

# **A Guide to the *Long Service Leave Act 1976***

**For entitlements from 1 July 2012**

Department of Justice  
WorkSafe Tasmania



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# INTRODUCTION

Long service leave is a leave entitlement granted to employees for 'long service' to an employer. Entitlements are contained in either state legislation or in federal awards or agreements. In Tasmania, the main piece of legislation covering employees in the private sector is the *Long Service Leave Act 1976*. This Act was amended effective 1 July 2012. If you are seeking information relating to a possible *entitlement* before that date please contact Worksafe Tasmania.

The aim of this Guide is to provide an easy to read description of long service leave basics together with an explanation of certain terms used in the Act. It should not to be seen as a substitute for the Act. The Act can be accessed online at [www.thelaw.tas.gov.au](http://www.thelaw.tas.gov.au) or purchased from Mercury Walch on 1800 030 940.

A number of the issues covered in the Guide have been the cause of misunderstandings and in some cases, disputes. A number of these disputed matters have been sorted out in the Tasmanian Industrial Commission. For guidance, some case examples determined by the Commission are included. Past decisions of the Commission can be viewed at <http://www.tic.tas.gov.au/decisions>

The Guide also contains a section dealing with frequently asked questions, such as:

- can long service leave be 'cashed in'?
- are casual employees entitled to long service leave?
- can an employee work for another employer while on long service leave?

The relevant sections of the Act are highlighted in brackets throughout the Guide.

Although a guide only, care has been taken to ensure that the information is accurate. However, legislation is subject to alteration so it is in your interests to keep up to date with those changes.

Worksafe Tasmania administers the *Long Service Leave Act 1976* and its officers are able to assist with any long service leave enquiry. Information and assistance on long service leave is available from:

- Worksafe Tasmania on  
1300 366 322 (in Tasmania) or (03) 6166 4600 (outside Tasmania)
- your employer organisation
- your union.

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# THE LONG SERVICE LEAVE ACT 1976

## *[Section 3]*

The *Long Service Leave Act 1976* covers most employees in the private sector in Tasmania. Some employees not covered by this Act include:

- employees covered by federal awards or agreements that contain long service leave provisions
- employees covered by other Tasmanian long service leave legislation, such as the *Construction Industry (Long Service) Act 1997*
- State Service employees covered by the *Long Service Leave (State Employees) Act 1994*
- Local Government employees covered by the *Local Government (Building and Miscellaneous Provisions) Act 1993*.
- Commonwealth Government employees covered by Commonwealth legislation.

It is important that you know the source of your long service leave obligations and entitlements.

The *Long Service Leave Act 1976* deals with the entitlement of employees to long service leave and contains separate provisions for mining employees which are discussed in the section — 'Mining Employees'.

It is an offence not to comply with the terms of the *Long Service Leave Act 1976*. Proceedings for offences, which are dealt with in the Magistrates Court, can be both time-consuming and costly. It doesn't matter if the offence occurs by accident.

Lack of awareness of your obligations is no defence. Protect your interests by learning how this law affects you. Remember, there are authorities available to provide advice and assistance if you are uncertain of the source of your long service leave obligations and entitlements. Importantly, if you are unsure, do not ignore the issue.

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# DEFINITIONS

## *[Section 2]*

*age for retirement means –*

(a) in a case where an age for retirement is prescribed in an industrial award that is applicable to an employee, or is fixed by the terms of an employee's contract of employment – the age so prescribed or fixed; or

(b) in any other case – the age of 65 years, in the case of a male, or 60 years in the case of a female;

*employee means a person who is employed by an employer to do any work for hire or reward, and includes an apprentice or any other person whose contract of employment requires him to learn or be taught any business;*

*employer means a person by whom an employee is employed, and includes the Crown;*

*metalliferous mine means –*

(a) a place, open cut, quarry, shaft, tunnel, drive, level or other excavation, drift, gutter, lead, vein, lode, or reef in or by which an operation is carried on for or in connection with the purpose of obtaining a **mineral substance** (defined in Schedule 2) by any manner or method; or

(b) a place adjoining a metalliferous mine within the meaning of paragraph (a) on which a product of that mine is stacked, stored, crushed, or otherwise treated –

and includes –

(c) a place where 2 or more men are employed in connection with prospecting operations for the purposes of the discovery or exploration of or for a mineral substance, whether by drilling, boring, or any other method; and

(d) so much of the surface of a place and the buildings, workshops, change-houses, structures, and works on that place surrounding or adjacent to the shaft, outlets, or site of a metalliferous mine, within the meaning of a preceding paragraph of this definition, as are occupied, together with the mine, for the purposes of or in connection with the working of the mine, or the removal from the mine of refuse, or the health, safety, or welfare of persons employed in, at, or about the mine;

