REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2020 WAIRC 00791
CORAM	:	SENIOR COMMISSIONER S J KENNER
HEARD	:	FRIDAY, 6 DECEMBER 2019, TUESDAY, 12 MAY 2020
DELIVERED	:	TUESDAY, 8 SEPTEMBER 2020
FILE NO.	:	APPL 47 OF 2019
BETWEEN	:	GLENN WALLIS Applicant AND THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD Respondent

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Catchwords	:	Industrial law (WA) - Dispute as to entitlements to long service leave - Relevant "reviewable decision" - Whether employee engaged in the construction industry - Definition of "construction industry" - Employee engaged in repair and maintenance of railway maintenance machinery - Employee not employed in the construction industry - Application dismissed
Legislation	:	*Construction Industry Portable Paid Long Service Act 1985* (WA) ss 3(1), 50 *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA) Schedule 1 *Industrial Relations Act 1979* (WA) s 27(1)(n) *Industrial Relations Commission Regulations 2005* (WA) reg 102A

Result**:** Application dismissed

Representation:

Counsel:

Applicant**:** Mr C Fogliani of counsel
Respondent**:** Ms R Harding of counsel

Case(s) referred to in reasons:

Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme [2019] WAIRC 00860; (2019) 100 WAIG 125

Programmed Industrial Maintenance v Construction Industry Long Service Leave Payment Board [2020] WAIRC 00758

Aust-Amec Ltd t/a Metlab Mapel & SRC Laboratories and Ors v Construction Industry Long Service Leave Payments Board (1995) 15 WAR 150; (1995) 62 IR 412

Construction Industry Long Service Leave Payments Board v Positron Pty Ltd (1990) 70 WAIG 3062

Reasons for Decision

1 The present matter is an application to review under s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA). The applicant alleges that the respondent erred in its decision to deem him ineligible to accrue benefits to long service leave under the Act, because he was not employed in the "construction industry". The applicant maintains that he was employed in the construction industry and seeks orders accordingly.

2 A preliminary issue arises, raised by the Commission with the parties. That issue is whether the decision of the respondent set out in its letter to the applicant dated 15 October 2019 was the relevant "decision" under s 50(1) of the Act from which the present application to review is brought. This arises because at an earlier time, on 13 February 2019, the respondent wrote to the applicant's employer, Monadelphous Engineering Associates Pty Ltd, to inform it that it did not have to record service and make contributions under the Act for employees engaged in a classification occupied by the applicant. The present application to review has been brought from the "decision" set out in the respondent's letter of 15 October 2019, which letter makes no reference to the earlier letter from the respondent to Monadelphous dated 13 February 2019. The letter of 15 October 2019 was to the effect that the applicant would no longer accrue "days of service" as the applicant's work was not considered work "in the construction industry" as specified in s 3(1) of the Act.

3 On the face of it, both letters appear to constitute "reviewable decisions" for the purposes of s 50(1)(e) of the Act, as they deal with an "entitlement of an employee to long service leave".

4 Aside from this preliminary issue, the substantive issue to be determined is whether the work performed by the applicant, as a Track Machine Specialist Mechanical Fitter, who performs maintenance work, comprising diagnostic testing, maintenance, and repairs to track maintenance machines used by Rio Tinto to maintain its railway, is work in the "construction industry" as defined in s 3(1) of the Act.

5 The applicant maintained this work was "maintenance of or repairs to railways" under the definition of "construction industry" set out in s 3(1)(a)(ii) of the Act. The respondent disputed this contention and submitted that such work performed by the applicant did not involve, of itself, maintaining or repairing railways. Rather, the work engaged in by the applicant was the maintaining and repairing of equipment used in maintaining railways and therefore is not work that falls within the definition of "construction industry" and the applicant has no entitlement to long service leave under the Act.

Factual overview

6 The facts are not essentially in dispute. The applicant was initially employed by Fluor Rail Services from 18 January 2012 to 18 June 2018. He was employed in the position of a Mechanical Fitter and he performed repairs and servicing work on mechanical equipment used to maintain and repair the Rio Tinto railway network. This machinery included large track maintenance machines (track tampering machines) and other mobile equipment, used on the railway. The applicant was based at the Rio Tinto 6 Mile Workshop in Dampier. About 50% of his time was spent in the workshop servicing and repairing rail maintenance equipment and the other 50% of his time was out in the field, doing diagnostic testing, maintenance and repairs to track maintenance equipment and machines. This work also involved breakdown support to keep the track maintenance machinery operating.

