SUPREME COURT OF SOUTH AUSTRALIA

(Full Court: Civil)

FLINDERS PORTS PTY LTD v WOOLFORD

[2015] SASCFC 6

Judgment of The Full Court
(The Honourable Chief Justice Kourakis, The Honourable Justice Kelly and The Honourable Justice Stanley)

22 January 2015

INDUSTRIAL LAW - SOUTH AUSTRALIA - REGULATION OF PARTICULAR MATTERS UNDER PARTICULAR LEGISLATION - LONG SERVICE LEAVE - ENTITLEMENT TO LEAVE - CONTINUITY OF SERVICE

INDUSTRIAL LAW - SOUTH AUSTRALIA - REGULATION OF PARTICULAR MATTERS UNDER PARTICULAR LEGISLATION - LONG SERVICE LEAVE - PAYMENT IN LIEU OF LONG SERVICE LEAVE - GENERALLY

APPEAL AND NEW TRIAL - NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS - IN GENERAL

Appeal by permission from the Full Court of the Industrial Relations Court.

The respondent claimed an entitlement to payment in lieu of long service leave pursuant to the provisions of the Long Service Leave Act 1987 (SA).

The respondent claimed the entitlement on the basis he had worked for the appellant and related employers within the meaning of s 3(3) of the Long Service Leave Act for over 20 years.

The respondent was employed as a casual employee to perform mooring, deckhand and maintenance duties in Port Lincoln Harbour. He was originally employed by the Department of Marine and Harbours and later by the Ports Corporation which was the successor to the department's business operations in Port Lincoln, and finally by the appellant as the successor to the business of the Ports Corporation in Port Lincoln.

On Appeal from INDUSTRIAL RELATIONS COURT OF SOUTH AUSTRALIA (MCCUSKER, GILCHRIST AND FARRELL JJ) [2013] SAIRC 45

Appellant: FLINDERS PORTS PTY LTD Counsel: DR C BLEBY SC - Solicitor: MINTER ELLISON
Respondent: DESMOND WOOLFORD Counsel: MR M LIVESEY QC WITH MR J WARREN - Solicitor: LIESCHKE & WEATHERILL LAWYERS

Hearing Date/s: 02/09/2014

File No/s: SCCIV-13-1482

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The respondent's claim was allowed by an industrial magistrate. An appeal to the Full Court of the Industrial Relations Court from that judgment was dismissed.

Subsequent to the granting of permission to appeal to this Court, the respondent died. The judgment survives for the benefit of the respondent's estate subject to this appeal. The Court substituted the respondent's personal representative as the relevant party to the appeal.

Whether the respondent had a qualifying period of service for the purpose of accruing a long service leave entitlement. Whether the deceased was on unpaid leave for a period between 2008 and 2011 when he was in receipt of workers' compensation. What was the relevant date of termination of the deceased's service.

Held per Stanley J (Kelly J agreeing) allowing the appeal:

1. The deceased's absence from work as a result of a work-related injury cannot be characterised as unpaid leave for the purposes of the Long Service Leave Act 1987 (SA) (at [30], [105] - [108]).

Held per Stanley J (Kourakis CJ and Kelly J agreeing):

2. Continuous service as defined in the Long Service Leave Act 1987 (SA) means uninterrupted or unbroken service subject to the exceptions in s 6(1) of the Act. If the service rendered by a worker is intermittent, sporadic or irregular it can only satisfy the test of "continuous service" if the breaks between service fall within the terms of s 6(1) of the Act (at [2], [32], [76]).

Held per Stanley J:

3. The deceased worked pursuant to a continuing contractual obligation to make himself available for work as rostered by the appellant subject to such absences as were mutually agreed between the parties (at [84]).

4. The relevant date, as defined in the Long Service Leave Act 1987 (SA), is the date on which long service leave is commenced or an entitlement to payment in lieu of long service leave arises. In this case, that is the date on which the deceased's employment was terminated by reason of s 5(2) of the Act, namely, 23 September 2011 (at [111]).

Held per Kourakis CJ:

5. The deceased's service came to an end when he and the appellant agreed that no further contracts would be entered into. The relevant date for the purposes of the Act is 23 September 2011 (at [26] - [28]).

6. The Industrial Magistrate was correct in finding that the plaintiff was employed on a series of contracts of service and the employment constituted continuous service (at [8] - [13]).

Held per Kourakis CJ (dissenting):

7. In s 3(4) of the Long Service Leave Act 1987 (SA) the term "leave" is considered in its ordinary meaning to refer to any release from the employment obligation to attend work effected by operation of law or allowed at the discretion of the employer (at [21] - [25]).

Fair Work Act 1994 (SA) s 191; *Long Service Leave Act 1987* (SA) s 3-8, 13; *Workers Rehabilitation and Compensation Act 1986* (SA) s 30, s 40, s 58C; *Long Service Leave Act 1967* (SA); *Long Service Leave Act 1955* (NSW) s 4; *Long Service Leave Act 1992* (Vic) s 56; *Acts Interpretation Act 1915* (SA) s 26, referred to.
Melbourne Cricket Club v Clohesy (2005) 14 VR 206, distinguished.

Woolford v Flinders Ports Pty Ltd [2012] SAIRC 58; *Fox v Percy* (2003) 214 CLR 118; *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458; *Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor* (2011) 244 CLR 144 ; *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1; *Carr v Western Australia* (2007) 232 CLR 138; *Alcan (NT) v Commissioner of Territory Revenue* (2009) 239 CLR 27; *Cooper Brookes (Woollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297; *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555 ; *R v Brown; ex parte AMWSU* (1980) 144 CLR 462 ; *AJ Mills & Sons v Transport Workers' Union of New South Wales* (2009) 187 IR 56; *Forstaff Pty Ltd v Chief Commission of State Revenue* (2004) 144 IR 1; *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435; *Lucke v Cleary & Ors* (2011) 111 SASR 134; *Water Board v Moustakas* (1988) 180 CLR 491; *Robinson v New South Wales National Coursing Association* (1982) 3 IR 161; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; *Hawkins v Clayton* (1988) 164 CLR 539; *Port Noarlunga Hotel v Stewart* (1981) 48 SAIR 220; *R v Industrial Appeals Court and Automatic Totalisers Ltd; Ex parte Kingston* (Unreported, Full Court of Supreme Court of Victoria, delivered 26 February 1976); *South Australia v Day* (2000) 78 SASR 270; *Grout v Gunnedah Shire Council (No. 2)* (1994) 57 IR 243; *Hill v CA Parsons & Co Ltd* [1972] Ch 305 ; *Griggs v Noris Group of Companies* (2006) 94 SASR 126 , considered.

WORDS AND PHRASES CONSIDERED/DEFINED

"Long Service Leave", "Continuous Service", "Leave"

FLINDERS PORTS PTY LTD v WOOLFORD
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Full Court: Kourakis CJ, Kelly and Stanley JJ

1 **KOURAKIS CJ:** I would dismiss the appeal. I have had the advantage of reading the draft reasons of Stanley J and gratefully adopt his Honour's summary of the evidence and the history of this litigation.

2 I agree with Stanley J's conclusion in paragraph [76] that continuous service as defined in the *Long Service Leave Act 1987* (SA) (the LSL Act) means uninterrupted or unbroken service subject to the exceptions in s 6(1) of that Act. In particular I agree that if service rendered by a worker is intermittent, sporadic or irregular, it can only satisfy the test of "continuous service" if the breaks between service fall within the terms of s 6(1) of the LSL Act.

3 However, I would not make the finding of fact that Mr Woolford was employed under a single contract of service for both procedural and substantive reasons. I deal first with the procedural reason.

4 The respondent did not allege that there was a single contract of service because, on the way he put his claim, he was entitled to long service leave even if he had been employed pursuant to a series of contracts. If the respondent had expressly made the allegation, and had expressly adduced evidence and advanced submissions in support of it, the appellant is likely to have resisted it because that factual conclusion would attract the operation of s 6(1)(c) LSL Act. Given the course of the litigation below, this Court should not find that the appellant could not have adduced evidence that there was not a single continuous contract of employment. It is not difficult to imagine the kinds of evidence that the appellant might have adduced showing that there was not a single contract of service. For example, evidence of unilateral changes in rostering arrangements would suggest that there was not a single contract of service. Employee induction material and workplace circulars might also show that there was no such single contract. On the case presented by the respondent it was not at all surprising that the Industrial Magistrate reached the conclusion that there was a series of contracts. The appellant was entitled at trial to proceed on the basis that given the state of the evidence, and in the absence of any claim or submission that there was a single contract, it was likely that the Magistrate would make the finding that there was a series of contracts. Employment arrangements of the kind pursuant to which the respondent worked have commonly been accepted as comprising separate sequential contracts of employment.