*mining employee means an employee who is employed in, at, or about a metalliferous mine;*

*transmission, used in relation to an employer's business, includes any transfer, conveyance, assignment, or succession, whether by agreement or by operation of law;*

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# ENTITLEMENT

## *[Section 8]*

From 1 July 2012 the long service leave entitlement is  $8\frac{2}{3}$  weeks of paid leave after completing ten years of 'continuous employment'. After each additional five years of 'continuous employment' an employee's entitlement is  $4\frac{1}{3}$  weeks of leave. An employee may have an entitlement to payment for pro rata long service leave on termination of employment after completing seven but less than ten years of 'continuous employment'. For more information on pro rata long service leave, refer to the section — 'Pro Rata Long Service Leave'.

## TRANSITIONAL ARRANGEMENTS

Because the Act has been changed to allow employees to access part of their entitlement at 10 years of service, there are transitional arrangements in place from 1 July 2012 as follows:

- Workers who have completed 12 or more years of continuous employment as at 1 July 2012 will immediately be able to take their long service leave entitlement if they wish, subject to the needs of their employers' establishments.
- Workers who, as at 1 July 2012, have completed 9 or more years but less than 12 years of continuous employment will have to wait until 1 July 2013 before they can take their leave, subject to the needs of their employers' establishments.

This does not prevent a worker with 10 or more years of continuous employment (or their personal representatives) from receiving their long service leave entitlements in the event that the worker leaves their employment or dies during the period 1 July 2012 to 1 July 2013.

## CONTINUOUS EMPLOYMENT

### *[Section 5]*

'Continuous employment' is the period of employment that must be completed to establish an entitlement to leave or payment of pro rata leave on termination of employment.

'Continuous employment' generally means unbroken employment with one employer. However, the Act contains provisions that deem employment to be continuous in circumstances where employment appears to have been broken. These circumstances relate to breaks in employment due to certain absences and interruptions or, in certain other circumstances, where work was performed for more than one employer. These circumstances are discussed separately.

## ABSENCES AND INTERRUPTIONS

The following absences and interruptions do not break 'continuous employment':

- (1) annual leave or long service leave
- (2) public holidays
- (3) any absence due to illness or injury that has been certified as necessary by a medical practitioner

- (4) any interruption or termination of employment by the employer, if done to avoid annual leave or long service leave obligations
- (5) any period of approved leave to attend meetings of either the Tasmanian State Training Authority or committees established under the *Vocational and Education Training Act 1994*
- (6) jury service or other prescribed attendance at court
- (7) maternity leave
- (8) any interruption arising from an industrial dispute
- (9) termination for any reason, except for slackness of trade, but only if the employee is re-employed by the employer within three months of the date of termination
- (10) stand down or termination due to slackness of trade, provided that the employee returns to work or is re-engaged within six months and within 14 days of an offer by the employer to return to work or be re-engaged
- (11) any other absence approved by the employer.

This may appear straightforward, but it's not. All of the absences and interruptions do not break 'continuous employment', but only some of the absences count towards the period of 'continuous employment'; some others don't.

An absence or interruption due to reasons listed at items (1) to (6) will count as part of the period of 'continuous employment'. An absence or interruption due to reasons listed at items (7) to (11) will not.

If an employee has completed 10 years of 'continuous employment' with the employer, and absences were limited to reasons (1) to (6), then an entitlement to long service leave has been created.

However, if an employee was absent for a reason in (7) to (11), then the employee will need to work for an additional period, equal to the period of the absence, before becoming entitled to long service leave. This is shown in the following example.

#### **EXAMPLE**

An employee, who commenced work on 1 January 2000 and was absent on leave without pay for 12 months commencing 1 January 2005, would be entitled to long service leave on 1 January 2011.

That is, 1 January 2000 + 10 years + 1 additional year.

#### **EXPLANATION:**

In this example, the one year absence on leave without pay in 2005, while not breaking 'continuous employment', does not count as part of the period of 'continuous employment'.

Had there been no such absence, the employee's entitlement to long service leave would be January 2010. But because the absence was for a reason that does not count as part of the period of 'continuous employment', then at 1 January 2010 the employee would have had only 9 years of 'continuous employment'. In this case the employee would need to work one additional year in order to complete 10 years of 'continuous employment'.

'Continuous employment' is broken if employment is terminated (except where the terms of items (4), (9) or (10) above apply) or an absence or interruption occurs for a reason that is not covered in matters (1) to (11). This means all previous employment up to the date on which the interruption began is disregarded.

