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**JURISDICTION** : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

**CITATION** : BROWNE -v- DIRECTOR GENERAL,  
DEPARTMENT OF WATER AND  
ENVIRONMENTAL REGULATION [2020] WASCA  
16

**CORAM** : BUSS J  
MURPHY J  
LE MIERE J

**HEARD** : 16 AUGUST 2019

**DELIVERED** : 11 FEBRUARY 2020

**FILE NO/S** : IAC 3 of 2018

**BETWEEN** : FLOYD BEDFORD BROWNE  
Appellant

AND

DIRECTOR GENERAL, DEPARTMENT OF  
WATER AND ENVIRONMENTAL REGULATION  
Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

**Coram** : J H SMITH AP  
T EMMANUEL C  
D J MATTHEWS C

**Citation** : 2018 WAIRC 00817

**File Number** : FBA 5 of 2018

*Catchwords:*

Public service - Voluntary severance - Continuous service - Whether appellant's service in the Tasmanian public service to be taken into account with his service in the Western Australian public service in calculating his entitlement to a severance payment - *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) - Award Wages Employees' Long Service Leave General Order of the Industrial Commission 1986 - Proper construction of relevant provisions

*Legislation:*

*Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA), reg 3, reg 13

*Result:*

Appeal allowed

**Representation:**

*Counsel:*

Appellant : Mr A L Drake-Brockman  
Respondent : Mr R J Andretich

*Solicitors:*

Appellant : Industrial Agent for Appellant  
Respondent : State Solicitor's Office (WA)

**Case(s) referred to in decision(s):**

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) [2009] HCA 41; (2009) 239 CLR 27

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd [2005] HCA (2005) 221 CLR 568

Bull v Attorney-General (NSW) [1913] HCA 60; (1913) 17 CLR 370

Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; (1996) 186 CLR 389

IW v City of Perth [1997] HCA 30; (1997) 191 CLR 1

Kelly v The Queen [2004] HCA 12; (2004) 218 CLR 216

Khoury v Government Insurance Office (NSW) [1984] HCA 55; (1984) 165  
CLR 622

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;  
(1998) 194 CLR 355

**BUSS & MURPHY JJ:**

1           This appeal from the Full Bench of the Western Australian  
Industrial Relations Commission is concerned with the proper  
construction of reg 13(2) of the *Public Sector Management  
(Redeployment and Redundancy) Regulations 2014* (WA) (the  
Redundancy Regulations) and the now repealed *Award Wages  
Employees' Long Service Leave General Order* of the Industrial  
Commission 1986 (the Long Service Leave General Order).

2           The Redundancy Regulations were made pursuant to s 94(1) and  
s 108 of the *Public Sector Management Act 1994* (WA).

3           Regulation 13(2), read with the definition of 'continuous service'  
in reg 3 of the Redundancy Regulations, directs attention to the  
meaning of 'continuous service' in the Long Service Leave General  
Order. Essentially, the issue for determination is the proper  
construction of the phrase 'each complete year of continuous service  
served by the employee in the Public Sector' in reg 13(2) of the  
Redundancy Regulations, having regard to its incorporation of the  
meaning of 'continuous service' in the Long Service Leave General  
Order.

4           'Continuous service' is not defined in the Long Service Leave  
General Order. Its meaning, instead, is to be discerned from an  
understanding of the relevant provisions of the Long Service Leave  
General Order and their operation.

5           The appellant was employed between 3 June 1997 and  
18 October 2011 in the Public Service of Tasmania.

6           On 24 October 2011, the appellant commenced employment in the  
Public Service of Western Australia.

7           By letter dated 22 November 2017, the respondent offered the  
appellant voluntary severance under a scheme approved by the Minister  
pursuant to reg 16 of the Redundancy Regulations.

8           The offer took into account the appellant's service in the  
Tasmanian Public Service in calculating the estimated amount of  
voluntary severance that would be paid to the appellant should he  
accept the offer.

9           On or about 7 December 2017, the appellant purported to accept  
the offer.

10           On 11 December 2017, the respondent informed the appellant that  
his service in the Tasmanian Public Service was not service for the  
purpose of calculating the severance payment under the Redundancy  
Regulations and therefore an amended letter of offer would be sent to  
him.

11           The amended offer of voluntary severance did not take into  
account the appellant's service in the Tasmanian Public Service in  
calculating the estimated amount of voluntary severance that would be  
paid to the appellant should he accept the amended offer.

12           The appellant was aggrieved by the respondent's decision to  
reduce the amount of the offer of voluntary severance. He commenced  
proceedings in the Commission pursuant to s 95 of the *Public Sector  
Management Act*.

13           Senior Commissioner Kenner held that the appellant's complaint  
was made out. The Senior Commissioner:

- (a) declared that, for the purposes of reg 3 and reg 13(2) of the  
Redundancy Regulations, 'continuous service' includes service  
in the employment of the Commonwealth or of another State in  
accordance with clauses 2, 3 and 16 of the Long Service Leave  
General Order; and
- (b) ordered that, for the purposes of the calculation of the appellant's  
severance payments under pt 3 of the Redundancy Regulations,  
the appellant's service in the Public Sector in Western Australia  
be deemed to include the period from 18 September 1991 to the  
date of termination of the appellant's employment.

14           On appeal to the Full Bench, a majority (Commissioner Emmanuel  
and Commissioner Matthews; Acting President Smith dissenting)  
allowed the respondent's appeal and, in effect, reinstated the  
respondent's decision. The reasoning of the majority and the minority  
is summarised by Le Miere J in his reasons.

15           The appellant now appeals to this Court.

## The statutory scheme

### The Redundancy Regulations

#### *Definitions*

16 Regulation 3 of the Redundancy Regulations provides for the definitions of 'continuous service' and 'period of continuous service':

*continuous service* has the same meaning as it has in the *Wages Employees Long Service Leave General Order* of the Industrial Commission;

*period of continuous service*, in relation to an employee, means the period of continuous service in the Public Sector (including a ministerial office) served by the employee -

- (a) in any period greater than 10 years for which, in the opinion of the employing authority of the employee, there are reliable records of the hours worked each week by the employee; and
- (b) if paragraph (a) does not apply, in the period of 10 years, ending on the day of acceptance by the employee of -
  - (c) an offer referred to in regulation 26(1) or 40(1); or
  - (d) an offer of severance payment referred to in regulation 13(2).

17 The words 'employee', 'Public Sector' and 'ministerial office' are not defined in the Redundancy Regulations. They are, however, defined in the *Public Sector Management Act* (see [37] - [41] below) and those statutory definitions apply to corresponding terms in the Redundancy Regulations: s 44(1) of the *Interpretation Act 1984* (WA).

#### *Application*

18 Regulations 4 and 5 of the Redundancy Regulations provide:

#### **4. Application**

- (1) *Except as provided in regulation 5, these regulations apply to all employees in departments and organisations.*
- (2) Despite regulation 5, these regulations apply to all employing authorities of departments and organisations in their capacity as employing authorities.

**5. Limits on application of regulations**

(1) In this regulation -

*seasonal employee* means an employee who is employed to work for limited periods during a season of the year.

(2) Parts 2 to 6 do not apply to the following employees -

- (a) an executive officer;
- (b) an employee to whom section 59 of the Act applies;
- (c) a ministerial officer;
- (d) an employee who is a casual employee or a seasonal employee;
- (e) an employee who is to retire or is called on to retire from employment on the grounds of ill health, whether under section 39 of the Act or otherwise;
- (f) an employee whose employment in the Public Sector is to be terminated because of substandard performance;
- (g) an employee who is to be dismissed under Part 5 Division 3 of the Act.

