



DECISION

Fair Work Act 2009
s.739—Dispute resolution

United Workers Union

v

Coles Group Supply Chain Pty Ltd
(C2024/7436)

COMMISSIONER SLOAN

SYDNEY, 16 MAY 2025

Dispute about any matters arising under an enterprise agreement – long service leave entitlements – dispute as to the payment to be made to an employee who takes a single day of long service leave under the Long Service Leave Act 1955 (NSW) – whether it is a dispute capable of being dealt with by the Fair Work Commission – interpretation of Long Service Leave Act – meaning of ordinary pay

[1] If an employee takes a single day of long service leave under the *Long Service Leave Act 1955* (NSW) (“LSL Act”), what should they be paid? Are they entitled to be paid for the ordinary hours that they would have worked for that day? Or is a “day” to be determined by reference to a calendar week, entitling them to one-seventh of their weekly pay for the day? Those are the questions at the heart of the dispute before the Commission.

Background¹

[2] The United Workers Union represents workers employed by Coles Group Supply Chain Pty Ltd at a chilled distribution centre at Eastern Creek in New South Wales. The employees are covered by the Coles Eastern Creek CDC Enterprise Agreement 2021 (“Enterprise Agreement”).

[3] In July 2024, the UWU was informed by one of its members that when he had taken a day of long service leave, he had received payment for 5.36 hours rather than his ordinary 7.5 hours. The UWU raised the matter with the Distribution Manager on site. It was informed that Coles’ position was that when an employee takes a single day of long service leave, they are entitled to be paid one-seventh of their weekly wage for the day.

[4] The UWU was provided with an email from Coles’ Employee Relations Manager to the Distribution Manager dated 8 July 2024. As that email reflects Coles’ position in these proceedings, it is convenient to reproduce it in full:²

“The recent changes to how single days of LSL are calculated are due to system changes

that Coles has made to more accurately align with how long service is calculated under state LSL legislation, which is in calendar days/weeks rather than being based on the working week.

Previously our systems were configured on the 5-day working week. When the ability to take single days of LSL was introduced in NSW (and some other states) a few years ago, this meant our systems calculated single days of LSL on the 5-day working week. For example, where a team member took a single day of LSL, they received a LSL payment based on 1/5th of the amount payable for their weekly pay, and 1/5th of a calendar week (or 7/5, i.e., 1.4 days) of LSL entitlement was deducted from the team member's accrued LSL.

However, under the state LSL legislative regimes a week is a 7 day calendar week (not the 5-day working week). Coles' decision to make the LSL system changes is to ensure that the calculation of single days aligns to the 7 day calendar week, i.e. for a single day of LSL the payment is based on 1/7th of the TM's weekly pay and 1/7th of a calendar week. Aligning our systems to more accurately reflect how LSL is calculated under the applicable legislation is an important compliance measure and consistent with our broader compliance programs and initiatives.

For your further reference I have provided the relevant NSW Long Service Leave Act 1955 (**Act**) provisions below:

1. Section 4(2)(a)(i) sets out the entitlement to LSL and quantum in months: *the amount of long service leave to which a worker shall be so entitled shall—*
 - (i) *in the case of a worker who has completed at least 10 years service with an employer be—*
 - (A) *in respect of 10 years service so completed, 2 months...*
2. A 'month' is defined as 4 and one-third **weeks** (section 4(2)(a2)).
3. 'Week' is not expressly defined in the Act and its ordinary dictionary meaning applies (i.e. 7 day calendar week).
4. The definitions in the Act regarding payment for LSL also demonstrate that a week means a 7 day calendar week rather than a 5-day work week:
 1. 'ordinary pay' is defined as '*the average **weekly amount** of the ordinary remuneration...*' (section 3(1))
 2. 'ordinary remuneration' means '*the **remuneration for that worker's normal weekly number of hours** of work calculated or, where 2 or more time rates of pay are so fixed, the amount of remuneration for that **worker's normal weekly number of hours** of work calculated at the higher or highest of those rates and so reduced..*' (section 3(2))
5. This is supported by the guidance on the Industrial Relations NSW web page which states: *If you have been working for the same employer for 10 years you*

are entitled to 2 months (8.667 weeks) paid leave, to be paid at your ordinary gross weekly wage under the Long Service Leave Act 1955 (the Act)."

(Emphasis in original)

[5] In response, the UWU proposed that Coles revert to "paying a worker their ordinary days *[sic]* earnings when they take a day of long service leave".³ Coles did not agree to do so.

[6] The UWU invoked the dispute resolution procedure in the Enterprise Agreement.⁴ The issue was raised at a meeting of the site's Joint Consultative Committee. The matter could not be resolved at the site level.

[7] On 21 October 2024, the UWU referred the dispute to the Commission. There was no controversy that it was entitled to do so.⁵

What is the dispute I need to resolve?

[8] Clause 30 of the Enterprise Agreement is in these terms:

"All Team Members will be entitled to take and accrue long service leave in accordance with the provisions of the *Long Service Leave Act 1955* (NSW) (as amended)."