#### WORK PERFORMED FOR MORE THAN ONE EMPLOYER

Although an employee may have worked for more than one employer, the employee may be deemed to be 'continuously employed' and have a long service leave entitlement.

It is important for employers to be aware of these circumstances because it is possible to incur a potentially large financial liability.

There are at least three situations in which the *Long Service Leave Act 1976* deems an employee to have been continuously employed where the employee has worked for more than one employer.

#### **[Section 5(5)]**

One situation occurs when an employee transfers between 'associated' corporations. A corporation is considered to be 'associated' to another corporation if it is a subsidiary or a holding company of the corporation. This is explained in more detail in the relevant corporations legislation.

When an employee transfers between 'associated' corporations, the employee's previous employment counts towards the period of 'continuous employment'. This situation is illustrated in the following example.

#### **EXAMPLE**

Jim was employed by Company A for a period of six years and was then transferred to Company B, which is a subsidiary of Company A. The six years that Jim worked for Company A is to be counted as 'continuous employment' with Company B. Therefore, Jim needs to work a further four years to be entitled to long service leave.

#### **[Section 5(4)]**

Another situation takes place when a 'transmission of business' occurs which means one employer taking over the business of another employer. The transmission of a business does not affect an employee's long service leave entitlement. All prior 'continuous employment' must be recognised by a new employer. This is highlighted by the following examples.



### EXAMPLE

Sally has been employed at a hotel since March 2002. In July 2009 the ownership of the hotel changed hands but Sally continued to work at the hotel for the new owner until August 2012 when she was terminated for reasons of staff rationalisation and lack of work. Payment was sought for long service leave.

Sally has been continuously employed at the same establishment from March 2002 until August 2012 (10+ years) and therefore the same or substantially the same business was transmitted from the former employer to the latter employer in July 2009.

The employer at the time of termination has responsibility for all long service leave entitlements accrued between March 2002 and August 2012.

### *[Section 2(2)]*

A third situation happens when an employee is terminated by one employer and is re-engaged to work in the same place of business, and in substantially the same kind of business, with another employer. If the re-engagement takes place within a period of two months from the date of termination from the former employer, the employee is deemed to be continuously employed.

### EXAMPLE

Julie was a cleaner at the XYZ Shopping Centre from July 2000 until October 2012 when her employment was terminated for reasons other than serious and wilful misconduct. Over this time she was employed by a series of cleaning contractors who held the contract for that centre over the following periods:

28 July 2000 — 30 June 2003

1 July 2003 — 30 June 2006

1 July 2006 — 30 June 2009

1 July 2009 — 30 October 2012

In all, Julie was employed by 4 different cleaning contractors, but worked at the one business location for a continuous period of 12+ years. The fact Julie had been terminated by successive cleaning contractors did not change the fact that she had continued on ‘... in or about that place in the business of some other employer...’. and the business of all of the successive employers was ‘... of the same kind, or substantially the same kind as the business in which Julie was employed ...’.

## GRANTING LONG SERVICE LEAVE

### *[Section 12]*

Long service leave may be taken after an employee has established an entitlement to leave. It cannot be taken in advance. An employer may grant the leave on application. There is no form to apply for

long service leave. An application may be either a verbal or written request. In considering the request, the employer is entitled to have regard to the needs of the business.

Long service leave must be taken in one period unless the employer and employee have agreed that it will be taken in two periods.

#### 'CASHING-IN' LONG SERVICE LEAVE

##### *[Section 10]*

Employees with the agreement of their employer may 'cash-in' long service leave by receiving payment in lieu. This means that the employer may pay an employee the cash value of long service leave due and the employee will not be absent from work. An employee may also take a mixture of cash and leave.

#### PAYMENT FOR LONG SERVICE LEAVE

##### *[Sections 7A & 11]*

An employee is to be paid 'ordinary pay' for a period of long service leave. 'Ordinary pay' is the remuneration that the employee would receive if the employee remained at work during that period.

'Ordinary pay' includes:

- shift penalties
- part-time and casual loadings
- allowances which are generally paid both for all hours worked and for all purposes of the award
- the cash value of board and lodging, other than board and lodging provided by the employer for work in localities distant from the employee's genuine place of residence.

The following payments are excluded from 'ordinary pay' and are not payable during periods of leave:

- overtime payments
- award special rates such as danger, hardship or inconvenience type allowances
- travel payments and allowances
- bonus payments
- living away from home allowance
- meal allowances.

The 'ordinary pay' for a casual employee is based on the average number of hours worked over the 12 months immediately prior to the commencement of leave.

