HOW SECURE ARE EMPLOYEES' RIGHTS TO LONG SERVICE LEAVE?

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Long service leave has many facets. In *Kennedy* v. *Board of Fire Commissioners*,[1] the New South Wales Industrial Commission in Court Session described the basic social purpose of the long service leave legislation in that State as "reward for long service".[2] More recently,[3] the Commonwealth Conciliation and Arbitration Commission expressed the view that long service leave should be treated as a respite from work and not as a "reward for long service given over an extended period".[4] Certain provisions[5] in the status and awards governing this benefit also emphasize the recreational aspect of long service leave. But to some employees it is merely an attractive fringe benefit which serves as a form of severance pay. Others accumulate their long service leave entitlement for their retirement.[6]

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[1] 1967 A.R. 455.

[2] *Kennedy* v. *Board of Fire Commissioners* 1967 A.R. 455 at 460. See too, *R.* v. *Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* (1952) 86 C.L.R. 283 at 308 *per* Webb, J.

[3] *Re Municipal Officers* (*N.S.W. Electricity Undertaking*) *Long Service Leave Award* 1970 (1973) 148 C.A.R. 917.

[4] (1973) 148 C.A.R. 917 at 919.

[5] In most States, the payment of an amount in lieu of long service leave where the entitlement has accrued prior to the termination of the employment is prohibited. Contrast the Long Service Leave Act 1956 (Tas.), s. 9A, inserted by Long Service Leave Act 1972 (Tas.), s. 6. In some jurisdictions paid employment during the period of leave is prohibited, e.g. Long Service Leave Act 1958-1973 (W.A.) s. 27(1); Labour and Industry Act 1958 (Vic.), s. 161(1), Long Service Leave Act 1967-1972 (S.A.), s. 13(1). Under the standard federal award, an employee on leave is prohibited from employment for hire or reward with any employer he knows is bound by the award, cl. 8(1), *Re Graphic Arts and Metal Trades (Long Service Leave) Awards* 106 C.A.R. 412; 108 C.A.R. 740; 108 C.A.R. 1036; 108 C.A.R. 1127. The standard federal award is hereinafter referred to as the *"Metal Trades (Long Service Leave) Award,* 1964".

[6] In 1969-1970, taxation returns revealed that some $235 million was paid to individuals as lump sum retirement or terminal payments. The Hancock Committee estimated that only a minor part of this amount represented accrued long service leave. See: Australia, *National Superannuation in Australia,* Interim Report of the National Superannuation Committee of Inquiry [Chairman, Professor Keith Hancock] June 1974 (Canberra, 1974) p. 36. This finding suggests that long service leave entitlement is being taken as leave rather than in the form of monetary payments. If this is so, then long service leave may properly be described as "respite from work".

However long service leave is treated, employees almost take it for granted that they will receive the benefits promised. For a number of reasons such an assumption is unfounded. The burden of this paper is to analyse the factors which may deprive an employee of long service leave or the chance to qualify for such leave and to propose measures which will more adequately protect employees' interests in this benefit.

The terms of long service leave entitlement are prescribed by statutes[7] and awards[8] in each State and the federal long service leave "code".[9] Entitlement is based upon a certain qualifying period of service under an "unbroken contract of employment"[10] or in a "continuous employment".[11] A variety of factors and events could sever a contract of employment or interrupt a continuous employment. Unless the law excused these interruptions, employees would, in many cases, be deprived of an opportunity to benefit from long service leave.

1. Interruptions Excused by the State Statutes and the Federal "Code"

(i) *Absence on Annual Leave or Long Service Leave.*

In Victoria, Tasmania and Western Australia, it is expressly provided that the taking of annual leave or long service leave shall not interrupt the continuity of employment.[12] The relevant provision in the Australian Capital Territory is similar.[13]

The Queensland statute excuses "absence from work on leave granted by the employer",[14] while in South Australia an "absence of the worker from work in accordance with the contract of service" and an absence by leave of the employer do not break the continuity of service.[15] In both these States the provisions are broad enough to cover absence on annual leave or long service leave.

Entitlement under the New South Wales statute and the federal "code", depends upon an "unknown contract" of employment. Since normal absences from employment such as the taking of annual leave or of long service leave do not sever this contract it has not been necessary to exempt these absences in those jurisdictions.

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[7] See: Industrial Conciliation and Arbitration Act, 1961-1967 (Qld.); Long Service Leave Act, 1955-1967 (N.S.W.); Labour and Industry Act 1958 (Vic.); Long Service Leave Act, 1967-1972 (S.A.); Long Service Leave Act, 1958-1973 (W.A.); Long Service Leave Act 1956 (Tas.). See also Long Service Leave Ordinance, 1976 (A.C.T.).

[8] See e.g.: *In re Butchers Wholesale (Cumberland) and Other Awards* 1953 A.R. 738; *Meat Industry Employees Riverstone Meat Co. Pty. Ltd. (Long Service Leave) Award* 1957 A.R. 135.

[9] See generally D. C. Thomson, "The Federal Long Serve Leave Code" (1959) 1 *Journal of Industrial Relations* 51.

[10] This is the criterion under the N.S.W. Act, s. 4(11) and the standard federal award: *Metal Trades (Long Service Leave) Award,* 1964, cl. 5(1).

[11] See: Vic., s. 154; W.A., s. 8(1); Tas., s. 8(1); In Queensland, South Australia and the Australian Capital Territory, the criterion is "continuous service". See: Qld., ss. 17(2) and 19(2); S.A., ss. 4(1) and 5; and A.C.T., s. 4.

[12] See: Vic., s. 151(1)(a); Tas., s. 5(1)(a); W.A., s. 6(1)(a).

[13] A.C.T., s. 2(1).

[14] Qld., s. 17(3)(a).

[15] S.A., s. 5(1)(a) and s. 5(1)(b).

(ii) *Absence on Account of Illness or Injury.*

Short absences on account of illness or injury are expressly or impliedly excused by the statutes in each State and the federal "code".[16] In Tasmania, the illness or injury must be certified by a qualified medical practitioner.[17] In Queensland, the absence is excused only if the employer grants leave.[18] Where the absence is caused by an injury arising out of or in the course of his employment, it appears that the Victorian and Tasmanian statutes grant an unlimited exemption.[19]

In Victoria, a woman's absence from work for a period not exceeding twelve months through pregnancy does not interrupt her period of "continuous employment".[20] In the other jurisdictions, however, there is no express provision of this nature, and it would seem that pregnancy cannot be classified as an "illness".[21] It appears, therefore, that in most jurisdictions a lengthy absence through pregnancy will rob an employee of the chance to qualify for long service leave unless the employer grants the employee special leave for the period of her absence.

(iii) *Attempted Evasion of Award or Statutory Obligations.*

The relevant statute in each State and the standard federal long service leave award expressly provide that any interruption or termination of an employee's employment caused by an employer for the purpose of avoiding his award or statutory obligations will not deprive the employee of his accruing entitlement;[22] the employee's contract of service remains unbroken, and the employment continuous, notwithstanding the employer's action.

Australian Society of Engineers v. *Rogers Meat Co. Pty. Ltd.*[23] illustrates the evidentiary problem raised by this type of provision. Wharton was employed by the company as a fitter and turner at the time of his dismissal less than a fortnight before the completion of a ten year period of qualifying service with the company. It appeared that he had been dilatory in carrying out work assigned to him over a weekend. Because of his lack of progress he used the services of an assistant on the Sunday without justification or authorization and thereby incurred expensive

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[16] See: Qld., s. 17(3)(a) (leave of the employer is necessary); Vic., s. 151(1)(b); S.A., s. 5(1)(c) (no time limit mentioned); W.A., s. 6(1)(b); Tas., s. 5(1)(b) (no period mentioned); A.C.T., s. 2(1). Absences of this nature would not normally sever the "unbroken contract of employment" contemplated by the New South Wales and federal award provisions.

[17] See: Tas., s. 5(1)(b).

[18] See: Qld., s. 17(3)(a).

[19] See: Vic., s. 151(1)(g); and Tas., s. 5(1)(g). Where, however, the injury causes permanent and total incapacity it would appear that the contract of service is terminated by frustration: *Boilermakers' Society of Australia, Queensland Branch* v. *Evans Deakin & Co. Ltd.* (1962) 56 Q.J.P. 5.

[20] Vic., s. 151(1)(fa).

[21] See *Whiteley* v. *Garfield Spinning Ltd.* [1967] I.T.R. 128.

[22] See: Qld., s. 17(3)(d); N.S.W., s. 4(11)(a)(i); Vic., s. 151(1)(c); S.A., s. 5(1)(d); W.A., s. 6(1)(c); Tas., s. 5(1)(c); *Metal Trades (Long Service Leave) Award*, 1964, cl. 5(1). The equivalent provision in the Australian Capital Territory is Long Service Leave Ordinance 1976 (A.C.T.), s. 2(1).

[23] 1956 Industrial Arbitration Service, *Current Review* 463.

penalty rates which could have been avoided. When the company's engineer questioned Wharton about the incident, he replied in improper and abusive language. The Industrial Commission of New South Wales found that the applicant union had not discharged the onus of proving that the dismissal was unjustified and rejected the application for reinstatement.

It is possible to argue from this case that a dismissal on technical legal grounds will break continuity of employment and sever a contract of service. Where there is a clear proximity between the interruption or termination of the employment and the time at which the employee would become entitled to long service leave it may be easier to prove the illicit motive of the employer. It would appear much more difficult to impugn a dismissal with notice, say, twelve months before entitlement accrues.

In those jurisdictions where reinstatement is available in cases of harsh, unjust or unconscionable dismissal an employee may still forfeit the benefit of his service prior to the dismissal because reinstatement does not revive the original contract of employment; it merely enables the employee to re-commence employment under a fresh contract. This result can, however, be avoided if the industrial tribunal which orders reinstatement requires the employer to give the employee credit for his previous service.

(iv) *Interruptions Arising Directly or Indirectly from an Industrial Dispute.*

The federal "code" and the relevant statutes in Western Australia, South Australia, Tasmania and the Australian Capital Territory provide that interruptions of this nature do not break continuity of employment or terminate a contract of service provided the employee returns to work in accordance with the terms of settlement of the dispute.[24] Unfortunately it is often difficult to discern the terms of settlement of an industrial dispute; in many cases the employees simply return to work without negotiation.[25] The Queensland and South Australian provisions have overcome this difficulty to some extent by providing that such an interruption is not taken into account where the striking employees are re-employed by their employer.[26] The New South Wales and Victorian Acts also avoid this problem by simply ignoring any interruption which arises directly or indirectly from an industrial dispute.[27]

It may be noted that only breaks arising from an *industrial dispute* are excused by the State statutes and the federal "code". Since in most jurisdictions the concept of an industrial dispute is linked with the term

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[24] *Metal Trades (Long Service Leave) Award*, 1964, cl. 5(1); W.A., s. 6(2)(e); S.A., s. 5(1)(e); Tas., s. 5(1)(d); A.C.T., s. 2(5).