[9] In its application, the UWU described the dispute in these terms:

"5. The dispute relates to the way in which the Respondent calculates and pays Long Service Leave (**LSL**), particularly when a single day of LSL is taken, and whether it is consistent with clause 30 of the Agreement." (Bold in original)

[10] In its written submissions, the UWU framed the dispute in these terms:

"2. The parties are in dispute about the proper construction of cl 30 – Long Service Leave of the Coles Eastern Creek CDC Enterprise Agreement 2021 ('**Agreement**').

...

14. The issue to be resolved in this dispute is the proper method for calculating LSL under cl 30 of the Coles EA, for an employee seeking to access LSL for a single day. Because cl 30 of the Coles EA refers to the LSL Act, resolving this issue necessitates a consideration of the meaning of 'a day' in the provisions relating to the taking and accrual of LSL under the LSL Act." (Bold in original)

[11] The UWU further submitted:

- 1) Clause 30 of the Enterprise Agreement provides that the employees covered by it are entitled to take and accrue long service leave in accordance with the LSL Act.

- 2) It is necessary to interpret the relevant provisions of the LSL Act to understand the effect of clause 30. This involves for present purposes a consideration of the meaning of “a day” under the LSL Act.
- 3) On a proper interpretation, a “day” of long service leave under the LSL Act means an ordinary working day, not a calendar day. An employee is therefore entitled to payment for their ordinary hours of work for the day, not one-seventh of their weekly wage.

[12] In its written submissions, Coles described the dispute in these terms:

“1. The dispute is in respect of the proper construction of clause 30 – Long Service Leave of the *Coles Eastern Creek CDC Enterprise Agreement 2021 (Agreement)*.

2. The Respondent submits that the questions for the Fair Work Commission are:

(a) On the proper construction of the Agreement does clause 30 impose a distinct and enforceable obligation on the Respondent, punishable by the imposition of pecuniary penalties under the *Fair Work Act 2009 (Cth) (FW Act)* in the event of non-compliance with that obligation, to provide long service leave (*LSL*) to the employees who are covered by the Agreement, in accordance with the provisions of the *Long Service Leave Act 1955 (NSW) (LSL Act)*?

(b) If the answer to question (a) is yes, are the employees able to accrue and take LSL in accordance with the LSL Act, such that the Respondent is complying with the obligation under clause 30 of the Agreement?

3. For the reasons set out in Part B below, the Respondent submits that the answer to question (a) is no. For the reasons set out in Part C below, the Respondent submits that the answer to question (b) is yes.” (Italics and bold in original)

[13] Coles made the following contentions:

- 1) Clause 30 of the Enterprise Agreement does not impose “a distinct and enforceable obligation” on it. Rather, it does no more than recognise the source of the employees’ entitlement to long service leave, namely the LSL Act, and confirms that they have no additional entitlement. It follows that the UWU’s contention that Coles is contravening the Enterprise Agreement cannot be made out. In that case, the premise of the dispute falls away. It is unnecessary to consider the meaning of “a day” under the LSL Act.
- 2) In the alternative, were the Commission to find that clause 30 imposed “a distinct and enforceable obligation” on it, Coles is meeting that obligation. This was said to be the case for two reasons:
 - a) clause 30 is limited on its terms to an obligation to allow employees to accrue and take long service leave in accordance with the LSL Act. The clause says nothing about how the employees should be *paid* when they take a single day of long service leave. Again, were the Commission to

accept that argument it would dispose of the dispute. It would not be necessary to consider the terms of the LSL Act; and

- b) in the alternative, its construction of the LSL Act – that “day” means a calendar day, or one-seventh of a week – was the proper and correct one.

[14] There is significant force to Coles’ submissions as to the meaning of clause 30. That is, that it acts as a “signpost” – it identifies the source of the employees’ entitlements to long service leave as opposed to being that source. The UWU did not properly grapple with that contention. But it does not follow that the outcome of a finding to that effect must be that the proceedings be dismissed.

[15] To my mind, the parties’ focus on the terms and effect of clause 30 of the Enterprise Agreement distracted from the real substance of the dispute between them. That is, what is an employee entitled to be paid when they take a single day of long service leave?⁶

[16] I do not consider that in order to answer that question it is necessary for me to determine the effect of clause 30 and whether or not Coles is acting in breach of it. The dispute resolution procedures in clause 38 of the Enterprise Agreement are said to apply to “[a]ll disputes about a provision of this Agreement, the National Employment Standards, *or the workplace*” (my emphasis). Neither party suggested that the disagreement as to what an employee should be paid for a single day’s long service leave was not a “dispute about...the workplace”.

[17] At the hearing of this matter, I had the following exchanges with Coles’ representative:⁷

“THE COMMISSIONER: But why do I need to find that there’s a positive obligation under clause 30 of the Enterprise Agreement? Isn’t it enough, as Mr Orr says, that there is a dispute about that entitlement for the purposes of 38.1 that I need to resolve in the context of these proceedings?”

MR DEWBERRY: Commissioner, not in my submission. I think that for the purpose of this dispute, for you to find that Coles is not complying with clause 30 of the Enterprise Agreement, you have to find that it imposes a distinct and enforceable obligation outside the Act.