That is, the total hours worked over the past 12 months divided by 52 (weeks)

### EXAMPLE

Terry has completed 10 years of 'continuous employment' and in the year immediately before going on leave, worked 1508 hours. Terry would receive  $8\frac{2}{3}$  weeks of leave at 29 ordinary hours pay for each week of leave.

That is,  $\frac{1508 \text{ hours}}{52 \text{ weeks}} = 29 \text{ hours per week}$

'Ordinary pay' is calculated differently for an employee on commission, such as a commercial traveller or a real estate salesperson. It is based on the average weekly remuneration received over the three months immediately prior to the commencement of leave.

### *[Section 12 (6)]*

An employee taking long service leave is to be paid in one of the following ways:

- in full when the employee commences leave
- on normal pay days throughout the period of leave
- in any other way agreed upon between the employer and employee.

### CASUAL AND PART-TIME EMPLOYEES

#### *[Section 5(3)]*

Casual and part-time employees are entitled to long service leave if they have completed 10 years of 'continuous employment'. They are considered to be continuously employed if they have been regularly working for 32 hours or more in each consecutive period of four weeks.

An employee engaged before 21 December 1979 is considered to be continuously employed if the employee was regularly employed throughout any period. An employee in this situation is not required to regularly work a minimum of 32 hours in each four-week period.

It is also important to note that casual and part-time employees may have an entitlement to pro rata long service leave if employment is terminated after seven years of 'continuous employment'. For more information refer to the next section.

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## PRO RATA LONG SERVICE LEAVE

### *[Section 8 (2)(b), (3) and (3A)]*

An employee, including part-time and casual employees, may be entitled to a payment for pro rata long service leave on termination after completing 7 but less than 10 years of 'continuous employment'. The payment of a pro rata entitlement is not automatic and is only available in certain circumstances.

This section considers the circumstances when an employee will or may be entitled to payment for pro rata long service leave. As most of these circumstances are not clear cut, you may wish to seek further advice if you are unsure. It is important that you know when an entitlement to pro rata long service leave may arise.

An employee having completed at least seven years of 'continuous employment', will be entitled to a pro rata payment if employment is terminated by the employer for any reason other than serious and wilful misconduct. 'Serious and wilful misconduct' is discussed in more detail in the section — 'If Employment is Terminated by the Employer'.

An employee who has completed at least seven years of 'continuous employment', will also be entitled to a pro rata payment if employment ceases either through illness that was of such a nature to justify the termination of employment, or retirement or death. In the latter case, amounts are payable to the personal representatives of the deceased. Cases involving illness are discussed in the section — 'Illness'.

A pro rata entitlement will also be payable if an employee, who has completed at least seven years of 'continuous employment', resigns due to incapacity or 'domestic or other pressing necessity' that was of such a nature to justify the termination of employment. This is discussed in more detail in the section — 'Domestic or Other Pressing Necessity'.

When making a claim for pro rata long service leave, for reasons of illness, incapacity or 'domestic or other pressing necessity', it is in the interests of both parties that the employee provide the employer with supporting evidence prior to ceasing employment. An employer should then be able to consider whether the employee is entitled to a pro rata payment.

Criteria that you may wish to consider when examining whether a pro rata entitlement exists, are set out in the decision of the New South Wales Industrial Commission in *Computer Sciences of Australia Pty Ltd v Leslie* (1983 AILR at 557). Although that case was in relation to 'domestic or other pressing necessity', it may be of assistance in assessing if a pro rata entitlement exists in other circumstances. The criteria are:

- I. Was the reason claimed for termination one which fell within the circumstances provided in the Act? That is, illness, incapacity, retirement, death, 'domestic or other pressing necessity' or termination of the employment by the employer for any reason other than serious and wilful misconduct.

2. Was the reason genuinely held by the employee and not simply colourable, or a rationalisation?
3. Although the reason claimed may not be the sole ground which influenced the employee's decision to terminate, was it the real or motivating reason?
4. Was the reason such that a reasonable person in the circumstances in which the employee was placed might have felt compelled to terminate his or her employment? That is, was the motivation of 'such a nature to justify termination'? What would the consequences have been if the employee did not take that course of action?

#### **'DOMESTIC OR OTHER PRESSING NECESSITY'**

What is 'domestic or other pressing necessity'? There is no simple answer, but as a guide, ask yourself if the 'domestic or other pressing necessity' is of a kind which gives little reasonable option but to resign. The key word is 'necessity'.

Necessity needs to be looked at mainly from the employee's view. That is, what was going through the mind of the employee at the time of resignation? Did the employee genuinely regard themselves as being under a 'domestic or other pressing necessity'? If so, that is sufficient.

