**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CITATION:

*Baggow v MARABISDA Inc (ABN 32 094 705 973)* [2019] QIRC 204

PARTIES:

**Tarita Baggow**

(Applicant)

**v**

**MARABISDA Inc (ABN 32 094 705 973)**

(Respondent)

CASE NO:

EC/2019/649

PROCEEDING:

Application for payment instead of taking long service leave

DELIVERED ON:

MENTION DATE:

23 December 2020

16 December 2019

MEMBER:

HARTIGAN IC

HEARD AT:

On the papers

ORDER:

**The application for payment instead of taking long service leave is dismissed.**

CATCHWORDS:

INDUSTRIAL LAW – Payment for long service leave in lieu of taking long service leave - s 110 of the *Industrial Relations Act 2016* (Qld) - whether applicant had an entitlement to long service leave

LEGISLATION:

APPEARANCES:

*Industrial Relations Act 2016* (Qld), s 95, s 96 and s 110

Ms T. Baggow, the Applicant.

Ms A. Barnett, for the Respondent.

**Reasons for Decision**

**Introduction**

[1] Ms Tarita Baggow is currently employed on a full-time basis by MARABISDA Inc. The Applicant commenced employment with the Townsville Aboriginal and Islander Community Health Service ('AIHS') on 19 November 2012, as a Child Protection Advisor. On 2 August 2016, Ms Baggow's employment was transferred by agreement to MARABISDA Inc.

[2] Ms Baggow filed an application on 20 November 2019 for payment instead of taking long service leave. This application was made pursuant to sections 95(2)(a) and 110(1) of the *Industrial Relations Act 2016* (Qld) ('the IR Act').

[3] Section 95(2)(a) provides that an employee is entitled to long service leave on full pay where the employee has completed 10 years continuous service. Additionally, section 110(1) provides that an employee may be paid for all or part of an entitlement to long service leave where the Commission is satisfied that the payment should be made on compassionate grounds or on the ground of financial hardship.

[4] In her application, Ms Baggow states that she commenced employment with MARABISDA Inc. on 2 August 2016 but that her long service leave entitlements were transferred from her previous employment with the AIHS. Ms Baggow commenced employment at AIHS on 19 November 2012. Ms Baggow states the date she will become entitled to take long service leave is 19 November 2019, seven years after commencing her employment with AIHS.

[5] Ms Baggow presently remains employed by MARABSIDA Inc.

[6] Ms Baggow applies for payment of a proportionate amount of long service leave being an amount of $7,303.34.

[7] At the date of the Application, the Applicant had completed 7 years and 1 day of continuous service. A mention was scheduled on 16 December 2019, following which, directions were issued for the parties to provide written submissions with respect to Ms Baggow's entitlement to long service leave.

[8] The question for my determination is whether Ms Baggow has an entitlement to long service leave within the meaning of s 110(1) of the IR Act.

[9] For the reasons referred to below, Ms Baggow does not have such an entitlement.

**The Applicant's submissions**

[10] Ms Baggow submits that payment of long service leave entitlement should be allowed, *inter alia,* on the following grounds:

(a) an application pursuant to s 110(1) of the IR Act is made, where an employee may be paid for all or part of a long service leave entitlement instead of taking the leave or part of the leave, as outlined in subsection (2) or (3);

(b) pursuant to s 110(2)(b) of the IR Act, an employee and employer can agree by signing an agreement for payment. Despite there being no signed agreement, the Employer had verbally agreed to pay out Ms Baggow's long service leave entitlement; and

(c) Ms Baggow outlines compassionate grounds for the purpose of the Commission making an order for payment instead of long service leave, pursuant to s 110(4) of the IR Act.

**The Respondent's submissions**

(a) The Respondent has not filed any submissions in accordance with the directions issued following the mention. It is noted, however, that at the mention the representative for the Respondent who appeared at the mention was generally supportive of Ms Baggow’s application.

**Relevant legislation**

[11] Section 95 of the IR Act provides for an entitlement to long service leave in the following terms:

95 Entitlement—employees other than seasonal employees

(1) This section applies to an employee, other than a seasonal employee.

Note -

For provisions applicable to seasonal employees, see subdivisions 7 and 8.