THE COMMISSIONER: I don’t need to find that it’s not complying with that clause. I just need to find that there is a dispute about it – there’s a dispute about a provision of this agreement, the National Employment Standards or the workplace. Why do I need to find that there’s a breach, to find that there is a dispute arising under the agreement?

MR DEWBERRY: Commissioner, we accept that there’s a dispute arising under the agreement, so I’m sorry if my submission was not clear. So we’re not disputing that you have the power in this arbitration to make a finding. My submission is that, yes, you can exercise that, but in exercising that, the proper way to exercise it is to determine what the ordinary meaning of clause 30 is.

...

THE COMMISSIONER: But to get to the point of saying, ‘Well, because it doesn’t create a separate entitlement’, I then say, ‘Well, there is no breach of clause 30. Dismiss the proceedings’, because you say that there is nothing on the face of the agreement that is being breached.

It’s still a question, the underpinning question, which is whether that entitlement, the source of the entitlement, whether the entitlement under the Long Service Leave Act is being met, and I think that’s the heart of this, isn’t it?

MR DEWBERRY: Yes, but Commissioner, my submission on that is that your powers don’t extend to making a finding in respect of that matter. We accept that your power to arbitrate permits you in interpreting clause 30 and deciding whether or not the respondent is complying with the Enterprise Agreement to make findings about the interpretation of that provision, and depending on where you land, the proper interpretation of the Long Service Leave Act.

My submission is that your powers in dealing with this dispute do not extend but would be an exercise of a judicial power for you to make a finding absent the finding, or outside the finding, about the proper interpretation of the Enterprise Agreement, its application, about whether or not my client is in contravention of the Long Service Leave Act. That’s a matter for a court, in my submission.”

[18] I acknowledge that Coles responded to the case advanced by the UWU. The union essentially characterised the dispute as concerning Coles’ contravention of clause 30. However, the largest part of the UWU’s submissions was directed to what an employee should be paid for a day’s long service leave, by reference to the terms of the LSL Act. To consider the dispute only by reference to the UWU’s particular contentions as to the effect of clause 30, and its assertions that Coles is not complying with it, would be to lose sight of the wood for the trees. More particularly, it would nothing to address the real substance of the dispute between the parties.

[19] Having regard to these considerations, and given the terms of clause 38 of the Enterprise Agreement, I find that the Commission’s power to arbitrate this dispute is not limited to the proper interpretation of the Enterprise Agreement and whether or not Coles is complying with it. That is, I do not need to find a contravention of the Enterprise Agreement in order to exercise the powers that the parties have conferred on the Commission to resolve this dispute. I do not accept Coles’ submissions to the contrary.

[20] I also do not accept Coles’ submission that absent a finding “about the proper interpretation of the Enterprise Agreement” I am unable to form an opinion as to an employee’s entitlement to payment under the LSL Act. As the Commission has observed:⁸

“In dealing with a dispute such as this, the Commission is not undertaking an exercise of judicial power but is instead exercising a power of private arbitration, with that power deriving from the parties’ agreement to submit their differences for decision by a third party. The resultant arbitrator’s award is not binding of its own force, but instead its effect depends on the law which operates with respect to it. It is accepted that while not

exercising judicial power, the Commission ‘may legitimately form and act upon opinions about legal rights and obligations as a step in the exercise of its own functions and powers.’ (Footnotes omitted)

[21] As I flagged at the opening of this decision, the dispute between the parties comes down to this: Under section 4(1) of the LSL Act, “every worker shall be entitled to long service leave on ordinary pay”. How is “ordinary pay” to be calculated when a worker takes a single day of long service leave? Is it calculated by reference to their ordinary hours of work for the day, as the UWU argues? Or is it one-seventh of the worker’s weekly wage, as Coles contends?

Coles’ approach to long service leave

[22] Coles led evidence that its system “is configured to accrue, pay and deduct LSL on the following basis”:⁹

“(a) An employee’s LSL entitlement accrues in the system in ‘calendar days’, based on a weekly entitlement. Therefore, the entitlement to LSL is expressed in Coles’ system as an entitlement to a certain number of calendar days of paid leave.

(a)[sic]This entitlement expressed in calendar days has a corresponding entitlement calculation that is based on the employee’s average weekly earnings for their average weekly hours. The employee’s average weekly earnings for their average weekly hours is not relevant to the accrual of LSL (as LSL accrues in the system in calendar days rather than in dollars or hours). However, it is relevant for determining the correct amount to be paid to the employee on each occasion that they take LSL.

(b) When an employee takes a full calendar week of LSL, they are paid their average weekly earnings for their average weekly hours in respect of that calendar week. The employee will also have seven units deducted from their LSL balance, as the employee will have used one week of their entitlement to LSL (being equal to seven calendar days). For example:

Scenario: Team member takes one calendar week of LSL in pay period (where pay period is equal to one week).

Average weekly hours = 37.5

Hourly rate = 40

LSL balance = 50

LSL Pay = average weekly hours x hourly rate

= 37.5 x 40

= \$1500

LSL balance after leave = 43 (being 50 – 7, as there are 7 calendar days per week of LSL).