5 Turning to the substantial merits of the question, I do not accept that the evidence established a single contract of employment. The finding of the Industrial Magistrate that the deceased was at all times ready, willing and able to

be called out for work does not conclusively determine the question of whether the deceased had contractually bound himself to be so. It is not obvious to me that the deceased was legally obliged to make himself available for work. To put it in another way, it is not obvious to me that the deceased would have been in breach of any contractual obligation if he had notified the appellant that he would never again make himself available to work after the conclusion of one of his shifts or that he would not be available for some more limited period of time. I accept the force of the argument that there was an implied contractual promise made by the appellant that it would continue to phone the deceased for work in accordance with the roster system it had adopted. However, much uncertainty would attend an implied term of that kind. For example, would the implied term speak to how many persons the appellant would include within the roster arrangement and between whom the appellant would distribute the work? There is no evidential matrix in this matter which would allow this question to be answered. Should any minimum or maximum limits on the work that would be made available be implied? Is there any limit on the periods of down time between shifts? Again, evidence on these issues is lacking. The uncertain content of the proposed term tells strongly against its implication.

6 Moreover, I do not accept that the circumstance that Mr Woolford was, as a matter of fact, generally available for work meant that his "service" was not broken. Indeed this is but another way of approaching the question whether there was, or was not, a single contract of service. If there was a single contract of service then it can be accepted that the deceased was serving under it by keeping himself ready, willing and able to work because it is an ongoing incident of that contract that he do so. However, if instead of a single contract of service there were a series of contracts, the deceased was not in service whilst waiting for a subsequent offer of contractual employment to be made and accepted by him because there was no operative obligation to do so in the interlude between contracts.

7 The facts founding the conclusion that there was a single contract of continuous service in *AJ Mills & Sons Pty Ltd v Transport Workers' Union of New South Wales*[1] can be distinguished from this case. In *AJ Mills* the duty of the worker was to attend as a steward at every greyhound race meeting held during the year unless he took leave with the acquiescence of the employer. There was, therefore, a single contract of employment requiring the worker's attendance at race meetings notwithstanding the wide spread of days throughout the year on which those meetings were held. The worker was subject to a continuing obligation to make himself available to work on the specified race days.

8 Even though I would not find that there was a single contract of employment, I would reach the same ultimate conclusion as Stanley J, that the

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[1] (2009) 187 IR 56.

deceased's service is deemed to be continuous pursuant to s 6(1)(c) LSL Act, by a different route. I would construe the term "contract of service" in s 6(1)(c) LSL Act to include "a series of contracts of service" within the meaning of that term in s 3(1) LSL Act. The extended definition of continuous service, for s 3(1) LSL Act, which was an innovation of that Act, to include service under a series of contracts would, in itself, achieve very little unless the definition is effectively read into s 6(1)(c) of the LSL Act. Standing alone, s 3(1) LSL Act provides only that service which is unbroken is continuous even if it is performed under a number of sequential contracts. However, it is most unlikely that a worker would work for the length of time necessary to meet the period prescribed by the LSL Act under a series of back to back contracts without a single days break. Weekends, Easter Sunday, Christmas Day and other public holidays make that prospect no more than a fanciful possibility. Parliament could not have intended to extend the benefits of the LSL Act to only those employees who had made such a herculean effort. Only by reading the LSL Act in a way which assimilates the position of employees working under a series of contracts with those working under a single contract would casual employees receive any practical benefit from the extended definition.

9 That approach is also supported by s 26 of the *Acts Interpretation Act 1915* (SA) which allows the singular to be construed as the plural.

10 It is the manifest purpose of the LSL Act to extend the benefit of long service leave to casual employees. If the term "contract of service" does not include casual workers employed under a series of contracts, s 6(2) LSL Act would extend inordinately the period of time required for regular casual employees to qualify for long service leave. I acknowledge that some casual employees might, on all of the evidence, be found to be employed under a single contact of service as his Honour, Stanley J, has found in this case with respect to the deceased. The facts also supported that conclusion in the cases of *AJ Mills* and *Port Noarlunga Hotel v Stewart*.[2] However, many casual employees are not employed under a single contract of employment. Furthermore, it would be relatively easy for employers to stipulate terms and arrangements which would preclude that conclusion, and in so doing defeat the construing purpose of the LSL Act.

11 The anomalous operation of the LSL Act and its failure to achieve its intended purpose, if the term "a contract of service" is not deemed to include a series of contracts, can be simply demonstrated. A worker who was engaged to work on average two days in each week would at the end of a calendar year have accumulated only about 15 weeks of continuous service whereas a worker employed under a single contract of service but working on average the same number of days in each week, would have accumulated a full year of continuous service. That result would follow from the application of s 6(1)(c) of the LSL

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[2] (1981) 48 SAIR 220.

Act because weekends, and other days not worked, would count as time served for workers employed under a single contract of service even if it be the case that the contract precludes them from being directed to work on those days. If casual employees employed under a series of contracts do not fall within s 6(1)(c) of the LSL Act, the days in between engagements must be ignored pursuant to s 6(2) of the LSL Act. Accordingly it would take something in the order of 40 years for a casual worker working two days a week to accumulate the necessary length of service. Legislation that is plainly remedial should not be given a limited construction so that it leads to arbitrary results which do not serve its manifest purpose.

12 Reading the words of s 6(1)(c) of the LSL Act in accordance with the legislative intention to assimilate the position of casuals with those of permanent employees, the deceased's employment should be viewed as continuous service. His absences from employment were in accordance with the series of contracts offered to him in the sense that he did not attend work because he was not subject to a contractual obligation to do so.

13 In the case of a casual employee, the limiting criterion will be whether his or her short-term engagements are part of a series. Whether or not the individual contracts together constitute a series will depend on the regularity of the engagements, the period of time between them and the reasons for the interludes between engagements.

14 I turn next to the problem posed by s 3(2) of the LSL Act in its prescription of the method by which the hours worked by permanent part-time employees or casual employees are to be averaged. Section 3(2) of the LSL Act provides that the long service leave weekly payment, or alternatively the payment in lieu of long service leave on termination of casual or part-time employees, shall be calculated by multiplying their average weekly hours worked by the hourly rate to which they are entitled immediately before taking long service leave or on termination.

15 The average hours are to be calculated over the period of three years immediately preceding either the termination date or the date on which long service leave commences. A difficulty arises in making that calculation because s 3(4) of the LSL Act provides by subparagraphs (a) and (b) that weeks during which the worker was on unpaid leave for the whole of the week must be disregarded, with the result that the period of three years over which the weekly hours are to be averaged is extended further back from the relevant date for each week so disregarded.

16 Before turning further to the proper construction of s 3(4)(a) and (b) LSL Act, I observe that, in my view, s 3(4)(c) LSL Act is limited to the calculation of the average pay of a worker on commission mandated by s 3(2)(a) LSL Act. It is not capable of any sensible application in the calculation of average hours worked. The difference in language is referable to the quite different averaging

calculations required by subparagraphs (a) and (b) on the one hand and subparagraph (c) on the other. Whereas subparagraphs (a) and (b) speak of weeks which must be "disregarded", subparagraph (c) refers to periods of paid leave being "taken into account". I would read the subparagraphs distributively to have that effect.

17 Returning then to subparagraphs (a) and (b) of s 3(4) of the LSL Act, their manifest purpose is to provide for an averaging of an employee's weekly hours over the period of 156 weeks (three years) during which the employee worked variable hours. The purpose of the averaging over a long period of time is to strike a fair balance between employer and employee, and to minimise manipulation of the average. However, there is no textual or contextual reason to think that the averaging formula enacted by s 3(4) of the LSL Act was intended to deny any worker the long service leave which had accrued before the unpaid leave was taken. For example, a part time employee who takes unpaid leave from one employer or agency to work on secondment to another for an extended period of time of three years or more without taking his or her long service leave entitlement, is plainly entitled to later claim long service leave based on the average of weekly hours in the three years preceding the secondment.

18 Equally a part-time worker who is unable to work due to a non-compensable injury and is given unpaid leave for a period of three years or more, but who does not in that time claim his or her long service leave entitlements, may after three years still claim long service leave based on the average weekly hours worked before becoming incapacitated.

19 Given the non-controversial operation of s 3(4) of the LSL Act which I have just outlined, it would appear to be a rather capricious result to deny a permanent part-time worker whose hours have varied, or a casual worker, who has been absent from work by reason of a compensable injury and in receipt of worker's compensation payments for more than three years, the equivalent benefits of the LSL Act.

20 That result is avoided if an absence from work by reason of a compensable injury is regarded as unpaid leave for the purposes of s 3(4)(a) and (b) of the LSL Act. I accept that in many other industrial contexts absence by reason of compensable injury is not ordinarily regarded as leave. Leave in an award, industrial agreement or contract of employment commonly and generally refers to an entitlement such as annual leave or sick leave. In an employment context it may also refer to a dispensation granted by the employer by way of an indulgence.

21 However, the word leave is not yet a term of art. The ordinary meaning of the term is wide enough to refer to any release from the employment obligation to be ready, willing and able to perform work as directed by the employer, effected by operation of law or allowed at the discretion of the employer. The *Workers Rehabilitation and Compensation Act 1986* (SA) does not confer a

statutory entitlement to leave during a period of incapacity caused by a compensable injury. Nor in this case, and in most cases of absence due to compensable injury, is there evidence of active consent by the employer. However, an employer's decision not to exercise, for a definite or indefinite future period, the power to direct an injured worker to perform work, when communicated to a worker, in effect releases the worker from the obligation to be ready, willing and able to work and gives that worker leave from his or her employment. Indeed if an employer does not so direct over a period of the time whilst the worker is in receipt of compensation, it is likely that the employer would be estopped from terminating the contract of employment for breach without first giving the worker notice that he or she is once again required to be ready, willing and able to work.