[25] Fifty-three percent of industrial disputes in 1975 terminated when employees resumed work without any negotiation. *Industrial Disputes*, December Quarter 1975 and Year 1975 (Canberra, Australia Bureau of Statistics, 1976), p. 3.

[26] Qld., s. 17(3)(d)(ii) and S.A., s. 5(1)(e).

[27] These provisions simply excuse any interruption which has arisen directly or indirectly from an industrial dispute. See: N.S.W., s. 4(11)(a)(ii); and Vic., s. 151(1)(d).

"industrial matter", interruptions caused by disputes over non-industrial matters might not be excused. Further, to determine in advance whether a dispute relates to an industrial matter or not is sometimes a speculative exercise. Matters regarded by a union as legitimate issues for negotiation with an employer may fall outside the scope of "industrial matters". In particular, strikes over ecological or political issues or managerial matters will interrupt the continuity of an employee's service and his contract of employment.[28] This is a harsh result for an individual employee who has little influence upon his union's decision to take strike action.

In New South Wales, Queensland and South Australia and in the federal "code", any *determination* arising directly or indirectly from an industrial dispute does not interrupt continuity of service or terminate the contract of employment.[29] The relevant provisions in Victoria, Tasmania and the Australian Capital Territory do not excuse such a determination:[30] it appears that the term "interruption" in the long service leave legislation in those jurisdictions connotes a temporary suspension, rather than a termination, of the contract of employment. At common law an employer is legally entitled to treat a striker's withdrawal of labour as conduct justifying summary dismissal.[31] If this course is open to employers, employees who participate in strikes could prejudice their chances of qualifying for long service leave, at least in Victoria, Tasmania and the Australian Capital Territory. The relevant provisions in New South Wales, Queensland and South Australian statutes and the standard federal award

[28] For an excellent analysis of the scope of the term "industrial matter" see: E.I. Sykes and H.J. Glasbeek, *Labour Law in Australia* (1972), pp. 405-433.

[29] See: N.S.W., s. 4(11)(a)(ii); Qld., s. 17(3)(d)(ii); S.A., s. 5(1)(e); and the *Metal Trades* (*Long Service Leave*) *Award*, 1964, cl. 5(1). The Western Australian provision excuses "any *absence* from duty arising directly or indirectly from an industrial dispute if the employee returns to work in accordance with the terms of settlement of the dispute". [Emphasis added]. This term "absence" would probably encompass a "determination". See W.A., s. 6(2)(e).

[30] See: Vic., s. 151(1)(d); Tas., s. 5(1)(d).

[31] C. Grunfeld, *Modern Trade Union Law* (1966), p. 325. See also the *dicta* of Donovan, L.J. (as he then was) and Lord Devlin in *Rookes* v. *Barnard* [1963] 1 Q.B. 623 at 682-683, Denning, M.R. in *J.T. Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269 at 285 and *Morgan* v. *Fry* [1968] 2 Q.B. 710 which suggest that a strike notice should be regarded as indicating an intention to *suspend* rather than terminate the contracts of service of the strikers. While this theory probably accords with the realities of the situation and the wishes of both employer and employees, it does cut across the common law principle that suspension of a contract must be consensual.

Grunfeld's comment on the effect of strikes upon continuity of employment is particularly relevent in the context of long service leave:

> As to those important industrial schemes based in part on the factor of continuity of service, management needs to be exceptionally unimaginative if it tries to use the formal break in continuity of service in such schemes constituted by a lawful strike as a bargaining counter in its negotiations with organised labour.
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> (Grunfeld, *Modern Trade Union Law*, p. 33.)

The fact remains that employers can resort to the remedy of dismissal if their employees withdraw their labour. For a report of an incident in which seventy-six employees were dismissed for attendance at a stop-work meeting over a compulsory unionism issue, see *The Australian* 27 March 1974, 1. And on 10 May 1974, 1,000 Broken Hill miners were dismissed over a "go-slow campaign" in support of a wage demand: *The Australian* 11 May 1974, 11.

would seem to be broad enough to cover this situation since they refer to determinations arising *indirectly* from an industrial dispute. This may include summary dismissals in response to strike action. But, once again, the salutary effect of these provisions is confined to disputes over industrial matters.

(v) *Dismissal followed by Re-employment.*

In most jurisdictions the dismissal of an employee followed by a re-employment of the employee within two months of the dismissal will not disrupt the continuity of service or the contract of employment for the purposes of long service leave.[32] The term "re-employment" means a re-engagement *by the former employer;* it is hardly necessary to state that the term does not cover the *"fortuitous employment"* of the dismissed employee within the two month period by another employer at a different wage on different work.[33]

(vi) *Stand-down or Dismissal on Account of Slackness of Trade.*

Most of the State statutes and the federal "code" provide that the standing-down of employees on account of slackness of trade will not interfere with the continuity of employment or the contract of service.[34] The Western Australian provision is slightly broader in scope since it excuses stand-downs in accordance with a federal award or an award of that State.[35] In some jurisdictions the exemption is only available if the employee is re-employed by the employer within a certain period.[36]

Only the federal, New South Wales, Queensland and Western Australian provisions expressly cover *dismissals* on account of slackness of trade.[37] This is an important concession to employees' interests since in Victoria it has been held that continuity of employment is interrupted by a dismissal for slackness of trade followed by a re-employment three months later.[38] Under the federal "code" and the New South Wales and Queensland statutes such an absence would not have disentitled an employee.

The termination of a worker's employment in a particular capacity because of slackness of trade does not necessarily mean that the continuity of his employment will be broken. In *Crennan* v. *Oliver Furniture Pty.*

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[32] See: Qld., s. 17(3)(c) (three months' absence excused); Vic., s. 151(1)(e); S.A., s. 5(1)(g); A.C.T., s. 2(5)(e); W.A., s. 6(2)(f) (dismissal from any reason other than slackness of trade if re-employed within two months is excused); Tas., s. 5(1)(e). The standard federal award is identical to the Western Australian provision on this point. See *Metal Trades (Long Service Leave) Award,* 1964, cl. 5(1).

[33] *Wein* v. *Melville* (1958) 13 I.I.B. 438.

[34] See: Qld., s. 17(3)(d); N.S.W., s. 4(11)(a)(iii); Vic., s. 151(1)(f); S.A., s. 5(1)(f); W.A., s. 6(2)(d); Tas., 5(1)(f); *Metal Trades (Long Service Leave) Award,* 1964, cl. 5(1).

[35] W.A., s. 6(2)(d).

[36] See: S.A., s. 5(1)(f); *Metal Trades (Long Service Leave) Award,* 1964, cl. 5(1); A.C.T., s. 2(5)(b).

[37] See *Metal Trades (Long Service Leave) Award,* 1964, cl. 5(1); N.S.W., s. 4(11)(a)(iii); Qld., s. 17(3)(d); W.A., s. 6(2)(g).

[38] *William Angliss & Co. Pty. Ltd.* v. *Beasley* (1962) 17 I.I.B. 796.

Ltd.[39] a foreman was advised that the economic situation of the company made it necessary to dispense with his position. He forthwith accepted the company's offer of a re-classification as a pattern maker on a lower rate of pay. The Industrial Appeals Court held that the worker's continuity of employment was maintained nothwithstanding the re-classification.

The phrase "slackness of trade" admits several interpretations. It could refer to a general economic recession. Again, the overall economic position of the employer might reflect a "slackness of trade". Alternatively the phase might relate to a down-turn in one aspect of the employer's operations. In *Amalgamated Engineering Union of Employees, Queensland* v. *Evans Deakin & Co. Ltd.*[40] the Industrial Conciliation and Arbitralian Commission of Queensland chose the latter interpretation. Thus, if one sphere of the employer's business is experiencing a down-turn, it matters not that the other sectors of the business compensate for this depression.[41]

(vii) *Absence through Service in the Armed Forces.*

In all jurisdictions absence through service in the naval, military or air forces does not interrupt continuity of employment or sever the contract of employment.[42]

(viii) *Absence on Union and Related Business.*

Any reasonable absence on union business is excused in Western Australia if the employer refuses leave.[43] In Tasmania, absences through attendance at meetings of the Apprenticeship Commission or a wages board are exempted.[44] In other States which rely on the concept of continuous employment or continuous service as a basis for long service leave entitlement, there are no express provisions dealing with this type of situation.[45] In these jurisdictions an employee who plays an active rôle in legitimate union or industrial activities may jeopardise his accruing entitlement.

(ix) *Absence by Leave of the Employer.*

Many of the oversights or omissions of the long service leave provisons can be corrected by the sections which excuse any absence by leave of the employer. Provisions of this nature are not necessary in the New South Wales Act or the standard federal award because such absences would not sever the contract of employment. In the other States, employers are, of course, free to grant leave for reasons other than those specified

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[39] (1962) 17 I.I.B. 799. Compare *Innes* v. *G.J. Coles & Co. Limited* 1969 A.I.L.R. Rep. 529.

[40] (1972) 27 I.I.B. 803.

[41] *Ibid.*

[42] See: Qld., s. 17(12); N.S.W., s. 4(11)(d); Vic., s. 151(5)(a); S.A., s. 5(3); W.A., s. 6(1)(d); Tas., 5(5); A.C.T., s. 2(4). See also Defence (Re-establishment) Act 1965 (Cth.).

[43] See W.A., s. 6(2)(h).

[44] See Tas., s. 5(1)(da) and s. 5(1)(h)(iv).

[45] If the employee can persuade the employer to grant leave, this will not present a problem. See *post.*

in the relevant statute and for periods in excess of those stipulated.[46] In either case continuity of service will be preserved.[47] However, it does seem that in many cases the legislature has left the employee's accruing entitlement at the mercy of the employer's discretion and disposition.

2. Do the Excused Absences Count as Qualifying Service?

Although the interruptions excused by the State statutes and the federal "code" do not break the continuity of a worker's employment or his contract of employment, such absences are not always taken into account in calculating the employee's long service leave entitlements.[48] In other words, the length of qualifying service in some cases is the sum of the period of service before the interruption and the period of service after the interruption.

3. Service with Related Companies

The interruption of determinations discussed above are not the only factors which could interfere with the employee's "continuous employment" or an "unbroken contract of employment". A simple transfer of an employee from one company to another company in the same group could defeat an employee's chance of qualifying for long service leave. To safeguard an employee's interests in this situation the relevant provisions in most jurisdictions deem any period of employment with a company related to the "initial employer" to be a period of service with that

[46] For an example, see *Ingamellis* v. *Howlett* (1954) 9 I.I.B. 1032 where it was held that an absence of five weeks on account of sickness did not break continuity of employment since the employer had granted leave for that period.

