which an employer engages in employer response action within the meaning of s.411".

[30] Fourthly, it seems to me that the narrow meaning of "authorised" for which the Unions advocate, is capable of including an unpaid absence from work by reason of employer response action. It seems to me that when a person does not do a thing that the person is otherwise required by his or her employer to do, because the person is prevented from doing the thing or directed not to do the thing, the person is in an appropriate context not only prevented from doing the thing but at the same time authorised not to do it. Thus, in the case of employer response action, the employee is prevented by the employer from attending for work or directed not to attend for work, but is at the same time authorised to be absent from work.

[31] Finally, as to the other contextual matters the Unions have raised, I agree with the contentions advanced by CCH. I agree that s.416A is directed to ensuring that whilst an employee might not be paid in relation to the period of the action, the employee is nevertheless protected with respect to the continuity of employment for such purposes as are prescribed by the regulations, relevantly "any entitlements under the National Employment Standards."

[32] In addition, there is nothing in the objects of the Act or in the scheme regulating protected industrial action or that prescribing minimum employment conditions in the form of the NES which would lend support to a different construction of the words "unpaid authorised leave" in s.22(2)(b) to that which I consider to be correct.

[33] It follows that upon a proper construction there cannot be any entitlement to annual leave (a NES entitlement) for the lockout period when it is valid employer response action under the Act. The entitlement to annual leave in s.87 is for *service*. Such period of the lock out does not count as employee service by reason of s.22(2)(b). Section 416A is not to expand or alter the meaning of service set out in s.22, rather it is directed at a different mischief, namely that an employee's continuity of employment is not affected because the employee is excluded from the workplace when employer response action is taken in accordance with s.411 of the Act.

Long service leave

[34] Division 9 of Part 2-2 of the Act establishes the entitlement for long service leave under the NES. Section 113 of the Act makes certain provision for long service leave. Relevantly, s.113(1) has the effect that if there are in existence an 'applicable award-derived long service leave terms' applicable to an employee, that employee is entitled to long service leave in accordance with those terms.

[35] In all other respects, an employee is entitled to long service leave in accordance with the relevant state or territory legislation, however that entitlement is not a NES entitlement to long service leave.[20]

[36] It is not in contest that the relevant employees affected by the lockout period fall into two classes for long service leave purposes. The first class of employees comprises the maintenance employees, for whom there are in existence applicable award derived long service leave terms. Subject to meeting the requisite qualifying period of service, these employees have a NES entitlement to long service leave. The production employees fall into the second class and for these employees there are not in existence any applicable award derived long service leave terms. Any entitlement to long service leave for these employees arises under the *Long Service Leave Act 1992* (Vic) (LSL Act) and/or the Agreement.

[37] Immediately prior to 1 January 2010, the maintenance employees (disregarding the operation of any enterprise agreement) were covered by the *Metal, Engineering and Associated Industries Award 1998* (Metals Award), Part IV of which contained an entitlement to long service leave. These are the applicable award derived long service leave terms in respect of the maintenance employees.

[20] Sections 26 and 27(2)(g) of the Act

[38] The entitlement to long service leave under Part IV of the Metals Award for a period of long service leave after completing 15 years' of 'service'.[21] Service of an employee is 'the period during which the employee has served his/her employer under an unbroken contract of employment'.[22] An employee's contract of employment is not taken to have been broken by reason of any interruption that has arisen directly or indirectly from a dispute concerning industrial matters[23] but the period during which the employment has been interrupted by reason of a dispute about industrial matters shall not be taken into account in calculating the period of service.[24]

[39] It is instructive to reproduce the terms of clause 5.1.1 Part IV of the Metals Award below:

"**5. Long Service**

5.1 Service Entitling to Leave

5.1.1 For the purposes of this Part of the Award the service of an employee with an employer means the period during which the employee has served his/her employer under an unbroken contract of employment. Provided that a contract of employment shall be deemed not to have been broken by reason only of any interruption or determination thereof, if the interruption or determination:

5.1.1(a) has been made by the employer with the intention of avoiding any obligation imposed by this Part of the award or by State law dealing with long service leave; or

5.1.1(b) has arisen directly or indirectly from a dispute concerning industrial matters, if the employee returns to duty with the same employer in accordance with the terms of settlement of the said dispute; or

5.1.1(c) has been made by the employer by reason of slackness of trade, if the employee is re-employed by the same employer within six months of such interruption or determination; or

5.1.1(d) has been made by the employer for any reason other than those referred to in sub-paragraphs 5.1.1 (a), (b) and (c) hereof, if the employee is re-employed by the same employer within two months of such interruption or determination.