(c) When an employee takes a single day of LSL, each individual day is treated as being equal to 1/7th of a week's entitlement to LSL, which is determined by reference to the employee's average weekly number of hours. As such, an employee will be paid their hourly rate for a period equal to 1/7th of their average weekly number of hours when they take a single day of LSL. The employee will also have one unit deducted from their LSL balance to reflect that one day out of a week's entitlement to LSL has been used. For example:

Scenario: Team member takes a single day of LSL in a pay period (where a pay period is equal to one week).

Average weekly hours = 37.5

Hourly rate = 40

LSL balance = 50

Entitlement to single day of LSL = average weekly hours / 7

$$= 37.5 / 7$$

$$= 5.36 \text{ hours}$$

LSL Pay = entitlement to single day of LSL x hourly rate

$$= 5.36 \times 40$$

$$= \$214.4$$

LSL balance after leave = 49 (being 50 – 1, as 1 day (of a week's entitlement) has been taken).

(d) The same approach is used when employees take LSL for periods of more than one day, but less than one full calendar week. For example:

Scenario: Team member takes five single days of LSL in a pay period (where a pay period is equal to 1 week).

Average working hours per week = 37.5

Hourly rate = 40

LSL balance = 50

Entitlement to single day of LSL (see calculation at (d) above) = 5.36 hours

LSL Pay = entitlement to single day of LSL x 5 days x hourly rate

$$= 5.36 \times 5 \times 40$$

$$= \$1,072$$

LSL balance after leave = 45 (being 50 – 5, as 5 days (of a week's entitlement)

have been taken).”

The proper construction of the LSL Act

The relevant provisions of the LSL Act

[23] The LSL Act relevantly provides as follows:

3 Definitions

(1) In this Act, unless the context otherwise indicates or requires—

...

Ordinary pay, in relation to any worker, means the sum of—

(a) where the worker is, on the prescribed date, remunerated wholly in relation to an ordinary time rate of pay fixed by the terms of the worker’s employment—

(i) the *amount of the ordinary remuneration of the worker*, as on the prescribed date, or

(ii) the average weekly amount of the ordinary remuneration which was earned by the worker as a worker during that part of the period of 5 years ending on the prescribed date during which the worker was so remunerated,

whichever is the greater,

(b) where the worker is, on the prescribed date, remunerated otherwise than wholly in relation to an ordinary time rate of pay so fixed—the amount of *the average weekly wage which was earned by the worker* as a worker (being the average of the amounts received by the worker each week under those terms after excluding any amount payable to the worker in respect of shift work, overtime or other penalty rates) during the period actually worked by the worker during—

(i) the period of 12 months, or

(ii) the period of 5 years,

ending on the prescribed date, whichever amount of average weekly wage is the greater,

...

(2) For the purposes of—

(a) the definition of **ordinary pay** in subsection (1) and of subsection (2A), **prescribed date**, in relation to a worker—

(i) means...the date immediately preceding the date on which that worker enters, or is deemed to have entered upon long service leave or the date of that worker’s death, as the case may require, or

...

(b) paragraph (a) of that definition, *ordinary remuneration*, in relation to a worker, means *the remuneration for that worker's normal weekly number of hours of work* calculated at the time rate of pay fixed by the terms of that worker's employment for his or her work under the terms of that worker's employment reduced by any amount payable to that worker in respect of shift work, overtime or other penalty rates or, where 2 or more time rates of pay are so fixed, the amount of remuneration for that worker's normal weekly number of hours of work calculated at the higher or highest of those rates and so reduced,

...

(2A) For the purpose of subsection (2)(b), where no normal weekly number of hours of work is fixed for a worker under the terms of that worker's employment, the normal weekly number of hours of work shall be deemed to be *the average weekly number of hours worked by that worker* during the period of 12 months, or 5 years, as the case may require, ending on the prescribed date.

...

4 Long service leave

(1) Except as otherwise provided in this Act, *every worker shall be entitled to long service leave on ordinary pay* in respect of the service of the worker with an employer. Service with the employer before the commencement of this Act as well as service with the employer after such commencement shall be taken into account for the purposes of this section.

(2)

(a) Subject to paragraph (a2) and subsection (13) the amount of long service leave to which a worker shall be so entitled shall—

(i) in the case of a worker who has completed at least 10 years service with an employer be—

(A) in respect of 10 years service so completed, 2 months, and

(B) in respect of each 5 years service with the employer completed since the worker last became entitled to long service leave, 1 month, and

(C) on the termination of the worker's services after the completion of 15 years service, in respect of the number of years service with the employer completed since the worker last became entitled to an amount of long service leave, a proportionate amount on the basis of 2 months for 10 years service, and

(ii) in the case of a worker who has completed at least 10 years service but less than 15 years with an employer and whose services with the employer are terminated or cease for any reason, be a proportionate amount on the basis of 3 months for 15 years service, and

(iii) in the case of a worker who has completed with an employer at least five years service, and whose services are terminated by the employer for any reason other than the worker's serious and wilful misconduct, or by the worker on account of illness, incapacity or domestic or other pressing

necessity, or by reason of the death of the worker, be a proportionate amount on the basis of 2 months for 10 years service.

...

(a3) For the purposes of subsections (2), (3) and (3A), *month* means 4 and one-third weeks.