22 In the context of the LSL Act and s 3(4) in particular, and having regard to the arbitrary results to which I have referred above, I would construe the word leave in that subsection to mean an absence from work resulting from the employer's decision not to exercise the power to direct the worker to perform work such that the employer and the worker proceed on the express or tacit understanding that the worker has been released from the employment obligation to be ready, willing and able to work.

23 In the case of employment under a series of contracts, I would construe leave to be any period during which the employer does not offer the employee work under any further contracts at the request of, or with the concurrence of, the worker such that the same understanding is reached. If the employer refrains from offering any further employment under a continuing series of contracts, without such assent or concurrence, or if the worker declines an offer, then for the purposes of section 8(4) of the LSL Act, there will have been a termination.

24 Once it is accepted that leave during a period of incapacity caused by a compensable injury is leave, then it must be unpaid leave. Workers' compensation payments are made in accordance with a statutory obligation and not as pay for work done.

25 It is not clear why s 3(4) of the LSL Act excludes only unpaid leave. If weeks in which a worker received paid leave are included in the averaging formula, the worker's average weekly hours will necessarily be reduced and the average will not reflect the hours usually worked. I accept that an employee who was in receipt of pay for substantial periods of leave would, in those circumstances, be disadvantaged. The policy or other rational reason for calculating the average in that way is not obvious to me. Be that as it may, in practice, it is unlikely to pose a significant problem. In any event, that issue does not present any reason not to construe the term unpaid leave as I have.

26 Finally, I, like Stanley J, would find that the relevant date for the purposes of s 5(2) and s 8(4) of the LSL Act is 23 September 2011, but for different reasons.

27 Section 8(4) of the LSL Act must be capable of sensible application both to employees under a single contract of employment and those subject to a series of contracts. Section 7(1) of the LSL Act provides that long service leave should be granted by an employer to a worker as soon as practicable (taking into consideration the needs of the employer's business or undertaking) after the worker becomes entitled to that leave. Section 7(3) of the LSL Act requires the employer to give a worker at least 60 days notice of the date from which leave is to be taken. Those provisions are subject to agreements reached between the employer and employee.[3]

28 The obligation to pay long service leave to a casual employee, pursuant to s 8(4)(b) of the LSL Act "immediately on termination" is not an obligation which arises at the end of any one of the series of contracts of employment after the prescribed period of ten years has been accumulated. Casual employees do not have the right, and are not subject to an obligation, to take their long service leave as a lump sum during the continuity of their period of service, but they are entitled to take a period of paid long service leave. The deceased's employment was not terminated for the purpose of the LSL Act when the last of the series of contracts he worked came to an end. Rather the deceased's service only came to an end when he and the appellant agreed that no further contracts would be entered into.

Conclusion

29 I would dismiss the appeal.

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[3] See *Long Service Leave Act 1987* (SA), ss 7 and 8.

30 **KELLY J:** I agree for the reasons given by Stanley J that the period during which the deceased was absent from work was not a period of unpaid leave within the meaning of s 3(4)(b) of the *Long Service Leave Act 1987* (SA) ("LSL Act").

31 On the reasoning of either Kourakis CJ or Stanley J, the relevant date for the purposes of ss 5(2) and 8(4) of LSL Act is 23 September 2011, although I acknowledge that this conclusion is reached by different routes.

32 I agree with Kourakis CJ and Stanley J that the deceased rendered continuous service. However, I find it unnecessary to determine whether that service was pursuant to a single contract or a series of contracts and, in my view, given the course of the litigation in the Courts below, it is undesirable to do so.

33 I would allow the appeal and agree with the orders of Stanley J.

STANLEY J:

Introduction

34 This is an appeal by permission from the Full Court of the Industrial Relations Court pursuant to s 191 of the *Fair Work Act 1994* (SA).

35 The respondent claimed an entitlement to payment in lieu of long service leave pursuant to the provisions of the *Long Service Leave Act 1987* (SA) (the LSL Act).

36 The respondent claimed the entitlement on the basis he had worked for the appellant and related employers within the meaning of s 3(3) of the LSL Act for over 20 years between 16 October 1990 and the termination of his employment on 23 September 2011.

37 The respondent was employed as a casual employee to perform mooring, deckhand and maintenance duties in Port Lincoln Harbour. He was originally employed by the Department of Marine and Harbours and later by the Ports Corporation which was the successor to the department's business operations in Port Lincoln, and finally by the appellant as the successor to the business of the Ports Corporation in Port Lincoln.

38 The respondent's claim was allowed by an industrial magistrate. An appeal to the Full Court of the Industrial Relations Court from that judgment was dismissed.

39 Subsequent to the granting of permission to appeal to this Court, the respondent died. The judgment survives for the benefit of the respondent's estate subject to this appeal. The Court substituted the respondent's personal representative as the relevant party to the appeal.

The facts

40 The deceased was employed on a casual basis in accordance with the policy of his then employer to casualise its workforce by replacing permanent fulltime employees with casual staff to perform its core activities. The deceased worked from 16 October 1990 until he ceased work due to a work-related injury on 10 October 2008, with the exception of a calendar period of 83 days when he was absent from work due to a serious illness.

41 The nature of the work performed by the deceased is described in the reasons of the learned industrial magistrate as follows:[4]

> Mr Woolford was one of a number of casual employees who could be called upon to assist with various shipping movements and to a lesser degree maintenance tasks. In 2001 a written roster system was introduced for the allocation of jobs to casuals within the pool

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[4] *Woolford v Flinders Ports Pty Ltd* [2012] SAIRC 58 at [7] – [9].

> on a rotational, and what was considered to be a fair basis as between the casuals. Prior to then there was some favouritism in the allocation of jobs as between the available pool members.
>
> The extent of work offered to Mr Woolford depended upon shipping demands in Port Lincoln. Most shipping was in relation to the export of grain, but bulk fertiliser and fuel were also delivered by cargo ships.
>
> The shifts that Mr Woolford performed varied in length from one and a half hours up to a full day's work. There were occasions when multiple shifts were worked on one day, for example, for mooring and later releasing a ship. On some occasions a full day's work plus a call out for mooring duties was performed.

42 At trial there was a dispute between the parties as to the number of hours and days worked by the deceased prior to December 1997. Apart from recording the fact of the dispute, the learned industrial magistrate made no finding as to the frequency of the work performed by the deceased prior to December 1997. It appears that the learned magistrate accepted that from 1998 until October 2008 the deceased worked somewhere between 20 and 60 hours per fortnight, depending on shipping demands in Port Lincoln.

43 By reason of a work-related injury, the deceased did not work after 10 October 2008. His employment was formally terminated by the employer on 23 September 2011. His employment was terminated in accordance with the provisions of s 58C of the *Workers Rehabilitation and Compensation Act 1986* (SA).

44 The learned industrial magistrate found the deceased was always ready, willing and able to be called out for work at any hour of the day including weekends. He only declined one offer of work for any reason other than illness throughout the period in question. He did not know when he would next be offered work, even with knowledge of his position on the roster, due to the unpredictable nature of shipping movements. He would generally only get one day's notice of a work engagement or notice on a Friday for weekend work. He did not have to undergo a site induction, training or safety briefing at the start of every engagement. When work was offered, he did not know for how long the engagement would last, although he could generally make a close estimate based on past experience and knowledge of the nature of the mooring, pilot or maintenance duty to be performed. He had a reasonable expectation that he would be offered similar engagements to perform his employer's ongoing mooring work although the employer was under no legal obligation to offer any shifts, nor did he have any legal obligation to accept any offer of work. The learned magistrate accepted, however, that if the deceased refused an offer for reasons other than illness, it would "not have gone down too well" and from the time the roster was in use his name would have been put to the bottom.

45 During the period from 10 October 2008 to 23 September 2011 the deceased was in receipt of weekly payments of income maintenance pursuant to the *Workers Rehabilitation and Compensation Act*.

46 On 7 May 2012 the deceased made a claim for payment in lieu of long service leave pursuant to the LSL Act.

Reasons of the industrial magistrate

47 The deceased was self-represented at the trial before the learned industrial magistrate.

48 The learned industrial magistrate found:

- The deceased was a casual employee, engaged under a series of separate contracts of service;
- That the deceased enjoyed continuous service with the appellant and its predecessors between 16 October 1990 and 23 September 2011;
- That the period of qualifying service was 20 years;
- That he qualified for payment in lieu of long service leave upon termination of his employment on 23 September 2011;
- That for the purposes of calculating his entitlement to payment by reference to the average number of hours worked per week pursuant to s 3(2) and (4) of the LSL Act, the period from 11 October 2008 to 23 September 2011 should be disregarded as a period of unpaid leave when he was absent from work and in receipt of weekly payments of income maintenance pursuant to the *Workers Rehabilitation and Compensation Act*.

Reasons of the Full Industrial Relations Court

49 The Full Court of the Industrial Relations Court held that whether service is continuous within the meaning of the LSL Act is a question of fact and perhaps degree. It considered there was sufficient evidence to permit the magistrate to conclude that the service was continuous under a series of contracts of service. It held that because that finding was open on the evidence, there was no error demonstrated. It further held that during the period when the deceased was absent from work and in receipt of workers' compensation payments, he was on unpaid leave for the purposes of s 3(4) of the LSL Act. Accordingly, it considered the relevant period for the purpose of s 3(2) and (4) were the three years preceding 10 October 2008. On the other hand, it considered that the relevant date for the purposes of s 5(2), s 8(4) and s 13(4) of the LSL Act was the date of termination of employment, namely, 23 September 2011.