[47] See Qld., s. 17(3)(a); Vic., s. 151(1)(g); S.A., s. 5(1)(e); W.A., s. 6(2)(c); Tas., s.5(1)(i). In Western Australia there is an additional provision excusing any absence other than those discussed above unless the employer, during the absence or within fourteen days of the termination of the absence, gives written notice to the employee that the continuity of his employment has been broken by that absence: W.A., s. 6(2)(i).

[48] In Queensland, where an employee has been dismissed or stood-down by the employer or where he himself terminates his service by reason of illness or injury and he is subsequently re-employed, the period of his absence will not be counted as qualifying service: Qld., s. 17(3)(b).

Absence arising directly or indirectly from an industrial dispute is not counted as qualifying service in any jurisdiction. See: Qld., s. 17(3)(d); N.S.W., s. 4(11); Vic., s. 151(2); S.A., s. 5(1); W.A., s. 6(3); Tas., s. 5(2); A.C.T., s. 2(5); and *Metal Trades* (*Long Service Leave*) *Award* 1964, cl. 5(1).

Interruptions caused by slackness of trade are not counted in any jurisdiction.

Absence through a dismissal followed by a re-employment within two months is not counted in Victoria, South Australia, Western Australia, Tasmania, the Australian Capital Territory or under the standard federal award.

An absence by leave of the employer is not taken into account in computing the period of qualifying service in Victoria, Western Australia, South Australia, Tasmania or the Australian Capital Territory.

Absence through injury sustained in the course of employment is not counted in Victoria or the Australian Capital Terriory. And in Victoria an absence on account of pregnancy is not taken into account in calculating the period of service.

In Western Australia, any reasonable absence on legitimate union business where this employer refuses leave is not counted as qualifying service. Nor is the absence contemplated by s. 6(2)(i) of the W.A. Act counted.

It appears that only the New South Wales statute excludes from qualifying service the period of absence caused by an employer who seeks to evade the long service leave provisions. See N.S.W., s. 4(11).

employer.[49] The periods of service with the "initial employer" and subsequent periods with related companies are, therefore, aggregated to calculate the period of qualifying service.

4. Interstate Service

(i) *Jurisdiction.*

A more complex problem arises from interstate service with the one employer or with companies related to the employer. It is sufficient for present purposes to refer to some of the anomalies.[50]

In Queensland, long service leave entitlement is based upon a certain period of "continuous service with one and the same employer (whether wholly within or partly within and partly without Queensland)".[51] This provision was applied in *Re Federal Hotels Ltd.*[52] There, the claimant was engaged by the company in Melbourne around August 1954. He then worked for the company in Victoria and New South Wales before being transferred to Queensland as the company's State general manager. In September 1964, after four years Queensland service, he resigned. On these facts the Industrial Court of Queensland upheld the employee's claim for a payment in lieu of proportionate long service leave ruling that his service fell literally within the terms of the local Act. The court did not consider whether the Queensland Parliament was competent to enact such a provision but it would appear that it can be justified on private international law principles.[53]

In New South Wales, jurisdiction in these cases may be invoked where the service on which the claim is based has a substantial connection with that State. In *Australian Timkin Pty. Ltd.* v. *Stone* (*No.* 2)[54] the New South Wales Industrial Commission in Court Session stressed that it is not necessary for the terminating event to occur within the State. Rather, at the time of the employee's resignation, dismissal or death, the Commission will look at the service as a whole and ascertain whether it may fairly be said to be substantially New South Wales service.[55] Since the Act was designed to provide a "reward for long service" the Commission felt that the locality of the service was irrelevant.[56] Rather,

[49] See: Qld., s. 17(17); N.S.W., s. 14(13)(b)(i), (ii), (c) & (e); Vic., s. 151(1A); S.A., s. 5(6) and (7); Tas, s. 5(3A), (3B) and (3C); A.C.T., s. 11. Western Australia appears to be the only exception: the relevant statute in that State contains no provision relating to service in related companies. This is a serious defect.

[50] See generally K.R. Handley and V. Watson, "Australian Long Service Leave Legislation: Some P.I.L. and Related Problems" (1960) 3 *Syd. L.R.* 260 at 270-78.

[51] See Qld., ss. 17, 19.

[52] *Re An Employee of Federal Hotels Ltd.* (1965) 59 Q.J.P. 153 (hereinafter referred to as the "*Federal Hotels Case*").

[53] See *Broken Hill South Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (1937) 56 C.L.R. 337 at 375 where Dixon, J. (as he then was) commented that "it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability . . . " and that "it is of no importance upon the question of validity that the liability imposed is . . . altogether disproportionate to the territorial connection. . . . "

[54] 1971 A.R. 246.

[55] *Id.* at 253.

[56] *Id.* at 252.

entitlement to leave or a payment in lieu thereof accrued as an incident of employment in New South Wales.[57]

If the locality of the service is to be disregarded in applying the "substantial connection" test, what factors may be taken into account? In the Commission's view, the fact that the terminating event occurred within the State is significant, but not conclusive, evidence that the service had the necessary connection with the State.[58] Yet in *Australian Timken Pty. Ltd.* v. *Stone* (*No.* 2)[59] there were few other factors linking the service with New South Wales. The material facts were as follows: the employee was engaged in Victoria; he served a training period of about two years in the United States, and it was agreed that he would return to the company's head office at Ballarat in Victoria after his training period; the company was at all material times incorporated in Victoria although from August 1958 it was registered in New South Wales as a foreign company.

On the facts, the Commission concluded that the substantial connection test was satisfied. Notwithstanding their comment early in their judgment that "locality of service appears irrelevant",[60] their Honours seemed to rely heavily upon the fact that the employee served for eight years in New South Wales prior to his resignation. Indeed, in their view, the employee's period of service in New South Wales was "far longer than would have been sufficient to meet the test which we have formulated".[61] One final comment should be made about the reasoning in this case. The Industrial Commission inferred from the facts that the proper law of the contract was Victorian law yet this finding had no bearing upon the employee's entitlement. This was so because the relevant long service leave Act operated independently of the will of the parties to the contract of employment, and it displaced the proper law of the contract as the governing principle.

In the other States, the principles upon which the tribunals will assume jurisdiction in these cases await definition. It has been suggested that jurisdiction could be invoked in the State where the employment is located even though during some periods the employee was engaged in service outside that that State.[62] The suggestion probably derives from the judgments of Rich and Dixon, JJ. in *Mynott* v. *Barnard*,[63] a case involving the construction of the Workers' Compensation Act 1928 (Vic.). However, the basic nature of long service leave legislation differs substantially from workers' compensation legislation. Under the former, benefits are conferred not by

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[57] *Ibid.*
[58] *Id.* at 254.
[59] 1971 A.R. 246.
[60] *Id.* at 252.
[61] *Id.* at 254.
[62] See K.R. Handley and V. Watson, "Australian Long Service Leave", at 270. See also J.C. Moore and Vernon Watson, *Long Service Leave* (*New South Wales*) (2nd ed. by Vernon Watson 1963) and "Long Service Leave: Some Comments on the Legislation in Victoria" (1961) 35 *Law Institute Journal* 286 at 290.
[63] (1939) 62 C.L.R. 68.

reason of an isolated event or incident but because of a prolonged period of service under a contract of employment.[64] Nevertheless, it would accord with the subject matter and policy of the long service leave legislation to determine an employee's entitlement under the law of the State where his employment is located. It must be stressed that it is the locality of the employment, not the locality of the service, which should be the criterion. On this view, the "substantial connection test" is merely a method of determining in a given case where an employment is situated.

(ii) *Can Periods of Interstate Service be Aggregated?*

Assuming the employee can overcome the first obstacle of persuading a State tribunal to entertain his claim, an even more difficult issue arises: what periods of interstate service can be aggregated for the purpose of calculating long service leave entitlement? The answer depends, to some extent, upon the effect of the full faith and credit provisions.[65]

The diversity of opinion on the effect of these provisions falls outside the scope of this paper. At most the provisions have a substantive effect and require a State tribunal to recognize "rights" conferred by the statutes of sister States.[66] Even if this view is correct the State tribunal is only obliged to recognize "rights".[67] Under long service leave legislation, an absolute right to long service leave normally accrues after, say, fifteen years service, while a contingent right to *pro rata* long service leave is usually earned after a shorter period of service of five or ten years.

Thus a company employee who completes twenty years continuous service consisting of nine years service in the company's Western Australian branch, nine years service in the Tasmanian branch and finally two years service at the Head Office in Victoria, may not qualify for long service leave. This anomaly results from the fact that he has not become entitled to any rights under the long service leave legislation in Western Australia, Tasmania or Victoria. Although the employments in Tasmania or Victoria might be viewed as being undertaken by leave of the employer, the terms of those employments may not be taken into account in calculating the period of "continuous employment" under the Western Australian statute. Similar reasoning would defeat any attempt to combine the periods of service in Tasmania and Victoria.

If the substantial connection test determines the employee's rights, could it be said that his service as a whole had a substantial connection with Victoria? The answer would probably be "no". After all, the contract of service was made in Western Australia, and eighteen years service was performed outside Victoria.

Where the period of service includes a term of service in New South Wales, further anomalies appear. Consider the following example:

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[64] *Australian Timken Pty Ltd.* v. *Stone (No.* 2) 1971 A.R. 246 at 253.

[65] Commonwealth Constitution, ss. 118 and 51(xxv) and State and Territorial Laws and Records Recognition Act 1901 (Cth.). See generally P. Nygh, *Conflict of Laws in Australia* (2nd ed. 1971).

[66] See Handley and Watson, "Australian Long Service Leave", at 271.

[67] *Id.* at 272.

An employee is engaged in New South Wales by a national company. He works with the company's New South Wales office for nine years, and is then sent to the Tasmanian branch for a period of eight years. After completing that period of service he is transferred back to the New South Wales office where he works until his resignation some four years later.

When the employee is transferred to Tasmania it would appear that his contract of employment is broken for the purposes of the long service leave legislation as the New South Wales Act does not excuse absences by leave of the employer. Moreover, a lengthy absence interstate could not be regarded as a normal break in the continuity of employment.[68]

Assuming the New South Wales contract of employment is severed, the right to *pro rata* long service leave accrues as the employee has served for more than five years and he has not been dismissed for "serious and wilful misconduct".[69] But there is no obligation placed upon the employer to grant long service leave as soon as it accrues. It may be taken "as soon as practicable" after accrual "having regard to the needs of the employer's esablishment".[70] In the example, the employee would forfeit his civil remedy against his employer for failure to grant long service leave after he had served in the Tasmanian office for over two years.[71] His civil remedy in New South Wales would be statute-barred by the expiry of the two year limitation period prescribed by the New South Wales Act.[72]

When the employee returns to New South Wales and eventually resigns he will clearly be able to satisfy the substantial connection test, but with what period of service will he be credited? As noted above, the initial period of New South Wales service may well be excluded because the employee's civil remedy in respect of that service has lapsed. No "rights" are conferred by the Tasmanian statute in respect of the service in Tasmania so there is no room for the operation of the full faith and credit provisions. Moreover, his final term of four years service in New South Wales, taken by itself, is not sufficient to qualify for *pro rata* long service leave under the State Act.[73] In the result, after twenty-one years service for one employer, the employee has failed to quaify for long service leave!