7 Photographs of the machinery and equipment that the applicant maintained were set out at pp 57 - 68 of the applicant's book of documents. The applicant accepted these machines and equipment were not connected to the railway itself. They could be removed by a crane.

8 In June 2018, the applicant's position with Fluor was made redundant because Rio Tinto changed its contracting arrangements. Shortly after, Monadelphous took over the railway maintenance contract with Rio Tinto. On 11 July 2018, the applicant started employment with Monadelphous doing the same work he did for Fluor. The title of his position was different as a "Specialist Mechanical Technician - Step 1". The applicant continued to work in both the Rio Tinto workshop and out onsite, to the same extent as he did with his previous employer.

9 There was also no dispute that the work performed by the applicant fell within a classification of work in a "prescribed award", as set out in Schedule 1 of the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA). The classification being an "Engineering Tradesperson Level 1 Engineering/Production Employee", in the Metal Trades (General) Award 1966.

10 Whilst it seems from the documents in evidence that during his employment by Fluor, Fluor was contributing to the respondent on the applicant's behalf, this situation changed during the applicant's employment with Monadelphous. When Monadelphous attempted to register the applicant under the Act, the respondent did not accept the registration because the respondent did not consider that the applicant was an employee engaged in the "construction industry" for the purposes of s 3(1) of the Act. In January 2019, correspondence passing between Monadelphous and the respondent raised queries about the work performed by the applicant and other employees engaged on similar duties. Once all the requested information was provided by Monadelphous to the respondent, as I

have mentioned above, by letter dated 13 February 2019 (p 23 respondent's documents), the respondent informed Monadelphous that employees engaged as Track Machine Specialist Electricians and Mechanical Fitters, maintaining and repairing track machines, were not employees covered by the Act.

11 In the letter, in summary, the respondent considered this work involved work on mobile plant and equipment, that did not otherwise fall within the definition of "construction industry" in s 3(1) of the Act. The applicant said that he noted that he no longer received credits for long service leave from the respondent once his employment changed from Fluor to Monadelphous. This led the applicant to correspond with the respondent from March to September 2019, in relation to this issue. Copies of this correspondence was at pp 44 - 52 of the applicant's book of documents.

12 The upshot of this correspondence was a letter from the respondent to the applicant, as I have mentioned above, dated 15 October 2019. In it, again in summary, the respondent informed the applicant that the work he was performing in the Rio Tinto workshop was not regarded as "onsite work" and thus was not eligible for long service leave under the Act. In relation to the "onsite" work performed by the applicant, in maintaining and repairing track maintenance machines and equipment, the respondent said this work was not covered by the Act as it was work performed on mobile plant, not being a structure or fixture, for the purposes of the definition of "construction industry" under the Act. Whilst acknowledging that the applicant had received service contributions made to the respondent from his former employer, Fluor, the respondent said they were made in error and that the company could seek a credit for those contributions.

13 The mechanics of how contributions are made to the respondent and the respondent's internal processes were dealt with in the evidence of Mr Cinquina and Ms Van Bosch. The system of the respondent in relation to contributions by employers seems to be on a self-assessment basis, with the respondent relying on information given to it by an employer. Checking and review processes of returns seems to occur when a claim for payment of long service leave is made or a query is raised. This is largely due to the many employees and employers in the scheme. Where an employer has been found to have wrongly contributed to the fund, refunds can be made.

14 Both Mr Cinquina and Ms Van Bosch were taken to the respondent's letter of 13 February 2019. The letter was signed by Ms Van Bosch. Both said this was a decision reached by the respondent that work done by Monadelphous on mobile plant was not covered by the Act. It would appear, however, that the applicant was not made aware of this letter or the decision it constituted. This was plainly a decision that would affect an employee's entitlement to long service leave under the Act for the purposes of s 50(1)(e). Despite this, Mr Cinquina also

accepted, when put to him, that the respondent's letter of 15 October 2019 to the applicant also constituted a decision by the respondent that the applicant could not receive long service leave under the Act because the applicant was not employed in the construction industry. It was also Mr Cinquina's opinion that the letter of 15 October 2019 constituted a decision that whilst the applicant was employed by Fluor, he was also not entitled to receive contributions into the scheme under the Act, for the same reasons as the decision was made that Monadelphous did not have to make contributions.