Issues raised by the appeal

50 The issues raised by the appeal are:

- Whether the deceased had a qualifying period of service for the purposes of accruing a long service leave entitlement under the LSL Act;
- Whether the period 10 October 2008 to 23 September 2011, when the deceased was absent by reason of a work-acquired injury and in receipt of weekly payments of income maintenance, is a period of unpaid leave within the meaning of s 3(4)(b);
- Was the relevant date for the purposes of s 5(2) and s 8(4) 23 September 2011 or 10 October 2008; and
- Was the Court deprived of jurisdiction to make an order for payment in lieu of long service leave by reason of the operation of s 13(4) of the LSL Act?

***Long Service Leave Act 1987* (SA)**

51 In order to understand the issues raised by the appeal it is necessary to set out relevant provisions of the LSL Act.

52 Section 5 provides the entitlement to long service leave or for payment in lieu in certain circumstances. It provides:

> (1) Subject to this Act, a worker who has 10 years or more service is entitled to the following long service leave—
>
> (a) 13 weeks leave in respect of the first 10 years of service; and
>
> (b) 1.3 weeks leave in respect of each subsequent year of service.
>
> …
>
> (2) Where the service of a worker who is entitled to long service leave is terminated, the worker is entitled to a payment in lieu of long service leave.

53 "Service" is defined in s 3(1) to mean continuous service with the same employer or with related employers under a contract of service or a series of contracts of service.

54 Section 6 provides:

> 6—Continuity of service
>
> (1) A worker's continuity of service is not affected by—
>
> (a) subject to an order of the Court or the Industrial Relations Commission to the contrary, a break in the worker's service brought about by the

employer where the worker is re-employed pursuant to an order of a Court or the Industrial Relations Commission;

(b) a break in the worker's service brought about by the employer in an attempt to avoid an obligation or liability imposed on the employer by this Act or by an award, agreement or scheme relating to long service leave;

(c) absence of the worker from work in accordance with the contract of service;

(d) absence of the worker from work on account of illness or injury;

(e) absence of the worker from work on account of long service leave or annual leave;

(f) absence of the worker from work on any other kind of leave;

(g) the standing down of the worker by the employer on account of slackness in trade where the worker is subsequently re-employed by the employer;

(h) a break in the worker's service arising directly or indirectly from an industrial dispute where the worker returns to work in accordance with the terms of settlement of the dispute or is re-employed by the employer when the dispute is settled;

(i) any other break in the worker's service brought about by the employer where the worker returns to work or is re-employed by the employer within two months.

(2) Where a worker's continuity of service with an employer is preserved under subsection (1)(f), (g), (h) or (i), the period of absence or the duration of the break from work is not to be taken into account in calculating the period of the worker's service with the employer.

...

55 Section 8 prescribes the basis for the payment of long service leave as follows:

8—Payment in respect of long service leave

(1) Subject to this section, a worker who is on long service leave is entitled to be paid at his or her ordinary weekly rate of pay.

...

(3) If a variation in a worker's rate of pay occurs while the worker is on leave, that variation must be reflected in the payment for the leave and if payment has been made in advance, the employer must, on the worker's return to work, make any adjustment necessary to give effect to the variation.

...

(4) A payment in lieu of long service leave made under this Act on the termination of a worker's service—

(a) will be calculated at the worker's ordinary weekly rate of pay applicable immediately before the termination; and

(b) must be made to the worker immediately on the termination or, if the worker has died, to the personal representative of the worker on request.

56 The basis for determining a worker's ordinary weekly rate of pay is prescribed by s 3(2) as follows:

(2) A reference in this Act to a worker's ordinary weekly rate of pay is a reference to the worker's weekly rate of pay as at the relevant date exclusive of overtime, shift premiums and penalty rates but this definition is subject to the following qualifications—

(a) if the worker is employed on commission or on any other system of payment by result, the worker's ordinary weekly rate of pay will be ascertained by averaging the worker's weekly earnings over the 12 months immediately preceding the relevant date; and

(b) if during the whole or part of the period of three years immediately preceding the relevant date—

(i) the worker was employed on an hourly basis at an hourly rate of pay; or

(ii) the workers ordinary hours of work per week were varied and consequently the worker's weekly rate of pay was varied; or

(iii) the worker worked on a casual or part-time basis,

the worker's ordinary weekly rate of pay will be ascertained by averaging the number of hours worked per week in that period of three years and multiplying that result by the worker's rate of pay per hour as at the relevant date, exclusive of overtime, shift premiums and penalty rates (and for the purposes of this paragraph a person who is employed on a casual basis is not to be regarded as being paid at a penalty rate); and

(c) if the worker's employer provides accommodation during his or her employment but not while the worker is on leave, the worker's ordinary weekly rate of pay will be increased by an amount representing the weekly value of that accommodation (that value being determined, where possible, by reference to an award or agreement and, where there is no applicable award or agreement, by reference to the fair and reasonable monetary value of that accommodation).

57 Section 3(4) provides:

(4) For the purpose of averaging weekly earnings under subsection (2)(a) or the number of hours worked per week under subsection (2)(b)—

(a) any week when the relevant worker was on unpaid leave for the whole of the week will be disregarded; and

(b) the relevant periods under subsection (2)(a) and (2)(b) will be taken to be periods (which need not be consecutive) totalling 12 months (in the case of subsection (2)(a)) or 3 years (in the case of subsection (2)(b)) after disregarding any weeks when the worker was not at work due to unpaid leave; and

(c) any period when the relevant worker was on paid leave will be taken into account.

58 "The relevant date" is defined in s 3(1) to mean the day on which long service leave is commenced or an entitlement to payment in lieu of long service leave arises.

59 Finally, s 13 confers jurisdiction on the Industrial Relations Court to order an employer or former employer of a worker entitled to long service leave or a worker or the personal representative of a deceased worker entitled to receive a payment in lieu of long service leave, to grant the leave or make the payment. This jurisdiction, however, is subject to the terms of s 13(4) which provides that an order cannot be made under s 13 if the service of the worker was terminated more than three years before the date of the application to the Court.

Approach on appeal

60 The principles applicable to the exercise of this Court's appellate function, like that of the Full Industrial Court, are definitively stated by the High Court in *Fox v Percy.*[5] Gleeson CJ, Gummow and Kirby JJ said that, while an appeal court should conduct a real review of the trial and the trial judge's reasons, there was nevertheless a need for appellate respect for the advantages of trial judges. They said:[6]

> Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect". In *Warren v Coombes*, the majority of this Court reiterated the rule that:
>
>> [I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.

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5 [2003] HCA 22, (2003) 214 CLR 118.
6 [2003] HCA 22 at [25] – [29], (2003) 214 CLR 118 at 126 – 128.

As this Court there said, that approach was "not only sound in law, but beneficial in . . . operation".

...

The continuing application of the corrective expressed in the trilogy of cases was not questioned in this appeal. The cases mentioned remain the instruction of this Court to appellate decision-making throughout Australia. However, that instruction did not, and could not, derogate from the obligation of courts of appeal, in accordance with legislation such as the *Supreme Court Act* applicable in this case, to perform the appellate function as established by Parliament. Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute.

Over more than a century, this Court, and courts like it, have given instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.

That this is so is demonstrated in several recent decisions of this Court. In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own conclusion.

(Citations omitted).

61 In *CSR Ltd v Della Maddalena*,[7] Kirby J explained the ratio of *Fox v Percy*. He said:[8]

In *Fox v Percy* there was an important change in the statement by this Court of the jurisdiction and powers of intermediate appellate courts. Like many other principles re-expressed by this Court in recent years, the change was one founded in a close analysis of the statutory provisions governing the legal task in issue. It involved a reminder of the obligations of the appellate court, so far as it properly could, to perform its statutory functions of appellate review by way of rehearing, in a real and substantive way as the enacted law mandates.

62 Consistent with the performance of its statutory function the Full Court of the Industrial Relations Court is obliged in hearing an appeal to evaluate the evidence heard by the magistrate whose judgment is under appeal and to decide

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7 [2006] HCA 1, (2006) 80 ALJR 458.

8 [2006] HCA 1 at [19], (2006) 80 ALJR 458 at 465.

whether findings made or conclusions reached are wrong. The discharge of that role is not necessarily fulfilled by concluding that a finding made by the magistrate was open on the evidence. That a finding of fact might be open on the evidence does not necessarily exclude the possibility that the finding is in error. Whether the finding is in error will depend on an evaluation of all the relevant evidence by the appeal court for the purpose of deciding whether the finding was correct or in error. Accordingly, it was necessary for the Full Court of the Industrial Relations Court to consider whether the finding by the industrial magistrate that the deceased's service was continuous was erroneous. That question was not answered by observing that because the finding was open on the evidence no error was shown. The Full Industrial Relations Court should have undertaken its own evaluation of the evidence to decide that question for itself. Having failed to do so, in these circumstances, I turn to consideration of that question.

Did the deceased qualify for long service leave?

