

15 December 2019

Committee Secretary c/- eesbc@parliament.qld.gov.au
Education, Employment and Small Business Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Secretary

Re: Community Services Industry (Portable Long Service Leave) Bill 2019

Please accept this submission in relation to the above and in particular amending the *Industrial Relations Act 2016* to make it clear that an employee whose employment is terminated through an illness-related incapacity will be entitled to pro rata long service leave in accordance with the Act.

Chronology

On 28 April 2018 my employer (The Star Gold Coast) terminated my employment. The reason they provided for my termination was an inability to fulfil the inherent requirements of my role.

At the time of my termination, I had served 9 years, 11 months, 3 days. I was advised by my employer that I was not entitled to my long service leave because I had not reached my 10 years' service and that the legislation entitles a pro rata payment if I chose to resign based on illness or incapacity.

On 21 September 2018 I lodged an application with the QIRC for proportionate payment of long service.

[REDACTED]

[REDACTED]

[REDACTED]

On 21 March 2019 Commissioner Thompson delivered his determination that s 95(4)(c)(i) of the Act does not confer a pro rata long service leave entitlement (continuous service in excess of seven years) when an employer dismisses an employee because of the employee's illness-based incapacity for work. [*Schipp v The Star Entertainment Pty Limited* [2019] QIRC 049]

On 29 March 2019 I wrote to the Minister of Industrial Relations, the Honourable Grace Grace expressing my concern and seeking the Ministers assistance in regard to the Commission's decision, namely that:

- a Qld worker (with continuous service in excess of 7 years) should not be forced to resign from their employment if they are ill or medically incapacitated (temporarily or permanently) to enable them to receive their pro rata long service leave payment, on the possibility (remote or otherwise) that their employer could dismiss them as a result of their illness or medical incapacity (effectively disabling the worker from receiving their pro rata long service leave payment).
- the decision appeared inconsistent with *section 48 (1) of the new Human Rights Act 2019* which requires that “*statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.*”
- The decision appeared inconsistent with *section 48 (2) of the new Human Rights Act 2019* which states “*If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights*”
- The decision appeared to constitute discrimination, given “*a person must not discriminate in denying or limiting access to opportunities for promotion, transfer, training or other **benefit to a worker***” in accordance with *Section 15 (1) (b) of the Anti-Discrimination Act 1991* given long service leave is a benefit to a worker.
- The decision may discourage workers in other states and territories of Australia from wanting to move to or work in Qld (noting all other States & Territories provide pro rata payment to employees terminated for illness related reasons)
- The decision results in Qld long service leave provisions being the “**least favourable in Australia**”
- The decision would have a wide-reaching adverse impacts on ill or medically incapacitated Qld workers (including Qld workers with a temporary or permanent physical or psychological disability).

Thankfully the Minister lodged an Appeal against the decision of the Commission, as did I.

On 19 June 2019, my Appeal and the Ministers Appeal was heard concurrently before Deputy President Merrell.

On 18 July 2019 DP Merrell delivered his decision agreeing with Commissioner Thompsons' determination, concluding “Despite the skill with which Mr Murdoch QC argued the case for the Minister, and despite Mr Schipp's impassioned plea in his submissions, for the reasons I referred to above, the Industrial Commissioner did not misconstrue the meaning of the noun 'capacity' in the phrase 'conduct, capacity or performance' in s 95(4)(c)(i) of the Act.” [Schipp & Anor v The Star Entertainment Qld Limited [2019] ICQ 009]

My View

There appears to be no other published case law decisions in Queensland (or Australia) relevant to employees seeking payment for pro rata LSL as a result of being terminated for illness based reasons. This means that:

- a) employers have paid the pro rata LSL to their entitled employees terminated for illness based reasons; or
- b) employees have not pursued a claim; or
- c) employees have pursued a claim and settled out of court.

The Appeal decision of DP Merrell is the catalyst for the Minister's decision to seek to rectify the anomaly in the legislation which once amended will provide clarity on employee entitlements and employer obligations when it comes to pro rata LSL entitlements, bringing Qld into line with the rest of Australia when it comes to illness based terminations and an entitlement to pro rata LSL.

If the legislation is amended and made clear that an employee whose employment is terminated through an illness-related incapacity will be entitled to pro rata long service, I request that consideration be given for the amendment to be retrospectively dated, to apply before 28 April 2018 (my termination date). If this retrospection occurs, my former employer (The Star Gold Coast), would be obligated to pay my LSL accrued during my service period of 9 years, 11 months and 3 days, being approximately \$5,682.

A retrospective application may provide similar LSL payment entitlements to other Qld employees who may have found themselves in a similar situation to mine.

Furthermore, and given all I have gone through to get this far, I would like the opportunity to plead for the retrospective element of the proposed amendment relative to pro rata long service leave, at the public hearing scheduled for 21 January 2020.

Yours faithfully
David Schipp

Address:
Email:
Phone:

