TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT HAMPTON
DEPUTY PRESIDENT MASSON

C2023/6325

s.604 - Appeal of decisions

Appeal by Programmed Facility Management Pty Ltd
(C2023/6325)

Melbourne

10.00 AM, FRIDAY, 15 DECEMBER 2023

PN1

MR L HOWARD: If the Commission pleases - - -

PN2

DEPUTY PRESIDENT GOSTENCNIK: Good morning, Mr Howard.

PN3

MR HOWARD: - - - I'm seeking permission to appear.

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DEPUTY PRESIDENT GOSTENCNIK: I know you are. I know you're very keen. Thank you. Mr Lettau, you're seeking permission to appear for the respondent?

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MR P LETTAU: Yes.

PN6

DEPUTY PRESIDENT GOSTENCNIK: Given that neither party has filed any submissions in opposition to the applications for permission we are satisfied that taking into account the complexity of the matter, the matter will be dealt with more efficiently if permission is granted and we do so in each case. We should indicate also that we have had an opportunity to read the parties' submissions that have been filed, so we don't need those repeated, but this is an opportunity to highlight any particular points or reply to any matters that arise. Yes, Mr Howard.

PN7

MR HOWARD: Thank you, Deputy President, and the Bench. The appeal concerns the construction of the agreement. The applicable principles have been set out in my written submissions at paragraphs 13 to 15. As we say there, permission is required. The appeal proceeds by way of the correctness standard. The principles of construction are summarised there. They are taken from two cases, Skene and Ridd. I have provided those cases - or extracts - in an authorities bundle. Does the Bench have a copy of that? I intended to hand up a paper version.

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DEPUTY PRESIDENT GOSTENCNIK: Not on my account.

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DEPUTY PRESIDENT HAMPTON: No.

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DEPUTY PRESIDENT GOSTENCNIK: We are paperless.

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MR HOWARD: You're paperless.

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DEPUTY PRESIDENT GOSTENCNIK: Well, sort of.

PN13

MR HOWARD: I will ensure my instructor recycles those.

PN14

DEPUTY PRESIDENT GOSTENCNIK: You can take them back, yes.

PN15

MR HOWARD: Yes.

PN16

DEPUTY PRESIDENT GOSTENCNIK: The Commission is no longer a dumping ground for folders brought up by parties.

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MR HOWARD: I think that's probably a good thing for all of us. We have also provided you with the extracts of Kucks and *Short v Hercus.*

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DEPUTY PRESIDENT GOSTENCNIK: Yes.

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MR HOWARD: In terms of principles, I don't see too much in dispute but I just want to clarify four matters. Firstly, Programmed is not propounding a theory of entrenchment. We are just simply seeking to use context as an available tool to construction. Second, context is to be distinguished from evidence. We're using applicable statutory legislative context rather than evidence. Thirdly, context is considered at the outset in line with these authorities. There is a slight dispute about that in my friend's submissions.

PN21

Fourthly, my friend is inviting the Bench to deploy what is known as the beneficial approach to statutory construction. That applies to statutes. We would caution the Bench against that. The applicable principle is that in Kucks. That is at page 44 of the authorities book, which I'll just read out to avoid the Bench from using its computer to locate it:

PN22

> *The task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written -*

PN23

so that is the appropriate lens rather than the beneficial principle in statutory construction. With those four caveats, that is the applicable principles. Can I turn to the decision below, which you'll find in the tribunal book which I assume is also on computer. The decision starts at page 9. Can I just note, firstly, paragraph 3. This appeal concerns the CoInvest scheme. It's established under the Construction Industry Long Service Leave Act 1997 Victoria.

PN24

Under that Act employers in the industry are required to pay a charge to CoInvest for every employee and every employee is entitled to long service leave, and to be paid benefits out of the fund. Can I just take you to the statute at this point. It becomes more relevant later. The statute can be found at page 14 of the authorities book. You'll see section 6 there and it provides that:

PN25

Every worker is entitled to long service leave and to be paid benefits out of the fund in respect of continuous service in the construction industry.

PN26

This is establishing two things. Firstly, an unpaid leave entitlement and, secondly, payments from the trust fund whilst that unpaid leave entitlement is being administered. Now, just so you understand how that interlinks with other legislation, if you could turn page 16 of the authorities book which is an extract of the Long Service Leave Act 2018.

PN27

You will find there at section 5 that that Act doesn't apply to employees who - and if you turn the page to paragraph (e) - are entitled entitlements under the Construction Industry Act, although at that time the long service leave to be paid benefits out of the fund, so the Long Service Leave Act of Victoria has (indistinct) it. Your Honours will be familiar - particularly the Victorian Members of the Bench - that this trust fund is established by the legislation. It creates a set of rules; how to calculate continuous service, how to pay the entitlement out of the fund to the employee and how that goes about.

PN28

Going back to the decision, at paragraph 6 - page 10 of the tribunal book - the clause at issue is extracted at paragraph 6. 4.8 creates a monthly contribution entitlement in the first instance -

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while at work or on authorised leave paid by the Company.

PN30

4.8.1 goes on to provide further contribution entitlements and a. is what is at issue in this case. There is an obligation to make contributions for:

PN31

Paid leave - while the employee is on any paid leave from the employer.

PN32

b. is whilst the employee is on a 'work-related injury or illness', and b. goes on to condition it, 'Subject to a maximum of 52 weeks', whilst they're in receipt of workers compensation payments and they remain employed. That is the clause that falls for interpretation. Paragraph 7 extracts the award provision that regulates the same thing. Now, you will see immediately once you study this that 4.8.1 is a copy and paste of 31.5. There is a little bit of change in the formatting,

but 31.5(a) is 'Paid leave', 31.5(b) is 'Work-related injury or illness'. They are in the same terms precisely.

PN33

The only difference is as follows: (a) in the agreement has additional words, as you will have identified from my submissions, 'from the employer'. So the award says 'whilst the employee is on paid leave', the agreement says 'whilst the employee is on any paid leave from the employer'. Turning to paragraph 11, it identifies the AMWU's submission in the second sentence. The AMWU contended below that -

PN34

> *employees who are on long service leave and being paid out of the CoInvest fund are on 'any paid leave from the employer'; that this phrase is synonymous with 'any authorised absence from the employer for which payment is received.'*

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Programmed submissions are recorded at paragraph 13. The last sentence encapsulates it - or the penultimate sentence. Programmed submitted that -

PN36

> *'paid leave' has to be read as leave that is both authorised and paid for by the Respondent. This meaning is said to be confirmed by the words 'from the employer' which would otherwise have no work to do.*

PN37

They were the two submissions. Paragraph 19 is her Honour's conclusion where she says in the first line, 'I largely accept the submissions of the AMWU.' Paragraphs 20 to 26 contain the synthesis or the analysis of why she accepted that submission and we say each of those paragraphs contains errors. My intention is just to address paragraph by paragraph why that is so and I'm starting with paragraph 20.

PN38

Paragraph 20 deals with meanings of 'by' and 'from'. 'By' is used in the chapeau to clause 4.8 and 'from' is used in clause 4.8.1.a. Her Honour's conclusion is that there is a meaningful distinction between those particles and this is essentially the axis of the balance of the rules. Now, unfortunately you will see, at footnote 14, her Honour was led into the error of adopting incomplete dictionary definitions that were proffered. That is the cause of the error.

PN39

Can I take you to the dictionary in the first instance. You will find that at page 9 of the authorities book. Now, her Honour concluded that 'by' means -

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> *'through authority of' or 'through the agency of',*

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which is correct and -

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'from' means 'a particle specifying - a starting point' and 'to express removal or separation' -

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also correct, but not in context. Page 9 of the authorities book - - -

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DEPUTY PRESIDENT GOSTENCNIK: Mr Howard, sorry, could I ask you this - - -

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MR HOWARD: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: - - - if one looks at clause 4.8.1 - - -

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MR HOWARD: Yes.

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DEPUTY PRESIDENT GOSTENCNIK: - - - the introductory sentence to the subparagraphs provides that the employer 'must also make the superannuation contributions', which suggests that there is some additional obligation there created which is not encompassed by 4.8.

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MR HOWARD: That's correct. We agree with that. I will explain that.

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DEPUTY PRESIDENT GOSTENCNIK: Okay.

PN51

MR HOWARD: But can I immediately observe 'must also' is also from the award - that copy and paste.

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DEPUTY PRESIDENT GOSTENCNIK: Yes.

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MR HOWARD: I will explain when we go through context what work is to be done.

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DEPUTY PRESIDENT GOSTENCNIK: Yes, all right.

PN55

MR HOWARD: If I turn back to page 9 of the authorities book where we have a definition of 'by' and you will see there are many meanings of 'by', of course, because it's a very elastic concept. You will see the definition of it in point 8 is somewhat comparable:

PN56

Through the evidence or authority of; by his own account -

PN57

by the employer's account. Paragraph 12, somewhat comparable:

PN58

Through the agency or efficacy of: founded by Napoleon -

PN59

founded by the employer. That is what we say and what the Deputy President said was what 'by' means in context. Page 11 is the Macquarie meaning of 'from'. You will see the Deputy President adopted the first meaning:

PN60

A particle specifying a starting point, and hence used to express removal or separation in space.

PN61

So that's the definition her Honour adopted, but 'from' has many meanings and is just as elastic. We point to the third definition:

PN62

Source or origin: sketches drawn from nature -

PN63

sketches drawn from the employer. Number 4 is relevant:

PN64

Cause or reason: to suffer from the heat -

PN65

to suffer from the employer. Now, you can see how the error in paragraph 20 came about when you go back to the dictionary. Unfortunately, her Honour was misguided in what 'from' means, but more importantly we say that one doesn't make a fortress out of the dictionary and we point the Bench to what the High Court has made of this type of construction and the use of dictionaries in Thiess.

PN66

Our submission is that one word within a composite cannot control meanings of clauses and that's especially the case when we're talking about participles like 'by' and 'from'. They are incredibly elastic, they do not control the meaning of this clause. 'By' and 'from' have to be given a meaning in context and that context, we say, building upon what I'm about to submit later, is that paid leave from the employer and leave paid by the employer are conveying the same thing to us all; it's leave that's granted and paid by the employer.

PN67

DEPUTY PRESIDENT HAMPTON: Mr Howard, if that were the case why wouldn't it just use the same language?

PN68

MR HOWARD: I have addressed that issue at paragraphs 16 and 17 of my written submissions. Your Honour is one step ahead of me, but you'll see there that I have tried to do that at paragraph 17. My point is demonstrated by your hypothetical. If you do that in clause 4.8.1, it would read, 'The employer must also make the superannuation contributions provided for whilst the employee is on paid leave by the employer', that English.

PN69

DEPUTY PRESIDENT GOSTENCNIK: No, but you could use the same language as used in 4.8, couldn't you?

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MR HOWARD: That is the same language in 4.8.

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DEPUTY PRESIDENT GOSTENCNIK: But could it not read, 'While the employee is on authorised leave paid by the employer', and that would then align the language with 4.8.

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MR HOWARD: Certainly. They are multiple hypotheticals that we could perfect this drafting. We're not parliamentary drafts people, we're industrial parties.

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DEPUTY PRESIDENT GOSTENCNIK: But a choice has been made to use it.

PN74

MR HOWARD: A choice has been made and it's this choice - copy and paste the award - and we do that all the time, especially in industrial relations. We don't want to change the language. We cut and paste the award; we put in 'from the employer' within that award clause to make it abundantly clear what the position is when it comes to the CoInvest payments. That's what we've done. Now, the technique of trying to use the same particle, it results in bad English and that's the point we make in paragraph 17. So that is my submissions in relation to paragraph 20. Moving to paragraph 21, this is the conclusion that the -

PN75

construction of the phrase 'any paid leave from the employer' as being synonymous with an authorised absence for which payment is received -

PN76

that was the AMWU concept. That concept 'authorised absence for which payment is received' is not known to industrial relations or parliaments. An 'authorised absence for which payment is received', your Honours, on its ordinary words extends to workers compensation payments, income protection insurance payments, in addition to CoInvest payments.

PN77

Now, we say that that's not what paid leave is and there is a ridge here that has some pretty curious ramifications. If that is what 'paid leave' means in industrial relations employers subject to this award and subject to this enterprise agreement

have to contribute to superannuation, to income protection, I'm not sure how any employer can get the information about those payments from an insurer. It's private information.

PN78

DEPUTY PRESIDENT GOSTENCNIK: On one view the work-related injury issue at paragraph .b of 4.8.1 is unnecessary if any paid leave from the employer is read in the way that the Deputy President below read it.

PN79

MR HOWARD: Precisely.

PN80

DEPUTY PRESIDENT GOSTENCNIK: But it might be necessary because it limits the period payment.

PN81

MR HOWARD: That's her Honour's conclusion which I'll come to when I deal with paragraphs 22 and 23, but let's just get back to basics; paid leave. This is not what we understand payment to be. Can I just identify some authorities to assist you in that regard?

PN82

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN83

MR HOWARD: Our first is Mondelez, which is authorities book page 53. Gageler CJ, at para 47, gives us a definition of 'leave' and he says:

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'Leave', in an employment context, means authorised absence from work.

PN85

Uncontroversial, but important to apply in this course, because that's the words. 'Leave', your Honours, is the language of permission from one person to another; from an employee to an employer, from the Full Bench to Mr Howard when he seeks leave or indulgence. Clause 4.8 also uses the concept of 'absence', as does the award, as a broader concept. It also should be appreciated. An absence can encompass leave, the permission, but it also encompasses situations where there is no permission.

PN86

Can I take you to Woolford, a decision of the Full Court of the Supreme Court of South Australia, which is at appeal book 50. This is a judgment of Stanley J, for who Kelly J agreed. Woolford concerned long service leave and workers compensation, and this type of language was called for interpretation. At paragraph 105, Stanley J gives us an industrial definition of these words and he says in yellow:

PN87

More fundamentally, however, a worker's absence from his or her employment because of an injury arising from employment is not 'leave' in any commonly understood industrial sense. Leave is an entitlement relieving the employee from the performance of work duties, which is conferred by the terms of the employment contract, an industrial instrument or Act of Parliament that applies to that employment.

PN88

Usually such leave is paid. Leave can also be granted to an employee by an employer as an indulgence. The employee is relieved from the performance of work outside of any contractual or statutory context. Usually in those circumstances it is unpaid.

PN89

Thus there is a distinction between absence and leave, but this decision also helpfully tells us that leave is the permission to be absent from the duty to perform work and remuneration can attach to it; that's called paid leave. It can be where no remuneration attaches; it's called unpaid leave. This the language of the clause rather than an authorised absence for which payment is received. Ultimately we ask the Full Bench to adopt this language rather than some other concept that is foreign to the agreement, to industrial relations, to the Fair Work Act, and we say for that reason paragraph 23 is - so those are my submissions on paragraph 23.

PN90

Paragraphs 24 and 25, your Honours, deal with the superannuation law context and we need to be very careful here about how this applies because there is this inception, as it were, of the award clause and its copy and paste with an additional word; so there is a bit of confusion in these paragraphs about what context was put below and there is also some confusion in my friend's submissions.

PN91

What I say in paragraph 14 of my written submissions - what I said below and what I say now - is that industrial instruments often incorporate phrases, concepts, terms and clauses. That industrial soil, to use the language of Burchett J in *Short v Hercus*, has an obvious application in this case. We have seen that the agreement is a copy and paste. That's the application of *Short v Hercus* that we urge today and that's how it is to be applied, but then in order to understand the outer context, that informs a construction of the award and thus the enterprise agreement bears the superannuation law, so there is that double layer.

PN92

I want to take you to the superannuation context to impart and address the Deputy President's question. I would like to do this by reference to the rulings. I have provided those extracts in the authorities book. Can I just say this about rulings; your Honours will be aware. Rulings summarised the statutory provisions. They are reflections of the statutory obligations. My friend seems to want to make some submission about the chronology of this ruling. That doesn't take us very far.

PN93

This ruling - or the rulings I'm about to show you - are summarised in the statutory situation since it existed in 1992 when superannuation legislation was introduced. With that in mind, can I turn to page 28 of the authorities book. This is SGR2009/2. I just want to identify a couple of features to answer your Honour's question, Deputy President Gostencnik. This ruling deals with what is ordinary time earnings and salary or wages. It sets out what is excluded from that calculation. At 59A of the ruling it notes that sections of the Administration Act -

PN94

specify salary or wages that are not to be taken into account.

PN95

If we turn the page, at 59B there is exceptions for parental leave and ancillary leave. Parental leave, for one reason or another, is excluded from ordinary time earnings, as is some ancillary leave. The second sentence of this paragraph identifies community service leave, Australian Defence Force leave, et cetera. Jury service leave is another example. The basic premise of why they are excluded is because they are not in the service of the employer whilst they're getting this payment.

PN96

Can I just turn over to page 32, there is a helpful table about what is salary, wages or ordinary time earnings. Row 18 deals with workers compensation and you'll find that where the employee is in service and returned to work, salary or wages. Where they're not working it's not salary or wages, nor is it ordinary time earnings. That answers your Honour's question.

PN97

Clause 4.8 provides the obligation under superannuation law. Clause 4.8.1 extends it to these other forms of any paid leave; jury service leave, community service leave, parental leave. Clause 4.8.1.b extends it to workers compensation because under the Commonwealth legislation so far as it applies to superannuation, that's not ordinary time earnings. So that is the first ruling, then the second ruling and the more proximate ruling is ID2005/33. That is at authorities book 21.

PN98

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Mr Howard, just to be clear, the additional obligation in respect of paid leave which is encompassed by paragraph .a, what additional matters that are not also caught by 'authorised paid leave' by the company in 4.8? What are the additional ones?

PN99

MR HOWARD: We would say that it's giving effect to the change to the superannuation or Defence leave, community service leave, so on and so forth. I accept that you - if you wanted to perfect it and you want to adopt a (indistinct) clause - mightn't need 4.8.1.a because you've got 4.8, but that's the work that 4.8.1.a does in the award and this agreement.

PN100

Turning back to ID2005, this is a ruling about CoInvest payments. At the bottom of page 21 the issue is posed by the decision:

PN101

Will either the worker entitlement fund or employer have an obligation ... to make superannuation contributions on long service leave payments made to an individual from the fund?

PN102

The decision is recorded there, that there is no such obligation on the fund or the employer and the summary is that there is no employee/employer relationship for the superannuation legislation to attach. The facts part tell us that this is very much about Victorian CoInvest legislation and the reasoning - which I won't bother you with, but I commend it to you - is that the superannuation legislation sets up the obligation on an employment relationship and thus third parties providing leave payments aren't obliged to make that payment, nor is the employer. I have provided this summary in my written submissions at paragraph 5, so I won't trouble you with that.

PN103

Can we turn back to how her Honour below treated the context at paragraphs 23 and 24. We do say there is a subversion in the way we treat context. For example, at line 3 of paragraph 24, her Honour says or concludes that:

PN104

The ATO ruling only deals with the obligations under the Superannuation Guarantee Law. As the AMWU submitted, it says nothing about obligations under the Agreement.

PN105

There are a few problems with that conclusion, the first being an implied one. The ATO is not in the practice of issuing these rulings on an agreement by agreement basis. This is a public ruling available to all of us and used by all of us, but more importantly what we're doing when we're identifying this legislation is we're searching for the surrounding context to see whether it informs constructional choices made by the duty to the Full Bench when creating the award and the parties to the enterprise agreement.

PN106

This is a top-down approach rather than a bottom-up approach, which we say is inappropriate, and ultimately you can't dismiss this context on a top-down approach because the agreement says what you need to do as a starting point is look at the context and then ascertain whether it informed a constructional choice - - -

PN107

DEPUTY PRESIDENT HAMPTON: Mr Howard, you referred to the argument of timing put forward by the AMWU and suggested that the origins lie in the 1992 legislation.

PN108

MR HOWARD: Yes.

PN109

DEPUTY PRESIDENT HAMPTON: So is it the 1992 legislation one must look to in terms of the context regarding the choices that the parties made of the language because that seems to have predated the drafting of the clause. What relevance then does the ATO ruling have if it postdated the origins of the drafting of the clause?

PN110

MR HOWARD: Context is considered in its widest sense and your Honour is correct to identify this chronology that my friend raises. The chronology is as follows: superannuation legislation is introduced and known to all of us in the 90s. The Commission prepares an award in light of that legislation in 2009. The enterprise agreement is made in 2017, I think. That's the bare chronology.

PN111

What my friend says is that this interpretive ruling is placed in 2005 and for that reason that affects the way that this Full Bench treats the 1990s decisions, which he has brought along which we'll hear about. That's what I think he will say, but my submission is that only goes so far because the context in its wider sense and objective sense, not a subjective sense, includes all of this. It includes most proximately for this appeal parties to an agreement copying and pasting the clause and then introducing for clarity from the employer.

PN112

That's about as much we can say about that immediate context, but then this outer context must include the superannuation legislation. I went through the rulings as a shortcut. I didn't want to go through the Superannuation Guarantee Administration Act. Paragraph 24 of the decision goes on in the second bottom line:

PN113

> *The ATO ruling may have led to the parties agreeing to include such an obligation in the Agreement.*

PN114

There is not an objectively available conclusion in this circumstance in light that this as a copy and paste. There is no support for that hypothesis. There is no, for example, common intention about the bargaining, about, 'We're going to change this.' It's simply a cut and paste, and we have put in 'from the employer'. This conclusion that we agreed to differ from the award is unavailable.

PN115

Bringing this together, we say the proper approach to context involved four steps. First, the agreement copied and pasted the award and we used *Short v Hercus*, and that principle. Second, the only difference from the award clause was the insertion of words to clarify that it was paid leave from the employer and not leave payments from third parties. That would say 'from third parties', it says 'from the employer'.

PN116

Third, and at the level of superannuation legislation, context persuasively suggests that clause .a extends to all forms of paid leave that are not captured in the ordinary time earnings concept, such as parental leave, and .b extends superannuability(sic) to workers compensation. Fourth, and finally, the superannuation legislation context additional confirms that third party leave payments are not superannuable. That's the four steps to context we embrace and ask the Bench to embrace.

PN117

Moving to paragraph 26 where her Honour deals with our submission that some emphasis should be given to the choice to introduce 'from the employer'; because of that departure from the award, it should be given some emphasis, some meaning. That emphasis is rejected in paragraph 26, because it was said to be a subjective intention and you will see that conclusion the middle of the paragraph. Now, that's not what we said and that's not what we say now.

PN118

All we are saying is objectively speaking when you are reading this document, that 'from the employer' - and that language should be given some sort of emphasis, some sort of objective construction because it's there. I'm not opining upon what the parties subjectively thought it meant, so we're just making the submission that you have got to interpret that language and also give it some emphasis because it's there and it's not in the award.

PN119

There is a second conclusion in paragraph 26 and you can find it within the fifth last line of the paragraph where her Honour concludes:

PN120

In considering the industrial context that the clause arose from, it appears to me to be relevant that, broadly speaking, employees are entitled to be paid superannuation contributions whilst on long service leave paid by an employer. That is the general position, and the distinction relied on here is the fact that payments are not made by the employer but by the CoInvest fund. In light of the broader context, clear language excluding an entitlement in those circumstances might be expected.

PN121

Your Honours, there are two errors that manifest there in that conclusion. The first is that the concept of broader industrial context that her Honour poses, that's erroneous. In this particular industry the CoInvest scheme applies and it's not the case that employees are entitled to superannuation contributions whilst on long service leave. We know that because the ATO ruling tells us that, so this broader conception might be accurate with respect to other Victorian employers, as we saw earlier when I took you to legislation, but this broader context that she observes is not right; in this industry it's different. That's the first error.

PN122

The second conclusion or error was that she thought that clearer language should be expected and we simply say that introducing 'from the employer' into the

clause was that clear language. We don't know what else we could do to make it clear. That's what we did, so it's a bit circular to say that we didn't have clear language when the language is there. Your Honours, my friend has provided a list of authorities which appear new. I'm not sure what he wants to make of them. Subject to what he says about that, I intend to address that in reply. Unless the Bench has any further questions, those are my submissions.

PN123

DEPUTY PRESIDENT GOSTENCNIK: Mr Howard, for my own part I'm struggling to understand if 'unauthorised leave paid by the company' means the same as 'any paid leave from the employer', what is that additional leave that is not covered by 4.8 that is covered by paragraph .a of 4.8.1? I understand the point you're making about the ruling, but if they mean the same thing then whatever is in .a is already covered by 4.8. There is nothing to also make a contribution in respect of, because it's already required by 4.8.

PN124

MR HOWARD: That's correct and it's an imperfection by industrial parties. Can I just take you to help you along with that - - -

PN125

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN126

MR HOWARD: The award and the agreement - because that first clause 4.8 is not - - -

PN127

DEPUTY PRESIDENT GOSTENCNIK: Is not better.

PN128

MR HOWARD: Yes.

PN129

DEPUTY PRESIDENT GOSTENCNIK: That's right.

PN130

MR HOWARD: That's right.

PN131

DEPUTY PRESIDENT MASSON: But isn't 4.8, the contribution rate - do you say the only thing that's required by the superannuation guarantee legislation is the rate?

PN132

MR HOWARD: No, no, I don't make that submission. No, no. Maybe if we start with the award at page 6 and I'll explain - I'll answer that question. On page 6 you will find clause 31 and this will be a familiar clause to all of us. 31.1 has some history to it. It basically picks up and applies the legislation, your Honour, and in essence directs the reader to that legislation, (b) supplements it.

PN133

DEPUTY PRESIDENT MASSON: Yes.

PN134

MR HOWARD: 31.2 requires the employer to make contributions to avoid the charge.

PN135

DEPUTY PRESIDENT MASSON: Yes.

PN136

MR HOWARD: So far very different clauses to the agreement. Over the page, 31.3 and 31.4 are also different and deal with voluntary contributions and funds, then it's 31.5 over the page at page 8 that it's extracted in full. Now, the difference between that award, your Honour, and the EA is the clause in the chapeau to 4.8. So what 4.8 is doing, Deputy President, is obliging Programmed to make superannuation contributions monthly rather than quarterly while at work or on authorised leave paid by the company. So this is a bespoke clause and that is a superior entitlement to the award because it has got a monthly entitlement there. Now, that has been drafted by the parties to this enterprise agreement.

PN137

To take up Deputy President Gostencnik's question, authorised leave paid by the company has the construction which we contend for - authorised leave paid by the company - and any unauthorised leave paid by the company. That must be the case; Defence Force leave, parental leave, so on and so forth.

PN138

DEPUTY PRESIDENT MASSON: Yes.

PN139

MR HOWARD: That's true, but what these industrial parties did was then copy and paste 31.5 and there is an overlap there. I accept that, it's imperfect, but it doesn't mean that any - - -

PN140

DEPUTY PRESIDENT GOSTENCNIK: On your construction really 4.8 is concerned only with the manner in which the contribution is to be paid.

PN141

MR HOWARD: Precisely.

PN142

DEPUTY PRESIDENT MASSON: And the rate, presumably.

PN143

DEPUTY PRESIDENT GOSTENCNIK: Yes, and the contribution rate.

PN144

MR HOWARD: Yes.

PN145

DEPUTY PRESIDENT GOSTENCNIK: There is an overlap between - the words 'while at work' don't particularly mean anything because we're talking about earnings; contributions on earnings.

PN146

MR HOWARD: Yes.

PN147

DEPUTY PRESIDENT GOSTENCNIK: And then 'authorised leave paid by the company' you say means the same thing.

PN148

MR HOWARD: It does. 'Authorised leave paid by the company' means paid leave from the employer, yes.

PN149

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN150

MR HOWARD: And there is no distinction there, it is an overlap.

PN151

DEPUTY PRESIDENT MASSON: So just to be clear, 4.1(a) doesn't expand the forms of leave paid for by the employer beyond 4.8.

PN152

MR HOWARD: Yes. Now, the reason why I hesitate, Deputy President Masson, is because in the chapeau to 4.8.1 there is a caveat which is subject to the governing rules of the relevant superannuation fund. I've addressed your Honours about what that means in my written submissions, so 'subject to the rules of the governing fund' means the superannuation legislation. Now, my friend has found cases that confirm that, so the governing rules is the superannuation legal term.

PN153

I think I've put in a footnote - yes, footnote 1, but let's just put that caveat - to answer your question, the governing rules of the superannuation fund would have little work to do to answer your Honour's question, in my submission. I think it is the case that it is extending the obligation to paid leave as it is the last part of 4.8, but as Deputy President Gostencnik identified, the core obligation - like, the actual duty - in 4.8 is a different one.

PN154

I read the last sentences of 4.8 as follows: 'while at work or on unauthorised leave' is intending to capture the obligations in 4.8.1 in a summary way. The core obligation of 4.8 is the duty to provide superannuation contributions on a monthly basis at the contribution rate. That's the terms, that's the obligation in 4.8.

PN155

DEPUTY PRESIDENT MASSON: Does that mean that subclause .a of 4.8.1 is likely redundant?

PN156

MR HOWARD: No, no, because the obligation of 4.8 creates a different obligation. 'Will be paid', that's the language of obligation there, 'while at work or on authorised leave paid by the company' - 'while at work' is dealing with 4.8.1.b and 'on authorised leave' is dealing with or picking up 4.8.1.a. There is no redundancy. That's a sensible construction.

PN157

It is overlap, but, you know, we're not parliamentary drafts people, but it's a sensible construction of this clause. It's not a basis to reject Programmed's appeal, it's just a way to sensibly read the clause. There is a different redundancy which you will have seen in my submissions between .a and .b. If .a means payment for which - - -

PN158

DEPUTY PRESIDENT MASSON: Authorised absence.

PN159

MR HOWARD: Authorised absence, yes, for which payment is received, that's .a. There is no need for .b, that's the redundancy, because an authorised absence for which payment is received is what .b is regulating there.

PN160

DEPUTY PRESIDENT GOSTENCNIK: Save for the limitation on the period of absence in .b of 52 weeks.

PN161

MR HOWARD: Yes. Now, the Deputy President below thought that that was a meaningful difference - I think the language was. Again, in order to discern meaningful differences we look at context. The context is that that is the award; that's what the award says. That's what the parties to this agreement wanted to continue.

PN162

DEPUTY PRESIDENT GOSTENCNIK: Well, it may be that the history of the 52-week absence is similar to the period, but under lots of industrial cases it was the case that the employer had an obligation to make up pay during the period. The accident compensation scheme which applied might have paid 95 per cent and 85 per cent and so on over the 12 months, and the employer was required to make up the difference.

PN163

MR HOWARD: Precisely.

PN164

DEPUTY PRESIDENT GOSTENCNIK: It may be that those two things coincide.

PN165

MR HOWARD: Precisely, precisely, and we have raised that. That's why we have this 52-week limitation. It is a particular time period that applies in workers compensation to a number of entitlements. In Victoria, and I think in many other

states, the workers compensation legislation prohibits an employer from terminating an injured worker for a 52-week period.

PN166

DEPUTY PRESIDENT GOSTENCNIK: It more properly requires the employer to re-engage the employee in employment if they are able to work - - -

PN167

MR HOWARD: Precisely.

PN168

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN169

MR HOWARD: And the reality is the employer under that scheme has a duty to return the employee to work.

PN170

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN171

MR HOWARD: So that's why we've got 52 weeks there. I mean, that's the obvious conclusion - - -

PN172

DEPUTY PRESIDENT GOSTENCNIK: I suppose contextually if that's accepted then that might point to or explain the words in paragraph .a. We're here talking about periods of leave that are paid for by the employer; 52 weeks being the period where the employer is making make-up pay contributions.

PN173

MR HOWARD: Yes, yes.

PN174

DEPUTY PRESIDENT GOSTENCNIK: I'm not saying it's right, but that's a contextual - - -

PN175

MR HOWARD: Contextually something that we ought to take into account, I agree.

PN176

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN177

MR HOWARD: Those are my submissions.

PN178

DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you, Mr Howard. Mr Lettau.

PN179

MR LETTAU: Thank you, Deputy President. My submissions will probably be a little bit shorter than my friend's - - -

PN180

DEPUTY PRESIDENT GOSTENCNIK: That, I can assure you, will stand in your favour, Mr Lettau.

PN181

MR LETTAU: Nonetheless, I thank my friend for giving very fulsome - - -

PN182

DEPUTY PRESIDENT GOSTENCNIK: I'm sure they will be no less helpful to - - -

PN183

MR LETTAU: - - - helpful summary of the case as it stands. I think really there is not a lot in dispute other than the meaning of a few words in the agreement. Our approach, as you will garner from our submissions, is that an ordinary plain reading of those words gives us the meaning we need. On top of that, even taking into account the context, history, as well as the award - even taking that into account, it supports the plain reading that we advance rather than the reading advanced by the appellant.

PN184

I wanted to give the Commission a little bit of an overview of some of the historical materials before I move on to our actual interpretation of the clause. Now, we had advanced this material in the context of the, sort of, *Short v Hercus* situation that my friend has raised and I guess our intention is to bury down a little bit into that industrial soil to provide a little bit of context. We don't necessarily advance, you know, lengthy submissions on this material, but we do think the material could be of some assistance to the Commission.

PN185

DEPUTY PRESIDENT GOSTENCNIK: Sometimes going into the soil provides context and other times it's just throwing mud. Away you go.

PN186

MR LETTAU: That could be the case. Well, we'll try to keep the mud to a minimum. There are just three, I guess, authorities or decisions that I wish to refer the Bench to. I don't want to go into some of the - now, there is the superannuation test case and so on. I have provided those materials just for fulsomeness basically. They are there if they're needed.

PN187

There are three that we want to look at. One is numbered number 7 in our authorities. It's known as the National Building and Construction Industry Award 1990 superannuation decision. This is where we found, as far as we can tell, the origin of this clause that exists in the modern award. The second decision we wanted to take you to is number 6 in our authorities. This is titled 'Metal Industry (Superannuation) Award 1989 re award simplification'. This is a decision that

brought that original clause into the superannuation award that applied before the award modernisation.

PN188

Finally there is the decision in the award modernisation which seeks to preserve the situation that existed beforehand and largely uses the same words that existed beforehand.

PN189

DEPUTY PRESIDENT GOSTENCNIK: Which tab is that, Mr Lettau?

PN190

MR LETTAU: I beg your pardon, tab 2. It largely preserves - intended to preserve and subject to some, well, in some sense minor alterations but in another sense sort of significant which I will draw the Commission's attention to in a moment. Just beginning with number 7, this is as I said the earliest instance we can find of this absence from work clause and it's on page 67 in an appendix called 'Appendix F'. You will see the full clause as it's drafted - I'm going to bring it up for myself, as well. Clause 31.5:

PN191

Subject to the governing rules of the Fund of which an employee is a member, the following provisions shall apply.

PN192

'Paid leave' is at 31.5.1:

PN193

Contributions shall continue whilst a member of a fund is absent on paid annual leave, sick leave, long service, public holidays, jury service, bereavement leave or other paid leave.

PN194

Then there is also the 'Work related injury or illness' clause there, as well. We just wanted to make a few observations in relation to this decision. The first observation we wish to make - - -

PN195

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Mr Lettau, which decision number?

PN196

MR LETTAU: It's number 7 in the - - -

PN197

DEPUTY PRESIDENT GOSTENCNIK: Number 7.

PN198

MR LETTAU: It's known as the National Building and Construction Industry - - -

PN199

DEPUTY PRESIDENT GOSTENCNIK: I have it. At which - - -

PN200

MR LETTAU: Page 67.

PN201

DEPUTY PRESIDENT GOSTENCNIK: Page 67.

PN202

MR LETTAU: Yes, at the bottom left.

PN203

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN204

MR LETTAU: Page 67.

PN205

DEPUTY PRESIDENT GOSTENCNIK: Yes. Just bear with me one moment. This is just proving that paper is often faster.

PN206

MR LETTAU: I do apologise for not having such a concise format that might have provided - - -

PN207

DEPUTY PRESIDENT GOSTENCNIK: No, no, no, that's - yes, I have it now. Thank you.

PN208

MR LETTAU: Okay. Great. I read it out a moment ago. I'll come back to these terms shortly. I won't read it out again, but it's down there at 31.5 'Absences from work'. I'll take you to one other place in this decision. It's on pages 52 and 53. These paragraphs of the decision - so it's paragraph 154 - document the reasoning of the Commission in terms of which clauses were adopted, so it gives a bit of a background - I'm not going to go into the detail - about the different positions of the parties on how the wording should be drafted.

PN209

There is broad consensus from the parties, including the CFMEU and the building employers, as well as the Commonwealth, subject to one differing view - I guess you could put it that way - which was about defining 'governing rules' in relation to a fund, scheme or trust - I beg your pardon. It's there at page 156. The only sort of differing view was about the meaning of 'governing rules'. The union and the employers defined it simply as a 'trust deed', whereas the Commonwealth wished to actually bring in the 'governing rules' definition from the Act. That's basically the only point of difference and, as we know, the Commission used the phrase 'governing rules' rather than 'trust deed'.

PN210

A few observations we wanted to make about this decision. One, the first observation is there is discussion at page 15, paragraph 18, of some of the evidence that was led during this decision. The summary of that evidence shows

that in the CFMEU's evidence they raised or were cognisant of the question of portable industry schemes, so they were discussed; portable industry schemes including superannuation. Portable industry schemes, it's on the mind of the parties. That's our first observation.

PN211

The second observation we wanted to make is that these terms were introduced consensually by the CFMEU, the employers and the Commonwealth. There is no suggestion - which is our third observation - in the text that paid leave hinges in any way upon from whom the payment comes; it's just paid leave. The final observation, which is I guess the obvious observation, it appears to us that this is the source of the clause as it exists today in the award.

PN212

There is one final observation in relation to this decision that I just wanted to draw the Commission's attention to briefly. It's at pages 54 and 55, which is just over the page in fact. Specifically to page 55 and paragraph 167 where it's observed that:

PN213

The Commonwealth submitted that the scope for awarding different provisions has narrowed since the award simplification decision. In particular those parts of it which in the Commonwealth's view indicated that award provisions should not replicate legislation.

PN214

It's this view that is advanced by the Commonwealth and in the next sentence you will see agreed upon by the Commission that superannuation clauses in awards should not seek to replicate what's already in the superannuation legislation, and there is an obvious reason for that. As my friend will probably agree, superannuation legislation is extremely complex and if you start trying to replicate existing legislation in awards, you run the risk of introducing ambiguity, uncertainty, and I guess this is a case in point of such uncertainty if we are going to endeavour to start replicating highly complex legislation.

PN215

The Commission accepted that submission. We generally agree with that submission, in our opinion, having regard to the award simplification decision:

PN216

Award superannuation should, in general, comply with the superannuation test case and with the present decision -

PN217

and I won't delve further into that context, but the general point which I guess I would summarise is a presumption again replication in award provisions. That is all I want to say about this decision. The next decision is tab 6. The absence from work clause is - I'll make this first observation: paragraph 9 of the decision, it's pointed out that the intent here was to give effect to the National Building and Construction Industry Award 1990 superannuation decision that I've just covered.

PN218

It's noted it contains all the substantive provisions from that decision and it is modified only to the extent necessary for the award to apply it in the metal industry. Attachment A on page 10 contains that clause 11 'Absence from work', so here again:

PN219

Subject to the governing rules of the Fund of which an employee is a member, the following provisions shall apply.

PN220

11.1:

PN221

Paid Leave. Contributions shall continue whilst a member of a Fund is absent on paid annual leave, sick leave, long service leave, public holidays, jury service, bereavement leave, or other paid leave.

PN222

I guess we would make four observations here. The first is it's connected to this concept of absence from work. It's a very broad, general concept as my friend had enunciated earlier. Again, 'paid' is used in the same way it's used in the current clause, which is as an adjective rather than as a verb. It's not said to be paid by any particular person or entity. 'Long service leave' is expressly named in the list and then we have at the end a catch-all that sort of seems to incorporate any other form of paid leave. That's all I wish to say about this decision.

PN223

The final decision I wish to turn to is tab number 2 and specifically paragraph 92 on page 22. This is an award modernisation decision of the Full Bench. I should note that this is the first decision in which exposure drafts are published with award modernisation and attached to this decision is the first exposure draft for the modern Manufacturing Award. We have attached at tab 3 a copy of the exposure draft. The Full Bench says:

PN224

The superannuation provision in some of the exposure drafts included an additional paragraph dealing with superannuation contributions during periods of paid leave or while an employee was absent from work due to injury or work-related illness. It is not our intention that the additional paragraph should be part of the standard clause. It may be appropriate, however, where it is necessary to maintain the pre-existing safety net.

PN225

In our submission, the pre-existing safety net is the situation that exists under - well, the Metals Award in this case, but also existed under other awards which had incorporated this original clause, the 'Absence from work' clause, that goes back to the '99 decision at tab number 7 that I was discussing earlier.

PN226

If I can take you to the tab 3 exposure draft, which is in the authorities, as well, and to page 61, clause 35.5. Here it is, here is the modern award clause as it exists today. Unfortunately, we couldn't find any background in terms of why this particular wording was chosen, but this is it; this is what we have found. It's pretty well exactly as it appears in the modern award aside from a few formatting changes. There are dot points instead of Roman numeral numbers.

PN227

DEPUTY PRESIDENT GOSTENCNIK: Mr Lettau, in the context of the employment relationship and the industrial instruments that are designed to govern the employment relationship, or at least parts of it, is there a form of leave that is not from the employer?

PN228

MR LETTAU: It's difficult to sort of think of one, unless it's leave from another employer and you'll see in our submissions we make - - -

PN229

DEPUTY PRESIDENT GOSTENCNIK: Leave from an employer.

PN230

MR LETTAU: From an employer.

PN231

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN232

MR LETTAU: We make the submission that - - -

PN233

DEPUTY PRESIDENT GOSTENCNIK: I'm just trying to understand what was the purpose of including those additional words in 4.8.1.

PN234

MR LETTAU: Yes, well - - -

PN235

DEPUTY PRESIDENT GOSTENCNIK: All leave from work must be from the employer.

PN236

MR LETTAU: As my friend rightly points out, industrial drafters are not lawyers and when they read words like 'while the employee is on any paid leave' it's conceivable - although I wouldn't advise them they need to do this - that they might want to clarify that this is paid leave from us, not paid leave from some other context, some other employment you may have.

PN237

DEPUTY PRESIDENT GOSTENCNIK: But in an enterprise agreement an employee is only an employee of the employer that is covered by the agreement. It doesn't regulate a relationship of the person and another employer.

PN238

MR LETTAU: Yes.

PN239

DEPUTY PRESIDENT GOSTENCNIK: So, given that, it just seems to me that while the employee is on any paid leave it already tells you that it must be from that employer that is covered by the agreement.

PN240

MR LETTAU: I would certainly agree with that and that would be my advice that I would give to, you know, parties drafting these clauses, but any paid leave from the employer simply clarifies that it's paid leave from Programmed in this context.

PN241

DEPUTY PRESIDENT GOSTENCNIK: Yes, unless it's intended to differentiate between any - - -

PN242

MR LETTAU: I guess our submissions - - -

PN243

DEPUTY PRESIDENT GOSTENCNIK: Who makes the payment. Unless it's intended to differentiate who makes the payment, that is by reference to - or putting up a difference as between that provision and 4.8. That is 4.8 makes it clear that the authorised leave there is authorised leave paid by the employer.

PN244

MR LETTAU: Exactly. If I'm understanding the import of the question, if - - -

PN245

DEPUTY PRESIDENT GOSTENCNIK: Yes. My question is I don't see what work those words have to do in the context of an enterprise agreement which is concerned with paid leave. It must be paid leave from the employer that is covered by the agreement, so those words are not necessary for that purpose.

PN246

MR LETTAU: Well, on the one hand they do clarify that it's paid leave from this employer. On the other hand, I mean, it's the natural - - -

PN247

DEPUTY PRESIDENT GOSTENCNIK: But this is the only employer that's covered by the agreement. It can't be paid leave by another employer not covered by the agreement, surely. It doesn't regulate the relationship of this employee and another employee or the other employer and this employer.

PN248

MR LETTAU: Yes. Maybe I'm not making the point clear, which is that it clarifies that any form of leave that this employee is engaging in will not receive the superannuation unless it's paid leave from the employer.

PN249

DEPUTY PRESIDENT GOSTENCNIK: Yes, and that's really my question. One explanation for the additional words is not that it is intended to - or that it's adding nothing to what is already there, but rather it is intending to differentiate leave from the employer as compared to authorised leave paid by the employer, which is in the preceding paragraph.

PN250

MR LETTAU: Which is this heart of the whole contention, yes.

PN251

DEPUTY PRESIDENT GOSTENCNIK: I understand that, but - - -

PN252

MR LETTAU: And unfortunately given we don't have evidence on why these words were put in, we're left with context and - - -

PN253

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN254

MR LETTAU: Which is sort of the basis of our whole argument and that is that the phrase - I'll come to this in a moment - 'on any paid leave from the employer' we submit is, you know, a common construction used in everyday language; that sort of 'on' and 'from' construction which we discuss in our written submissions. On leave from work, on holidays from school, on whatever innumerable number of examples you could give and it's used in everyday language to convey, well, one, you're on leave, you're engaged in a particular state and that state is to be considered relative to some other state that you were previously on and that was engaged in employment.

PN255

Our submission is that the language here is just - you know, it's common everyday language how you communicate a state of being on leave from your employer. If you wish to communicate on the other hand that it's only when you're on leave paid by the employer, you can do that and you use the appropriate wording 'paid by the employer' as they use in 4.8. I think my friend perhaps underestimates sort of - - -

PN256

DEPUTY PRESIDENT GOSTENCNIK: Well, another contextual issue that concerns me is the nature of the CoInvest scheme. That is that multiple employers make contributions to the fund because in recognition of the itinerate nature of the work that it's difficult to accumulate in the normal course of events the period of service that the long serve leave legislation would require you to obtain with one employer, because construction in particular is itinerate work. You can work for multiple employers over 10 years and it's designed to recognise service in the industry as opposed to service with the employer.

PN257

In the end the last employer might only have secured one year's worth of service in this person and they continue, and then they access their CoInvest entitlement

and the employer is obliged to make contributions, on your construction, for superannuation for that period of leave, most of which was accumulated by some other employer. Isn't that a contextual matter that tells against your construction?

PN258

MR LETTAU: Well, it only does if you sort of presume the answer in the first place, which is that the words 'from the employer' can be meaningfully construed in ordinary everyday language in a way that implies payment from the employer. We just say that that construction is not available on these words. That's not what these words convey or are even capable of conveying in good English.

PN259

DEPUTY PRESIDENT GOSTENCNIK: Yes, but one can access long service leave from the CoInvest scheme whilst the person is not employed at all. If I have a qualified period of service and I'm terminated at the end of a particular project, and I want to take some - I can access my CoInvest entitlement.

PN260

MR LETTAU: Sure.

PN261

DEPUTY PRESIDENT GOSTENCNIK: At that point I'm not on leave from anybody.

PN262

MR LETTAU: Exactly, and I guess the - - -

PN263

DEPUTY PRESIDENT GOSTENCNIK: Other than the industry perhaps.

PN264

MR LETTAU: Yes, leave from the industry, and in that case naturally there would be no entitlement to a superannuation payment because it would be leave from, say, the industry as it has been put.

PN265

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN266

MR LETTAU: As opposed to leave from the employer.

PN267

DEPUTY PRESIDENT GOSTENCNIK: But I'm still on paid leave, it's just not from anybody.

PN268

MR LETTAU: Yes. Our submission is that the way the award has drafted the terms, it's so broad. It says 'any paid leave' and a reasonable mind could look at that and think that's a little bit concerning - - -

PN269

DEPUTY PRESIDENT GOSTENCNIK: So your contention - not that we're concerned necessarily with the award, but given that it provides some context - is that 'any paid leave' has the same meaning as 'any paid leave from the employer'.

PN270

MR LETTAU: Our submission is slightly different to that, which is that any paid - as I was about to put it, a reasonable mind could read the award clause and think to themselves, '"Any paid leave", that's very broad, that's a bit worrying. Let's make it really abundantly clear that we mean paid leave from us, not paid leave from some other - - -'

PN271

DEPUTY PRESIDENT MASSON: But isn't it unrealistic to suggest that any paid leave covered leave other than from the particular employer covered by the instrument?

PN272

MR LETTAU: I would tend to agree.

PN273

DEPUTY PRESIDENT MASSON: Yes.

PN274

MR LETTAU: But I can assure you in my experience - my industrial experience - there are situations where these sorts of questions are put; 'What do you mean? Any paid leave?' 'No, this is paid leave from us, so let's make that really clear.' It does happen despite - - -

PN275

DEPUTY PRESIDENT GOSTENCNIK: But on your construction the result is the same under the award as under the agreement.

PN276

MR LETTAU: Yes.

PN277

DEPUTY PRESIDENT GOSTENCNIK: That is, under the award you say an employer must pay superannuation contributions for CoInvest leave.

PN278

MR LETTAU: Of course, and it would be an unwinnable case if anyone were to bring an interpretive claim that under the award they were entitled to contributions in a context where it wasn't paid leave from the employer. That would obviously be the advice of any lawyer in an industrial setting, that you don't need the words from the employer but, as my friend has enumerated several times, these are not lawyers who are putting these terms together. They can have reasonable concerns about the specific framing of clauses and adjust it to their liking.

PN279

In our submission, it's more probable that that type of concern would have occurred than that parties who are well versed in good English would use a sort of

awkward, almost nonsensical, formulation of leave paid by the employer. I think we would be underestimating the intelligence of industrial drafters - - -

PN280

DEPUTY PRESIDENT GOSTENCNIK: Under or over?

PN281

MR LETTAU: Underestimating - - -

PN282

DEPUTY PRESIDENT GOSTENCNIK: Okay.

PN283

MR LETTAU: - - - their ability to speak in good English. I think most people - you know, 'Who were you paid from?' One doesn't say, 'Who were you paid from? Who were you paid - - -'

PN284

DEPUTY PRESIDENT GOSTENCNIK: Mr Lettau, these days judging by the content of text messages and emails, something in good English is in the eyes of the beholder. It's a dying art.

PN285

MR LETTAU: It is a dying art. I will, on that note, continue. I'm nearly done on this history lesson, for what it's worth. So a couple of observations we wanted to make here just about the modern award and I'll just remind you where I was at; it's tab 3, page 61, clause 35.5. The obvious observation to make here is that the Commission has rolled up what was previously separated, so in the original each type of leave was spelt out and that included long service leave. Now it has been rolled up, I think for sort of probably obvious reasons, into just a simple any paid leave that includes long service leave.