(3) Subregulation (2)(a) does not limit the operation of section 58(5) of the Act. (emphasis added)

***Registrable employees***

19 Part 2 of the Redundancy Regulations is headed 'Registrable employees' and includes reg 9, which provides:

**9. Employee must be notified if registrable or to become registrable**

(1) An employing authority must give an employee written notice that -

- (a) the employee's office, post or position is or is to be abolished and the employee may be -
    - (i) transferred under regulation 10; or
    - (ii) registered under regulation 18;
- or

- (b) the employee is, or will become, surplus to the requirements of the employee's department or organisation and the employee may be -
  - (i) transferred under regulation 10; or
  - (ii) registered under regulation 18.
- (2) The notice may be revoked at any time.
- (3) If the notice is revoked, the employing authority must give the employee written notice of the revocation.

***Voluntary severance***

20 Part 3 of the Redundancy Regulations is headed 'Voluntary severance' and includes reg 11 to 17.

21 Regulation 11 provides:

**11. Registrable employees may be offered voluntary severance**

- (1) In this regulation -

*notified employee* means an employee who has been given notice under regulation 9(1).
- (2) The employing authority of a notified employee may offer voluntary severance to the employee if the employing authority is satisfied that the employee cannot be transferred within his or her department or organisation.
- (3) The offer must -
  - (a) specify a period of not less than 8 weeks after the offer is made within which the employee may accept or refuse the offer; and
  - (b) provide for the employee to accept the offer and resign from his or her employment with effect on and from a day that is not later than 4 weeks after the day on which the offer is accepted; and
  - (c) *provide for the making of a severance payment under regulation 13 to the employee.*
- (4) The offer must include a notification that refusal to accept the offer may result in the employing authority registering the employee under regulation 18 and that, if the employee is registered and not offered suitable employment, the employee's employment may be terminated under Part 6.



- (5) An acceptance of an offer must be in writing signed by the employee. (emphasis added)

22 Regulation 13(1) defines the word 'pay' for the purposes of reg 13. The word 'pay' is defined to mean, in effect, the definition of 'pay' in reg 3, together with certain other specified allowances.

23 Regulation 13(2), which is the critical provision, provides:

Subject to subregulations (3), (4) and (5), a severance payment made to *an employee* is the payment of an amount equal to 3 weeks' pay for *each complete year of continuous service served by the employee in the Public Sector (including a ministerial office)*. (emphasis added)

24 Regulations 13(3) - (5) deal with periods of continuous service, and provide:

- (3) A severance payment made to an employee who has completed more than one year of continuous service but less than 2 years of continuous service is the payment of an amount equal to 4 weeks' pay.
- (4) The amount of a severance payment must not exceed the amount of 52 weeks' pay.
- (5) For the purposes of subregulations (2), (3) and (4), the weekly pay of an employee who, during the employee's period of continuous service, worked a different number of hours in different weeks must be calculated as follows -

$$A = B \times C$$

where -

- A is the employee's weekly pay;
- B is the employee's full-time weekly pay;
- C is the employee's average weekly hours expressed as a percentage of the employee's potential full-time weekly hours.

25 Regulations 13(6) and (7) provide:

- (6) Despite subregulations (2) to (5), an employee in respect of whom all or some of the conditions of employment are determined under a Commonwealth award is not entitled to any payment provided for by those subregulations.

- (7) An employee mentioned in subregulation (6) is entitled to such payment as is determined by the employee's employing authority, being an amount not greater than the amount that would be payable under this regulation to the employee if none of his or her conditions of employment were covered by a Commonwealth award.

26 Regulation 14 deals with other benefits payable on voluntary severance. Regulation 15 deals with incentive payments for early resignation. Regulation 16 provides, in effect, that the Minister may approve a scheme under which employees are invited to apply to be offered voluntary severance. Regulation 17 provides:

**17. Restriction on employment in Public Sector**

- (1) Subject to subregulation (2), a person to whom a severance payment is made under regulation 13 or under a scheme approved under regulation 16 must not subsequently be employed in the Public Sector before the expiry of the number of weeks (the *period of restriction*) after the day on which the severance payment is made that is equal to the number of weeks in respect of which the person received a severance payment (the *severance pay period*).
- (2) The Commissioner may, in writing, as from a specified day, exempt from subregulation (1) a person to whose employment that subregulation would otherwise apply.
- (3) If the person's severance pay period exceeds the portion of the period of restriction up to the specified day, the exemption is subject to the person repaying to the employing authority an amount that bears to the severance payment the same proportion as the excess bears to the severance pay period.

***Registered employees***

27 Part 4 of the Redundancy Regulations is headed 'Registered employees' and includes regs 18 and 20, which provide:

**18. Registration of registrable employee**

- (1) The employing authority of an employee may register the employee in accordance with the Commissioner's instructions if -
  - (a) the employee -
    - (i) has been given a notice under regulation 9(1);
    - and

- (ii) is a registrable employee; and
- (iii) cannot be transferred within his or her department or organisation;

and

- (b) at least 14 days before the day of registration, the employing authority has given the employee written notice of the employing authority's intention to register the employee.

- (2) The notice referred to in subregulation (1)(b) must not be given to the employee before the employee is given notice under regulation 9(1).

...

## **20. Retraining of registered employees**

- (1) The employing authority of a registered employee may arrange for the registered employee to be employed for retraining purposes inside or outside the Public Sector in an office, post or position other than the employee's present or former office, post or position under that employing authority.
- (2) Subject to subregulations (3) and (4), the arrangements for the retraining of a registered employee, and the terms and conditions that apply to the retraining, are to be as agreed between -
  - (a) the employee; and
  - (b) the employing authority of the employee; and
  - (c) the employer or employing authority that employs the employee for retraining purposes.
- (3) A registered employee must not be employed for retraining purposes for a period that is greater than the employee's redeployment period, as defined in regulation 28.
- (4) An employing authority who arranges for a registered employee to be employed for retraining purposes must bear the whole cost of that arrangement, unless it is otherwise agreed between that employing authority and the employing authority or employer which employs the registered employee for training purposes.
- (5) A period of employment of a registered employee for retraining purposes is, if regulation 25(4) applies to the registered

employee, to be disregarded for the purposes of calculating the period of 6 months referred to in that provision.

### ***Redeployment***

28 Part 5 of the Redundancy Regulations is headed 'Redeployment' and includes reg 23 to the effect that the Commissioner may, in writing, direct a registered employee to accept an offer of employment if the Commissioner is satisfied that the offer is for suitable employment in a department or organisation (as defined), and the registered employee has refused the offer or hindered or obstructed his or her redeployment to that suitable employment.

29 Regulation 25(1) provides, in effect, that an employing authority whose offer of an office, post or position is accepted by a registered employee, must credit the registered employee with (amongst other things) all accrued and accruing rights of annual leave and long service leave in accordance with the relevant employment instrument, up to the time of that acceptance.

30 Regulation 26(1) provides for certain benefits to be paid to the registered employee if an employing authority arranges for an offer of a suitable office, post or position 'outside the Public Sector', which the registered employee accepts.

### ***Termination of employment***

31 Part 6 of the Redundancy Regulations is headed 'Termination of employment' and includes regs 28 - 36.

32 In broad terms, reg 30 provides that the employment of a registered employee terminates after the last day of the employee's 'redemption period' (as defined). Regulation 32 provides, in effect, for an earlier termination where earlier termination is requested by the employee and accepted by the employing authority.

33 By reg 32(4), the amount of redundancy pay for an employee whose employment is terminated under reg 32 is (subject to specified adjustments) (a) equal to '3 weeks' pay for each complete year of continuous service served by the employee in the Public Sector (including a ministerial office)', or (b) the minimum amount specified in reg 34. Regulation 33 provides for redundancy pay to be paid to the employee in (broadly speaking) not dissimilar terms, where the employee's employment is terminated under reg 30.

34 Regulation 34 (referred to in relation to the determination of redundancy pay under each of reg 32(4) and reg 33) provides:

**34. Minimum amount of redundancy pay**

The amount of redundancy pay must not be less than an amount equal to the employee's pay for the number of weeks set out in column 2 of the Table that corresponds to the period of the employee's continuous service calculated up to the end of the day on which the employee's employment is terminated.