(2) The employee is entitled to long service leave, on full pay, of –

(a) if the employee has completed 10 years continuous service - 8.6667 weeks; and

(b) after 10 years' service, if the employee has completed at least a further 5 years continuous service - a period that bears to 8.6667 weeks the proportion that the employee's further period of continuous service bears to 10 years.

(3) An employee who has completed at least 7 years continuous service is entitled to a proportionate payment for long service leave on the termination of the employee's service.

(4) However, if the employee's service is terminated before the employee has completed 10 years continuous service, the employee is entitled to a proportionate payment only if –

(a) the employee's service is terminated because of the employee's death; or

(b) the employee terminates the service because of –

(i) the employee's illness or incapacity; or

(ii) a domestic or other pressing necessity; or

(c) the termination is because the employer –

(i) dismisses the employee for a reason other than the employee's conduct, capacity or performance; or

(ii) unfairly dismisses the employee; or

(d) the termination is because of the passing of time and –

(i) the employee had a reasonable expectation that the employment with the employer would continue until the employee had completed at least 10 years continuous service; and

(ii) the employee was prepared to continue the employment with the employer.

…

[12] Section 110 of the IR Act provides for the payment of a long service leave entitlement as follows:

110 Payment instead of long service leave

(1) An employee may be paid for all or part of an entitlement to long service leave instead of taking the leave or part of the leave under subsection (2) or (3).

(2) The payment may be made if –

(a) a relevant industrial instrument or federal industrial instrument provides for the employee to be paid for all or part of the entitlement; and

(b) the employee and employer agree by a signed agreement the payment may be made; and

(c) the payment is made in accordance with the industrial instrument.

(3) If no relevant industrial instrument or federal industrial instrument provides for the employee to be paid for all or part of the entitlement, the payment may be made only if the payment is ordered by the commission on application by the employee.

(4) The commission may order the payment only if satisfied the payment should be made –

(a) on compassionate grounds; or

(b) on the ground of financial hardship.

**Consideration**

[13] Ms Baggow's employment is covered by the *Social, Community, Home Care and Disability Services Industry Award 2010* ('the Award'). The Award deals with long service leave only with respect to the "Payment on termination of employment" in 24.2(b) as follows:

24.2 Payment on termination of employment

…

(b) the requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

 …

 Note 3: State and Territory long service leave laws or long service leave entitlements under s.113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

[14] The Award does not provide for the payment of proportionate long service leave after completing 7 years of continuous service.

[15] No other statutory instrument relevantly applies to the Applicant's employment.

[16] Pursuant to section 95(2)(a) of the IR Act, an employee is entitled to long service leave on full pay where the employee has completed 10 years of continuous service. The Applicant has not completed 10 years of continuous service; having completed 7 years and 1 day of continuous service as at the date of the application filed in the Industrial Registry.

[17] Section 95(3) provides that an employee who has completed less than 10 years' service but at least 7 years of continuous service is entitled to a proportionate payment for long service leave *on the termination* of the employee's service. Ms Baggow’s employment has not been terminated as she remains employed by the Respondent.

[18] Ms Baggow is not entitled to a proportionate payment for long service leave pursuant to s 95(3) of the IR Act because her employment is ongoing, and the employment has not been terminated.

[19] Further, section 110(2) of the IR Act permits payment only if a relevant industrial instrument or federal industrial instrument provides for the employee to be paid for all or part of the entitlement and the employee and employer agree by a signed agreement the payment may be made and the payment is made in accordance with the industrial instrument.

[20] The use of the word “and” in the context of s 110(2) is conjunctive and is used to join the matters listed in s 110(2)(a) – (c).

[21] As the Award does not provide for Ms Baggow to be paid for all or part of the entitlement as set out in s 110(2)(a) it is irrelevant if, as she asserts, her employer has agreed to the payment being made ,although it is noted that no signed agreement has been produced by Ms Baggow and the Respondent agreeing for the payment to be made pursuant to s 110(2)(b).

[22] For these reasons, Ms Baggow does not have an entitlement to long service leave within the meaning of s 110(1) of the IR Act, as she has not completed 10 years of continuous service.

**Conclusion**

[23] I have determined that Ms Baggow does not have an entitlement to long service leave within the meaning of s 110(1) of the IR Act.

[24] Ms Baggow's application for payment instead of taking long service leave is dismissed.