What constitutes 'domestic or other pressing necessity' really depends upon the circumstances of each case. It is important to note that general statements may be misleading as the Industrial Commission will consider all the circumstances of each case, not just certain parts.

The following cases are drawn from disputes that were determined by the Tasmanian Industrial Commission. In these cases all the applicants (or former employees) had completed more than seven years of 'continuous employment'.

#### **CASE EXAMPLE 1**

The applicant's reason for termination was due to financial commitments. He claimed that he did not earn enough to support his wife and small child. The decision was that it was not appropriate to consider his income alone and ignore the income of his spouse.

The applicant was therefore unable to highlight what the problem was, that is, if he did not resign an undesirable consequence would have taken place. The application was rejected on the grounds that the applicant was not able to demonstrate that he had terminated his employment on account of 'domestic or other pressing necessity'. He was therefore not entitled to pro rata long service leave.

(T747 of 1987 — Behrens and TGIO)

#### **CASE EXAMPLE 2**

The applicant and his wife were both in the workforce and a decision had to be made about the care of their five month old child. Their options were limited. They decided that the applicant take on the carer's role. This was the prime motivating factor for his resignation.

The decision stated:

When deciding their future and the future of their children, parents have a fundamental right to choose whether or not their children will be cared for by themselves or some other person.

The undesirable consequence of not resigning was that the applicant and his wife would have been forced to place their child in care.

The application was considered to fall within the meaning of 'domestic or other pressing necessity' and the applicant was therefore entitled to pro rata long service leave.

(T5156 of 1994 — Withers and Industrial Transmission and Engineering Supplies Pty Ltd)

### **CASE EXAMPLE 3**

The applicant and all other employees were informed that the cable logging operation of the business was likely to close.

The decision stated that the onus is on the applicant to demonstrate to the satisfaction of the Commission that:

- the applicant terminated his employment because of, not only some pressing necessity, but also because it was of such a nature as to justify his actions, and
- a real and genuine problem existed and that had the applicant not resigned, a particular undesirable consequence would have taken place.

Although there was uncertainty, this did not mean that the employer's entire business was to cease. It appeared that the applicant arrived at the conclusion that once the employer's cable logging operation closed, it automatically made his position with the company redundant. However at no time did the employer inform the employee that his position within the Company would become redundant.

It was held that the applicant was unable to demonstrate that he resigned because of 'domestic or other pressing necessity'.

(T5280 of 1994 — Radford and Northrop Logging Pty Ltd)

### **CASE EXAMPLE 4**

Whilst living and working in Launceston, the applicant's wife obtained employment in Hobart. The applicant unsuccessfully approached his employer to seek either a transfer to the Hobart office, or an arrangement where he could work from Hobart and frequently travel to the Launceston office.

After his wife took up work and residence in Hobart, the applicant again approached the employer and again was told there was no position in Hobart. As a consequence the applicant informed the employer of his intention to seek other employment in Hobart. His reason for terminating employment was to bring to a conclusion an 11-month separation from his wife.

In its decision, the Commission believed the applicant's view to be genuinely held and was satisfied that it was the real and motivating reason for doing what he did. The Commissioner stated that he was satisfied that the application fell within the requirements of 'domestic or other pressing necessity'. The applicant was therefore entitled to pro rata payment for long service leave.

(T5390 of 1995 — Thomas and The Examiner Newspaper Pty Ltd)

#### **CASE EXAMPLE 5**

The applicant claimed an entitlement due to 'domestic or other pressing necessity' on the grounds that, at the time she ceased work, she was over six months pregnant and was terminating her employment to have and raise her child.

In this decision the Commission stated that it considered the applicant genuinely believed that the reason she gave up work was to be available to care for her soon to be born child — a decision made together with her husband.

In this decision, the Commission stated that the real questions to be answered in this matter were:

- why the applicant terminated her employment
- whether the reasons claimed for doing so fell within the meaning of 'domestic or other pressing necessity'.

The applicant's real and motivating reasons for terminating her employment were:

- because of pregnancy and the impending birth of the baby
- her desire to care for the child rather than placing the child under the care of others.

The decision of the Commission stated that the decision of a pregnant woman to cease work constituted a domestic necessity and therefore warranted payment of pro rata long service leave.

(T6215 of 1996 — Brazendale and P & P Holdings Pty Ltd trading as Elphin Continental Cakes)

#### **ILLNESS**

When an employee claims payment for pro rata long service leave on the basis of illness, what is important is that the illness is of such a nature that the employee has no option but to resign.