<b>Period of continuous service with the employer at termination of employment</b>	<b>Redundancy pay period</b>
At least one year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years	16 weeks

35 Regulation 36(1) provides that subject to its terms, a person to whom a redundancy payment is made under reg 32 or reg 33 'must not subsequently be employed in the Public Sector' before the expiry of a certain period of time.

***The Public Sector Management Act***

36 The *Public Sector Management Act* contains definitions of, amongst other terms, 'employee' and 'Public Sector'.

37 The term 'employee' is defined in s 3(1) of the *Public Sector Management Act* as:

*employee* means a person employed in the Public Sector by or under an employing authority.

38 Section 5 of the *Public Sector Management Act* refers to 'employing authority', and provides:

**5. Term used: employing authority**

(1) For the purposes of this Act, but subject to this section -

*employing authority* means, in relation to -

- (a) a chief executive officer (other than a chief executive officer referred to in section 4), the Commissioner; or
- (b) a chief employee (other than a chief employee referred to in section 4), the person or board, committee or other body specified by a written law as being the employer of the chief employee; or
- (c) a department or organisation or an employee (other than a chief executive officer or chief employee) employed in a department or organisation -
  - (i) subject to subparagraph (iii), if a chief executive officer or chief employee is the accountable authority of the department or organisation, the chief executive officer or chief employee; or
  - (ii) subject to subparagraph (iii), if a board, committee or other body established under a written law is the accountable authority of the department or organisation, that board, committee or other body; or
  - (iii) if a written law confers on a person or board, committee or other body the power to appoint or employ staff, the person or board, committee or other body;

or

(d) a ministerial office or a ministerial officer, the Minister,

or, when used otherwise than in relation to a public sector body or a chief executive officer, chief employee, employee or ministerial officer, means employing authority of any public sector body, chief executive officer, chief employee, employee or ministerial officer.

(2) For the purposes of this section -

(a) a department -

(i) which is established to support an organisation (other than an organisation which is a Minister); and

(ii) which is not prescribed as an independent department for the purposes of this paragraph,

is to be taken to be a part of the organisation referred to in subparagraph (i); and

(b) **accountable authority** has the meaning given by section 3 of the *Financial Management Act 2006*.

(3) Despite anything in paragraph (c) of the definition of **employing authority** in subsection (1), regulations made under section 108 may provide that the holder of an office, post or position, or a board, committee or other body, created or established under a written law is the employing authority of a department or organisation or of an employee (other than a chief executive officer) employed in a department or organisation.

39 Section 3(1) of the *Public Sector Management Act* defines 'Public Sector' as:

**Public Sector** means all -

(a) the agencies; and

(b) the ministerial offices; and

(c) the non-SES organisations;

40 The term 'agency' is defined in s 3(1) to mean a 'department' or 'a SES organisation'. A 'department' is defined to mean a 'department established under s 35'.<sup>1</sup> A 'non-SES organisation' is defined to mean (in general terms) an entity which consists of a body, or the holder of an

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<sup>1</sup> Section 35(1) provides: '**department** means a department established under section 35'.

office, that is established or continued for a public purpose under a written law and persons employed by or for the purposes of that body or holder under that written law or another law, subject to specified exceptions. The term 'SES organisation' is defined (broadly speaking) to mean an entity which consists of a body or the holder of an office, post or position established or continued for a public purpose under a written law and which is specified in column 2 of sch 2 of the Act, as well as persons employed by or for the purposes of that body or holder under that written law or another law.

41 The term 'ministerial office' is defined in s 3(1) to mean 'one or more ministerial officers appointed to assist a particular office holder'.

42 Section 94 of the *Public Sector Management Act* relevantly provides:

(1A) In this section -

**registered employee** means an employee registered under arrangements prescribed under subsection (1);

**registrable employee** means -

- (a) an employee who is surplus to the requirements of a department or organisation; or
- (b) an employee whose office, post or position has been abolished; or
- (c) an employee in a category prescribed by the regulations.

(1) The Governor may under section 108 make regulations prescribing arrangements for registrable employees in relation to -

- (a) redeployment and retraining; and
- (b) redundancy.

(2A) Regulations referred to in subsection (1) must specify which parts of the Public Sector must comply with the regulations.

(2) Without limiting the generality of subsection (1), regulations referred to in that subsection may provide for -

- (a) the situation in which the whole or any part of -



- (i) the undertaking of a department or organisation is, or is to be, sold or otherwise disposed of to; or
- (ii) the production or provision of goods or services or both by a department or organisation is, or is to be, replaced by the production or provision of goods or services or both by,

a person outside the Public Sector, and an employee of the department or organisation is offered a suitable office, post or position by that person; and

- (b) an employee referred to in paragraph (a) who -
  - (i) refuses the offer of a suitable office, post or position, to be directed by his or her employing authority to accept that offer; or
  - (ii) hinders or obstructs the process by which an employee is selected for the making of an offer of a suitable office, post or position, to be directed by his or her employing authority to refrain from that hindrance or obstruction;

and

- (c) the terms and conditions (including remuneration) which are to apply to an employee who accepts an offer referred to in paragraph (a); and
- (d) the terms and conditions (including remuneration) which are to apply to an employee who is dismissed under section 82A(3)(a), 88(a) or 89(1).

### **The Long Service Leave General Order**

43 The relevant provisions of the Long Service Leave General Order are set out verbatim in the schedule to these reasons.

44 The Long Service Leave General Order provides, in effect, that it was made pursuant to div 3 pt II of the *Industrial Relations Act 1979* (WA).

45 Clause 1 of the Long Service Leave General Order provides, in effect, subject to its conditions, for the provision of long service leave for all Government wages' employees 'employed by a Public

Authority'<sup>2</sup> after and by reference to specified qualifying periods of 'continuous service'.

46 The phrase 'continuous service' is not defined in the Long Service Leave General Order, or in the *Industrial Relations Act*. The word 'continuous' in its ordinary meaning includes 'having the parts in immediate connection, *unbroken*'.<sup>3</sup> In the context of cl 1 of the Long Service Leave General Order, it is evidently used to apply both to unbroken consecutive years of service, and to service within a year of service which is unbroken.

47 Clause 2(a) provides that the word 'service', for the purposes of the Long Service Leave General Order, means 'service as an employee of a Public Authority'. The content of its meaning is not defined, but its scope is enlarged upon by cl 2(a), which also provides that 'service' shall 'be deemed to include' the matters in pars (i) to (ix) of cl 2(a). As a result, and in general terms, 'service as an employee of a Public Authority' is deemed to include:

1. Where the employee employed by a Public Authority:
  - (a) is absent whilst on specified types of leave;<sup>4</sup>
  - (b) is absent whilst engaged in National Service;<sup>5</sup> and
  - (c) is absent whilst on workers compensation.<sup>6</sup>
2. Where the employee employed by the Public Authority has been employed in the service of the Commonwealth or another State of Australia, employment in the service of the Commonwealth or that other State as provided in cl 16.<sup>7</sup>

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<sup>2</sup> The term 'Public Authority' is defined in s 7(1) of the *Industrial Relations Act* as:

**public authority** means the Governor in Executive Council, any Minister of the Crown in right of the State, the President of the Legislative Council or the Speaker of the Legislative Assembly or the President of the Legislative Council and the Speaker of the Legislative Assembly, acting jointly, as the case requires, under the *Parliamentary and Electorate Staff (Employment) Act 1992*, the Governor or his or her delegate under the *Governor's Establishment Act 1992*, State Government department, State trading concern, State instrumentality, State agency, or any public statutory body, corporate or unincorporate, established under a written law but does not include a local government, regional local government or regional subsidiary.

<sup>3</sup> *Macquarie Dictionary Online*.

<sup>4</sup> Clauses 2(a)(i), (ii), (iii), (iv), (vii) and (viii) of the Long Service Leave General Order.