Some lack of uniformity in the State statutes is perhaps inevitable

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[68] As in *Duchess Manufacturing Co. Pty. Ltd.* v. *Barlow* 1967 A.R. 622.

[69] N.S.W., s. 4(2)(a)(iii).

[70] See N.S.W., s. 4(3). See too: Qld., s. 17(13)(c); Vic., s. 156(1); S.A., s. 7(1); W.A., s. 9(1)(a); Tas., s. 10(1) for the position in the other States. See also *Metal Trades (Long Service Leave) Award,* 1964, cl. 1.8(1).

[71] The limitation period specified in the New South Wales statute is two years: N.S.W., s. 12(1). If the employee brought his claim in Tasmania it may well be that the New South Wales limitation period would be regarded as a procedural issue and the Tasmanian tribunal might apply the *lex fori.* Since the limitation period provided in the Tasmanian statute is one year, the employee's remedy would still be statute-barred. See Tas., ss. 13(1), 20.

[72] N.S.W., s. 12(1).

[73] N.S.W., s. 4(2)(a)(iii).

but disparities causing injustices of this magnitude are inexcusable. The limitation periods prescribed by the State statutes[74] are simply inadequate to cope with the problem of multi-State service.

(iii) *Interstate Service in Related Companies.*

The examples considered above involve service for national companies with branches in each State. Under these circumstances it may be easier to conclude that the period of service is continuous employment with one and the same employer. What is the position if the periods of interstate service are undertaken for companies "related" to the original employer?

In the *Federal Hotels Case*,[75] the Industrial Court of Queensland took into account a period of some five years service in a wholly-owned subsidiary of the appellant company. Again, in *Australian Timken Pty. Ltd.* v. *Stone* (*No.* 2),[76] service with the appellant company's parent company in the United States was added to a period of New South Wales service to calculate long service leave entitlement. It thus appears that State tribunals will be prepared to give extra-territorial effect to the provisions of the State statutes deeming service with a related company to form part of the continuous service with the initial corporate employer.

To this point, the rights of an employee transferred within one company or to a related company have been discussed. When the business itself is transferred, a different set of problems arise.

5. Effect of Transmission on Continuity of Employment

If an employer acquires the business of another employer, and the employees remain in the service of the business as employees of the new employer, there is a technical break in the continuity of the employees' service.[77] In theory, the former employer terminates the services of his employees who are then engaged by the new employer. To safeguard the interests of employees in this situation there are provisions[78] in all jurisdictions preserving an employee's continuity of employment if the employer transmits his business and the employee is engaged by the purchaser. There are slight differences in the wording of the relevant provisions in the State statutes and the federal "code".[79]

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[74] See Qld, s. 17(13)(d) (3 years); Vic., s. 157(2) (5 years); W.A., s. 20(2) (1 year); S.A., s. 15(7) (3 years).

[75] (1965) 59 Q.J.P. 153.

[76] 1971 A.R. 246.

[77] See *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014.

[78] See Qld., s. 17(16)(a); N.S.W., s. 4(11)(c); A.C.T., s. 10; Vic., s. 151(3)(a); S.A., s. 5(4),(5); W.A., s. 6(4); Tas., s. 5(3); *Metal Trades* (*Long Service Leave*) *Award* 1964 cl. 5(5). On the effect of a "transmission", see *Phillips* v. *Camp Brothers Pty. Ltd.* (1962) 17 I.I.B. 515.

[79] The definition of "business" in the Victorian statute and the standard federal award includes "trade, process, business or occupation" and includes any part of such business; the corresponding Queensland section refers to the transmission of the "calling carried on by the person who is an employer"; in Western Australia, Tasmania and the Australian Capital Territory, the transmission provisions give no definition of the term "business". "Business" is defined in the South Australian Act to include "any part of a business". The New South Wales section is similar.

Where a person who was an employee at the time of the transmission becomes an employee of the transmittee his continuity of employment is deemed not to have been broken by the transmission. In addition, any period of service by the employee with the transmittor or any prior transmittor is deemed to be service with the transmittee.

In New South Wales the provision relates to the transmission of a "business, undertaking or establishment or any part thereof". These words were considered by the Full Bench of the New South Wales Industrial Commission in *Hayman* v. *Neill*.[80] It was held that the terms "business, undertaking or establishment" should be construed *ejusdem generis;* each term is intended to refer to the whole of the enterprise carried on by the transmittor. Further, the Full Bench placed a restrictive interpretation on the words "or any part thereof". In their view, "to be a part of a business the part must itself constitute a business".[81] Both these points were recently affirmed in *Manley* v. *Gazal Clothing Co. Pty. Ltd.*[82]

(i) *What is a Transmission?*

In most jurisdictions "transmission" is defined as including (a) "transfer, conveyance, assignment or succession, whether by agreement or operation of law".[83] This technical definition provides little assistance in determining whether a transmission has occurred and guidance must be sought in the authorities. It appears that a transmission within the meaning of the sections comprises two essential elements: transmission of a business and transmission of the employees.

(ii) *First requirement: Transmission of the Business.*

The ultimate test of a transmission of a business appears to be: has the transferee been put in possession of a going concern?[84] Usually the test will be satisfied by evidence that there has been a transfer of the goodwill associated with the business.[85] Clearly if there is no business and no goodwill there can be no transmission.[86]

It may often be difficult to ascertain whether the business had any

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[80] 1960 A.R. 363.

[81] *Hayman* v. *Neill* 1960 A.R. 363 at 370.

[82] *Manley* v. *Gazal Clothing Co. Pty. Ltd.*, 1973 Industrial Arbitration Service, *Current Review* 162.

[83] In Queensland the definition reads: "'transmission' includes but without limit to the generality of the meaning thereof, transfer, assurance, conveyance, assignment or succession, and derivatives of that term shall have a corresponding meaning". Qld., s. 17(16). See also Vic., s. 151(3)(b); S.A., s. 5(4),(5); W.A., s. 6(4)(ii); Tas., s. 5(3); and *Metal Trades (Long Service Leave) Award* 1964 cl. 5(5).

[84] See *Kenmir Ltd.* v. *Frizzell* [1968] 1 W.L.R. 329 at 335 adopted by South Australian Industrial Commission in *Sims* v. *Laslett and Paxford* 1969 A.I.L.R. Rep. 405. See too *Woodhouse* v. *Peter Brotherhood Ltd.* [1972] 2 Q.B. 520.

[85] See *M.* v. *H.S. Ltd.* (1963) 29 S.A.I.R. 344 and *Hayman* v. *Neill* 1960 A.R. 363: See also *Barrow* v. *Masonic Catering Co-operative Society Ltd.* 1957 A.R. 736. For an example of a case involving a transmission of a business even though there was no amount apportioned to goodwill in the transaction, see *Sterling Co.* v. *Allan* (1958) 13 I.I.B. 107.

[86] See *Barrow* v. *Masonic Catering Co-operative Society Ltd.* 1957 A.R. 736. See also *Cocker* v. *Lident Laboratories* 1973 A.I.L.R. Rep. 546.

goodwill and, if so, whether the parties intended it to be assigned.[87] But if the vendor covenants not to compete with the purchaser this will be cogent evidence of a transmission of the business.[88] Again, the tribunal may find that a transmission has taken place if the transferee agrees to perform all the vendor's outstanding contractual obligations.[89]

(a) *There must be a Transaction.*

There must be a transaction involving some legal nexus or privity between the transferor and the transferee.[90] This transaction must concern the acquisition of the business, not just shares in the business or the assets of the business.[91] *Hayman* v. *Neill*[92] clearly illustrates this point. There, Styl-Master, a partnership, acquired all the issued shares in a company and later purchased some of the company's plant. In the meantime, the firm moved some 150 employees and 100 machines into factory premises leased and occupied by the company. Styl-Master's partners operated the company until December 1954 when it was decided that the company would cease manufacturing. The company's employees were advised by a notice posted on a notice board that their services would no longer be required after 22 December 1954. On the same day and on the same board Styl-Master published a notice stating that all employees dismissed from the company could apply for employment with the firm. In fact, all but seven of the employees applied and were accepted. They ceased working for the company on 22 December 1954 and started work for Styl-Master about three weeks later.

On these facts the Full Bench of the New South Wales Industrial Commission concluded that transmission had not occurred. Their Honours stated:

> It is plain, in our view, that there was no transfer, conveyance or assignment from the Company to Styl-Master of the Company's business or any part thereof. There was no transaction at all between the

[87] *Cocker* v. *Lident Laboratories* 1973 A.I.L.R. Rep. 546 provides a good example of this difficulty. There the Industrial Commission of Western Australia in Court Session found that there had been no transmission of a business because, *inter alia,* the transaction involved a purchase figure below half of what an established dental practice could be expected to realize and because the vendor had tried unsuccessfully over a period to dispose of his dental practice as a complete entity. The Industrial Commission concluded that a sale of goodwill was not involved in the transaction. See also *Long Service Leave* 1968 A.I.L.R. Rep. 22.

[88] See *Sims* v. *Laslett and Paxford* 1969 A.I.L.R. Rep. 405; *Long Service Leave* 1968 A.I.L.R. Rep. 22.

[89] *Sim* v. *Laslett and Paxford* 1969 A.I.L.R. Rep. 405; *Hayman* v. *Neill* 1960 A.R. 363. An agreement to fulfil *some* of the transferor's contractual commitments will not suffice: *Manley* v. *Gazal Clothing Co. Pty. Ltd.* 1973 Industrial Arbitration Service, *Current Review* 162.

[90] *Tinniswood v. Martin* 1958 52 Q.J.P. 102; *Hayman* v. *Neill* 1960 A.R. 363; *Latta* v. *Farago & Co. (Aust.) Pty. Ltd.* 1969 A.I.L.R. Rep. 454.

[91] See *Sowerby* v. *Argus and Australasian Ltd.* 1969 A.I.L.R. Rep. 186 where the acquisition of some shares, plant and machinery did not amount to transmission of a business. See also *Barrow* v. *Masonic Catering Co-operative Society Ltd.* 1957 A.R. 736; *Manley* v. *Gazal Clothing Co. Pty. Ltd.* 1973 Industrial Arbitration Service, *Current Review* 162. Nor is the leasing and purchasing of property sufficient: *Sims* v. *Laslett and Paxford* 1969 A.I.L.R. Rep. 405.

[92] 1960 A.R. 363.

Company and Styl-Master. In particular there was no transfer of goodwill, no transfer of assets (except an isolated sale of machinery for a particular purpose), no transfer of liabilities.[93]

Hayman v. *Neill*[94] demonstrates that the technical requirements of a transmisson must be satisfied before an employee's continuity of employment will be preserved. Employees not familiar with these requirements may forfeit their accruing entitlement to long service leave. To allow a break of three weeks, especially in the dubious circumstances in *Hayman* v. *Neill*,[95] to erase this accruing benefit is a parody of justice.