...

(3) Subject to subsection (5), where a worker has become entitled to long service leave in respect of the service of the worker with an employer, the employer shall give to the worker and the worker shall take the leave—

(a) as soon as is practicable having regard to the needs of the employer's establishment, or, where the employer and the worker agree that the taking of the leave be postponed until an agreed date, as from that date,

(b) in one continuous period or, if the worker and the employer so agree, in the following separate periods and not otherwise—

- (i) where the amount of the leave is 2 months, in two separate periods,
- (ii) where the amount of the leave exceeds 2 months and does not exceed nineteen and one-half weeks, in two or three separate periods,
- (iii) where the amount of the leave exceeds nineteen and one-half weeks, in two, three or four separate periods—

Provided that where any leave has been given to and taken by the worker pursuant to subsection (3A), this subsection shall apply to and in respect of so much only of the leave to which the worker has become entitled as has not been so given and taken.

(3AA) Despite subsection (3)(b), an employer and worker may agree to the worker taking long service leave in 2 or more separate periods of not less than 1 day.

(3A) If the employer and the worker so agree, a period of long service leave of not less than 1 day may be given by the employer, and taken by the worker, wholly or partly in advance before the worker has become entitled to any long service leave or to the amount so agreed to be given and taken. No such agreement shall, for the purposes of subsection (2) (A) (i) (B) or (C), be deemed to confer on the worker an entitlement to long service leave.

(3B) For the purposes of subsections (3AA) and (3A), in relation to a worker for whom no normal weekly number of hours is fixed under the terms of the worker's employment, the reference to 1 day is taken to be a reference to the number of hours calculated as follows—

A/B

where—

A is the higher of—

(a) the *average weekly number of hours worked by the worker* during the period of 12 months ending on the date immediately preceding the date on which the worker enters long service leave, or

(b) the *average weekly number of hours worked by the worker* during the period of 5 years ending on the date immediately preceding the date on which the worker enters long service leave, and

B is the average number of days worked weekly by the worker during the period used for calculating ***A***.

(Other than where appearing in bold, the italics are mine.)

Coles' construction of the LSL Act

[24] Coles contended that the approach it has adopted to the payment of long service for single day absences (or those of less than a week) is consistent with the LSL Act. It advanced a construction of the LSL Act that was reflected in the email of 8 July 2024 reproduced at [4] above. Its written submissions included the following contentions:

- 1) Under the LSL Act, long service leave accrues in weeks, not days.
- 2) The LSL Act describes the entitlement to long service leave as two months after 10 years' service and a further month after each additional five years' service.¹⁰ Entitlements on termination of employment are also expressed by reference to months.¹¹
- 3) The LSL Act defines "month" as being "4 and one-third weeks".¹²
- 4) It follows that the entitlement to long service leave is to a certain number of *weeks* of paid leave.
- 5) The introduction of the ability to take single days of long service leave did not change that entitlement.
- 6) Because the entitlement the employee is taking is to a certain number of weeks, the payment must also be based on a week. This is reflected in the definition of "ordinary pay" in the LSL Act, which makes repeated mention of an employee's *weekly* earnings.¹³
- 7) A "week" is not defined in the LSL Act. There is no reason why it should not be given its ordinary meaning, which is a period of seven consecutive days.¹⁴ If Parliament had intended to refer to "working week", it would have done so.

[25] To my mind, Coles' submissions do not reflect all of the terms of the LSL Act. Read properly and as a whole, the LSL Act cannot be read as providing that an employee who takes a single day of annual leave is entitled to receive payment of one-seventh of their weekly wage.¹⁵

The history of the LSL Act

[26] To explain why I have come to this view, it is informative to traverse some of the history of the legislation.

[27] In 1951, the *Industrial Arbitration (Amendment) Act 1951* (NSW) amended the *Industrial Arbitration Act 1940-1950* (NSW) to insert section 88C. Amongst other things, that section empowered the Industrial Commission of New South Wales (as it was then called), on application, to insert in an award or industrial instrument “provisions entitling employees to long service leave *on full pay*” (my emphasis). Long service leave was to be calculated at the rate of three months leave for twenty years’ service.

[28] Section 88C was amended several times over the following years. Relevantly, the *Industrial Arbitration (Amendment) Act 1953* (NSW) amended the section to allow for LSL as follows:

- 1) three months after 20 years’ service;
- 2) in respect of each subsequent 10 years’ service, “six and one-half weeks”;
- 3) on the termination of an employee’s services, in respect of the number of years’ service completed since they last became entitled to an amount of long service leave, a proportionate amount on the basis of six and one-half weeks for ten years’ service.

[29] On 5 November 1955, the *Long Service Leave Act 1955* (NSW) received assent. It amended section 88C of the *Industrial Arbitration Act 1940-1950* to effectively remove any reference to long service leave.

[30] As enacted, the LSL Act contained the following provisions relating to “ordinary pay”:

3. (1) In this Act, unless the context otherwise indicates or requires –

...

“Ordinary pay”, in relation to any worker, means remuneration for the worker’s normal weekly number of hours of work calculated at his ordinary time rate of pay...

...