It is important to note that general statements may be misleading as the Industrial Commission will consider all the circumstances of each case, not just certain parts. Three disputed Industrial Commission cases are examined below. In these cases all the employees had completed more than seven years of 'continuous employment'.

#### **CASE EXAMPLE 1**

The applicant resigned because she could no longer cope with lifting or assisting to lift heavy and helpless patients. On advice from the employer, she obtained a certificate from her doctor stating that she had been advised to cease work in a hospital situation due to a back injury.

It was found that although the applicant did not supply a medical certificate until after termination, it should not disentitle her to long service leave if the reason for leaving was her medical condition. The medical evidence and the nature of work were not contested by the employer.

The Commission decided that the applicant's medical condition justified her ceasing work and it caused her to terminate her employment. She was therefore entitled to payment of pro rata long service leave.

(T2482 of 1990 — Smith and St Luke's Private Hospital Ltd)

### **CASE EXAMPLE 2**

An ex-employee claimed to have terminated her employment on account of 'illness of such a nature as to justify the termination of that employment'. She had been advised to resign by her doctor and an appropriate medical certificate was produced.

The Commission held the doctor's evidence to be sufficient to grant the applicant's claim. The issue of whether or not the work contributed to the termination was not really a factor that needed to be considered under the *Long Service Leave Act 1976*.

(T5468 of 1995 — Spencer and Hawkins & Daly)

### **CASE EXAMPLE 3**

The applicant terminated her employment without notice after a heated discussion with the employer. She claimed an entitlement to pro rata long service leave because employment was terminated on account of 'illness of such a nature as to justify the termination of employment'.

To be eligible for pro rata long service leave, the applicant had to demonstrate that she terminated her employment on account of illness or a pressing necessity. It was also necessary for her to show that the illness or the pressing necessity were of such a nature as to justify the termination of her employment.

In its decision the Commission noted the content of the doctor's reports but was not satisfied that those reports established that the applicant's illness was of such a nature that it became necessary for her to terminate her employment. The doctor did not make any recommendation to that effect.

The absence of a recommendation from the doctor did not, of itself, disentitle the applicant to pro rata long service leave on account of illness. But, without this type of medical evidence, the onus was on the applicant to establish that the alleged illness required her to terminate her employment.

The decision was that the illness was not the real and motivating reason for the applicant's termination and therefore the applicant was not entitled to pro-rata long service leave.

(T6426 of 1996 — Rowe and TSE Pty Ltd)



## IF EMPLOYMENT IS TERMINATED BY THE EMPLOYER

An employee, who has completed at least seven years of 'continuous employment', will be entitled to a pro rata long service leave payment if employment is terminated by the employer for any reason other than serious and wilful misconduct. For an employee to be denied pro rata long service leave, termination must have occurred because of 'serious and wilful misconduct'.

### 'SERIOUS AND WILFUL MISCONDUCT'

For an action to be considered 'serious and wilful misconduct' in relation to long service leave provisions, all three components must be shown to exist. That is, the action must be 'serious' and 'wilful' and constitute 'misconduct'. In disputed matters the onus is on the employer to prove all three components exist.

What constitutes serious and wilful misconduct really depends upon the circumstances of each case. It is important to note that general statements may be misleading as the Industrial Commission will consider all the circumstances of each case, not just certain parts.

### CONSTRUCTIVE DISMISSAL

The central issue in disputes is the question of whether employment was terminated by the employee or the employer. In essence, constructive dismissal takes place when an employee resigns at the suggestion of, or through pressure exerted by, the employer.

In a situation where the employer says to an employee something along the lines of 'I want your resignation' or 'If you don't resign I am going to sack you', that is constructive dismissal, and may mean an employee has an entitlement for pro rata payment of long service leave.

What has happened is that termination has occurred at the initiative of the employer. The employee has not resigned of his or her own free will; the resignation has taken place because the employer has forced the issue. There is no question of real choice; what the employer has said is 'Your employment is finished, your only choice is whether I sack you or you resign'.

What constitutes constructive dismissal will depend upon the circumstances of each case. Cases involving 'serious and wilful misconduct' and constructive dismissal are not straightforward. Seek advice if you are unsure.

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# CALCULATION OF PRO RATA LEAVE

## *[Section 8(2)(b)]*

A pro rata long service leave entitlement is calculated by dividing the employee's period of 'continuous employment' in years by 10 years and multiplying the result by 8 $\frac{2}{3}$  weeks. This is illustrated in the following example.

### **EXAMPLE 1**

What is the pro rata entitlement of an employee who, having been continuously employed for 9 years, resigns because of ill-health, and is eligible for payment of pro rata long service leave on termination?