<sup>5</sup> Clause 2(a)(v) of the Long Service Leave General Order.

<sup>6</sup> Clause 2(a)(vi) of the Long Service Leave General Order.

<sup>7</sup> Clause 2(a)(ix) of the Long Service Leave General Order.

48 Clause 2(b) limits the ambit of 'service' for the purposes of the Long Service Leave General Order by providing that certain matters are deemed 'NOT' to be included in the term 'service'.

49 Clause 3, in general terms, provides that, subject to cl 2, the service of an employee 'shall not be deemed to have been broken' by three specified matters which concern, in effect, (1) where the employee has ceased employment (by resignation or termination), and (2) where his absence from employment is treated as leave by the employer. The words 'shall not be deemed to have been broken' indicate that without them, the matters referred to would impair continuity of service. The three specified matters in this regard are (broadly speaking):

- (a) By resignation, if the employee resigns from one Public Authority 'in this State' and commences with another Public Authority 'in this State' within one week.
- (b) If the employment is ended by the employer for any reason other than serious misconduct but only if (1) the employee resumes employment with the Government<sup>8</sup> not later than six months from the date of termination of the employment and (2) payment in lieu of long service leave has not been made pursuant to cl 11.
- (c) '[B]y any absence approved by the employer as leave with or without pay'.

50 Clause 3 is subject to cl 2. Accordingly, despite the interruption in employment wrought by resignation (as contemplated in cl 3(a)) or termination by the employer (as contemplated in cl 3(b)), the employee's preceding and subsequent employment (in the manner contemplated by those provisions) are effectively treated as continuous, but the employee's 'service' must still be in accordance with cl 2. It is less clear how cl 3(c) is intended to operate subject to cl 2 and, in particular, cl 2(b)(iv) and cl 2(a)(i) - (iv) and (vii) - (viii). However, that was not a matter the subject of any submissions.

51 Clause 16 deals with an employee in the service of a Public Authority who, immediately prior to being engaged in such service, was employed in the service of the Commonwealth or another State.

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<sup>8</sup> 'Government' is presumably intended to be a reference to the government of the State of Western Australia; cf the definition of 'Government' in s 5 of the *Interpretation Act*.

Clause 16 provides, in effect, that if the other (earlier) Commonwealth or State service 'was continuous with this service under cl 3', then the employee is entitled to long service leave 'determined' in the manner specified in cl 16.

52 It was not in dispute in this appeal that in cl 16, the words 'was continuous with this service under cl 3' are designed to apply to cl 16 the concept of continuity of service evident in cl 3, although there was some dispute as to how, as a matter of construction, cl 3 was intended to be adapted so as to achieve that result in its application to cl 16.<sup>9</sup>

53 For present purposes, the effect of the Long Service Leave General Order is that when determining periods of continuous service:

1. An employee employed by a Public Authority is deemed to be in the service of a Public Authority despite, within any year, the employee's absence from work on leave, on National Service or on worker's compensation, in accordance with cl 2(a)(i) - (viii).
2. In the case of an employee employed by a Public Authority, temporary cessations of employment associated with returns to employment in accordance with cl 3(a) and (b) are deemed not to affect continuity of service.
3. Where an employee of a Public Authority was, immediately prior to the employee's employment, employed in the service of the Commonwealth or another State, then the employee's employment in the service of the Commonwealth or other State is deemed to be, to the extent and in the manner provided for under cl 16(a) - (c), service as an employee of the Public Authority, providing that such earlier service elsewhere is unbroken (in the sense provided for under cl 3) with the service with the Public Authority.

### **The parties' arguments**

54 It was not in dispute that the bodies in the definition of 'Public Sector' are all bodies constituted under Western Australian State law.

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<sup>9</sup> Appeal ts 8 - 10, 22 - 25.

55 Nor was it in dispute that whilst the definition of 'Public Sector' in the *Public Sector Management Act* overlapped to some extent with the definition of 'Public Authority' in the Long Service Leave General Order, the two are not co-extensive in their operation.<sup>10</sup>

56 The appellant contends that in reg 13(2), the words 'served by the employee in the Public Sector (including a ministerial office)' read in the context of the preceding words 'each complete year of continuous service' and in the context of the definition of 'continuous service' in reg 3, are apt to include deemed service in the Commonwealth or another State as provided for in the Long Service Leave General Order.<sup>11</sup> The appellant's submissions included:<sup>12</sup>

16. When one understands the Regulations as a whole, and in their proper context and purpose, it is clear that the purpose of the Regulations is to provide a mechanism whereby periods of service which are continuous can be determined for the purpose of calculating severance payments for public sector employees.
17. The purpose of the use of the meaning of 'continuous service' in the Regulations is to determine and include periods of service or absences which would not otherwise be counted as service in and for the public sector.
18. What constitutes 'continuous service' within the meaning of the General Order must first be ascertained before the meaning of 'continuous service' in reg 3(1) of the Regulations can be read into the substantive provision (Reg 13(2)).
19. This is because the meaning of 'continuous service' is not found within one provision of the General Order. This task requires the whole of cl's 2, 3 and 16 of the General Order to be read in its relevant context which context includes incorporation by reference of the words 'continuous service' in reg 3(1) of the Regulations.
20. Once the meaning of 'continuous service' in the General Order is ascertained, the meaning of those words are to be read with the definition of 'Public Sector' (in section 3(1) of the PSMA), and then by reading both of these definitions in the text of reg 13(2) of the Regulations. Regulation 13(2) can then be construed within its context and purpose. (Smith AP at [48]). The term Public Sector is not defined in the Regulations, but the meaning of 'Public Sector' in section 3(1) of the PSMA is not disputed.

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<sup>10</sup> Appeal ts 4 - 5, 22.

<sup>11</sup> Appellant's submissions, pages 9 - 10.

<sup>12</sup> Appellant's submissions, pars 16 - 20.

57 The respondent contends that reg 13(2) excludes prior service in another State or the Commonwealth. The respondent contends that under reg 13(2) service must be both 'continuous' (as understood in the Long Service Leave General Order) and served in the Public Sector (as defined in the *Public Sector Management Act*).<sup>13</sup> The respondent contends that the appellant's construction makes the words 'in the Public Sector (including a ministerial office)' in reg 13(2) redundant.<sup>14</sup> The respondent contends that the only features of continuity in the Long Service Leave General Order which can sensibly be applied to service 'served by the employee *in the Public Sector ...*' are those referred to in [53.1] and [53.2] above.

### **Proper construction of the Redundancy Regulations**

58 The effect of the definitions in reg 3 is that in reg 13(2):

- (a) the term 'continuous service' has the same meaning as it has in the Long Service Leave General Order; and
- (b) the term 'period of continuous service', when used in relation to an 'employee',<sup>15</sup> means 'the period of continuous service in the Public Sector ... served by the employee ...'.

59 There is no difficulty in applying *mutatis mutandis* the meaning of 'continuous service', evident in the operation of the Long Service Leave General Order referred to in [53.1] and [53.2] above, to an employee in the Public Sector for the purposes of regs 13(2), (3) and (5). The dispute in essence is whether deemed service referred to in [53.3] above is picked up in regs 13(2), (3) and (5).

60 Regulation 13(2) is evidently a remedial provision which is *prima facie* to be given a beneficial construction. This requires that the provision be construed so as to give the fullest relief which the fair meaning of its language will allow, but not that its true signification should be strained or exceeded. See *Bull v Attorney-General (NSW)*;<sup>16</sup> *Khoury v Government Insurance Office (NSW)*.<sup>17</sup> But the

<sup>13</sup> Respondent's submissions, par 7.

<sup>14</sup> Respondent's submissions, pars 13 - 19.

<sup>15</sup> Being a person employed in the Public Sector by or under an employing authority: definition of 'employee' in s 3(1) of the *Public Sector Management Act*; s 44(1) of the *Interpretation Act*.