- (2) For the purposes of the definition of the term “ordinary pay” in subsection one of this section –

- (a) where no ordinary time rate of pay is fixed for a worker’s work under the terms of his employment, his ordinary time rate of pay shall be deemed to be *the average weekly rate earned by him* during the period of twelve months immediately preceding the date on which he enters, or is deemed

to have entered, upon long service leave, or the date of his death, as the case may require;

(b) where no normal weekly number of hours is fixed for a worker under the terms of his employment, the normal weekly number of hours shall be deemed to be *the average weekly number of hours worked by him* during the period of twelve months immediately preceding the date on which he enters, or is deemed to have entered, upon long service leave, or the date of his death, as the case may require...

[31] The amount of long service leave to which a worker was entitled was prescribed in section 4(2) as three months in respect of 20 years' service and for each subsequent 10 years' service "six and one-half weeks".

[32] The LSL Act was amended by the *Long Service Leave (Amendment) Act 1963* ("1963 Act"). Paragraph 3(2)(a) of the LSL Act was replaced with the following:

(a) the term "ordinary time rate of pay" in the case of a worker who is remunerated in relation to an ordinary time rate of pay fixed by the terms of his employment means the time rate of pay so fixed for the worker's work under the terms of his employment...;

(a1) where a worker is remunerated otherwise than in relation to an ordinary time rate of pay so fixed, or partly in relation to an ordinary time rate of pay so fixed and partly in relation to any other manner, or where no ordinary time rate of pay is so fixed for a worker's work under the terms of his employment, the worker's ordinary pay shall be deemed to be *the average weekly wage earned by him during the period actually worked by him* during the twelve months immediately preceding the date on which he enters, or is deemed to have entered, upon long service leave, or the date of his death, as the case may require.

For the purposes of this paragraph the average weekly wage earned by a worker shall be *the average of the amounts received by him each week* under the terms of his employment after excluding any amount payable to him in respect of shift work, overtime or other penalty rates.

(a2) where during the period of twelve months immediately preceding the date on which he enters or is deemed to have entered upon long service leave, or the date of his death, as the case may require, the worker has received under the terms of his employment, any amount under any bonus, incentive or other similar scheme...his ordinary pay shall be increased by a further sum namely the sum which the worker *would have received each week* in respect of such bonus, incentive or other similar scheme had such amount been paid by equal weekly payments throughout that period of twelve months.

(Emphasis added)

[33] Relevantly for present purposes, the 1963 Act also amended section 4(2)(a) of the LSL Act to allow for three months long service leave after 15 years' service, and "in respect of each

ten years service with the employer completed since he last became entitled to long service leave, eight and two-third weeks”.

[34] The *Long Service Leave (Amendment) Act 1967* (NSW) (“1967 Act”) introduced section 4(2)(3A) to the LSL Act. That section relevantly provided:

(3A) If the employer and the worker so agree, a period of long service leave *of not less than one month* may be given by the employer, and taken by the worker, wholly or partly in advance before the worker has become entitled to any long service leave...

(Emphasis added)

[35] The LSL Act was further amended by the *Long Service Leave (Amendment) Act 1977* (NSW) (“1977 Act”). That Act deleted the existing definition of “ordinary pay” in subsections 3(1) and (2) of the LSL Act and replaced it with the current definition. It also introduced the definition of “ordinary remuneration” in section 3(2)(b), and section 3(2A).

[36] The LSL Act was again relevantly amended by the *Long Service Leave (Amendment) Act 1985 NSW* (“1985 Act”). Amongst other changes (including the removal of the then gender-specific language of the LSL Act), the 1985 Act amended the LSL Act to allow for two months long service leave after 10 years’ service (in place of three months after 15 years), and one month for each subsequent 5 years’ service (in place of eight and two-third weeks after each subsequent 10 years’ service). The 1985 Act also introduced section 4(2)(a3) into the LSL Act.

[37] On 14 May 2020, the *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020* (“2020 Act”) introduced two new provisions to the LSL Act: sections 15B and 15C. Relevantly for present purposes, section 15B(2) provided:

(2) Despite section 4(3)(b), an employer and worker may agree to the worker taking long service leave during the prescribed period in 2 or more separate periods of not less than 1 day.

[38] Sections 15B and 15C were omitted from the LSL Act by the *COVID-19 and Other Legislation Amendment (Regulatory Reforms) Act 2022* (NSW). That Act made the following further amendments to the LSL Act:

- 1) The introduction of section 4(3AA).
- 2) Replacing “one month” in section 4(3A) with “1 day”. (This permitted the employer and employee to agree to the employee taking not less than one day of long service leave in advance of the employee accruing an entitlement to the leave. Previously, the minimum period was one month.)
- 3) The introduction of section 4(3B).

[39] In the second reading speech for the *COVID-19 and Other Legislation Amendment (Regulatory Reforms) Bill 2022*, the Honourable Felicity Wilson stated:¹⁶

“The bill also amends the Long Service Leave Act 1955 and proposes making the temporary measures currently contained in sections 15A and 15B of that Act permanent. *Prior to the temporary amendments coming into operation in 2020, the Long Service Leave Act was quite prescriptive about how leave could be taken.* For example, unless there was an agreement between the employer and worker to split long service leave in a manner specified in the Act, leave had to be taken in one continuous period. The provisions in the bill will allow, by agreement, leave to be taken in multiple periods of no less than one day. ...”