(b) *Can a Transmission Occur in a Liquidation?*

In certain circumstances a transmission may occur in the course of a company liquidation. In *Rayner* v. *Joseph Haskin & Co.*,[96] two former directors of a company in liquidation purchased a substantial part of the company's business and set up an enterprise in separate premises. An employee of the company was instructed to report to the new premises for work. Under the new arrangement the nature of the employee's work was the same and she worked under the same supervisor. It was held that in these circumstances continuity of employment had been maintained.

A liquidator, on the other hand, incurs no personal obligations in respect of the long service leave entitlement of employees whose services he has retained in the course of a voluntary winding up.[97] This follows from the fact that he is not deemed to be a transmittee of the business of the company.[98]. If, however, an employee qualifies for a long service leave entitlement during or at the completion of his service with the liquidator, his entitlement is given priority as one of the costs and expenses of the winding up.[99]

(iii) *Second Requirement*: *Transmission of Employees.*

The acquisition of a business without a transfer of staff cannot amount to a transmission; the transaction must involve the transmission of the employees as well as the business.[100] Thus, where the engagement of the employee by the purchaser of a business amounts to an independent

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[93] *Id.* at 368.

[94] 1960 A.R. 363.

[95] *Ibid.*

[96] (1960) 15 I.I.B. 508

[97] *Re Matthew Bros.* (*In Liquidation*) [1962] V.R. 262. See too Companies Act 1961, (N.S.W.) as amended, s. 292(1C).

[98] *Re Matthew Bros.* (*In Liquidation*) [1962] V.R. 262.

[99] See *Re Matthew Bros.* (*In Liquidation*) [1962] V.R. 262. New South Wales is the exception. See Companies Act 1961, (N.S.W.) as amended, s. 292(1E).

While there is ample authority to the effect that the publication of a compulsory winding up order operates as a notice of discharge to company employees, such a dismissal might not, *ipso facto,* terminate the contract of employment itself. Where a liquidator retains the services of a company employee to assist in the course of the winding up, the employee's continuity of employment is preserved notwithstanding the publication of the winding up order: *Re Associated Dominion Insurance Society Pty. Ltd. and the Life Insurance Act* (1962) 109 C.L.R. 516.

[100] *Harold* v. *Ward* (1960) 54 Q.J.P. 16.

employment, the transaction will not be a transmission.[101]

In most jurisdictions the re-engagement of the employees by the purchaser of the business must take place at the time of transmission.[102] If the employee decides to take a holiday,[103] or is directed to take a vacation, before taking up employment with the transmittee,[104] his continuity of employment will be broken. The only break which is excused by the transmission provisions in most jurisdictions is the gap caused by the very fact of transmission.[105]

In Tasmania and Queensland, however, an employee's continuity of employment is maintained if he is engaged by the transmittee within a few months after the transmission.[106] This type of provision would curtail some abuse of the transmission sections but it does not protect an employee's continuity of employment from transmittors and transmittees who act in collusion to minimise or avoid long serve leave liabilities.[107]

As a result of the legalistic interpretation which has been applied to the transmission provisions, the technical requirements of a transmission are difficult to establish. In many cases the employee's continuity of employment will be severed even though the employee himself believes on reasonable grounds that his employment is continuous.[108] Moreover, the requirement that there be a transmission of employees has been so strictly interpreted that it is relatively easy for the employers acting in concert to defeat the purpose of the transmission provisions.

The factors and events which affect the employee's continuity of service for the purpose of long service leave entitlement have been con-

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[101] *Sowerby* v. *Argus and Australasian Ltd.* 1969 A.I.L.R. Rep. 186. In *British Automotive Industries Pty. Ltd.* v. *McCarthy* 1959 A.R. 118, a company advised its employees that it had no objection to the staff seeking employment with the defendant company provided they terminated their services at a time convenient for the company. Over a period of time, several employees resigned and secured positions with the defendant company. It was held that there had been no transmission of staff since there was no definite legal nexus or privity between the employers.

[102] The only exceptions appear to be Queensland and Tasmania. See Qld., s. 17(3)(e) which deems service to be continuous if the employee is employed by the transmittee within three months of the transfer of the business. See also Tas., s. 2(4) where a two months' break is disregarded.

[103] See *Bowen* v. *Payne & Hirst Pty. Ltd.* 1960 A.R. 326. See too *Payne and Hirst Pty. Ltd.* v. *Bowen* 1959 A.R. 129.

[104] See *Fletcher* v. *Neill* 1958 A.R. 322.

[105] *Bowen* v. *Payne & Hirst Pty. Ltd.* 1960 A.R. 326 at 331.

[106] Qld., s. 17(3)(e) and Tas., s. 2(4).

[107] Indeed, it is not uncommon for contracts for the sale of a business to contain provisions obliging the vendor to dismiss all his employees with the intention that the purchaser has no long service leave liability to take over. See "Long Service Leave: Some Comments on the Legislation in Victoria" (1961) 35 *Law Institute Journal* 286 at 291.

If it were argued that the employer-vendor was dismissing his employees with the intention of avoiding obligations in respect of long service leave, the employer could presumably point out that the discharge was necessary because of the cessation of his business.

[108] See *Long Service Leave* 1968 A.I.L.R. Rep. 22 where the Chairman of the board of reference which heard the claim expressed sympathy for the position of the employees in the transfer of the business since they might be unable to understand the legal implications of the transaction.

sidered. Prior to the completion of a basic period of qualifying service an employee acquires, after a certain period of continuous employment, a contingent right to a payment in lieu of *pro rata* long service leave. In general, this right will only be forfeited when the employee is dismissed for serious and wilful misconduct[109] or when he resigns on grounds other than a domestic or pressing necessity. It is difficult to reconcile this concession with the basic purpose of long service leave since it does not necessarily involve a respite from work. Indeed, the *pro rata* payment often serves as a form of severance pay. Nevertheless, it can be justified by the economic and domestic stresses which our modern society places upon employment. It recognizes that an employee may be deprived of the opportunity to acquire an absolute entitlement to long service leave by factors beyond his control, for example, retrenchment or a personal crisis.[110] It remains to consider in more detail the factors which may cancel an employee's proportionate entitlement.

6. Effect of Dismissal for "Serious and Wilful Misconduct" upon Pro Rata Long Service Leave Entitlement

(i) *Meaning of the Term*

In *Knott* v. *Carlton & United Breweries Ltd.*[111] Gamble, J. found that the word "misconduct" in this context referred to a particular type of breach of the contract of service. His Honour suggested that the breach must be one which "according to the current and generally accepted moral standards of the community would be regarded as reprehensible and deserving of censure in the circumstances".[112] In his view, the word "serious" was intended to be a gauge of the gravity of the employee's offence.[113] To determine whether the misconduct is "serious" all the elements of the impugned conduct must be taken into account. The likely effect of the conduct upon the safety and well-being of the employer's business, his property, and other employees will be considered.[114] For example, in *Tucker* v. *Benoit*[115] the court concluded that an employee's actions in borrowing his employer's tools without permission for intended use in a competitor's business did not constitute "serious misconduct" since the employer's business was not prejudiced by the conduct and the tools were returned unused and undamaged. By contrast, in a recent South Australian

[109] This term is used in the New South Wales, Victorian and South Australian provisions and the standard federal award. See N.S.W., s. 4(2)(a)(ii); Vic., s. 154(2)(c)(i); S.A., s. 4(5)(a) and *Metal Trades (Long Service Leave) Award*, 1964, cl. 6(2)(b)(i).

[110] See the remarks of Mr. R.E. Hurst, member for Semaphore, in the Parliamentary Debates on the Long Service Leave Bill 1967. South Australia, Legislative Assembly, *Debates* 1967, vol. 3, 2411.

[111] (1958) 13 I.I.B. 212.

[112] *Id.* at 214.

[113] *Ibid.*

[114] *Ibid.*

[115] (1962) 17 I.I.B. 516.

case, the probable effect of the employee's conduct upon other employees was treated as a disqualifying factor.[116]

The term "wilful" denotes that the employee's conduct must amount to a deliberate repudiation of the contract of service.[117] It allows the appropriate authority to consider subjective factors such as the motivation and general attitude of the worker at the time.[118] Thus, a spontaneous reaction to an increased workload will rarely amount to wilful misconduct.[119] On the other hand, if an offender adopts a defiant attitude this will aggravate the seriousness of his conduct.[120]

When deciding whether the employee's actions justified dismissal for "serious and wilful misconduct", the appropriate authority will, it seems, disregard the employee's length of service[121] and the grave consequences for an employee who forfeits his *pro rata* entitlement.[122] The quality of the employee's service prior to the dismissal is equally irrelevant.[123] The sole issue is: has the employee been dismissed for serious and wilful misconduct?[124]

(ii) *Some Examples.*

The authorities shed some light upon the nature and degree of misconduct which may defeat an employee's *pro rata* entitlement. Dishonesty may amount to "serious and wilful misconduct".[125] Similarly, an unauthorised use of the employer's property may constitute "serious misconduct".[126] Moreover, refusal to obey a lawful instruction may, in certain circumstances, substantiate a dismissal for "serious and wilful misconduct". In *Gvozdenovic* v. *Mallabones Pty. Ltd.*[127] the claimant was summarily

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[116] See *Myer Emporium (S.A.) Ltd.* v. *Clemens* (1970) 37 S.A.I.R. 53. It is submitted that the Industrial Commission of South Australia, in that case, placed too much emphasis upon the probable effect of the employee's unauthorised absence of two days upon the other employees. Surely a dismissal of the employee concerned without forfeiture of long service leave entitlement would have calmed any disruptive effect the employee's conduct might have had, or been expected to have, on her workmates.

[117] *Johnson* v. *Marshall Sons & Co. Ltd.* [1906] A.C. 409 at 411.

[118] See *Knott* v. *Carlton & United Breweries Ltd.* (1958) 13 I.I.B. 212.

[119] Thus, where an employee used abusive words in an argument with a manageress over extra bags of washing which had to be done before an inspection by an officer of the Mines Department, the conduct did not amount to "serious misconduct": *Bell* v. *Beale & Co. Pty. Ltd.* (1958) 13 I.I.B. 106.

[120] *Myer Emporium (S.A.) Ltd.* v. *Clemens* (1970) 37 S.A.I.R. 53.

[121] *W.D. & H.O. Wills (Aust.) Ltd.* v. *Jamieson* 1957 A.R. 547.

[122] *Myer Emporium (S.A.) Ltd.* v. *Clemens* (1970) 37 S.A.I.R. 53.

[123] *Forwood Down W.A. Pty. Ltd.* v. *Brandis* (1964) 44 W.A.I.G. 818 at 820.