<sup>16</sup> *Bull v Attorney-General (NSW)* [1913] HCA 60; (1913) 17 CLR 370, 384 (Isaacs J).

<sup>17</sup> *Khoury v Government Insurance Office (NSW)* [1984] HCA 55; (1984) 165 CLR 622, 638 (Mason, Brennan, Deane & Dawson JJ).

court is not at liberty to give the provision a construction that is unreasonable or unnatural. See *IW v City of Perth*.<sup>18</sup>

61 Also, in *Project Blue Sky Inc v Australian Broadcasting Authority*,<sup>19</sup> the plurality said:<sup>20</sup>

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* [(1905) 2 CLR 405, 414] Griffith CJ cited *R v Berchet* [(1688) 1 Show KB 106 [89 ER 480]] to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'. (citations omitted)

62 Further, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*,<sup>21</sup> the plurality said:<sup>22</sup>

This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (citations omitted)

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<sup>18</sup> *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1, 12 (Brennan CJ & McHugh J).

<sup>19</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355.

<sup>20</sup> *Project Blue Sky* [70] - [71] (McHugh, Gummow, Kirby & Hayne JJ).

<sup>21</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27.

<sup>22</sup> *Alcan* [47] (Hayne, Heydon, Crennan & Kiefel JJ).

63 The function of a definition in a statute is not, except in rare cases, to enact substantive law. Rather, its function is to provide aid in construing the substantive enactment that contains the defined term. The meaning of the definition depends on the context, and the purpose or object, of the substantive enactment. See *Kelly v The Queen*,<sup>23</sup> *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*.<sup>24</sup>

64 The general principles applicable to the construction of statutes apply to the construction of delegated legislation. See *Collector of Customs v Agfa-Gevaert Ltd*,<sup>25</sup> *ADCO Constructions Pty Ltd v Goudappel*.<sup>26</sup>

65 When reg 13(2) is read with the definitions of 'employee' and 'Public Sector', reg 13(2) relevantly provides:

[A] severance payment made to a person employed in the Public Sector by or under an employing authority is the payment of an amount equal to 3 weeks' pay for each complete year of continuous service served by the person employed in the Public Sector (including a ministerial office).

66 When read with the definition of 'continuous service' in reg 3, this means:

[A] severance payment made to a person employed in the Public Sector by or under an employing authority is the payment of an amount equal to 3 weeks' pay for each complete year of service served by the person employed in the Public Sector (including a ministerial office) which is continuous service within the meaning of the Long Service Leave General Order.

67 On a literal reading of reg 13(2) (as elaborated upon in the preceding paragraphs), it is the service served by the relevant employee 'in the Public Sector ...' which must be continuous within the meaning of the Long Service Leave General Order, but that still begs the question as to the scope and operation of the word 'continuous' in this context. Ultimately, the point of construction turns upon whether and to what extent, and in what manner, the very compressed reference to 'continuous service' in reg 13(2) of the Redundancy Regulations is used

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<sup>23</sup> *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 [103] (McHugh J).

<sup>24</sup> *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA (2005) 221 CLR 568 (McHugh J).

<sup>25</sup> *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389, 398 (Brennan CJ, Dawson, Toohey, Gaudron & McHugh JJ).

<sup>26</sup> *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; (2014) 254 CLR 1 [28] (French CJ, Crennan, Kiefel & Keane JJ).



to control or influence the meaning of the concluding words 'served by the employee in the Public Sector ...'.

68 There is some force in the respondent's contention that the only 'continuous service' under the Long Service Leave General Order which can be read harmoniously with the requirement that the service be served 'in the Public Sector' is that referred to in [53.1] and [53.2] above.

69 However, the Long Service Leave General Order was made before the enactment of the *Public Sector Management Act*. The Long Service Leave General Order referred to the term 'Public Authority' (as defined in the *Industrial Relations Act*) and not to the term 'Public Sector'. By contrast, the *Public Sector Management Act* adopted and defined the term 'Public Sector' and did not refer to the term 'Public Authority' (as defined in the *Industrial Relations Act* or at all). Nevertheless, the drafter of the Redundancy Regulations chose to define the term 'continuous service' in reg 3 by reference to the Long Service Leave General Order.

70 The Long Service Leave General Order does not ascribe a meaning to the term 'continuous service' in the abstract. Rather, it ascribes a meaning to the term in the context of continuous or unbroken service by reference to the term 'Public Authority'. The deeming provisions in cl 2 are a significant and integral feature of the meaning which the Long Service Leave General Order ascribes to 'continuous service'.

71 The definition of 'continuous service' in reg 3 of the Redundancy Regulations states that in the Redundancy Regulations 'continuous service' has the same meaning as it has in the Long Service Leave General Order. It is the meaning of 'continuous service' in the Long Service Leave General Order, in the context of continuous or unbroken service by reference to the term 'Public Authority', including the deeming provisions in cl 2, that is picked up by the definition of 'continuous service' in reg 3.

72 By necessary implication, that meaning is transposed in the Redundancy Regulations:

- (a) to continuous or unbroken service, as explained in the Long Service Leave General Order, by reference to the defined term 'Public Sector' (instead of the term 'Public Authority'), including the deeming provisions in cl 2; and

- (b) having regard to the fact that an entitlement to long service leave crystallises upon the service of a specified period of service or deemed service whereas an entitlement to a severance payment is calculated by reference to the actual period of service or deemed service by the employee.

73 It is that transposed meaning which is applied for the purposes of, relevantly, regs 13(2), (3) and (5).

74 The transposed meaning which is applied for the purposes of, relevantly, regs 13(2), (3) and (5) includes the actual period of any employment in the service of the Commonwealth or another State that was continuous with service in the Public Sector under the provisions of cl 2(a)(ix) read with cl 3 and the chapeau of cl 16(a) of the Long Service Leave General Order.

75 Accordingly, the better view, which is open on the language of reg 13(2) read with the definition of 'continuous service' in reg 3, is that the reference to 'continuous', within the meaning of the Long Service Leave General Order, is intended to pick up the actual period of any service which is deemed service under the Long Service Leave General Order, and that the words 'served by the employee in the Public Sector' are to be understood in that light. On that view, the words 'for each complete year of continuous service served by the employee in the Public Sector' are, objectively, to be read as 'for each complete year of service served or which would be deemed to be served by the employee in the Public Sector if the Public Sector were a Public Authority and the relevant employee was an employee of a Public Authority for the purposes of the Long Service Leave General Order'.

76 The construction referred to in the preceding paragraph 'best gives effect to ... [the] purpose and language [of reg 13(2)] while maintaining the unity of the statutory scheme'.<sup>27</sup> Further, such a construction appears to us to be not unreasonable or unnatural, and gives the fullest relief which the fair meaning of the language would allow. Also, such a construction does not involve any element of redundancy as the respondent contends. Rather, such a construction gives meaning to each of the words in reg 13(2), albeit in a manner different from that advanced by the respondent.

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<sup>27</sup> Adopting and adapting the language in *Project Blue Sky* [70] (McHugh, Gummow, Kirby & Hayne JJ).

77 For these reasons, in our view the majority of the Full Bench erred in concluding that reg 13(2) of the Redundancy Regulations operated, on its proper construction, to exclude deemed service in another State in accordance with the meaning of continuous service in the Long Service Leave General Order reflected in [53.3] above.

78 We would allow the appeal.

79 The orders made by the majority of the Full Bench should be set aside and the declaration and order of Senior Commissioner Kenner reinstated.

## **Schedule - the Long Service Leave General Order**

The Long Service Leave General Order provides relevantly:<sup>28</sup>

Long Service Leave Conditions.  
State Government Wages Employees.

### Clause 1

1. Subject to the conditions hereinafter prescribed all Government wages employees employed by a Public Authority shall become entitled to 13 weeks' long service leave:
  - (a) after a period of 10 years' *continuous service*; and
  - (b) after each further period of seven years' *continuous service*.