63 Dr Bleby SC, counsel for the appellant, submits that the Industrial Relations Court erred in concluding that the deceased had 20 years of continuous service under a series of contracts of service with the appellant and its predecessors. He submits that in order to qualify, the relevant service must be continuous. That is to say service which is connected, unbroken and uninterrupted in time. The only exception to this principle is to be found in the terms of s 6(1) of the LSL Act. The deceased did not qualify because his employment was sporadic and irregular pursuant to separate contracts of service with periods of weeks between engagements where the breaks between engagements did not fall into any of the protected exceptions in s 6(1). He submits that the approach taken by the Industrial Relations Court did not give the words "continuous service" in s 3(1) work to perform. The construction adopted by the Court permits a mere series of contracts, however broken temporally and however long the intervals between contracts, sufficient to establish continuous service. He submits this is not consistent with the purpose of the LSL Act which is to provide a paid period of rest to a worker who has given long years of continuous service to his or her employer.

64 In the alternative, the appellant submits that the only possible basis upon which the deceased's pattern of engagements could be characterised as falling within the terms of s 6(1) is placitum (i) which provides that a worker's continuity of service is not affected by any other break in the worker's service brought about by the employer where the worker returns to work or is re-employed by the employer within two months. In that case, it submits that s 6(2) is engaged so that the breaks from work between each engagement are not to be taken into account in calculating the period of the deceased's service. When that exercise is undertaken, the deceased did not reach the prescribed qualifying period in s 5(1).

65 Mr Livesey QC, counsel for the respondent, submits that the LSL Act applies to casual employment which by its nature is usually undertaken pursuant to a series of contracts of service. As the LSL Act applies to casual employment, the breaks in casual employment cannot be restricted to those prescribed by s 6(1). It is the service and not any contract or series of contracts which must be continuous for the purposes of the LSL Act. The period of a casual employee's service for the purposes of the LSL Act is a matter of fact and degree. The factual findings made by the magistrate are not challenged and they support the conclusion the deceased had a qualifying period of service.

66 The contemporary approach to statutory construction emphasises that legislation is to be construed in accordance with its text, context and purpose.[9] In *Project Blue Sky v Australian Broadcasting Authority*[10] the High Court said:[11]

> 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*, 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.
>
> (Footnotes omitted).

67 This approach was recently reaffirmed by the High Court in *Australian Education Union v Department of Education and Children's Services*[12] as follows:[13]

> The process of construction begins with a consideration of the ordinary and grammatical meaning of the words of the provision having regard to their context and legislative purpose.

68 However, the general rule that a court is to construe legislation in a manner that promotes its purpose or object may be of little assistance where a statutory provision strikes a balance between competing interests and the problem is one of doubt about the extent to which the legislation pursues a purpose. In *Carr v Western Australia*[14] Gleeson CJ observed:[15]

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9 *Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor* [2011] HCA 32 per French CJ at [50], per Gummow, Hayne, Crennan and Bell JJ at [109], (2011) 244 CLR 144 per French CJ at 176 – 177, per Gummow, Hayne, Crennan and Bell JJ at 194; *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16 at [47], (2013) 250 CLR 523 at 539 – 540.

10 [1998] HCA 28, (1998) 194 CLR 355.

11 [1998] HCA 28 at [69], (1998) 194 CLR 355 at 391.

12 [2012] HCA 3, (2012) 248 CLR 1.

13 [2012] HCA 3 at [26], (2012) 248 CLR 1 at 13.

14 [2007] HCA 47, (2007) 232 CLR 138.

15 [2007] HCA 47 at [5] – [6], (2007) 232 CLR 138 at 143; See also *Alcan (NT) v Commissioner of Territory Revenue* [2009] HCA 41 at [51], (2009) 239 CLR 27 at 47 – 48.

> ... Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.
>
> ... Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.

69 This is consistent with the position of the High Court in *Cooper Brookes (Woollongong) Pty Ltd v Commissioner of Taxation:*[16]

> ... [I] f the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this *is not* to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature. The danger that lies in departing from the ordinary meaning of unambiguous provisions is that "it may degrade into mere judicial criticism of the propriety of the acts of the Legislature", as Lord Moulton said in *Vacher & Sons Ltd. v. London Society of Compositors*; it may lead judges to put their own ideas of justice or social policy in place of the words of the statute. On the other hand, if two constructions are open, the court will obviously prefer that which will avoid what it considers to be inconvenience or injustice. Since language, read in its context, very often proves to be ambiguous, this last mentioned rule is one that not infrequently falls to be applied.
>
> (Footnote omitted).

70 Accordingly, identifying the purpose of the LSL Act as conferring a right or entitlement to paid leave so as to afford a period of rest to a worker who has given a long period of continuous service does not necessarily resolve the difficulties that arise from the construction of the requirement in the Act for the worker to provide the requisite period of "continuous service" in order to qualify for leave or payment in lieu thereof.

71 There can be no doubt the LSL Act applies to a casual employee. So much is apparent from the reference in s 3(2)(b) to a worker who works on a casual basis. The proposition finds further support in the history of the definition of "service". In the predecessor legislation to the LSL Act, namely, the *Long Service Leave Act 1967* (SA), "service" was defined to mean continuous service under a contract of service. The addition of the words "or a series of contracts of service" in the definition enacted in the 1987 Act was intended to extend the application of the Act, *inter alia,* to casual employees engaged by the same employer pursuant to a series of contracts of service. The terms of s 3(2)(b) of the 1987 Act which provides a method of calculation of the worker's ordinary weekly rate of pay in circumstances where the worker is employed on an hourly basis at an hourly rate of pay also supports this construction. Payment on an

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[16] [1981] HCA 26, (1981) 147 CLR 297 at 305.

hourly basis at an hourly rate of pay is the usual manner of calculation of remuneration for a casual worker.

72 The terms of the 1987 Act were intended to address the obstacles confronting the regular casual employee from qualifying for an entitlement to long service leave or payment in lieu thereof by the characterisation of his or her employment as terminating at the end of each period of engagement.

73 The entitlement to long service leave or payment in lieu thereof depends upon the length of a worker's service with his or her employer. That service must be continuous, either under a contract of service or a series of contracts of service.

74 It is true, as the respondent submits, that it is the service which must be continuous and not any series of contracts. However, to acknowledge the validity of that proposition does not support the proposition that service can be continuous for the purposes of the LSL Act where the worker works pursuant to a series of contracts of service that are not continuous. There can be no service in the relevant sense without a subsisting contract of service.[17] "Continuous" is to be given its ordinary grammatical meaning. If the worker claiming an entitlement to long service leave or payment in lieu thereof bases the claim on service pursuant to a series of contracts of service, those contracts must be continuous in the sense of being immediately connected, unbroken or uninterrupted in time.[18] But what constitutes service? In *AJ Mills & Sons Pty Ltd v Transport Workers' Union of New South Wales*[19] the Full Bench of the Industrial Court of New South Wales held, by majority, that "service" in the context of the equivalent New South Wales legislation means "employment in any duties or work for another".[20] So much can be accepted, however the common law has long recognised that service pursuant to an employment contract can consist of standing and waiting to perform work as much as the active performance of work duties.[21] As Dixon J (as he then was) said in *Automatic Fire Sprinklers Pty Ltd v Watson,*[22] "They also serve who only stand and wait." So the concept of undertaking "work for another" must be understood in this sense.

75 The concept that there can be continuous service under more than one contract of service presents some difficulty of construction. However, the apparent tension suggested between the concepts of continuous service and

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[17] *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555 at 587; see also *R v Brown; ex parte AMWSU* [1980] HCA 42, (1980) 144 CLR 462 at 475.

[18] *AJ Mills & Sons v Transport Workers' Union of New South Wales* [2009] NSWIRComm 135 at [73], (2009) 187 IR 56 at 76.

[19] [2009] NSWIRComm 135, (2009) 187 IR 56.

[20] [2009] NSWIRComm 135 at [73], (2009) 187 IR 56 at 76.

[21] *Forstaff Pty Ltd v Chief Commission of State Revenue* [2004] NSWSC 573 at [91], (2004) 144 IR 1 at 20 – 21.

[22] [1946] HCA 25, (1946) 72 CLR 435 at 466.

service under more than one contract is resolved by recourse to s 6(1). Section 6(1) is a deeming provision that enables service to be regarded as continuous notwithstanding that it may be interrupted by some specified absence from work or break in the worker's service. It is integral to the scheme of the LSL Act and the operation of the qualifying measure of "continuous service".

76 Accordingly, continuous service as defined in the LSL Act means uninterrupted or unbroken service subject to the exceptions in s 6(1).[23] If the service rendered by a worker is intermittent, sporadic or irregular it can only satisfy the test of "continuous service" if the breaks between service fall within the terms of s 6(1).

77 Applying this analysis to the facts of the present appeal, did the deceased render continuous service to his employer, and if so, for how long?

78 In my view, the deceased did render continuous service for a period of 20 completed years. While this is the conclusion reached by the industrial magistrate and affirmed on appeal by the Full Industrial Relations Court, I come to this conclusion on a different basis from that adopted below. In my view, the deceased rendered continuous service from 16 October 1990 to 23 September 2011 under a single contract of service. The appellant submits that this conclusion is not open on appeal because of the way in which the deceased conducted his case below. I do not accept this submission.