The calculation is as follows:

$$\frac{9 \text{ years}}{10 \text{ years}} \times 8.667 \text{ weeks} = 7.8 \text{ weeks}$$

### **EXAMPLE 2**

What is the pro rata entitlement of an employee who, having been continuously employed for 13 years 6 months and 14 days, resigns because of ill-health, and is eligible for payment of pro rata long service leave on termination?

The calculation is as follows:

$$\frac{13.5383 \text{ years}}{10 \text{ years}} \times 8.667 \text{ weeks} = 11.7332 \text{ weeks}$$

## CALCULATION ON THE DEATH OF AN EMPLOYEE

### *[Section 9]*

A pro rata entitlement is calculated differently on the death of an employee. Two situations may exist. In the first situation, if the deceased had more than 7 years but less than 10 years of employment, the pro rata entitlement is an amount equal to 1/60th of the deceased employee's ordinary pay for the period of 'continuous employment'.

The second situation will occur if the deceased had more than 10 years of service at the time of death. In this situation the pro rata entitlement is calculated by adding both:

- the payment of any outstanding accrued entitlement
- an amount equal to 1/60th of the deceased employee's ordinary pay for the period of 'continuous employment' which occurred after the last accrual of an entitlement to long service leave.

In both of these situations amounts are payable to the personal representatives of the deceased.

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# LONG SERVICE LEAVE DISPUTES

*[Sections 13, 14, 14A, 15 & 16]*

Most disputes are about a pro rata entitlement. Some may be avoided by the employee providing full details of the reason for termination to the employer prior to ceasing employment. The circumstances where an entitlement will exist are discussed in the section — ‘Pro Rata Long Service Leave’.

## PROCEDURE

Disputed long service leave matters may be referred by employers or employees to Worksafe Tasmania which will investigate the dispute and attempt to resolve it with the parties.

If a dispute cannot be resolved, Worksafe Tasmania will submit a report to the Tasmanian Industrial Commission outlining the circumstances of the dispute. A hearing date will be set and the matter heard and decided by a Commission member.

Parties to proceedings may choose to represent themselves or seek to be represented by an agent, including a union but excluding a barrister or legal practitioner.

After hearing the parties the Commission may either dismiss an application or make an order. An order may direct an employer to pay a long service leave entitlement or a pro rata long service leave entitlement.

Decisions of a single Commissioner can be appealed to a Full Bench of the Industrial Commission.

If an employer does not comply with the Commission’s decision, it can be enforced through the Magistrates’ Court.

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# LONG SERVICE LEAVE RECORDS

## *[Section 18]*

The *Long Service Leave Act 1976* requires employers to keep long service leave records. Keeping records is in the interests of both employees and employers.

Accurate records are important, particularly in the event of a dispute. Long service leave records may be incorporated into any other employment record. The *Long Service Leave Regulations 2000* specifies that the record for each employee must include:

- the employer's name and address
- the employee's name, address and position
- the date employment commenced
- details of any additional period of employment to be served, due to an absence or interruption that does not count towards 'continuous employment'
- the end date of the qualifying period, after allowing for any additional period(s) required to be served
- details of leave taken, including: commencing date, finishing date, number of days taken, amount paid and method of payment
- details of termination of employment, including: date of termination, reason for termination and rate of ordinary pay at the date of termination.

Employers should be aware that the records of a previous employer are to be transferred to a new employer on the transmission of a business.

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# MINING EMPLOYEES

## *[Sections 2(1) and 2A]*

Mining employees are persons employed at a metalliferous mine. (see definitions P5)

## LONG SERVICE LEAVE ENTITLEMENTS

### *[Section 8A]*

Unlike other employees covered by the *Long Service Leave Act 1976*, a mining employee is entitled to **13 weeks** of long service leave after each ten years of 'continuous employment'. Apart from the differences in the amount of leave the concepts of 'continuous employment' are the same for all employees under the *Long Service Leave Act 1976*. The meaning of 'continuous employment' is explained in the section — 'Continuous Employment'.

## PRO RATA LONG SERVICE LEAVE

### *[Section 8A (2)(b), (3) & (3A)]*

Mining employees may be entitled to payment for pro rata long service leave on termination of employment after completing five but less than ten years 'continuous employment'. Apart from the differences in qualifying periods, the concepts of pro rata leave are the same for all employees under the *Long Service Leave Act 1976*. For more information on pro rata long service leave refer to the section — 'Pro Rata Long Service Leave'.