The long service leave prescribed in this clause may, by consent between the employer, the employee and the employee's union be taken in more than one portion provided that no portion shall be less than four consecutive weeks.

Provided further that these conditions shall have no application to employees who are subject to long service leave entitlements on an industry basis or wage employees who at the date of this order, or subsequent to this order, receive long service leave conditions which, when viewed as a whole, are more favourable than the conditions specified in this order.

Any qualifying service prior to 1 January 1986 for the second period of long service leave, shall be calculated on a 10 year qualifying period basis but all qualifying service after 1 January 1986 shall be calculated on a seven year qualifying period basis.

### Clause 2

- 2.(a) For the purpose of these conditions 'service' means service as an employee of a Public Authority and shall be deemed to include:-
  - (i) absence of the employee on annual leave or public holidays;
  - (ii) absence of the employee on paid sick leave or on an approved rostered day off;

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<sup>28</sup> Headings are provided here for convenience only. They are not part of the terms of the Long Service Leave General Order.

- (iii) absence of the employee on approved sick leave without pay except that portion of a continuous absence which exceeds three months. Provided that prior to 1 July 1957 only two weeks in any year shall be allowed and provided that prior to 1 April 1974 and after 1 July 1957 only six weeks in any year shall be allowed;
  - (iv) absence of the employee on approved leave without pay, other than sick leave without pay but not exceeding two weeks in any qualifying period;
  - (v) absence of the employee on National Service or other military training, but only if the difference between the employees' military pay and his civilian pay is made up, or would, but for the fact that his military pay exceeds his civilian pay, be made up by his employer;
  - (vi) absence of the employee on workers' compensation for any period not exceeding six months, or for such greater period as the Minister for Industrial Relations may allow;
  - (vii) absence of the employee on long service leave which accrues on or after 1 April 1974;
  - (viii) absence of an employee on approved leave to attend Trade Union training courses or on approved leave to attend Trade Union business; and
  - (ix) employment in the service of the Commonwealth or another State of Australia as provided in Clause 16 hereof, when employment in the State Government commences on or after 1 April 1974.
- (b) The Service of an employee shall be deemed NOT to include:-
- (i) service of an employee after the day on which he has become entitled to 26 weeks' long service leave until the day on which he commences the taking of 13 weeks of that leave;
  - (ii) any period of service with an employer of less than 12 months. Provided where after 1 April 1974 an employee has service of a month or more but less than 12 months immediately prior to being transferred by one State Government employer to another; becoming redundant or qualifying for pro rata payment in lieu of leave pursuant to Clause 11, then such period of service shall count;

- (iii) any period during which an employee has been paid as a casual;
- (iv) any other absence of the employee except such absences as are included in service by virtue of subclause (a) hereof; and
- (v) any service of an employee prior to 1 April 1974 where that employee was less than 18 years of age.

Clause 3

3. Subject to the provisions of Clause 2 of these conditions the service of an employee shall not be deemed to have been broken -

- (a) by resignation, if he resigns from one Public Authority in this State and commences with another Public Authority in this State within one working week of the expiration of any period for which payment in lieu of annual leave and/or public holidays has been made by the employer from which he resigned, or, if no such payment has been made, within one working week of the day on which his resignation became effective;
- (b) if his employment is ended by his employer for any reason other than serious misconduct, but only if
  - (i) the employee resumes employment with the Government not later than six months from the day on which his employment was ended; and
  - (ii) payment pursuant to Clause 11 of these conditions has not been made; or
- (c) by any absence approved by the employer as leave whether with or without pay.

...

Clause 11

11. If the employment of an employee ends before he has completed the first or further qualifying periods in accordance with Clause 1 of these conditions, payment in lieu of long service leave proportionate to his length of service shall not be made unless the employee -

- (a) has completed a total of at least three years' *continuous service* and his employment has been ended by his employer for reasons other than serious misconduct; or

- (b) is not less than 55 years of age and resigns, but only if the employee has completed a total of not less than 12 months' *continuous service* prior to the day from which the resignation has effect; or
- (c) has completed a total of not less than 12 months' *continuous service* and his employment is ended by his employer on account of incapacity due to old age, ill health or the result of an accident; or
- (d) has completed a total of not less than three years' *continuous service* and resigns or whose services are terminated because of her pregnancy after 1 April 1974 and who produces at the time of resignation or termination certification of such pregnancy and the expected date of birth from a legally qualified medical practitioner; or
- (e) dies after *having served continuously* for not less than 12 months before his death and leaves a spouse, children, parent or invalid brother or sister dependent on him in which case the payment shall be made to such spouse or other dependant; or
- (f) has completed a total of not less than three years' *continuous service* and resigns in order to enter an Invitro Fertilisation Programme provided she produces written confirmation from an appropriate medical authority of the dates of involvement in the programme.

...

#### Clause 16

16.(a) Subject to subclause (c) of this clause where an employee was, immediately prior to being engaged, employed in the service of the Commonwealth or another State of Australia and that employment was continuous with this service under Clause 3 of these conditions that employee shall be entitled to long service leave determined in the following manner:

- (i) Service with the previous employer shall be converted into service for the purpose of these conditions by calculating the proportion that the service with the previous employer bears to a full qualifying period in accordance with the provisions that applied in the previous employment and applying that proportion to a full qualifying period in accordance with the provisions of these conditions.

- (ii) Service with the State necessary to complete a qualifying period for an entitlement of long service leave shall be calculated in accordance with the provisions of these conditions.
  - (iii) An employee shall not become entitled to long service leave or payment for long service leave unless he has completed three years' continuous service with the State.
  - (iv) Where an employee would but for the provisions of paragraph (iii) hereof have become entitled to long service leave before the expiration of three years' continuous service with the State, service subsequent to that date of entitlement shall count towards the next grant of long service leave.
- (b) No employee shall be entitled to the benefit of this clause if service with the previous employer was terminated for reasons which would entitle that employer to dismiss the employee without notice.
  - (c) Nothing in these conditions confers on any employee previously employed by the Commonwealth or another State of Australia any entitlement to a complete period of long service leave that accrued prior to the date on which the employee was employed by the State.
  - (d) Any dispute as to the application of paragraph (i) of subclause (a) hereof or whether the employee was previously engaged in the service of the Commonwealth or another State of Australia shall be determined by the Long Service Leave Appeal Committee. (emphasis added)



**LE MIERE J:****Summary**

80 The appellant, Mr Browne, was employed by the Department of which the respondent is the Director General. Mr Browne had previously been employed in the Tasmanian public service. Mr Browne accepted an offer of voluntary severance. The Director General calculated the severance payment to which Mr Browne is entitled. Mr Browne says that the Director General erred in determining the payment to which Mr Browne was entitled under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (the Regulations). The Regulations provide for a severance payment based on the number of years of 'continuous service'. Mr Browne says that on a proper construction of the Regulations his service in Tasmania should have been counted as part of his 'continuous service' and the Director General erred by failing to take that service into account in calculating the severance payment to which Mr Browne is entitled.

81 Mr Browne referred the Director General's decision to the Industrial Relations Commission. The Senior Commissioner upheld Mr Browne's contention. On appeal, the Full Bench of the Industrial Relations Commission overturned the Senior Commissioner's decision and in effect reinstated the Director General's decision. Mr Browne now appeals to this court.

82 For the reasons which follow I would allow the appeal and quash the decision of the Full Bench.

**Mr Browne's grievance**

83 Mr Browne was employed by the former Environmental Protection Authority (EPA) in Western Australia from October 2011. Machinery of government changes implemented in July 2017 led to the EPA becoming part of the Department of which the respondent is the Director General. Mr Browne had a prior period of service in the Western Australian Public Service between September 1991 and May 1995. From May 1995 to October 2011 he was employed in the Tasmanian public service.

84 Mr Browne accepted an offer of voluntary severance from the respondent. Regulation 13 of the the Regulations provides for a

severance payment of three weeks' pay for each year of continuous service up to a maximum of 52 weeks. The Director General decided that Mr Browne's continuous service did not include his service in Tasmania and calculated the severance payments due to the appellant on that basis.

