

Northern Territory Law Reform Committee

REMOVAL OF AMBIGUITY IN THE *ANNUAL LEAVE ACT*

Report No. 20a

1 March 1999

Annual Leave Act

NORTHERN TERRITORY LAW REFORM COMMITTEE

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By letter dated 24 December 1998, the Attorney-General endorsed the Committee's proposal that it review the wording of particular provisions of Acts, Regulations and Rules of Court that have been identified by the legal profession as in need of rewriting for the purposes of ensuring greater clarity. It was not intended that the Committee would review the policy of such provision, but would refer to the Attorney-General the question of the Committee's further role if its considerations revealed a possible need for such review.

Mr Geoff James wrote to the Committee on 15 February 1999 raising the need to introduce an additional subparagraph in s.5 of the *Annual Leave Act* ('the Act'). The amendment would extend the definition of a "casual employee" to a person whose employment is expressly agreed between an employer and the person to be an hourly contract for hire in respect of which not less than 20% of the agreed hourly rate has been expressly apportioned by the parties as provision for holidays and illnesses. Since a casual employee does not benefit from the provisions of the Act (s.4), Mr James intends by this amendment to avoid the possibility of 'double dipping' by such persons, receiving the agreed pay loading in lieu of annual leave and also seeking the benefit of the provisions of the Act.

DEFINITION OF "CASUAL EMPLOYEE"

Section 5 of the Act exhaustively defines a "casual employee" as a person who has entered into an arrangement with an employer under which -

- (a) the employment is irregular and not fixed days or at fixed times;
- (b) employment is available and the person works only when required by the employer; and
- (c) there is no continuing contract of employment with the employer requiring the person to work on a subsequent occasion at a specified time.

Mr James suggests that it is a common belief in the "customs of employer and employee" that the concept of a "casual employee" extends to a person whose employment is expressly agreed between an employer and the person to be an hourly contract for hire in respect of which not less than 20% of the agreed hourly rate has been expressly apportioned by the parties as provision for holidays and illnesses.

While the receipt by "casual employees" of a "loading" in their ordinary pay rate is partially intended to compensate for their non-entitlement to annual leave (*Australian Labour Law Reporter* at 37-355), the fact of a loading is not of itself sufficient to define an employment as "casual". It is the non-continuing nature of the employment that properly characterises the employment as "casual". This already appears from the definition in s.5. The mere fact of payment at a specified rate per hour (whether or not subject to a loading) does not of itself make an employee "casual" if it is nevertheless a continuing contract. If it is not a continuing contract, the employee is already a "casual employee" within s.5; otherwise the employee is not "casual" and the Act should not be amended.

EMPLOYEES SUBJECT TO A "LOADING"

Mr James suggests that because the parties are not at liberty to contract out of the Act, there is a potential for "double dipping" by employees not "casual" under the Act but nevertheless entitled to payments by way of loading in lieu of annual leave. However, there are already protections against such double dipping in the legislation. Section 6(4) provides that (subject to certain exceptions not presently relevant) an employer shall not pay to an employee and an employee shall not accept any amount in lieu of leave to which the employee is or may become entitled under the Act (see this policy also reflected, eg, in the *Annual Holidays Act 1944* (NSW), s.3(5)).

EMPLOYEES TO BE BOUND BY THEIR AGREEMENTS?

While there is clearly no justification for the amendment proposed, the existence of s.6(4) raises for consideration Mr James' further conclusion that "[i]t would seem not an unreasonable policy that a person who contracted to accept a 20% loading in substitution for paid annual holidays should be held to that contract". Should agreement to accept a loading in lieu of annual leave preclude the employee's entitlements under the Act? Clearly this is a policy issue outside the Committee's reference from the Attorney-General with respect merely to questions of redrafting of ambiguous or unclear provisions. On the other hand, it may be useful to briefly explore the possible need for amendment with a view to determining whether the matter should be referred to the Attorney-General for direction as to whether the Committee should have a further role.

In the Australian Capital Territory, the *Annual Leave Act 1973* (ACT), s.4(3) provides:

"Without prejudice to any rights a person may have under an award or agreement, a person is entitled under this Act to annual leave at the end of a year of employment if, during the year-

...

- (b) *the person did not receive, under an award or agreement, a pay loading in excess of the base rate of pay in substitution for annual leave for that year and the payment is identifiable from leave records kept by the employer ...* (emphasis added)

This approach is consistent with that Mr James advocates. However, it ignores the health issues reflected in the policy of s6(4) in not allowing annual leave to be traded for a pay loading. Moreover, the ACT approach applies only to an award or industrial agreement. In the Territory, the Act does not apply to an employee in respect of whom an award makes provision for annual leave in his/her employment (s.5). There is no guarantee that (absent such) an employee will have been able to negotiate an adequate pay loading in compensation. This is inconsistent with the policy of the Act as reflected in s.18(1):

"This Act has effect notwithstanding any agreement between an employer and his employee that confers on the employee rights that are not as advantageous to the employee as the rights conferred on the employee by this Act."