79 Both the industrial magistrate and the Full Industrial Relations Court accepted that the deceased worked for the appellant (and its predecessors) pursuant to a series of contracts of service. The deceased was self-represented at trial before the industrial magistrate. I have perused the transcript of the proceedings. The deceased did not prosecute his claim before the industrial magistrate on the basis that his eligibility arose by reason of 20 years of continuous service under a series of contracts of service. That was the construction the learned industrial magistrate placed on the evidence he heard. Before the Full Industrial Relations Court the deceased was represented by counsel. On the appeal to the Full Industrial Court the respondent's counsel embraced the finding of a series of contracts but did not do so to the exclusion of the alternative finding that there was a single contract.

80 On appeal to this Court the question arose as to whether the true position is that the deceased worked pursuant to a single contract albeit different employers by operation of s 3(3) of the LSL Act.[24]

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[23] *AJ Mills & Sons v Transport Workers' Union of New South Wales* [2009] NSWIRComm 135 at [74], (2009) 187 IR 56 at 76.

[24] (3) Employers are related for the purposes of this Act if—

(a) one takes over or otherwise acquires the business or part of the business of the other; or

(b) they are related corporations; or

(c) a series of relationships can be traced between them under paragraph (a) or (b).

81 The appellant submits that it is not open to the Court to consider the matter on that basis on appeal given the case was not conducted in that way below. Dr Bleby submits that had the case been conducted on that basis below other evidence might have been called.

82 In *Lucke v Cleary & Ors*[25] the Full Court of this Court considered the principles applicable to raising on appeal an argument not put at trial. As I explained in my reasons, with which Gray and David JJ agreed, a change of position on appeal should only be countenanced in limited circumstances. I said:[26]

> In *University of Wollongong v Metwally (No 2),*[27] the High Court enunciated the principle relevant to the determination of an application to raise on appeal an argument not put at trial. The Court said:[28]
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> > It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.
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> In *Coulton v Holcombe*,[29] the High Court explained the underlying principles justifying this approach:[30]
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> > It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards.
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> The High Court reaffirmed the position in *Water Board v Moustakas*:[31]
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> > More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied.
>
> (Footnote omitted)

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[25] [2011] SASCFC 118, (2011) 111 SASR 134.
[26] [2011] SASCFC 118 at [43] – [47], (2011) 111 SASR 134 at 146 – 147.
[27] (1985) 59 ALJR 481.
[28] (1985) 59 ALJR 481 at 483.
[29] (1986) 162 CLR 1.
[30] (1986) 162 CLR 1 at 7-8.
[31] (1988) 180 CLR 491 at 497.

> Examples of the High Court allowing a new point to be raised for the first time on appeal can be found in *Coulton v Holcombe*,[32] *National Australia Bank Ltd v KDS Construction Services Pty Ltd (In Liq)*,[33] and *Fingleton v The Queen*.[34]
>
> The threshold test to be met by a party which seeks to raise an argument for the first time on appeal is high. An appeal court will only permit a party to do so in the most exceptional circumstances. Where all the facts have been established beyond controversy or where the point is one of construction or of law, the appeal court may, in the exercise of its discretion, entertain the point where it is expedient in the interests of justice to do so but, even in those circumstances, the exercise of the court's discretion is informed by the proposition that a party will only be permitted to do so in the most exceptional circumstances.

83 In this case it is important to recognise first, that whether the deceased was employed pursuant to a contract of service or a series of contracts of service was a subsidiary issue. The fundamental question is whether there was continuous service for the specified number of years. If there is, whether that service is rendered pursuant to a contract of service or a series of contracts of service is very much a secondary consideration. Second, it is important to recognise that the trial was not conducted on the basis that the deceased worked pursuant to a series of contracts of service. Rather, that was the legal characterisation adopted by the learned magistrate. Unsurprisingly, the respondent on appeal to the Full Industrial Relations Court sought to uphold the finding by the industrial magistrate that there was the requisite continuous service under a series of contracts of service. However, before the Full Industrial Relations Court the respondent did not expressly abandon the alternative proposition that continuous service could have occurred pursuant to a contract of service. In my view, there is no prejudice to the appellant in considering that argument on appeal before this Full Court. Given the way the trial was conducted and the fact that the deceased was self-represented, the appellant can be presumed to have put forward all the evidence it considered relevant to the issue of whether the deceased qualified for payment in lieu of long service leave by rendering continuous service for the specified period in s 5, whether pursuant to a contract of service or a series of contracts of service. Accordingly, this is not a case of a point being raised for the first time on appeal. In deciding whether or not a point was raised at trial, no narrow or technical view should be taken.[35] The issue was very much alive at trial. The failure to prosecute the point on appeal to the Full Industrial Relations Court does not preclude this Court from now considering the question. I am satisfied that all the evidence relevant to the question was before the industrial magistrate. What follows thereafter is a question of the correct legal characterisation of the facts either admitted or proved beyond controversy. In my view, it is expedient and in the interests of justice to entertain the point.

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[32] (1986) 162 CLR 1.

[33] (1987) 163 CLR 668.

[34] (2005) 227 CLR 166 at 218-219.

[35] *Water Board v Moustakas* [1988] HCA 12 at [47], (1988) 180 CLR 491 at 497.

84 In my view, the correct characterisation of the facts of the deceased's employment relationship is that he worked pursuant to a continuing contractual obligation to make himself available for work as rostered by the appellant subject to such absences as were mutually agreed between the parties. It does not matter for the purposes of the LSL Act whether the appellant rostered the deceased for work in any particular week or not. Neither does it matter whether the deceased actually performed work in any particular week or not. The fact is that the deceased was obliged to be available for work when required by the appellant. He had to hold himself available to perform work as and when required by the demands of the appellant which were dictated by shipping movements. The industrial magistrate found as a matter of fact the deceased was always ready, willing and able to be called out for work at any hour of the day including weekends. Notification of the appellant's requirements were published to the deceased by the roster system, albeit his position on the roster did not necessarily guarantee him work on any particular day or week because of the unpredictable nature of shipping movements. Usually he would only have a day's notice of when he was required to work except for weekend work when he might have two days' notice. Obviously the terms under which he worked necessarily limited his ability to undertake other work or domestic or recreational activities. While at the end of any shift the deceased may not have known precisely when next he would be required to work, he knew generally that at some stage in the next days or weeks he would be required to work. The industrial magistrate found that failure on the part of the deceased to comply with the appellant's requirements to attend for work as and when required, would have had an adverse effect on his employment, i.e. his name would have been put to the bottom of the roster or led to the termination of the employment.

85 The periods between the actual performance of work duties by the deceased, generally speaking, did not break his "service" because mostly he was, as a matter of fact, holding himself ready and available to undertake work duties as required by his employer. If I am wrong in this view, in any event, the continuity of his service was preserved during these periods pursuant to s 6(1)(c). His absence from work on these occasions was in accordance with his contract of service.

86 Support for this approach is found in *AJ Mills & Sons Pty Ltd v Transport Workers' Union of New South Wales.*[36] Boland and Backmann JJ allowed an appeal from an award of long service leave pursuant to the *Long Service Leave Act 1955* (NSW) to three truck drivers who worked on a seasonal basis year in and year out for many years carting sugar cane. The season ran for approximately six months. The trial judge upheld the drivers' claims on the basis that they had rendered continuous service under a single and ongoing, continuous contract of employment. On appeal, the majority of the Full Bench of the Industrial Court of New South Wales allowed the appeal on the basis that there

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[36] [2009] NSWIRComm 135, (2009) 187 IR 56.

was not continuous service rendered by the drivers in circumstances where they did not perform work during the off-season, which was approximately six months every year. The drivers' employment was not unbroken. Their employment was terminated at the end of every season and they were reemployed at the commencement of the following season. Moreover, the service of the drivers was not deemed to be continuous pursuant to the equivalent provision in the New South Wales legislation to s 6(1)(i) because the period between the termination of their employment and the recommencement of employment exceeded two months. In reaching this conclusion, however, the majority referred with approval to the trial judge's analysis of the decision in *Robinson v New South Wales National Coursing Association Ltd.*[37] In that case it was held that Mr Robinson was employed as a greyhound steward over a period of 33 years pursuant to one unbroken contract of employment. His work required him to attend race meetings once or twice a week. His duties as a steward occupied approximately 24 to 42 days of the year over a long period of time. He knew when to attend a race meeting from a list showing all the meetings conducted by the respondent each year. At some times he took leave with the acquiescence of the respondent employer. Notwithstanding he had other employment, he was found to have performed continuous work under an unbroken contract of employment. The employment of Mr Robinson was distinguishable from the employment of the drivers because he was found to have been employed under a continuing employment contract. Further, Boland and Backmann JJ considered the operation of the equivalent provision in the NSW Act to s 6(1)(c)[38] which provided that the service of a worker shall be deemed to be continuous notwithstanding that the service has been broken by an interruption caused by the absence of the worker under the terms of the worker's employment. They said:[39]

> Any inquiry about whether s 4(11)(a1)(i) applies must ask whether the interruption or determination breaking the worker's service was caused by the absence of the worker under the terms of the worker's employment. In other words, in order for s 4(11)(a1)(i) to apply, a term of the worker's employment must have caused the interruption or the termination. The search, therefore, must be directed to the terms of the worker's employment. This would involve a consideration of the worker's contract of employment (and the search for either an express or implied term) and the relevant industrial instrument.

87 Under the LSL Act the equivalent provision in s 6(1)(c) is directed to the absence of the worker from work in accordance with the contract of service. I do not consider that the differences in language between the provision in the SA Act and its equivalent in the NSW Act makes any difference to the operation of the subsection. I am satisfied that the absence of the deceased from work between shifts when he was required to attend in accordance with shipping movements was an absence in accordance with the contract of employment. To put it another

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[37] (1982) 3 IR 161.

[38] Section 4(11)(a1)(i) of the *Long Service Leave Act 1955* (NSW).

[39] [2009] NSWIRComm 135 at [122], (2009) 187 IR 56 at 86 – 87.

way, I consider that it was either an express or implied term of his contract of service that he hold himself available to attend work as and when required in accordance with the roster and the demands of the appellant dictated by shipping movements.

88 Whether the term is express or implied is to be decided by first deciding the actual intention of the parties before considering the presumed or imputed intention. Where, as in this case, there is no formal contract, the approach to be taken is that adopted in *Byrne v Australian Airlines Ltd*[40] where Brennan CJ, Dawson and Toohey JJ referred to the well-known test for the implication of terms established in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings.*[41] Their Honours cited with approval the dictum of Deane J in *Hospital Products Ltd v United States Surgical Corporation*[42] that a rigid approach should be avoided in cases where there is no formal contract. In those cases the actual terms of the contract must first be inferred before any question of implication arises. Their Honours then adopted the test formulated by Deane J in *Hawkins v Clayton*[43] as follows:[44]

> The most that can be said consistently with the need for some degree of flexibility is that, in a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case. That general statement of principle is subject to the qualification that a term may be implied in a contract by established mercantile usage or professional practice or by a past course of dealing between the parties.

89 In my view, the existence of this term can be inferred from the conduct of the parties in circumstances where they have not attempted to spell out the full terms of their contract or can be implied by reference to the parties' imputed intention on the basis that the implied term is necessary for the reasonable or effective operation of the contract of this particular nature in the circumstances of the case.

90 There is no issue that the continuity of his service was not broken by the change in the identities of his employers. That is because the continuity of his service is preserved by the statutory fiction created by the definition of "service" in s 3(1) which provides that service means continuous service with the same employer or with related employers in accordance with the definition of related employers in s 3(3).[45]

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[40] (1995) 185 CLR 410.
[41] (1977) 180 CLR 266 at 283.
[42] [1984] HCA 64, (1984) 156 CLR 41 at 121.
[43] (1988) 164 CLR 539.
[44] (1988) 164 CLR 539 at 573.
[45] (3) Employers are related for the purposes of this Act if—
(a) one takes over or otherwise acquires the business or part of the business of the other; or
(b) they are related corporations; or

91 I consider that there are parallels between the position of the deceased and the casual employee in *Port Noarlunga Hotel v Stewart*.[46] Interestingly, in *Stewart's* case the Full Industrial Court dismissed an employer's appeal from a decision that an employee, classified as a casual, was entitled to payment in lieu of long service leave pursuant to the 1967 Act. As I have noted, under the 1967 Act the entitlement to leave depended upon the rendering of "continuous service", however, unlike the current Act, that service could only be rendered pursuant to a contract of service and not under a contract of service or a series of contracts of service. Mrs Stewart worked for over 10 years between five and six days per week for some 20 to 30 hours per week according to a roster with some additional work over and above the rostered hours. The Court found that if she failed to attend for work when rostered she would be unlikely to be rostered again. On appeal, the Court found these facts indicative of a single contract of employment notwithstanding that she was engaged on the basis that she would be undertaking "casual work". The Court rejected the employer's submission that there were a series of individual contracts formed each time she worked a shift. The Full Industrial Court dismissed the employer's appeal on the basis that there had been continuous service under a contract of service by the worker.

92 While the facts of *Stewart's* case are distinguishable from this case, the analysis by which the Court found the entitlement to long service leave established is readily applicable to the facts of this case.

93 The appellant sought to rely upon the judgment of the Victorian Supreme Court in *Melbourne Cricket Club v Clohesy*.[47] In *Clohesy* Dodds-Streeton J allowed an appeal from a magistrate who had granted the respondent long service leave pursuant to s 56 of the *Long Service Leave Act 1992* (Vic). The facts of the case are set out in her Honour's judgment in the following terms:[48]

> The respondent, Mr Clohesy, began working with the MCC as an 'events person' in about July 1984. Prior to 1995, staff such as Mr Clohesy would be advised of their next 'shift' by way of a card presented to them at the end of their previous shift. From 1995, the MCC commenced a process whereby it would send out 'appointment sheets' to casual employees, which requested them to indicate their availability on a seasonal basis. For example, prior to the 2004 football season, casuals in the 'bank' were sent a form which required them to indicate alongside each game scheduled at the Melbourne Cricket Ground, their availability or otherwise. Following the return of the availability sheets, events personnel would then be sent an appointment card or would be contacted by telephone with details as to when they were required.
>
> Over the years since 1984, Mr Clohesy made himself available for all football matches, for concerts and for some of the cricket games, particularly test match and international games. The evidence indicates that Mr Clohesy was not offered the opportunity to work at, and did not make himself available for, a large number of games in the domestic cricket competition.

(c) a series of relationships can be traced between them under paragraph (a) or (b).

46 (1981) 48 SAIR 220.

47 [2005] VSC 29, (2005) 14 VR 206.

48 [2005] VSC 29 at [9] – [11], (2005) 14 VR 206 at 208.

> Mr Clohesy was under no legally enforceable obligation to attend on any day which he had accepted for attendance. It was expected that, as a matter of courtesy, events personnel such as Mr Clohesy would notify the MCC, if for some reason, they were unable to attend. However, a person who did not attend was not penalized for failing to do so, save that a casual may have been allocated less work in the future if he or she became "notoriously unreliable."

94 The relevant qualifying test for an entitlement to long service leave in that case was the completion of 15 years of continuous employment with one employer. The magistrate had found that Mr Clohesy's work at the Melbourne Cricket Ground satisfied the test of continuous employment. Dodds-Streeton J concluded that this finding was in error as the learned magistrate had failed to apply the binding judgment of the Full Court of the Supreme Court of Victoria in *R v Industrial Appeals Court and Automatic Totalisers Ltd; Ex parte Kingston*[49] which decided that the concept of "continuous employment" in the predecessor legislation to the *Long Service Leave Act 1992* involved a mutual contractual obligation requiring the employer to offer continuous employment and the employee to render continuous service. Her Honour considered that the ratio of *Ex parte Kingston* applied to s 56 of the 1992 Act, requiring a continuous contract imposing an obligation on the employer to offer and on the employee to render employment. As the facts of Mr Clohesy's employment did not satisfy this test, his claim failed.

95 In my view, *Clohesy's* case is readily distinguishable. Mr Clohesy's employment was casual in the sense that it involved a series of ad hoc contracts of employment which lasted only for the duration of each successive event between which he neither performed any work for his employer as a matter of fact, nor had any legal obligation or entitlement to work for it in the future. He was not holding himself available and ready to perform work as required by the employer. The nature of the work he performed and the service he rendered was quite different from the service rendered by the deceased.

96 This analysis leads to the conclusion that the deceased rendered continuous service to his employer as defined from 16 October 1990 to 23 September 2011.

97 In all the circumstances I consider, albeit for reasons that differ from those adopted below, that the deceased had a qualifying period of service for the purposes of accruing an entitlement to long service leave under the LSL Act. That qualifying period was 20 completed years.

98 This conclusion renders it unnecessary to consider the appellant's submission concerning the application of s 6(2). I observe, however, that had it been the case that the deceased's continuity of service had been preserved under s 6(1)(f), (g), (h) or (i), then the operation of s 6(2) would have been enlivened. The application of that provision could present some difficulty in the circumstances of a casual employee claiming an entitlement to long service leave

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[49] Unreported, Full Court of Supreme Court of Victoria, delivered 26 February 1976.

or payment in lieu thereof when calculating the qualifying period. Fortunately that difficulty does not exist in this case.

Whether the period 10 October 2008 to 23 September 2011, when the deceased was absent by reason of a work-related injury and in receipt of weekly payments of income maintenance, is a period of unpaid leave within the meaning of s 3(4)(b)?

99 The deceased suffered a work-related injury which incapacitated him from working for the period from 10 October 2008 until his employment was terminated on 23 September 2011. During that period he was paid weekly payments of income maintenance pursuant to the *Workers Rehabilitation and Compensation Act 1996*. There is no issue that this period represents an absence from work on account of illness or injury within the meaning of s 6(1)(d) preserving the deceased's continuity of service during this period. The difficulty that arises with respect to this period comes from the provisions of the LSL Act relevant to the calculation of the respondent's entitlement to payment in lieu of long service leave.