85 Mr Browne was aggrieved by that decision. He asserted that continuous service includes employment in the service of another State.

86 Section 95 of the *Public Sector Management Act 1994* (WA) (PSM Act) gives employees the right to refer 's 94 decisions' to the Industrial Relations Commission. The Director General's decision is a 's 94 decision'. In exercising the jurisdiction, conferred on it, the Industrial Relations Commission must confine itself to determining whether the regulations have been fairly and properly applied to or in relation to the employee. Mr Browne referred the Director General's decision to the Industrial Relations Commission.

### **The voluntary severance scheme**

87 The Regulations were made under s 94(1) of the PSM Act which empowers the Governor to make regulations prescribing arrangements for registrable employees in relation to redundancy.

88 Part 3 of the Regulations sets out the arrangements for voluntary severance. Regulation 11 provides for the employing authority to make an offer of voluntary severance. The offer must provide for the making of a severance payment under reg 13. Regulation 13(2) provides:

Subject to sub-regulations 3, 4, and 5, a severance payment made to an employee is the payment of an amount equal to three weeks' pay for each complete year of continuous service served by the employee in the Public Sector (including a ministerial office).

89 Regulation 3(1) is a definition section. It provides, amongst other things:

Continuous service has the same meaning as it has in the Wages Employees Long Service Leave General Order of the Industrial Commission.

90 The Long Service Leave General Order of the Industrial Commission (the General Order) is the order made in 1986 under the *Industrial Relations Act 1979* (WA) and published in vol 66 of the *Western Australian Industrial Gazette*. The General Order was repealed by s 64 of the *Labour Relations Legislation Amendment Act*

2006 (WA). Nevertheless, for the purposes of the Regulations 'continuous service' has the same meaning as it has in the General Order.

91           Whilst it was in effect the General Order applied to all government wages employees employed by public authorities as defined in s 7 of the *Industrial Relations Act*<sup>29</sup> except those receiving long service leave conditions which are more favourable than the conditions specified in the General Order.

92           The General Order does not contain a definition of 'continuous service'.

93           Clause 1 of the General Order provides that subject to the conditions thereafter prescribed all government wages employees employed by a Public Authority shall become entitled to 13 weeks' long service leave after a period of 10 years continuous service and after each further period of 7 years continuous service.

94           Clause 2(a) provides that for the purpose of these conditions 'service' means service as an employee of a Public Authority and shall be deemed to include the absences and employment set out in subpars (i) - (ix) which include employment in the service of the Commonwealth or other State.

95           Clause 2(b) provides that service of an employee shall be deemed not to include service in the circumstances set out in [(i)] - [(v)].

96           Clause 3 sets out the circumstances in which the service of an employee shall not be deemed to have been broken including by resignation if he resigns from one Public Authority in this State and commences with another Public Authority in this State within the period specified.

97           Clauses 4 to 15 deal with applications for leave, when leave shall be taken and other matters relating to the taking of, and payment during, long service leave. It is not necessary to further refer to those clauses.

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<sup>29</sup> Public Authority is defined to mean, amongst other things State Government Department, State trading concern, State instrumentality, State agency, or any public statutory body established under a written law but does not include a local government, regional local government or regional subsidiary.

98 Clause 16 deals with where an employee was, immediately prior to being engaged, employed in the service of the Commonwealth or another State. Clause 16 provides:

16(a) Subject to subclause (c) of this clause where an employee was, immediately prior to being engaged, employed in the service of the Commonwealth or another State of Australia and that employment was continuous with this service under Clause 3 of these conditions that employee shall be entitled to long service leave determined in the following manner:

(i) Service with the previous employer shall be converted into service for the purpose of these conditions by calculating the proportion that the service with the previous employer bears to a full qualifying period in accordance with the provisions that applied in the previous employment and applying that proportion to a full qualifying period in accordance with the provisions of these conditions.

...

(b) ...

(c) Nothing in these conditions confers on any employee previously employed by the Commonwealth or another State of Australia any entitlement to a complete period of long service leave that accrued prior to the date on which the employee was employed by the State.

(d) ...

99 Clause 17 deals with ill health during long service leave. Clause 18 establishes a long serve leave appeal committee to hear appeals by any employee in respect of their long service leave entitlement.

**Proceedings in the Industrial Relations Commission**

100 Mr Browne's application to the Industrial Relations Commission was heard by Senior Commissioner Kenner. Mr Browne contended that the terms of the General Order applied to the Regulations in relation to severance payments in the same manner as it does to long service leave. That is, as with the calculation of long service leave entitlements, where an employee has a period of service in the service of another State or the Commonwealth, that service is deemed to be continuous service for the purposes of pt 3 of the Regulations. Therefore, Mr Browne's service in Tasmania should be included as service in calculating his severance pay entitlements.

101 The Director General contended that the Regulations provide for 'continuous service', when determining a severance payment, to be both:

- service that constitutes continuous service as defined in the General Order; and
- service that has been served by the employee in the Western Australian Public Sector as defined in s 3 of the PSM Act and does not include employment in the service of the Commonwealth or another State.

102 Senior Commissioner Kenner preferred the appellant's construction of the Regulations and the General Order. The Senior Commissioner found that, just as for the purposes of the General Order in cl 2(a) 'service as an employee of a Public Authority' includes the various matters in [(i)] to [(ix)] [including employment in the service of the Commonwealth or another State], so does 'service served by the employee in the Public Sector ...', as specified in reg 13(2). The Senior Commissioner held that the deeming provisions apply to both the General Order reference to 'service as an employee of a Public Authority' and the Regulation's reference to 'continuous service served by an employee in the public sector', and extend their meaning.

103 The Director General also contended that there was a break in Mr Browne's service from him ceasing employment on 19 October 2011 in Tasmania and taking up his new employment in Western Australia on 24 October 2011.

104 The Commissioner rejected that argument. The Commissioner found that on the proper construction of the Regulations, having regard to cl 3 and cl 16(a) of the General Order, a break in service of no more than one week does not break service for continuity of service purposes.

105 The Senior Commissioner declared that for the purposes of reg 3 and reg 13(2) of the Regulations 'continuous service' includes service in the employment of the Commonwealth or of another State in accordance with cl 2, 3 and 16 of the General Order and ordered that for the purposes of the calculation of the appellant's severance payments the appellant's service in the Public Sector in Western Australia is deemed to include the period from 18 September 1991 to the date of the termination of the appellant's employment, that is including the period of his employment in Tasmania.

**Appeal to the Full Bench**

106 The appellant appealed to the Full Bench of the Industrial Relations Commission. The Director General appealed on the grounds that the Senior Commissioner erred in:

1. Finding 'continuous service served by the employee in the Public Sector' for the purposes of the Public Sector Management (Redeployment and redundancy) Regulations 2014 included the Respondent's service in the Tasmanian Public Service when section 3 of the Public Sector management Act 1994 defines the Public Sector to mean:
  - (a) the agencies, and
  - (b) the ministerial offices, and
  - (c) the non SES organisations
2. Deciding the break in service between 19 October and 23 October 2011 should not be considered a break in 'continuous service served by the employee in the Public Sector' for the purpose of the Regulations.
3. Deciding a fair application of the Regulations required recognition of the Respondent's Tasmanian Service in calculating the amount of voluntary severance payable to him under the Regulations when that service was not 'continuous service served by the employee in the Public Sector' for the purpose of Regulation 13(2).

107 The Full Bench allowed the appeal, quashed the decision of Senior Commissioner Kenner and dismissed Mr Browne's application to the Commission. The majority, Commissioners Emmanuel and Matthews, held that Public Sector in reg 13(2) has the same meaning as in the PSM Act and accordingly service in another State is not service in the Public Sector and does not count in the calculation of severance payments under the Regulations. The majority upheld appeal ground 1 and did not consider appeal grounds 2 and 3.