15 That the respondent appears to have made two decisions, one on 13 February 2019 and the other on 15 October 2019, in relation to both the employer's obligations and the applicant's entitlements under the Act, without the applicant being aware of the former decision, is a complication in these proceedings and is a matter upon which I comment further below.

Consideration

Preliminary issue

16 Given that two "decisions" were made by the respondent in relation to the applicant's eligibility to receive long service leave benefits under the Act, arising from his employment by Monadelphous, the issue arises as to which decision enlivens the present application for review. By s 50 of the Act, the jurisdiction is conferred on the Commission to review a decision of the respondent. Section 50 provides:

> **50**. Review of Board's decision
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> (1) In this section —
>
> ***reviewable decision*** means a decision by the Board —
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> (a) to refuse to register an employee; or
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> (b) to require an employer to register under this Act; or
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> (c) to remove the name of an employer or employee from the employers register or the employees register respectively; or
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> (d) as to the assessment of the amount of ordinary pay of an employee under section 34; or
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> (e) as to the entitlement of an employee to long service leave; or
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> (f) as to the amount of any moneys to be paid in respect of a long service leave entitlement whether pro rata or otherwise.
>
> (2) A person who is aggrieved by a reviewable decision may, in the manner and time prescribed by regulations made under section 51A(3), refer the decision for review to the WAIRC constituted by a single commissioner.

> (3) On a referral of a decision under subsection (2), the WAIRC is to inquire into the circumstances relevant to the decision and may —
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> (a) affirm the decision; or
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> (b) vary the decision; or
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> (c) set aside the decision and —
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> (i) substitute another decision; or
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> (ii) send the matter back to the Board for reconsideration in accordance with any directions or recommendations that the WAIRC considers appropriate.

17 For present purposes, the relevant provision is s 50(1)(e), dealing with a decision that affects an employee's entitlement to long service leave under the Act. Both the letter of 13 February 2019 and the letter of 15 October 2019 from the respondent, are "decisions" of the respondent. The letter of 13 February 2019 advised Monadelphous, as the applicant's employer, that after due investigation by the respondent, Monadelphous employees employed in Track Machine Specialist classifications were not "eligible employees" as defined under the Act and that "Monadelphous was not required to record service and make contributions under the Act for Track Machine Specialist Electricians and Maintenance Fitters maintaining and repairing Track Machines". Plainly such a decision was a "reviewable" decision under s 50(1)(e) of the Act because thereafter, being employed by Monadelphous in such a classification, despite having received contributions for service from his former employer, Fluor, the applicant was no longer, in the view of the respondent, to receive such contributions from Monadelphous.

18 On the evidence of the applicant, he was not aware of the letter of 13 February 2019. He said that he raised questions with the respondent because he was six months away from qualifying for pro rata long service leave. He also said that he spoke to a Monadelphous superintendent who made enquiries and informed him that Monadelphous had missed the then quarter for contributions for presumably the last quarter of 2018. At that point, the applicant escalated the matter with the respondent, by way of a "Days of Service Query" which ultimately led to the letter of 15 October 2019.

19 There can be no doubt that the letter of 15 October 2019 is also a "reviewable decision" for the purposes of s 50(1)(e) of the Act. Surprisingly, however, there was no reference made in this letter to earlier correspondence to Monadelphous in February 2019, informing Monadelphous it did not have to make contributions under the Act. It was clear that the applicant was employed in a Track Machine classification. This information was provided to the respondent by Monadelphous in email exchanges between Monadelphous and the respondent in January 2019, which included the applicant's name, classification and work performed. This

information led to the respondent's decision, set out in its letter of 13 February 2019, to Monadelphous.

20 It is therefore of some regret it took the respondent a further eight months to resolve an issue raised by the applicant, that would appear to have been resolved in early 2019. In that time, the applicant underwent a period of unnecessary uncertainty as to his entitlements under the Act. Whilst Mr Jacques who handled the applicant's query also gave evidence and admitted the delay was his error, it is suggested the respondent review its internal systems to avoid such a situation in the future. I would have thought the information leading to the letter of 13 February 2019 should have been readily available if cross-referenced with the applicant's employer as "Monadelphous", in his query dated 19 March 2019 (see p 24 respondent's book of documents). At the time of the applicant's query, the decision had already been made by the respondent, that persons employed in the applicant's class of work were not eligible to receive contributions under the Act.