(Emphasis added)

Observations

[40] Having regard to the terms of the LSL Act, in the context of its history, I can make a number of observations.

[41] First, the LSL Act has always referred to long service leave accruing by reference to a number of months after a certain period of continuous service. In turn, a month has been equated with a certain number of weeks. From section 4(2)(a) of the LSL Act as enacted in 1955, it can be deduced that “3 months” was seen by the legislature as being 13 weeks. (The entitlement after 20 years was 3 months long service leave. After each subsequent 10 year period it was 6½ weeks.) The same logic applies to the terms of section 4(2)(a) following the amendments made by the 1963 Act. It is made express in the terms of section 4(2)(a3), introduced by the 1985 Act.

[42] However, and second, it does not follow, as Coles submitted, that under the LSL Act leave accrues in weeks. The legislation clearly provides for an entitlement to two months long service leave after 10 years’ service and one month for each additional five years’ service. To my mind, noting that “ordinary pay” is defined by reference to an employee’s weekly earnings, the definition of “month” seems more directed to providing the basis for calculating an employee’s entitlement to payment for that leave.

[43] Third, the legislation does not and has never defined a “week”.

[44] Fourth, until the amendments introduced by the 2020 Act, the LSL Act did not expressly contemplate a period of long service leave of less than a week. Rather, it had to be taken in “one continuous period” unless the employer and employee agreed otherwise.¹⁷ Even then, there were limitations on the number of separate periods that could be taken.¹⁸ Leave in advance could not be less than one month.¹⁹

[45] The expectation that long service leave would be taken in significant blocks of time is reflected in the following observations of the Full Bench of the Industrial Relations Commission of New South Wales in *A J Mills and Sons Pty Ltd v Transport Workers' Union of New South Wales*:²⁰

“58. The purpose of the Long Service Leave Act is to provide paid leave for workers who have provided long service to an employer. As Haylen J observed, the purpose of long service leave was described as being ‘a period of rest for the employee, so that he

might recuperate after a long period of continuous service’ or as *providing a rest to employees to re-energise and recuperate* after many years of loyal service to an employer.”

(Emphasis added)

[46] Strictly speaking, nothing on the terms of the LSL Act prior to the 2020 Act expressly prohibited a single day period of leave. However, the fact that Parliament saw it necessary to legislate specifically to allow for single days in 2020 suggests that they were not then seen as being contemplated by the legislation.

[47] It is in that context that a “week” must be considered. The legislation did not anticipate long service leave being taken in shorter periods. Until the LSL Act was amended in 2020, there was no relevant difference between a calendar week and a working week when it came to paying the employee for that leave.

[48] Fifth, since it was first enacted, the LSL Act has entitled a worker to long service leave “on ordinary pay”.²¹ The definitions of that term have consistently referred to the “ordinary time rate of pay” as fixed by the terms of the worker’s employment. Where there is no such rate, the LSL Act has allowed for the worker’s ordinary pay to be determined by the weekly rate *earned* or the weekly hours *worked* by the worker. In that context, a week is to be seen as a working week.

[49] This is reflected in section 4(3B) of the LSL Act. It provides that where no normal weekly number of hours is fixed under the terms of the worker’s employment, a “day” is to be calculated by reference to the average hours worked by the worker over the relevant period. I agree with the UWU’s submission that this section refers to a working day.

[50] Coles’ submissions concentrated on the use of the words “week” or “weekly” in the definitions of “ordinary pay” and “ordinary remuneration”. But they did not grapple with the effect of the definitions themselves. That resulted in Coles putting a position to this effect: If an employee who takes a single day of long service leave does not have a fixed number of normal weekly hours, they will be entitled to be paid for that leave an amount based on the average hours they have worked on each working day over the relevant period. However, if the employee has fixed normal weekly hours, they will receive payment of one-seventh of their weekly wage. Unless that employee works seven days a week, that payment will be less than the amount they would receive for the average hours they work each day.

[51] There is no rational basis for that difference in outcome. Such a result would not be consistent with the language and purpose of all of the provisions of the LSL Act.²²

[52] It follows that paying an employee one-seventh of their weekly wage on a single day of long service leave is not to pay them their ordinary pay as required by section 4(1) of the LSL Act.

Other arguments that Coles advanced

[53] Coles advanced a number of other submissions that sought to challenge the construction of the LSL Act which the UWU proposed.

[54] First, Coles took issue with the UWU's submission that a single day of long service leave should be treated as one-fifth of a week. It argued that this would not provide a more accurate outcome for part-time employees or for employees who work on variable rosters where they may work different hours on different days (such as six hours on a Monday and eight hours on a Tuesday), or different days in different weeks (such as six days one week, four days the next). This would extend to full-time employees.