100 The basis of the payment is the deceased's ordinary weekly rate of pay applicable immediately before the termination of his employment in accordance with the provisions of s 8(4). The basis for determining the worker's ordinary weekly rate of pay is prescribed by s 3(2). Relevantly, in the case of the deceased, that calculation must be undertaken in accordance with the provisions of s 3(2)(b) as he worked on a casual basis during the whole or part of the period of three years immediately preceding the relevant date. "The relevant date" as defined in the Act, in the case of the deceased, was the day on which the entitlement to payment in lieu of long service leave arose. That date is the date his employment was terminated, namely, 23 September 2011, pursuant to s 5(2). Accordingly, the calculation of the worker's weekly rate of pay immediately before the termination of his employment is to be ascertained by averaging the number of hours worked per week in the period of 24 September 2008 to 23 September 2011 and multiplying that result by the worker's rate of pay per hour at the date of termination.

101 The difficultly confronting the respondent is that for almost all of that three year period, namely, 10 October 2008 to 23 September 2011, the deceased did not work. The appellant submits that when you average the number of hours worked per week in that period of three years the deceased's entitlement to payment in lieu of long service leave is reduced to next to nothing.

102 The Industrial Relations Court did not accept this approach. It applied the provisions of s 3(4)(a) and disregarded the weeks when the worker was absent by reason of his work-related injury and in receipt of weekly payments of income maintenance. It did so on the basis that he was on unpaid leave during these weeks and in accordance with s 3(4)(a) those weeks were to be disregarded in

undertaking the averaging exercise required by s 3(2). The appellant submits that in doing so the Industrial Relations Court erred.

103 The respondent submits that the deceased was on unpaid leave during this period. It was leave because the employer permitted or authorised his absence. The respondent contends that it is implicit that the appellant permitted the deceased's absence from work during this period, probably because it was not able to provide suitable duties. He submits the deceased's absence from work on weekly payments of compensation was authorised by the *Workers Rehabilitation and Compensation Act 1986*. Accordingly, the deceased's absence from work during this period was permitted or authorised by the employer and was therefore "leave" for the purposes of s 3(4) of the Act. As the deceased was not remunerated by the appellant during this period, the leave was unpaid. Accordingly, the respondent submits s 3(4)(a) applies.

104 I do not accept the respondent's submission.

105 I do not accept the respondent's characterisation of the deceased's absence from work on weekly payments of income maintenance. To characterise the appellant as permitting the deceased's absence from work during this period involves a misconception. The deceased was not absent from work with the permission of the employer. There was nothing for the employer to permit. The deceased's absence from work was due to an inability to perform work duties due to injury. The employer can be said to have permitted his absence from work only to the extent it took no action to terminate the contract of employment until 23 September 2011. Neither is it proper to characterise the deceased's absence from work during this period as being authorised by the *Workers Rehabilitation and Compensation Act 1986*. The *Workers Rehabilitation and Compensation Act 1986* merely confers rights, duties and obligations on workers who suffer injury arising from employment[50] and the employers of such workers. In any event, whether the deceased's absence was authorised by the *Workers Rehabilitation and Compensation Act 1986* does not involve any authorisation of that absence by the employer. More fundamentally, however, a worker's absence from his or her employment because of an injury arising from employment is not "leave" in any commonly understood industrial sense. Leave is an entitlement relieving the employee from the performance of work duties, which is conferred by the terms of the employment contract, an industrial instrument or Act of Parliament that applies to that employment. Usually such leave is paid. Leave can also be granted to an employee by an employer as an indulgence. The employee is relieved from the performance of work outside of any contractual or statutory context. Usually in those circumstances it is unpaid. The distinction between leave and the absence of a worker from employment due to compensable injury is highlighted by the provisions of s 40 of the *Workers Rehabilitation and Compensation Act 1986*. Section 40 provides:

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[50] Section 30 *Workers Rehabilitation and Compensation Act 1986* (SA).

(1) Subject to subsection (3), neither the liability to make weekly payments to a worker in respect of a period of incapacity nor the amount of such weekly payments is affected by a payment, allowance or benefit for annual leave or long service leave to which the worker is entitled in respect of that period.

(2) Where a worker is absent from employment in consequence of a compensable injury, the period of absence shall for the purposes of computing the worker's entitlement to annual leave or sick leave under any Act, award or industrial agreement, be counted as a period of service in the worker's employment.

(3) Where a worker has received weekly payments in respect of total incapacity for work over a period of 52 weeks or more, the liability of the employer to grant annual leave to the worker in respect of a year of employment that coincides with, or ends during the course of, that period shall be deemed to have been satisfied.

(4) Subsection (3) does not affect the obligation of an employer to make a payment in the nature of an annual leave loading.

(5) Where—

(a) the entitlement of a worker to annual leave, or payment in lieu of annual leave, is governed by a law of the Commonwealth or a State or Territory of the Commonwealth (not being this State); and

(b) the worker is absent from employment in consequence of a compensable injury; and

(c) the period of absence is not taken into account as service for the purpose of calculating the worker's entitlement to annual leave or payment in lieu of annual leave,

the worker is entitled by way of compensation to the monetary value of the annual leave that would have accrued if the worker had not been absent from employment.

(6) Any compensation payable under subsection (5) shall be paid when the annual leave, or the payment in lieu of annual leave, would (assuming that the worker had not been absent from employment) have been granted or made.

106 It is implicit in this section that the absence of the worker from employment due to compensable injury is not a form of leave.

107 Further, the decision of this Full Court in *South Australia v Day*[51] emphasises that the distinction between the rights, duties and obligations conferred by the *Workers Rehabilitation and Compensation Act 1986* in respect of employees' absence from work due to work-related injury and the rights, duties and obligations conferred by the contract of employment.

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[51] [2000] SASC 451,(2000) 78 SASR 270.

108 In my view, the deceased's absence from work during this period as a result of a work-related injury cannot be characterised as unpaid leave for the purpose of s 3(4)(a). I acknowledge that the LSL Act is remedial legislation but even allowing for a liberal and generous construction, I cannot construe the worker's absence on workers' compensation as constituting unpaid leave. This is a most regrettable conclusion because it has the result of depriving the respondent of the entitlement I consider the legislature intended to confer. Nonetheless, the text is intractable. I cannot accept the appellant's submission that this represents a deliberate policy decision by the Parliament. In my view, this represents an oversight by the Parliament. I consider that this case highlights the need for urgent legislative reform by the Parliament to fill the lacuna disclosed by this case.

Was the relevant date for the purposes of s 5(2) and s 8(4) 23 September 2011 or 10 October 2008?

109 As I have discussed already, the relevant date, as defined in the Act, is the date on which long service leave is commenced or an entitlement to payment in lieu of long service leave arises. In this case, that is the date on which his employment is terminated by reason of s 5(2). Accordingly, by reason of the provisions of s 8(4) the basis of the payment to the deceased is his ordinary weekly rate of pay applicable immediately before the termination of his employment.

110 The appellant submits this occurred on 10 October 2008 when the deceased last worked. The respondent submits this occurred on 23 September 2011 when the notice of termination of employment given by the appellant pursuant to s 58C of the *Workers Rehabilitation and Compensation Act 1986* took effect.

111 I do not accept the appellant's submission. It is founded on an incorrect premise, namely, that the deceased worked pursuant to a series of *ad hoc* contracts. For the reasons already explained, that was not the case. There was a single contract of service which was terminated lawfully by the giving of notice to the deceased. At common law a valid notice of termination brings the contract of employment to an end when the contract expires.[52] The notice was effective on 23 September 2011. That is when the entitlement to payment in lieu of long service leave, such as it is, arose.

Was the Court deprived of jurisdiction to make an order for payment in lieu of long service leave by reason of the operation of s 13(4) of the *Long Service Leave Act 1987* (SA)?

112 Section 13 confers power on the Industrial Relations Court to order an employer (or former employer) of a worker to grant long service leave or make

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[52] *Grout v Gunnedah Shire Council (No. 2)* (1994) 57 IR 243; *Hill v CA Parsons & Co Ltd* [1972] Ch 305 at 313 – 314; *Griggs v Noris Group of Companies* [2006] SASC 23 at [60], (2006) 94 SASR 126 at 146.

payment in lieu of leave to a worker.[53] Section 13(4) provides that an order cannot be made if the service of the worker was terminated more than three years before the date of the application.

113 The appellant submits that the Court lacked jurisdiction to make the order by reason of s 13(4) because the deceased's employment was terminated more than three years before the date of the application. As I have noted, the deceased made a claim for payment in lieu of long service leave on 7 May 2012.

114 The appellant's submission is predicated upon the proposition that the deceased's service was terminated on 10 October 2008. Given my conclusion that the deceased's employment was terminated with effect on 23 September 2011, s 13(4) does not operate to deprive the Industrial Relations Court of the power to make the order.

Conclusion

115 For the reasons set out above, I am of the view that the deceased was entitled to a payment in lieu of long service leave upon the termination of his employment on 23 September 2011. However, in the unusual circumstances that obtain in this case, where the deceased did not work for almost all of the three years immediately preceding his entitlement to payment in lieu of long service leave arising, the calculation of that entitlement pursuant to s 3(2) is in a negligible sum. This is an unfortunate result. I consider it deserves the attention of the Parliament. I would allow the appeal. I would set aside the order made by the learned industrial magistrate. I would remit the matter to the learned industrial magistrate for the purposes of making an order after calculating the entitlement to payment in lieu of long service leave in conformity with these reasons.

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53 The Court is also empowered to order payment in lieu of long service leave to the personal representative of a deceased worker.