21 Returning to the s 50(1)(e) point, it seems on the evidence, as I have mentioned, that the applicant was not aware of the respondent's decision as set out in its letter to Monadelphous of 13 February 2019. For the purposes of s 50(2) of the Act, a person "aggrieved" by a "reviewable decision" may refer the decision to the Commission for review. To be "aggrieved" by a decision carries with it the inference that the affected person knows of the decision to which s 50(2) refers. As the applicant only learned of the respondent's decision made as set out in its letter of 15 October 2019 to the applicant, I consider that for the purposes of s 50(1) of the Act, and reg 102A of the *Industrial Relations Commission Regulations 2005* (WA), this was the "decision" from which the application to review has been properly brought and within the time limit as prescribed.

22 Despite this conclusion, had I reached the view that the relevant "reviewable decision" was that set out in the respondent's letter of 13 February 2019, I would have in the circumstances, extended the time for the institution of the application to review, under s 27(1)(n) of the *Industrial Relations Act 1979* (WA).

The merits

23 The issue on the merits turns on whether the applicant's employment was covered by the Act, so he had an entitlement to accrue service towards long service leave. This requires the conclusion to be reached that the definitions of both "employee" and "employer" in s 3(1) of the Act are met. They relevantly provide as follows:

employee means —

(a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or

(b) an apprentice;

employer means —

(a) a natural person, firm or body corporate who or which engages persons as employees in the construction industry; or

(b) a labour hire agency which arranges for a person who is a party to a contract of service with the agency (***person A***) to do work in the construction industry for another person (***person B***), even though person A is working for person B under an arrangement between the agency and person B,

but does not include a Minister, authority or local government prescribed under subsection (4)(c);

24 There is no dispute that the applicant was engaged in a classification of work in a prescribed industrial instrument and therefore the applicant was "substantively occupied" in this work: ***Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme*** [2019] WAIRC 00860; (2019) 100 WAIG 125 at par 28. However, as most recently discussed by the Full Bench of the Commission in ***Programmed Industrial Maintenance v Construction Industry Long Service Leave Payments Board*** [2020] WAIRC 00758, to enable the applicant to receive benefits under the Act, his employment must also meet the test of Monadelphous being an "employer" of the applicant. This requires consideration of whether the applicant was an employee "in the construction industry". Given the evidence, that the work performed by the applicant for both Fluor and Monadelphous was the same, with the only difference being in the title of his position, it is only if the Commission concludes that the applicant was employed in the "construction industry" that consideration can be given to the applicant's arguments in relation to his prior period of employment with Fluor.

25 For present purposes, "construction industry" is defined in s 3(1) of the Act as follows:

construction industry means the industry —

(a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —

…

(ii) roads, railways, airfields or other works for the passage of persons, animals or vehicles; and …

26 It was not contended by the applicant that his employment with Monadelphous fell within any other part of the definition, other than that set out immediately above. The meaning of "construction industry" in s 3 of the Act was extensively considered by the Full Bench in ***Programmed Industrial Maintenance***. It is necessary to focus on that part of the applicant's work performed "on site", as opposed to work performed at the workshop premises of Monadelphous' client, Rio Tinto. This means work performed away from an employer's own premises but does not necessitate the work be performed on a "construction site" or a "building site". It was common ground that the work performed by the applicant was split on a 50/50 basis between work performed in the Rio Tinto workshop and work performed out in the field. It also seemed common ground on the evidence, that the work performed by the applicant for Monadelphous, involved maintenance and repairs to track maintenance machines and other machinery and equipment, which was used to maintain and repair the Rio Tinto railway. The applicant himself accepted in his evidence, that he did not perform repair or maintenance work on the railway itself.

27 If the applicant was engaged on work in the Rio Tinto workshop, as seemed accepted by the applicant in his submissions, this is not work performed "on a site" for the purposes of the definition of "construction industry" in s 3(1) of the Act: ***Aust-Amec Ltd t/as Metlab Mapel and SRC Laboratories and Ors v Construction Industry Long Service Leave Payments Board*** (1995) 15 WAR 150; (1995) 62 IR 412. The "construction industry" is that as set out in s 3 of the Act, and is not confined to the commonly understood meaning of "construction industry" or "building industry" and it is an expansive definition: ***Programmed Industrial Maintenance*** at [44].

28 I therefore consider that the applicant's work "on site" for about 50% of his time was sufficient to conclude that the applicant's work was to a substantial degree, work involving "on site" work. If the work performed otherwise falls within the definition of "construction industry" in s 3(1), then the Act has application to the applicant's employment.