[55] So far as they go, the submissions are correct. However, they are based on an unnecessarily literal and restrictive view of the UWU's case. The UWU's evidence concerned members who were employed by Coles on a full-time basis, five days a week. Its submissions that affected workers "should expect to receive payment of 7.5 ordinary hours of leave when they take a single day of LSL" was expressly stated to be in "the context of this application [where] effected [*sic*] employees work five hours a week at 7.5 ordinary hours a day".²³

[56] To the extent that employees are engaged on a part-time basis, or work on variable rosters, the provisions of the LSL Act provide the basis on which Coles is required to calculate their "ordinary pay".

[57] Second, Coles advanced what might be described as concerns as to how the UWU's construction of the LSL Act would affect its operations. It contended that:

- 1) "it is reasonable for Coles to maintain a single system for LSL across its business";²⁴
- 2) "in circumstances where it is reasonable for the Respondent to have a single system for managing LSL across its business, it is not sensible for the Respondent to be required to adopt an approach to paying and deducting LSL that results in record-keeping inaccuracies in respect of certain cohorts of employees";²⁵ and
- 3) paying one-seventh of a week's accrual "is the most accurate, appropriate and legally compliant way of implementing the LSL Act...[which] enables all employees to apply for and take LSL in single days in a manner that does not compromise the integrity and accuracy of the Respondent's employee leave records".²⁶

[58] For the reasons outlined above, I do not accept that paying employees one-seventh of a week's wages is a "legally compliant way of implementing the LSL Act". As to the balance of the submissions, I accept that Coles has a legitimate interest in seeking to have a single, accurate system to manage long service leave across its operations. However, such a consideration does not inform the proper construction of the LSL Act or provide a basis for non-compliance with it.

Conclusions

[59] The dispute before the Commission is ultimately whether the system that Coles has adopted, namely to pay employees who take a single day of long service leave one-seventh of their weekly wage, meets the entitlement that the employees have under section 4(1) of the LSL

Act to “long service leave on ordinary pay”. For the reasons I have set out above, I find that it does not.

[60] However, I do not wholly embrace the UWU’s submission that a “day” for the purposes of the LSL Act means an “ordinary working day”.²⁷ There is room for debate as to what that term means, particularly if the employee works variable hours per day or days per week. The surer guide to an employee’s entitlement to payment is the definition of “ordinary pay” and the related provisions in section 3 of the LSL Act.



COMMISSIONER

Appearances:

Liam Orr, Industrial Officer for the United Workers’ Union
Simon Dewberry of Allens, Solicitor for Coles Group Supply Chain Pty Ltd

Hearing details:

24 February
Sydney
2025

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¹ The factual background to the matter is set out in a Statement of Sourisak (Jason) Singvongsa of 19 December 2024 and a Statement of Sharon Eurlings of 20 December 2024, on which the UWU relied. This evidence was not challenged. It is not necessary to traverse it in detail.

² Statement of Sharon Eurlings, Annexure B

³ Statement of Sharon Eurlings, Annexure D

⁴ Clause 38

⁵ Clause 38.1.2(a) provides that if a matter cannot be resolved at the workplace level, a party to the Enterprise Agreement may refer the matter to the Commission. Clause 38.1.3 provides that the Commission “may conciliate and arbitrate upon application of either party” and in doing so it “shall have the power to exercise procedural powers in relation to directions, hearings, witnesses, evidence, and submissions which are necessary to make the conciliation and or arbitration effective”.

⁶ The parties framed the dispute by reference to single days of long service leave. The answer to the question I have posed would equally apply to absences of less than a week.

⁷ Transcript, 24 February 2025, PN41-PN44 and PN53-PN56

⁸ “*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*” known as the *Australian Manufacturing Workers’ Union (AMWU) v Knorr-Bremse Australia Pty Limited* [2024] FWC 1683 at [33]. See also *Kentz (Australia) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FWCFB 2019 at [46]-[54] and *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 at [75]-[78]

⁹ Statement of Mahaa Saisankar, 31 January 2025, par 7

¹⁰ Section 4(2)(a)(i)(A) and (B)

¹¹ Sections 4(2)(a)(i)(C), 4(2)(a)(ii) and 4(2)(a)(iii)

¹² Section 4(2)(a3)

¹³ Section 3

¹⁴ Coles cited the “Oxford English Dictionary, Macquarie Dictionary” in support of this contention

¹⁵ In construing the terms of the LSL Act, I have regard to the well-established principles on statutory construction, noting in particular *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69] and the useful summary in *Certain Lloyd’s Underwriters and Underwriters Subscribing to Contract No IHOOAAQS v Cross* (2012) 293 ALR 412; [2012] HCA 56 at [25]

¹⁶ NSW Legislative Assembly Hansard – 15 February 2022

¹⁷ Section 4(3)(b) of the LSL Act

¹⁸ Section 4(3)(b)(i)-(iii)

¹⁹ Section 4(3A) prior to amendment by the 2022 Act

²⁰ [2009] NSWIRComm 135

²¹ Section 4(1)

²² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69]

²³ Applicant’s Outline of Submissions, par 34

²⁴ Respondent’s Outline of Submissions, par 11(i)

²⁵ Respondent’s Outline of Submissions, par 11(k)

²⁶ Respondent’s Outline of Submissions, par 11(l)

²⁷ Applicant’s Outline of Submissions, par 39(b)