Recognition of this policy is implicit in Mr James' suggestion that not less than 20% of the agreed hourly rate must have been expressly apportioned by the parties as provision for holidays and illnesses.

Indeed, a number of other jurisdictions also specifically protect an employee from agreements less (or, at least, no more) advantageous than the benefits under the annual leave legislation.

Western Australia

Minimum Conditions of Employment Act 1993 (WA), s.5(2)

"A provision in, or condition of, a workplace agreement, an award or a contract of employment that is *less favourable to the employee* than a minimum condition of employment has no effect." (emphasis added)

New South Wales

Annual Holidays Act 1944 (NSW), s.5

"(1) The following provisions shall apply in every case where provision is made by an award, agreement or contract of employment for annual holidays or annual leave for any worker -

...

- (b) *where the worker is entitled under any such provision to any benefit that is not more favourable to the worker than the benefits provided by [relevant sections under the Act], that section shall apply to the worker and no benefit shall be allowed to the worker under that provision in respect of any period of employment after the commencement of this Act in the case of a benefit not more favourable than that provided by [relevant sections under the Act] or, after the commencement of the Annual Holidays (Amendment) Act 1967, in the case of a benefit not more favourable than that provided by [relevant section of the Act].*

WHERE BENEFITS ARE MORE ADVANTAGEOUS

In some jurisdictions, there is provision enabling an employee to enjoy the benefits negotiated with his/her employer where those are more advantageous than the benefits under the annual leave legislation.

New South Wales

Annual Holidays Act 1944 (NSW), s.5(1)

"The following provisions shall apply in every case where provision is made by an award, agreement or contract of employment for annual holidays or annual leave for any worker -

- (a) *where the worker is entitled under such provision to any benefit that is more favourable to the worker than the benefits provided by [relevant sections under the Act], that section shall not apply to the worker;*

..." (emphasis added)

Western Australia

Minimum Conditions of Employment Act 1993 (WA), s.8

"An employer and employee may agree that the *employee may forgo his or her entitlement to annual leave* under [the relevant part of the Act] if -

- (a) the employee is given an equivalent benefit in lieu of the entitlement; and

(b) the agreement is in writing." (emphasis added)

South Australia

Industrial and Employee Relations Act 1994 (SA), s.71(1):

"A contract of employment is to be construed as if it provided for annual leave in terms of the minimum standard for annual leave in force under this section unless -

(a) *the provisions of the contract are more favourable to the employee;*
..." (emphasis added)

[See also *Annual Leave Act 1973 (ACT)*, s.14(2)]

While such a policy would appear to have some merit, there is already provision in the Territory for an employee to similarly enjoy such benefits, where there is Ministerial approval for the arrangement. Section 15 provides:

"The Minister may, subject to such conditions as he thinks fit, by instrument in writing, *exempt an employer* or class of employers from the operation of this Act or of a provision of this Act in respect of an employee, or a class of employees, specified by the Minister *if the Minister is satisfied that the employee or class of employees is entitled to benefits in the nature of annual leave under a scheme conducted by or on behalf of the employer or class of employers not less favourable than those provided by this Act.*" (emphasis added)

The policy of requiring Ministerial approval is consistent with that under the *Long Service Leave Act* (s.13). The Territory's current policy as reflected in the Act broadly accords with the approach in a number of other jurisdictions. While slightly more restrictive, it is suggested that there is nothing on the face of the policy that would suggest a need for its reform.

RECOMMENDATIONS

- It is the non-continuing nature of an employment that properly characterises the employment as "casual". This already appears from the definition in s.5. The mere fact of payment at a specified rate per hour (whether or not subject to a loading) does not of itself make an employee "casual" if it is nevertheless a continuing contract. If it is not a continuing contract, the employee is already a "casual employee" within s.5; otherwise the employee is not "casual" and the Act should not be amended.
- Although attempts to contract out of the Act are contrary to the policy of the Act, there is already provision controlling the possibility of consequent double dipping. Section 6(4) provides that (subject to certain exceptions not presently relevant) an employer shall not pay to an employee and an employee shall not accept any amount in lieu of leave to which the employee is or may become entitled under the Act.
- A brief review of the Act and comparable interstate legislation about the application to an employee of arrangements for benefits alternative to those conferred under the Act reveals nothing on the face of its policy that would suggest a need for reform.