[124] Thus in *Myer Emporium (S.A.) Ltd.* v. *Clemens* (1970) 37 S.A.I.R. 53, the President of the South Australian Industrial Commission refused to take into account the fact that the employee might have avoided a forfeiture of her proportionate entitlement by giving her employer appropriate notice.

[125] *Re Brown and Australian Iron & Steel Ltd.* 1956 A.R. 849 provides an example. There an employee dismissed for fraudulently completing a false sick leave claim forfeited his proportionate entitlement.

[126] In *Re Nicholls* (1967) 61 Q.J.P. 89, the Queensland Industrial Court classified as "serious misconduct" an employee's action in using his employer's vehicle for private purposes contrary to the express instructions of the employer. In the circumstances of that case, the employee's conduct was also probably "wilful misconduct".

[127] (1965) 45 W.A.I.G. 407.

dismissed for his failure to comply with a lawful order to do spray painting. When a management representative questioned the claimant over his refusal of duty, he produced a medical certificate which stated that he was unfit for spray painting. Later the same day the foreman was instructed to insist that the claimant perform the work. The employee again refused and was dismissed. The Western Australian Industrial Commission in Court Session found that the employee was an unsatisfactory worker and it doubted the *bona fides* of the medical certificate. It concluded that the employee was not entitled to a *pro rata* long service leave payment.

A refusal to load and shift bricks without the assistance of another worker was held to constitute "serious misconduct" in *Ford* v. *C.S.P.P. and Farmers Ltd.*[128] It appeared that the particular task had been performed without assistance in the past and that, though an assistant would expedite the completion of the work, he would not lessen the effort required by the claimant. On the other hand, an employee who declined to perform work declared "black" by his union did not lose his *pro rata* entitlement.[129]

Closely related to the disobedience cases are those involving a neglect of duty by the employee. For example, where an employee deliberately absented herself from her employment for two days in the face of two definite refusals of permission for leave, her action constituted "serious misconduct" and also probably amounted to "serious and wilful misconduct".[310]

Conduct prejudicial to the employer's business or inconsistent with the employee's duty of good faith will normally be classified as "serious misconduct". *Forwood Down W.A. Pty. Ltd.* v. *Brandis*[131] provides an interesting illustration. A mass meeting of workers decided to press for a wage increase by restricting factory output in accordance with a "working to regulation plan". Brandis participated in this "go-slow" campaign along with the majority of the company's workers. As a result the level of production had fallen drastically by 18 June 1964, the date of the dismissal, and it appeared that the company might be compelled to retrench certain employees in sectors not involved in the "go-slow" policy. The foreman advised Brandis prior to 18 June that other workers were dependent upon his output for their work. Moreover, it was not disputed that he had exceeded a reasonable time for the completion of the job on which he was engaged. On 17 June the foreman advised Brandis that he "would have to get on with the job" and another worker was assigned to help him. The next day Brandis was some ten or fifteen minutes

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[128] (1966) 46 W.A.I.G. 194.

[129] *Knott* v. *Carlton & United Breweries Ltd.* (1958) 13 I.I.B. 212.

[130] *Myer Emporium (S.A.) Ltd.* v. *Clemens* (1970) 37 S.A.I.R. 53. Again in *Rusalen* v. *Tanner* 1968 A.I.L.R. Rep. 196 an employee who absented herself from her position for twelve days prior to her dismissal lost her proportionate entitlement because the medical certificates she tendered to her employer were regarded by the appropriate authority as unsatisfactory.

[131] (1964) 44 W.A.I.G. 818.

late in starting his work. The foreman dismissed him but made no mention of the fact that the dismissal was for misconduct.

The Western Australian Industrial Commission in Court Session was convinced that Brandis' actions amounted to "serious misconduct" within the meaning of the relevant long service leave award. The fact that Brandis was not proved to be an instigator or a "ring-leader" of the "go-slow" campaign was irrelevant.[132] Along with the mass of the workers, Brandis had, in the Commission's opinion, taken a direct part in the demands on the employer. Mr. Commissioner Schnaars dismissed the contention that Brandis was no more implicated in the campaign than any of the bulk of the company's employees with the following comment: "This case concerns one particular worker and it is his conduct which is under consideration and not the conduct of the other workers".[133]

Once the employee establishes that he has served his employer for a period sufficient to qualify for *pro rata* long service leave, it is incumbent upon the employer to prove that the dismissal was for "serious misconduct" or "serious and wilful misconduct", as the case may be.[134] Whether the employee has been guilty of this type of misconduct is a question of fact which will turn on the particular circumstances of each case.[135]

(iii) *Conclusion.*

The range of factors which the appropriate authorities are allowed to take into account in determining whether the employee's actions amount to "serious and wilful misconduct" appears to be too restricted. Where an important issue like long service leave entitlement is at stake, the authorities should be permitted to consider the employee's previous record and length of service. Perhaps the proper inquiry should be: is the employee's "serious and wilful misconduct" grave enough to deprive him of his *pro rata* entitlement, rather than simply, is the employee's action "serious and wilful misconduct"?

While the authorities state that "serious and wilful misconduct" involves actions of much greater gravity than mere misconduct, it appears

[132] *Forwood Down W.A. Pty. Ltd.* v. *Brandis* (1964) 44 W.A.I.G. 818 at 820.

[133] *Forwood Down W.A. Pty. Ltd.* v. *Brandis* (1964) 44 W.A.I.G. 818. This case was followed recently in *Singer Australia Ltd.* v. *Cardigan* (1970) 50 W.A.I.G. 895. There, the employee, who was the manager of a branch of the company, attended to a service call for which he received a cheque for $3.50. The manager issued an interim receipt endorsed on a business card. He later deposited the cheque in the cash drawer at the branch and removed $3.50 in cash which he retained. When his action was discovered he was dismissed. He explained that he had taken the amount as an advantage against the purchase of an appliance which he hoped the customer would buy. He then returned the money to the company. It appeared that, to some extent, his initial action could be attributed to his desire to perform well in a sales competition operated by the company. It was not suggested that he had retained the money dishonestly although his action was in contravention of an established practice of the company to issue an official receipt and deposit takings daily with the company. The Western Australian Commission in Court Session decided that the manager's departure from the established practice amounted to "serious misconduct". Accordingly the manager forfeited his *pro rata* long service leave entitlement.

[134] *W.D. & H.O. Wills (Aust.) Ltd.* v. *Jamieson* 1957 A.R. 547.

[135] *Re Brown and Australian Iron & Steel Ltd.* 1956 A.R. 849 at 884.

that some cases have set a low standard for the former concept. It is submitted that *Myer Emporium (S.A.) Ltd.* v. *Clemens,*[136] *Forwood Down W.A. Pty. Ltd.* v. *Brandis,*[137] *Singer Aust. Ltd.* v. *Cardigan*[138] and *Gvozdenovic* v. *Mallabones Pty Ltd.*[139] fall in this category. Indeed, in *Forwood Down W.A. Pty. Ltd.* v. *Brandis*[140] the employer's action in dismissing the claimant had undertones of discrimination against a particular employee. Yet the employee forfeited his *pro rata* entitlement. There can be little doubt that the employers in each of the above cases were justified in dismissing the employees for misconduct. What is disputed is the finding in each case that the misconduct was "serious misconduct".

7. Effect of Death and Resignation on Account of Illness or Domestic or Other Pressing Necessity upon Pro Rata Long Service Leave Entitlement

Entitlement to a payment in respect of *pro rata* long service leave accrues upon the death of the worker.[141] In addition, provided an employee resigns "on account of illness" or "domestic or other pressing necessity" he will not be denied his proportionate entitlement.[142] The interpretation of the terms "illness" and "domestic or other pressing necessity" will now be examined.

(i) *Has the Employee Resigned "on Account of Illness"?*

The tribunals have adopted a subjective test in determining this issue.[143] This is so even in those jurisdictions[144] where the illness must

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[136] (1970) 37 S.A.I.R. 53.

[137] (1964) 44 W.A.I.G. 818.

[138] (1970) 50 W.A.I.G. 895.

[139] (1965) 45 W.A.I.G. 407.

[140] (1964) 44 W.A.I.G. 818.

[141] See Qld., s. 17(2)(b),(d); N.S.W., s. 4(2)(a)(ii); Vic., s. 155(1)(2)(3); S.A., s. 4(5)(c); W.A., s. 8(2)(c)(i); Tas., s. 9(3); *Metal Trades (Long Service Leave) Award,* 1964, cl. 6(2).

[142] N.S.W., s. 4(2)(a)(iii); Vic., s. 154(2)(c) and the *Metal Trades (Long Service Leave) Award* 1964, cl. 6(2)(b)(ii). In Western Australia, the employee may have to satisfy a board of reference that his resignation can be justified on account of his "illness" or "domestic or other pressing necessity". In Tasmania he will forfeit a *pro rata* entitlement unless he can satisfy the Chief Inspector that his "illness", etc., was of such nature as to justify termination. See: W.A., s. 8(3)(c) and Tas., s. 8(2)(c)(ii).

In South Australia *pro rata* entitlement apparently accrues if the employee lawfully terminates his employment after a certain period of service. See S.A., s. 4(5)(b). An employee lawfully terminates his employment if he gives his employer the requisite period of notice: *Churchman* v. *Whyalla Hotel Pty. Ltd.* (1969) 24 I.I.B. 862.

The Queensland provision preserves an employee's entitlement if he terminates his service after a certain period by reason of illness or injury. See Qld., s. 17(3)(b). In most jurisdictions an employee is entitled to terminate his services on account of incapacity after a certain period of service without losing his *pro rata* entitlement. See: Qld., s. 17(2)(b); N.S.W., s. 4(2)(a)(iii); Vic., s. 154(2)(c); W.A., s. 8(2)(c) ("injury" which is of such a nature, in the opinion of the board of reference, as to justify the determination); Tas., s. 8(2)(c)(ii). ("incapacity" certified by the Chief Inspector as of such a nature as to justify the termination); *Metal Trades (Long Servie Leave) Award,* 1964, cl. 6(2).

[143] See *Tucker* v. *Imperial Chemical Industries of Aust. & N.Z. Ltd.* 1969 A.I.L.R. Rep. 543; *British Motor Corporation (Aust.) Pty. Ltd.* v. *Chance* 1965 A.R. 364.

[144] See Vic., s. 154(2)(c); Tas., s. 8(2)(c)(ii); and W.A., s. 8(2)(c).

be "of such a nature as to justify termination of employment".[145] But, although an objective test has been rejected as too restrictive, it appears that the resignation must be reasonable in all the circumstances.[146] The motive of the employee in terminating his employment is considered from the point of view of such an employee in his particular circumstances.[147]

The "illness" must be actually relevant to the employee's resignation but it need not *necessitate* the termination of the employment.[148] Evidence of the "illness" should, however, permit the tribunal to draw a reasonable inference that the sickness caused the employee's resignation.[149] Medical advice that the employee should change jobs because of his health will, of course, place the employee in a strong position.[150] On the other hand, the employer may be able to discredit the medical evidence submitted on behalf of the employee by proving that the doctor made an incorrect diagnosis.[151] Furthermore, the medical evidence adduced by the employee may be unacceptable for some other reason.[152]

The illness relied on as justification for the resignation need not be a drastic complaint. In one case,[153] the Victorian Industrial Appeals Court held that a state of mild nervous tension was sufficient to justify an employee resigning on account of illness. It is not even necessary for a claimant to establish that the illness alleged prevented him from performing his work; it is sufficient if the illness hinders the employee carrying out his normal duties.[154]

(ii) *Has the Employee Resigned "on account of . . . Domestic or Other Pressing Necessity"?*

In resolving this issue the tribunals again resort to a subjective test.[155] Neverthless, a tribunal is entitled to consider whether a reasonable

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[145] See *Durkin* v. *Baulderstone* 1969 A.I.L.R. Rep. 93.

[146] See *British Motor Corporation (Aust.) Pty. Ltd.* v. *Chance* 1965 A.R. 364 at 366, *per* McKeon, J. His Honour dissented in that case on the evidence but his judgment appears to contain an accurate statement of the law.

[147] *Durkin* v. *Baulderstone* 1969 A.I.L.R. Rep. 93.

[148] *British Motor Corporation (Aust.) Pty Ltd.* v. *Chance* 1965 A.R. 364.

[149] *Ibid.*

[150] *Ballard* v. *Liddy Classic Fibrous Plaster Pty. Ltd.* (1963) 18 I.I.B. 1193 at 1194.

[151] *Ibid.*

[152] See *R. Fowler Limited* v. *Crennan* (1966) 21 I.I.B. 1122 where the Victorian Industrial Appeals Court concluded that "a finding that he [the employee] was suffering from such an illness would be quite unwarranted on the medical testimony of a general practitioner who had seen Mr. Pratt on only one occasion". See also *Durkin* v. *Baulderstone* 1969 A.I.L.R. Rep. 93.

[153] See *Ballard* v. *Liddy Classic Fibrous Plaster Pty. Ltd.* (1963) 18 I.I.B. 1193. See too *British Motor Corporation (Aust.) Pty. Ltd.* v. *Chance* 1965 A.R. 364 where a claims storeman who resigned on account of a chronic mental disability that resulted in a recurrent "anxiety state" was held to be entitled to a payment in lieu of long service leave.

[154] See *Durkin* v. *Baulderstone* 1969 A.I.L.R. Rep. 93.

[155] *Eyles* v. *Cook* (1967) 13 F.L.R. 42; *Franks* v. *Kennedy* (1964) 7 F.L.R. 162 at 172; *Tucker* v. *Imperial Chemical Industries of Aust. & N.Z. Ltd.* 1969 A.I.L.R. Rep. 543.

man would feel that the situation warranted resignation.[156] The phrase "domestic necessity" imports a serious problem, not necessarily a crisis.[157] While specious or trifling matters will not normally be sufficient, the tribunal should be careful not to apply a too restrictive interpretation of the term.[158] The adjective "pressing" does not qualify "domestic necessity". Thus, the legislature has apparently indicated that a "domestic necessity" is automatically to be regarded as a pressing matter.[159]

Where an employee faced with heavy financial commitments resigns in order to secure a position on higher pay involving less travelling, he will not be denied his *pro rata* entitlement.[160] Indeed, in one case,[161] a saving in travelling expenses and car maintenance was sufficient justification for an employee who resigned because of his economic worries.

A normal healthy pregnancy does not of itself amount to a "domestic or other pressing necessity" in its early stages.[162] Thus, if an employee resigns at this stage of a pregnancy medical evidence will probably be required to establish that the pregnancy amounted to a "domestic or other pressing necessity".[163] During the later stages of a pregnancy it appears that the tribunal will allow the employee to decide in her own discretion whether her condition justifies resignation.[164]

Some cases appear to have adopted a stricter attitude to employees' claims for *pro rata* long service payments. In *Hill and Dalgety and N.Z. Loan Ltd.*,[165] an employee resigned because of his apprehension that a proposed interstate transfer would disrupt his domestic situation. The employee and his wife intended to adopt a child and his wife was firmly opposed to the transfer. Indeed, the employee alleged that his marriage would be jeopardised by the transfer. The Chairman of the board of reference which heard the claim concluded that the employee had overestimated the threat to his marriage. He considered that the degree of inconvenience caused by the proposed transfer fell considerably short of a domestic necessity which would justify the employee terminating his employment. With respect, it would seem that the Chairman strayed from the subjective test of "domestic necessity".

Again, in *Brindley* v. *Melesco Manufacturing Company Pty. Ltd.*,[166] a restrictive interpretation of the term "necessity" was employed. The

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[156] See: *Crennan* v. *Oliver Furniture Pty. Ltd.* (1962) 17 I.I.B. 799; *Franks* v. *Kembla Equipment Co. Pty. Ltd.* 1969 A.R. 17.

[157] *Franks* v. *Kembla Equipment Co. Pty. Ltd.* 1969 A.R. 17.

[158] *Ibid.*

[159] *Clancy* v. *David Jones Ltd.* 1965 A.R. 383.

[160] *Eyles* v. *Cook* (1967) 13 F.L.R. 42.

[161] *Crennan* v. *Oliver Furniture Pty. Ltd.* (1962) 17 I.I.B. 799.

[162] See *Wood* v. *Harris Scarfe & Sandovers Ltd.* (1965) 45 W.A.I.G. 398 where an employee who left her employment in the fifth month of her pregnancy and lost her baby some six weeks later was held to be entitled to a payment in lieu of long service leave.

[163] *Wood* v. *Harris Scarfe & Sandovers Ltd.* (1965) 45 W.A.I.G. 398.

[164] *Ibid.*

[165] 1970 A.I.L.R. Rep. 311.

[166] 1964 Industrial Arbitration Service, *Current Review*, 34.

tribunal decided that "necessity" denotes something unavoidable or an unavoidable compulsion. Accordingly, an employee who resigned from his job because it involved excessive travelling, loss of overtime and site allowances, and disruption of his domestic life forfeited his *pro rata* entitlement. These causes of distress did not fall within the relevant provision because the employee need not have purchased a house so far from his work place, or having bought it, he could have sold it![167] If the term "necessity" is to denote "an unavoidable compulsion" what interpretation should be attached to the word "pressing"? In the tribunal's view the term "pressing" would seem to be tautological. It is submitted, with respect, that the adjective "pressing" indicates that Parliament did not intend a literal interpretation of the word "necessity" to be applied.

More recently, in *Zussa* v. *Bent; Re Industrial Concrete and Terrazzo Pty. Ltd. (in liq.)*[168] an employee resigned from a company some three weeks before its compulsory winding up. His doubts about the solvency of the company and the security of his position in those circumstances precipitated his resignation. The Supreme Court rejected the employee's claim since he had not established that the termination of employment was caused by a "domestic or other pressing necessity". This decision appears to be particularly harsh in view of the fact that in a compulsory winding up an employee's entitlement to a *pro rata* long service payment accrues at the date of publication of the winding up order. It thus appears that to qualify for a *pro rata* payment an employee must remain with the company until the winding up order is published. He will then have to compete with his fellow employees for a position elsewhere and he will not receive an adequate regular income to sustain himself and his family during his search for alternative employment. In view of Australia's escalating unemployment, this could present a problem for the individual worker.

Although there is no authority on the point, it has been suggested that an employee who terminates his or her employment in order to get married would be denied *pro rata* long service leave entitlement since the resignation would not be caused by a "domestic or other pressing necessity".[169]

(iii) *Effect of Delay, Failure to State Reason at Time of Resignation, and Mixed Motives.*

Apart from the isolated cases mentioned above the tribunals have consistently adopted a liberal attitude to employees' claims for *pro rata* entitlement after a resignation on account of illness or domestic or other pressing necessity. The mere fact that an employee delays his decision to resign because of one of those reasons for a considerable period

[167] *Brindley* v. *Melesco Manufacturing Co. Pty. Ltd.* 1964 Industrial Arbitration Service, *Current Review* 34 at 36.
[168] [1972] V.R. 500.
[169] See: J.H. Greenwell, "Long Service Leave" (1955) 28 *A.L.J.* 599 at 600.

of time does not defeat his entitlement.[170] Again, since there appears to be no necessity for an employee to advise the employer of the reason for his resignation,[171] his failure to do so will not defeat his claim for a *pro rata* payment although it will be a factor which the tribunal can take into account. Moreover, if the employee's resignation is caused by "illness" or "domestic or other pressing necessity", it matters not that some other factor contributed to his decision.[172] But the termination of the employment of the employee must be attributed to "illness" or "domestic or other pressing necessity" and not some ulterior motive[173] such as better pay or conditions in another position.

8. Prohibition of Contracting Out

Having imposed obligations upon employers in respect of long service leave, the legislature and the tribunals would be neglecting the interests of employees if they allowed employers to contract out of the provisions of the relevant statutes or award. In some States, contracting out is expressly prohibited.[174]

In Queensland, State long service leave awards prevail over provisions in contracts of service unless those contracts provide more favourable conditions of employment.[175] Employees who are not covered by State long service leave awards in that State must fall back on section 19(1) of the Industrial Conciliation and Arbitration Act, 1961-1976 (Qld.). That section governs the entitlement of "any and every employee" in respect of whose employment there is no current federal or State long service award or industrial agreement.

In a similar vein, section 4(1) of the Long Service Leave Act, 1967-1972 (S.A.) provides: "Subject to this Act, every worker shall be entitled to long service leave or payment in lieu thereof, in respect of service with an employer". It remains to be seen whether the words "every worker" in this section will be sufficient to preclude contracting out. If they cannot be so interpreted an interesting question arises: can an employer stipulate in a contract of service that, say, South Australian law shall be the proper law of the contract and then provide that the provisions of the South Australian long service leave legislation shall

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[170] See *British Motor Corporation (Aust.) Pty. Ltd.* v. *Chance* 1965 A.R. 364 (two years delay); *Clancy* v. *David Jones Ltd.* 1965 A.R. 383; *Franks* v. *Kembla Equipment Co. Pty. Ltd.* 1969 A.R. 17; and *Durkin* v. *Baulderstone* 1969 A.I.L.R. Rep. 93.

[171] An employee who fails to specify that he is resigning on account of illness, incapacity or domestic or other pressing necessity when he actually gives notice will not forfeit his right to a *pro rata* payment. See *Re Transport Workers' (Long Service Leave, A.C.T.) Award* 1961 (1964) 19 I.I.B. 1342 and *Franks* v. *Kembla Equipment Co. Pty. Ltd.* 1969 A.R. 17.