108 In dissent, Acting President Smith held that the words 'continuous service' and 'Public Sector' in reg 13(2) are not to be read disjunctively and when the provisions of cl 2, 3 and 16 of the General Order are read into reg 13(2) by the operation of the definition of 'continuous service' in reg 3(1), together with the definition of 'Public Sector', the effect is that the continuous service in another State that is (subsequently) continuous with service in the 'Public Sector' is to be deemed to be

'continuous service served by the employee in the Public Sector' for the purpose of calculating severance pay (and for no other purpose).

### **Appeal to this court**

109 The appellant has appealed to this court against the decision of the Full Bench. There are two grounds of appeal:

1. In concluding that the Public Sector (Redeployment and Redundancy) Regulations 2014 (Regulations) excluded service outside of Western Australia in the calculation of the severance payment under the Regulations, the Full Bench in its decision of 22 November 2018 erred in its interpretation and/or construction of the Public Sector management Act 1994 (PSM Act) and the Regulations in particular ss 3, 94, 95 and 108 of the PSM Act and Regulations 3(1), 13(2), 13(3) and 14 of the Regulations.
2. The Full Bench in its decision of 22 November 2018 erred in its interpretation and/or construction of the regulations in that the Full Bench:
  - (a) failed to properly interpret and/or construe the definition of 'continuous service' in Regulation 3(1) as having the same meaning as in the Government Wages Employees Long Service Leave General Order of the Industrial Commission (General Order); and
  - (b) failed to properly interpret and/or construe the General Order in particular in relation to clauses 2(a), 3, 16(a), 16(b), and 16(c) of the General Order (properly read together with the Regulations) deeming service with the Commonwealth or another State of Australia to be service with a WA Public Authority (Public Sector) in the calculation of the severance payment under the Regulations.

110 Section 90(1) of the Industrial Relations Act provides that an appeal lies to this court from any decision of the Full Bench on the ground, amongst others, that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, Regulation, award, industrial agreement or order in the course of making the decision appealed against. The appellant's grounds of appeal are that there has been an error in the interpretation of the PSM Act and the Regulations. An appeal lies to this court on those grounds.

111 The Director General did not file a notice of contention that the decision of the Full Bench should be affirmed on grounds other than those relied on by the Full Bench. Therefore, it is not necessary to

consider the matters raised by grounds 2 and 3 of the Director General's appeal to the Full Bench. This court is concerned only with Mr Browne's grounds of appeal.

**Reasons of Full Bench majority**

112 Commissioner Matthews found that Public Sector in reg 13(2) has the same meaning as it does in the PSM Act - it means entities within the Western Australian Government. Commissioner Matthews rejected Mr Browne's contention that 'continuous service served by the employee in the Public Sector' must be construed as a whole and that as 'continuous service' has the same meaning as it has in the General Order and that meaning includes servicing government outside of Western Australia, then Public Sector, by necessary intendment, does not have the same meaning as in the PSM Act. Commissioner Matthews held that the term 'continuous service' served by the employee in the Public Sector' in reg 13(2) requires service in the Public Sector as defined by the PSM Act but once that requirement is met the General Order determines what is and what is not continuous service.

113 Commissioner Emmanuel held that reg 13(2) requires the period of service to be continuous **and** served in the Public Sector (emphasis in the original reasons). The Commissioner held that while Mr Browne's employment in Tasmania may have been continuous, in the sense that it did not break continuity of service under the General Order, it was not served in the Public Sector because Public Sector is defined in the PSM Act and does not include entities outside the Western Australian Government. Section 3 of the PSM Act defines Public Sector to mean all the agencies and the ministerial offices and the non-SES organisations, which are themselves defined in s 3. All of the definitions apply 'unless the contrary intention appears'. Commissioner Emmanuel found that a contrary intention does not appear in reg 13(2) notwithstanding the reference to 'continuous service'.

**Reasons of Acting President Smith**

114 As I have said Acting President Smith interpreted 'continuous service served by the employee in the Public Sector' in reg 13(2) to include service in the public service of another State.



**Preferred interpretation**

115 The PSM Act does not itself provide for or regulate redundancy. Section 94(1) provides that the Governor may make regulations prescribing arrangements for registrable employees in relation to redeployment and retraining and redundancy. Section 94(3) provides that the regulations may provide for, amongst other things, the remuneration to an employee who accepts voluntary severance.

116 Part 3 of the Regulations deals with voluntary severance of Public Sector employees. Regulation 11 provides for the employing authority to offer voluntary severance to an employee and for an employee to accept voluntary severance. Regulation 13 prescribes the amount of the severance payment to be paid to an employee who accepts voluntary severance.

117 Regulation 13(2), subject to sub-regulations 3, 4 and 5, sets out a formula for calculating the severance payment. The severance payment is a function of two factors - three weeks' pay and 'each complete year of continuous service served by the employee in the Public Sector (including a ministerial office)'. Regulation 3(1) provides that 'continuous service' has the same meaning as it has in the General Order.

118 The use of defined terms in statutory provisions is a common drafting technique. When interpreting statutory provisions which contain a defined term the proper course is to read the words of the definition into the substantive enactment and then construe the substantive enactment in its context and bearing in mind its purpose.<sup>30</sup> However, that is not a course that can be followed in this case because 'continuous service' is not a defined term in the General Order. The court must ascertain the meaning of 'continuous service' in the General Order having regard to its context, and then apply that meaning in reg 13(2) having regard to its context and purpose.

119 The meaning of 'continuous service' in the General Order must be determined by considering the terms of the General Order as a whole. The General Order makes provision for long service leave for government wage employees employed by a Public Authority. Clause 1 provides that employees employed by a Public Authority shall become entitled to specified long service leave after a specified period of 'continuous service'. The natural and ordinary meaning of service is

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<sup>30</sup> *Kelly v The Queen* (2004) 218 CLR 216 [103] (McHugh J).

a period during which an employee is employed by an employer. The natural and ordinary meaning of 'continuous service' is a period of unbroken service with an employer by an employee. The General Order enlarges the natural and ordinary meaning of both 'service' and 'continuous'.

120 Clause 2 of the General Order enlarges the natural and ordinary meaning of service in a number of ways, including by deeming the service as an employee of a Public Authority to include periods during which the employee is not employed by the employer. That is the effect of cl 2(a) which provides that for the purpose of these conditions 'service' means service as an employee of a Public Authority and shall be deemed to include:

...

- (v) absence of the employee on National Service or other military training, but only if the difference between the employees' military pay and his civilian pay is made up, or would, but for the fact that his military pay exceeds his civilian pay, be made up by his employer;

... and

- (ix) employment in the service of the Commonwealth or another State of Australia as provided in Clause 16 hereof, when employment in the State Government commences on or after 1 April 1974.

121 Clause 3 of the General Order enlarges the natural and ordinary meaning of 'continuous', in the context of service. Clause 3(a) deems service of an employee not to have been broken by resignation if the employee resigns from the Public Authority and commences with another Public Authority in the State within a specified period. Clause 3(b) deems the service of an employee not to have been broken if his employment is ended by his employer for any reason other than serious misconduct if the employee resumes employment with the Government within a specified period and he has not received a proportionate part of long service leave payment from the previous employer.

122 The enlarged meaning of continuous service by a Public Authority under the General Order includes periods during which an employee is not employed by the Public Authority, including a period of employment in the service of another State. 'Continuous service' in

reg 13(2) must be given the same enlarged meaning in its context, that is the context of service by an employee in the Public Sector. Relevantly, 'continuous service' served by an employee in the Public Sector' includes employment in the service of another State of Australia.

123 I find that the majority of the Full Bench erred in their interpretation of reg 13(2) and the General Order. I would allow the appeal and set aside the decision of the Full Bench.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Western Australian Industrial Appeal Court.

JM

Research Associate to the Honourable Justice Buss

11 FEBRUARY 2020