29 The applicant argued that he was engaged in "the industry of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to … railways". He submitted that in maintaining track machines and other equipment used by Monadelphous to maintain the Rio Tinto railway, he was an integral part of this industry, as he characterised it. As the applicant worked on "mobile plant" as it has been described, he relied on the decision of the Commission in Court Session in ***Construction Industry Long Service Leave Payments Board v Positron Pty Ltd*** (1990) 70 WAIG 3062. There, the Commission in Court Session concluded that employees engaged by a contractor to perform electrical maintenance work on

the treatment plant of a gold mine, including on mobile plant, were employed in the construction industry. From this case, the applicant contended that it may be open to conclude that work performed on mobile plant is not precluded from the definition of "construction industry" in s 3(1) of the Act. This means, that the work by the applicant on what was accepted to be mobile track maintenance machines and other mobile plant, is to be included in the definition of "construction industry" too.

30 The applicant contended that his work is the performance of work on a site, "in the industry of construction, reconstruction, alteration, and maintenance of and repairs to … a railway being the Rio Tinto railway" (applicant's outline of submissions at [44]).

31 I do not accept this contention.

32 To conclude that the applicant was employed in the construction industry, requires the conclusion that the applicant was engaged on work involving "the maintenance of or repairs *to* … railways …". This is so, as affirmed by the Full Bench in ***Programmed Industrial Maintenance***, because the activities of the first part of the definition in s 3(1), all expressed disjunctively, are to be performed on the things, structures or works, set out in pars (i) - (xviii) of the definition. The words "the industry" after the words "construction industry means" do not enlarge or otherwise alter the scope of the words following, setting out the activities in the first part of the definition in s 3(1).

33 Importantly also, the definition means the performance of these activities "to" the matters set out in pars (i) - (xviii). Whilst this simple word has many meanings, in the context in which it is used, according to the Shorter Oxford Dictionary it means relevantly:

> "**(III)**. Expressing the relation of purpose, destination, result, effect, resulting condition or status. **(1)**. Indicating aim, purpose, intention, or design … **(2)**. Indicating destination, or an appointed or expected end or event. **(3)**. Indicating result, effect, or consequence: So as to produce, cause or result in. **(4)**. Indicating a state or condition resulting from some process: So as to become …".

34 In applying this part of the definition to the work of the applicant, he was not engaged on work for either Fluor or Monadelphous, involving maintenance of or repairs to railways themselves, as the definition requires. He was engaged on work better described as maintaining and repairing machines and other equipment, that is used to repair or maintain railways. The work that the applicant was performing was one step removed from the work to be performed "to" railways in the required sense. If one wishes to describe the work as an industry, it could be part of the industry of mechanical or machinery maintenance. However one describes the applicant's work, it was not work in the "construction industry" for the purposes of the Act.

35 Whilst the applicant referred to ***Positron*** as assisting his argument that maintaining and repairing mobile track maintenance machines fell within the scope of the Act, I do not think that ***Positron*** can be taken that far. There are three reasons for this. First, the work in that case was found to be within the definition of "construction industry" because the employees concerned were performing maintenance of or repairs to "works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by products from materials;" in par (vi) of s 3(1)(a). This is a much broader category of work than the quite specific class of work in this case, of "the maintenance of or repairs *to…* railways" in par (ii), and this broader category of works is not relied on by the applicant in this case. Second, there is no reference to "mobile plant" in the definition in s 3(1) of the Act, or indeed anywhere in the Act. This appears to be a characterisation placed on the legislation by the respondent. The issue of whether or not a person is engaged as an employee in the "construction industry", depends not on whether a person works on mobile plant, but rather, whether they engage in work falling within the definition in s 3(1) of the Act. Finally, and in any event, the summary of facts in ***Positron*** was very brief and it is not open to draw any direct parallels between the facts in that case and the facts in this matter.

36 Thus, I think that the respondent, in its letters of 13 February 2019 and 15 October 2019, to the extent that they relied on the work of the applicant being characterised as work on "mobile plant", reached the correct decision but for the wrong reason. This does not however, for the purposes of this review application, alter the conclusion that I have reached that the applicant was not engaged in the "construction industry" in s 3(1) of the Act. Given this conclusion, it is unnecessary to finally decide whether the letter of 15 October 2019 constituted a "reviewable decision" in relation to the applicant's prior employment with Fluor. However, I have considerable doubt it would.

37 The application to review is dismissed.