[172] *Clancy* v. *David Jones Ltd.* 1965 A.R. 383; *Franks* v. *Kembla Equipment Co. Pty. Ltd.* 1969 A.R. 17; *British Motor Corporation (Aust.) Pty. Ltd.* v. *Chance* 1965 A.R. 364. See too *A.W.U.* v. *Canberra City Bowling Club* 1974 A.I.L.R. Rep. 35.

[173] *Eyles v. Cook* (1967) 13 F.L.R. 42.

[174] N.S.W., s. 7(1)(2); Vic., s. 160; Tas., s. 15. See also A.C.T., s. 14(1).

[175] See Qld., s. 123.

not apply to the contract? Chief Justice Latham's judgment in *Mynott* v. *Barnard*[176] probably demands a negative answer.

(i) *Exemptions.*

While in most jurisdictions an employer will be prevented from contracting out of the provisions of the long service leave legislation, he may apply for an exemption from the obligations imposed by that legislation. The grounds on which such an exemption will be granted are carefully scrutinised. In most States, to qualify for an exemption an employer must establish that a scheme conducted by him or on his behalf provides benefits in the nature of long service leave which are "not less favourable" than those specified in the relevant Act.[177] Provided the employer meets this condition and the appropriate tribunal is satisfied that is is in the best interests of the workers, an exemption will be granted.[178] In most States, there are also provisions for review of exemptions.[179]

(ii) *New South Wales Approach.*

In New South Wales, it appears that the appropriate tribunal determines the employer's application by comparing the provisions of the employer's scheme as a whole with the provisions of the statutory scheme as a whole.[180] It attempts to decide upon a final balance on an overall basis.[181] In *Kennedy* v. *Board of Fire Commissioners*[182] the Industrial Commission in Court Session granted an exemption notwithstanding the fact that the applicant's scheme gave employees with less than ten years service no rights to long service leave on termination of employment and despite the fact that employees with ten to fifteen years service forfeited their rights upon dismissal for misconduct. The Commission was clearly swayed by a provision in the scheme which granted employees with fifteen years service a more generous entitlement than that prescribed by the statute. But its reference to the relatively permanent features of the

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[176] (1939) 62 C.L.R. 68 at 80.

[177] See Qld., s. 17(9); N.S.W., s. 5(2)(a); Vic., s. 153; S.A., 11(1): In Western Australia, a board of reference may grant an exemption if it is satisfied that there is an existing or proposed scheme conferring benefits in the nature of long service leave which in its opinion are, or will be, viewed as a whole, not less favourable to the whole of the employees of that employer than the benefits prescribed by the Act: W.A., s. 5(1). The Tasmanian provision follows the pattern of the other states. See Tas., s. 7(1). See also A.C.T., s. 14(2).

[178] See Qld., s. 17(9); N.S.W., s. 5(2)(a); Tas., s. 7(1). In Victoria, the applicant must establish that the private scheme would "better serve the interests" of the workers. See Vic., s. 153. The Industrial Commission of South Australia is empowered to grant an exemption for an employer's scheme if the benefits provided under the scheme are not less favourable than those specified in the statutory provisions or if, for any other reason which appears to the Commission to be just and equitable in the circumstances of the case, an exemption should be allowed. See S.A., s. 11(1). See too W.A., s. 5.

[179] See N.S.W., s. 5(2)(d) and s. 5(4); S.A., s. 11(5); W.A., s. 5(2); Tas., s. 7(2), (5), (6).

[180] *In re Wire Fence (Other than Barbed Wire) Makers and Tubular Gate Makers (State) and Other Awards* 1952 A.R. 91 followed in *Kennedy* v. *Board of Fire Commissioners* 1967 A.R. 455.

[181] *Kennedy* v. *Board of Fire Commissioners* 1967 A.R. 455 at 460.

[182] 1967 A.R. 455.

particular employment involved does not dispel doubts that it failed to protect an employee's entitlement to long service leave prior to the completion of fifteen years service. It appears then, that the Commission neglected the rights of the individual employee in favour of a scheme which would provide a more generous entitlement for the bulk of the workers taken, as the Commission indicated, on an overall basis.[183]

(iii) *Victorian Approach.*

In Victoria, the appropriate tribunals have evinced a stricter attitude to exemption applications. It is not sufficient simply to compare the benefits provided by the employer's scheme with those required by the relevant statute. The appropriate tribunal is obliged to examine the basis on which the scheme's benefits are provided including the length of service necessary to qualify, the duration of the leave, the terms upon which it is granted and the conditions under which it may be forfeited.[184] The tribunal should also consider any benefits which the employees may lose if the exemption is withheld and the employer abandons the scheme as a result.[185] In addition, it is entitled to take into account the position of an individual worker or group of workers whose entitlement under the employer's scheme is substantially less than the corresponding statutory benefits.[186]

(iv) *Election.*

The prejudicial effect of a "global" approach to exemption applications so far as the individual employee is concerned is off-set in two States by allowing employees to elect to be covered by the statutory or award scheme rather than their employer's scheme.[187] The position in the other States is far from clear. The Tasmanian[188] and South Australian[189] provisions allow exemptions to be granted to employers in respect of their employees or "*any of them*".[190] The Victorian statute[191] contains a similar provision. Presumably these sections would enable the appropriate tribunals in those States to make allowances for the position of an individual employee who may not benefit as much from the employer's scheme as he would under the statutory provisions.

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[183] *Kennedy* v. *Board of Fire Commissioners* 1967 A.R. 455 at 460.

[184] *R.* v. *Industrial Appeals Court; Ex parte Henry Berry & Co. (Australasia) Ltd.* [1955] V.L.R. 156 at 169 *per* Hudson, J.

[185] *R.* v. *Industrial Appeals Court; Ex parte Henry Berry & Co. (Australasia) Ltd.* [1955] V.L.R. 156.

[186] [1955] V.L.R. 156 at 169.

[187] See Qld., ss. 17(9), 19(3); N.S.W., s. 5(2)(c)(i). Note that in Queensland the right of election must be expressly provided for in the employer's scheme.

[188] Tas., s. 7(1).

[189] S.A., s. 11(1).

[190] Emphasis added.

[191] Vic., s. 153(1). In Western Australia there appears to be no express provision enabling an employee to elect to be covered by the statutory scheme rather than the employer's exempted scheme. Furthermore, s. 5 of the W.A. Act refers to an exemption granted to an employer "in respect of his employees". It may be that the Western Australian provision is not open to the interpretation suggested for its Tasmanian, Victorian and South Australian counterparts.

9. Proposals for Reform

The foregoing analysis reveals two general defects in long service leave law: the loopholes and shortcomings in the legislative and award provisions themselves, and the technical approach of certain tribunals in interpreting and applying these provisions. The latter has already been considered. Let us now turn to proposals for legislative reforms or award variations.

(i) *Absences Excused.*

Most of the problems which appear in the provisions excusing various interruptions in an employee's continuity of service can be resolved by simple amendments. Thus, for example, the relevant statute or award could provide that an absence of, say, nine to twelve months because of pregnancy would not break continuity of service or the contract of employment. Again, the relevant statutes might excuse absences through lawful strikes whether they relate to industrial matters or not. And the Victorian and Tasmanian statutes could exempt any determination of employment arising out of an industrial dispute provided, of course, the striker was eventually re-employed by his original employer within, say, six months of his discharge. Further, continuity of the employment might be specifically preserved where an employee dismissed because of slackness of trade is re-engaged, say, twelve months after his retrenchment. This extended period of grace would save the accruing entitlement of a worker dismissed through no fault of his own.

An absence on grounds of legitimate union business or official industrial activities should also be excused in all jurisdictions if the employer unreasonably refuses leave. While this exemption would be a great benefit to employees generally, it is essential for employees who hold an official or semi-official position in, for example, a wages board or conciliation committee.

(ii) *Attempted Evasion of Award or Statutory Obligations.*

The evidentiary obstacle facing an employee who complains that he was dismissed in order to evade award or statutory obligations in respect of long service leave could be removed by revising the onus of proof provisions. Under the new formula, the complainant could carry a *prima facie* onus of raising a suspicion that his dismissal was effected for an illegitimate motive. This would normally be satisfied by evidence of the employee's length of service. The onus would then shift to the employer to establish that the claimant was not dismissed in order to escape award or statutory obligations. There is a precedent of this type of provision in the victimization sections of the various industrial arbitration and wages board statutes.[192] If the employer were unable to discharge his onus the contract of service would remain unbroken and the employee's

[192] See e.g., Conciliation and Arbitration Act 1904 (Cth.), s. 5(4).

service continuous notwithstanding the dismissal. This would be a very effective sanction.

(iii) *Interstate Service.*

Legislative amendment and award variations could also remove some of the more obvious anomalies which appear when an employee claims long service leave based on interstate service. Reform should be founded upon the premise that interstate service with a branch of the employer company or with a related company should not interrupt an employee's continuous employment. Accordingly, such an absence should be expressly excused. Yet this will not save an employee from all the pitfalls involved in this form of service.

Further amendments extending the limitation period in each jurisdiction to, say, six years would greatly enhance an employee's chance of qualifying for long service leave in respect of his total period of service. Ancillary to these amendments, it would be necessary to require employers to keep records of employees' service in interstate branches or related companies.[193] Considering the small number of employees who would be involved in interstate service this would not be a particularly onerous obligation.

(iv) *Transmission.*

Some attempt should be made to avoid the often unjust consequences which flow from the transfer of a business. It could be specifically provided in the long service leave statutes and awards that the technical break in the employees' service consequent upon the transfer would be disregarded if the employees were engaged by the transmittee within twelve months of the transfer of the business. This would be a vast improvement on the existing law. There would then be less opportunity for collusion aimed at defeating employees' claims for long service leave. The transmittee would be liable for the full long service leave entitlement when it eventually accrued but this liability could be off-set by an adjustment in the purchase price negotiated at the time of transmission. It might be thought that this proposal would encourage the transmittee not to employ long-service employees dismissed by the transmittor. To some extent, this is true. But the purchaser would need capable staff to ensure the smooth transmission of the business, and the long-serving employees displaced by the transmission would provide a pool of talent from which the purchaser could draw.

10. Conclusion

The measures outlined above are just some of the amendments necessary to safeguard an employee's right to receive long service leave and

[193] Employers are already obliged to maintain certain records for the purposes of long service leave. See e.g. N.S.W., s. 8. Under the South Australian provision employers are required to keep records of an employee's service and his entitlement to long service leave for a period of three years after his services are terminated, S.A., s. 10.

improve his chance of qualifying for that benefit. Coupled with a revision of the tribunal's attitude to the technical issues in long service leave claims, they would ensure that an employee is not unjustly or unreasonably deprived of his accruing entitlement. If these proposals were adopted it might be possible to share Mr. Justice Sheldon's confidence that the long service leave provisions implement "a social policy without loopholes".[194]

[194] *In re Long Service Leave Exemption — A.L. Vincent & Coy. Pty. Ltd.* 1967 A.R. 221 at 223 and 224. There his Honour was of course referring to the New South Wales Act.