5.1.1(e) Provided further that the period during which the employment has been so interrupted or determined shall not, except when due to the reasons referred to in sub-paragraph (a) hereof, be taken into account in calculating the period of service."

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[21] Clause 6.2

[22] Clause 5

[23] Clause 5.1.1(b)

[24] Clause 5.1.1(e)

[40] Clause 49 of the Agreement is also relevant. It provides for a long service leave entitlement conditional upon an employee having 15 years or more continuous service.[25] Clause 49.2 of the Agreement sets out that which constitutes continuity of service and relevantly provides that an employee's continuity of service is not affected by any "interruption arising directly or indirectly from an industrial dispute".[26] Though an employee's continuity of service is not affected by such an interruption, the period of interruption is nonetheless not to be counted as part of the period of an employee's employment.[27]

[41] In respect of the maintenance employees, CHH contends that the lockout period was an interruption by reason of a dispute concerning industrial matters with the consequence that the period that the maintenance employees were absent from work during the lockout period is not to be taken into account in calculating the employee's period of service for the purposes of their NES entitlement to long service leave.

[42] CHH contends in respect of maintenance employees who have a NES entitlement to long service leave, the relevant terms providing for that entitlement exclude the lock out period for the purposes of determining the period of service upon which the entitlement is calculated. As to clause 49 of the Agreement, CHH contends that an enterprise agreement may include terms that supplement the NES: s.55(4) of the Act. However, the Agreement has not supplemented the NES entitlement of the maintenance employees. This is because clause 49.2 of the Agreement provides that an interruption arising directly or indirectly from an industrial dispute will not affect the continuity of employment but the period of the interruption is not to be counted as part of the period of an employee's employment. CHH contends therefore that the lock out period is not to be counted for the purposes of calculating any entitlement to long service leave.[28]

[43] As to the production employees, for the reasons earlier stated, their entitlement to long service leave is derived from the LSL Act. The basic entitlement to long service leave under the LSL Act is to a period of leave on ordinary pay on completing a specified number of years of "continuous employment" with one employer.

[44] Section 62 of the LSL Act sets out the meaning of continuous employment and s.62(2)(f) provides that an employee's employment is to be regarded as continuous despite any interruption arising directly or indirectly from an industrial dispute.

[45] Section 63(4) of the LSL Act relevantly provides an absence from work referred to in s.62(2)(f) is not to be counted as part of the period of an employee's employment.

[46] To the extent that the LSL Act is a State or Territory industrial law within the meaning of s.26(2) of the Act, perhaps by reason of s.26(2)(b)(ii)[29], then it appears not to be an excluded law under s.26 because of s.27(1)(c) and (2)(g), except in respect of an employee who has a NES long service leave entitlement. Accordingly, the interaction provisions as between the LSL Act and the Agreement in s.29(1) of the Act, would appear to be engaged,

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[25] Clause 49.1

[26] Clause 19.2(c)(v)

[27] Clause 49.2(g)

[28] Respondent's Outline of Submissions dated 25 October 2017 at [42]

[29] Noting that s.26(2)(c) does not include laws dealing with long service leave

with the result that the Agreement would prevail over the LSL Act to the extent of any inconsistency.

[47] In any event, it is not necessary to finally decide this issue since the relevant applicable exclusions for the purpose of periods counting as service as between the LSL Act and the Agreement appear to be in substance the same, so that there is no inconsistency between the computation of qualifying service under the Agreement and under the LSL Act, as both exclude "any interruption arising directly or indirectly from an industrial dispute".