## CALCULATION OF A PRO RATA ENTITLEMENT

### *[Section 8(2)(b)]*

A pro rata long service leave entitlement for a mining employee is calculated by dividing the employee's period of 'continuous employment' by ten years and multiplying the result by 13 weeks. This is illustrated in the following example.

### **EXAMPLE**

What is the pro rata entitlement of a mining employee who, having been continuously employed for eight years, resigns because of a need to provide full time care of an aged parent, and is eligible for payment of pro rata long service leave on termination?

The calculation is as follows:

$$\frac{8 \text{ years}}{10 \text{ years}} \times 13 \text{ weeks} = 10.4 \text{ weeks}$$

## CALCULATION ON THE DEATH OF A MINING EMPLOYEE

### *[Section 9(3)]*

A pro rata entitlement is calculated differently on the death of a mining employee. Two situations may exist. In the first situation, if the deceased had completed more than 5 years but less than 10 years of

continuous employment, the pro rata entitlement is an amount equal to 1/40th of the deceased employee's ordinary pay for the period of 'continuous employment'.

The second situation will occur if the deceased had already accrued an entitlement to long service leave at the time of death. In this situation the pro rata entitlement is calculated by adding both:

- the payment of any outstanding accrued entitlement
- an amount equal to 1/40th of the deceased employee's ordinary pay for the period of 'continuous employment' which occurred after the last accrual of an entitlement to long service leave.

In both of these situations amounts are payable to the personal representatives of the deceased.

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# FREQUENTLY ASKED QUESTIONS

## WHAT IS THE LONG SERVICE LEAVE ENTITLEMENT?

### **[Section 8]**

The entitlement to long service leave is  $8\frac{2}{3}$  weeks of paid leave after completing 10 years of 'continuous employment'. After each additional five years of 'continuous employment', an employee is entitled to  $4\frac{1}{3}$  weeks of leave.

### **[Section 8A]**

Unlike other employees covered by the *Long Service Leave Act 1976*, a mining employee is entitled to 13 weeks of long service leave after each ten years of 'continuous employment'.

## WHEN IS AN EMPLOYEE ENTITLED TO PAYMENT FOR PRO RATA LONG SERVICE LEAVE?

### **[Section 8 (2)(b), (3) & (3A)]**

An employee may be entitled to payment for pro rata long service leave on termination of employment after completing 7 but less than 10 years of 'continuous employment'.

### **[Section 8A (2)(b), (3) & (3A)]**

However, a mining employee may be entitled to payment for pro rata long service leave on termination of employment after completing 5 but less than 10 years of 'continuous employment'.

The payment of a pro rata entitlement is not automatic and is only required in certain circumstances. For information on the circumstances where pro rata long service leave is to be paid, refer to the section — 'Pro Rata Long Service Leave'.

## ARE CASUAL EMPLOYEES ENTITLED TO LONG SERVICE LEAVE?

### **[Section 5(3)]**

Yes, if they meet the 'continuous employment' provisions.

## CAN LONG SERVICE LEAVE BE 'CASHED IN'?

### **[Section 10]**

Yes. By agreement, employees may 'cash-in' long service leave by receiving payment in lieu or may take a mixture of cash and leave.

WHAT HAPPENS WHEN PUBLIC HOLIDAYS OCCUR WHILE ON LONG SERVICE LEAVE?

*[Section 12(9)]*

Public holidays are added on to the period of long service leave.

CAN AN EMPLOYEE ACCRUE LONG SERVICE LEAVE WITH TWO EMPLOYERS AT ONE TIME?

*[Section 5(3)]*

Yes, if engaged on a regular basis with both.

CAN AN EMPLOYEE WORK FOR ANOTHER EMPLOYER WHILE ON LONG SERVICE LEAVE?

Yes. The Act does not prohibit an employee from working for another employer while on leave.

CAN AN EMPLOYER BE EXEMPT FROM THE *LONG SERVICE LEAVE ACT 1976*?

*[Section 7]*

Yes. The Secretary of the Department of Justice may grant an exemption to an employer from having to comply with the Act where:

- employees are entitled to benefits not less favourable than those set out in the Act
- it is in the best interests of the employees that the exemption is granted.

DOES AN APPRENTICESHIP COUNT TOWARDS 'CONTINUOUS EMPLOYMENT'?

*[Section 5(9)]*

Yes, provided that following the completion of the apprenticeship, the person is engaged for work by that employer within three months.

DOES A PERIOD OF WORKERS COMPENSATION COUNT TOWARDS 'CONTINUOUS EMPLOYMENT'?

*[Section 5(1)(c)]*

Yes. Any absence due to illness or injury that has been certified as necessary by a medical practitioner counts towards 'continuous employment'.

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