[48] CHH contends that the ordinary meaning of "industrial dispute" includes a dispute over the terms of an enterprise agreement under the Act and any employer response action, such as a lock out of employees. Accordingly, the period of the lock out and consequent employee absence is not to be counted as part of the period of employment for accruing an entitlement to long service leave.

[49] The essence of the Unions' contention is that the relevant periods which are excluded from qualifying service under the Metals Award, under clause 49 of the Agreement, and under the LSL Act are similar in structure and that that which falls for determination is whether the lockout was an absence by reason of a dispute about industrial matters or directly or indirectly from an industrial dispute.[30] They contend that the relevant employees' absence during lockout period was neither by reason of a dispute about industrial matters nor was it an interruption arising directly or indirectly from an industrial dispute. They say that this is so because of the historical context underpinning the meaning of industrial matters and industrial disputes developed at a time where there was no right embedded in the governing statute to take industrial action. Thus, the provisions concerning the exclusion of absences in the context of an industrial dispute or disputes about industrial matters were about absences for which there was no lawful authority or right.

[50] Under the Act employees have a right to take protected industrial action and an employer has a right to respond to protected industrial action by taking employer response action in the form of a lockout. Unprotected industrial action and employer lockouts which are not responsive to protected industrial action are not sanctioned by the Act. Construing the meaning of interruptions caused by disputes about industrial matters or interruptions arising directly or indirectly from an industrial dispute which evolved under a different regulatory regime in contemporary times should therefore be construed in a manner consistent with their origin. Therefore, the interruptions which are excluded by reason of disputes about industrial matters or interruptions arising directly or indirectly from an industrial dispute are to be confined to absences by reason of unlawful or unprotected industrial action in connection with such disputes.[31]

[51] Whilst I understand how and why the Unions' submission is put, it is not accepted. There is no reason why the ordinary meaning of industrial dispute or disputes about industrial matters should not be applied unencumbered by the dichotomy between protected and unprotected industrial action. Whilst it is true that those concepts developed during a time where no protection was afforded to industrial action, it is not this Act which introduced those

[30] Transcript PN67 – PN91

[31] Transcript PN91 – PN103

concepts. The notion of protected action which included employer lockout action was introduced some time ago by the *Industrial Relations Reform Act 1993*.[32]

[52] Since that time no effort had been made to alter the operation of the Metals Award or the LSL Act so as to narrow the operation of the excluded relevant periods of service to those involving unlawful or unprotected industrial action. Moreover, the Agreement makes no such narrow allowance even though it was made under the Act. A further reason for rejecting the Unions' construction is that it would lead to an absurd result. This is because if a lock out is not a relevant protected interruption, it would mean that the consequence of a lockout or of employee protected action in the form of a strike, would be that the employment would not be "continuous" since the protected interruption would be limited to periods of unlawful or unprotected industrial action arising directly or indirectly from an industrial dispute.

[53] I accept without repetition the contentions advanced by CHH summarised above which appear to me to be plainly correct.

[54] It follows that the absence by relevant employees during the lockout period was not a qualifying period of service in respect of those employees whether the entitlement is a NES entitlement because there are in existence an 'applicable award-derived long service leave terms' applicable to those employees (the Metals Award in respect of the maintenance employees), or a LSL Act or an Agreement entitlement (in respect of the production employees).

Conclusion

[55] For the reasons given the relevant employees were not entitled to accrue any annual leave during the lockout period nor did the lockout period constitute any part of any qualifying period of service or employment counting towards a long service leave entitlement under the NES, under the LSL Act or the Agreement. The applications by the CFMEU and the CEPU for the Commission to deal with disputes are determined accordingly.

DEPUTY PRESIDENT

Appearances:

Mr E White, Counsel for the CFMEU and CEPU.

[32] The concepts of protected action conferring a limited right to strike and other industrial action, and a capacity to lockout employees, during a bargaining period were introduced by the *Industrial Relations Reform Act 1993* (Cth) (s.170PG).

Mr P Wheelahan, Counsel for Carter Holt Harvey Woodproducts Australia Pty Ltd

Hearing details:

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