PN286

The other observation to make is that we couldn't find any evidence that there was any discussion about the way this was formulated - no disputes, no questions asked effectively - and it remains as it is here, an exposure draft unchanged all the way through.

PN287

DEPUTY PRESIDENT GOSTENCNIK: I think there was a lot of rough justice in that period.

PN288

MR LETTAU: There was a lot of rough justice.

PN289

DEPUTY PRESIDENT GOSTENCNIK: It was very tight time frame, but squeezed thousands of awards into 150-odd, so - - -

PN290

MR LETTAU: There were submissions made in relation to the decision itself, paragraph 92, that I mentioned before. Those submissions were, yes, we should

preserve the safety net in relation to absences from work where it pre-existed, but we shouldn't be incorporating that clause into other agreements. There were some disputes about whether they were going to go into other agreements, not in the case of the Manufacturing Award. The other observation is it's the same clause that's in the agreement other than 'from the employer'.

PN291

DEPUTY PRESIDENT GOSTENCNIK: Well, just on that, I accept that the words are very similar, but the introductory words after the words 'subject to' call up - this is in the award - superannuation contributions provided for in clause 35.2, which is a general obligation to make superannuation contributions and some are required to avoid the charge. It's in that context that the words 'must also make' appear, because 35.2 makes no reference to leave.

PN292

MR LETTAU: Yes, and, Deputy President - - -

PN293

DEPUTY PRESIDENT GOSTENCNIK: So if it was a sort of cut and paste, to use Mr Howard's term, not enough thought appears to have been given about what those must also make words mean given that the parties have added words at 4.8 which concern 'authorised leave paid by the company', which don't appear in the general obligation in 35.2 in the award.

PN294

The award flows because 35.2 doesn't provide for an obligation to pay whilst on leave and so the words 'must also' make sense in 35.5, but in this instrument leave is already dealt with at - - -

PN295

MR LETTAU: In 4.8.

PN296

DEPUTY PRESIDENT GOSTENCNIK: - - - 4.8, so the notion that they must also pay for leave is difficult to comprehend.

PN297

MR LETTAU: Yes, well, our submission there is that the - I mean, effectively the structure is the same because you have a prior clause - - -

PN298

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN299

MR LETTAU: - - - whereas in this case a prior sort of parent clause setting out the general obligation and then you make a supplementary sort of 'must also do these other things'.

PN300

DEPUTY PRESIDENT GOSTENCNIK: But the content of the general obligation is different because the form of the award doesn't include leave, the latter does.

PN301

MR LETTAU: I beg your pardon?

PN302

DEPUTY PRESIDENT GOSTENCNIK: The former, the award, the general obligation of it doesn't include leave. 35.2 doesn't say anything about leave.

PN303

MR LETTAU: I see the - - -

PN304

DEPUTY PRESIDENT GOSTENCNIK: So that when one goes to 35.5 the words must also make sense. That is, you've got a general obligation, under 35.2, but you've also got to make contributions in relation to paid leave. Whereas 4.8 already deals with paid leave. So why must the employer also make payments in respect of paid leave?

PN305

MR LETTAU: Well, in both contexts we're adding to the general obligations that precedes it.

PN306

DEPUTY PRESIDENT GOSTENCNIK: On your construction.

PN307

MR LETTAU: On our construction, yes, so that it does have work to do.

PN308

DEPUTY PRESIDENT GOSTENCNIK: Although it would be curious - well, on your construction then, the paid leave to which reference is made, in 4.8.1, is paid - is leave from the employer but the payment for which is sourced elsewhere, i.e. (indistinct) and that's payable.

PN309

MR LETTAU: Yes, exactly.

PN310

DEPUTY PRESIDENT GOSTENCNIK: Because leave that's already paid by the employer is already dealt with, in 4.8.

PN311

MR LETTAU: Exactly. That's exactly the point that we're making, that this is adding to that context. If the alternative argument is made, then 4.8.1(a), what's it there for? What does it do?

PN312

DEPUTY PRESIDENT GOSTENCNIK: That was my question as to how.

PN313

MR LETTAU: The argument that, as I understood it, that was made by my friend, is that it's mere clarification and - - -

PN314

DEPUTY PRESIDENT GOSTENCNIK: Or poor drafting or parties didn't give any thought to it when they copied and pasted it. All those things are possible.

PN315

MR LETTAU: The submission was also made that this is merely copy pasting the pre-existing situation that's under the award. You can't have two at the same time. Either you're bringing in award and you're adding your point of clarification from the employer, or you've invented a wholly new industrial clause. You can't sort of have your cake and eat it too on that point and I think there's a sort of contradictory submission being made there, by the appellant.

PN316

Our submission is consistent with the view that the parties have brought in the absence from work safety net and put it into the agreement and that it functions in the same way as it does under the award.

PN317

DEPUTY PRESIDENT GOSTENCNIK: Just to be clear, the use of 'from the employer' on your instruction is simply to clarify that it's leave authorised by the employer, irrespective of who pays for the leave?

PN318

MR LETTAU: Correct. That's exactly our submission.

PN319

Just a few summary points on this industrial side. The first point was that the parties to the historical provisions considered portable schemes, so I think that's very important. They drafted these terms with portable schemes in their minds. Two, the clauses are agreed by consent, as far as we can tell, all the way through. Consent from the AIG and consent from the unions, consent from the employers.

PN320

At three, this general and I guess it's more of a heuristic rather than a hard rule, but it came out of the earlier decision, which was this presumption against replication, that you don't replicate what's already in the superannuation scheme because you create problems of confusion and ambiguity.

PN321

I guess the final point is, which is our main submission, that there was no replication going on here. This has created something new and additional. This is - the word 'also' has work to do in that context. So those are our submissions on this historical materials.

PN322

I feel as though I may have taken a little more time that I'd originally anticipated. I won't dwell, I don't think, too deeply on our submission on the point of ordinary and plain meanings of the words, other than to say, as we point out in our written submissions, this is a familiar construction in every day speech on something from something else: on leave from work, on holidays from school, et cetera.

PN323

As I was sort of putting it before, one doesn't say, 'Who were you paid from?', you say, 'Who were you paid by?'. That's because the word 'by' suggests an agent or someone how makes a payment and it's connected to a verb. I don't want to get tied up in the grammar too much. In fact, I'd probably be making the same submission as my friend, which is that we don't want to make a fortress out of a dictionary. In fact, I don't think we need a dictionary to resolve this one, I think you can just understand how these phrases are used in everyday speech and come to the conclusion that, 'unpaid leave from the employer' means you're on leave away from your employment.

PN324

The second point in response to a submission that was made that 'from the employer' introduces clarification. I just don't see how 'from the employer' creates any form of clarity and if the parties did wish to make a clarifying statement it could have done so very easily by using clear words that they have used in 4.8, 'paid by the employer'.

PN325

On the question of what is meant by 'governing rules', my understanding is this submission of the appellant that governing rules includes, effectively, the ATO ruling but, in substance, the broader Acts in the superannuation scheme.

PN326

Section 10 of the - I'll just have to find where this is, bear with me one moment. Page 34 of the appellant's authorities contains the definition of 'governing rules'.

PN327

> *Governing rules, in relation to a fund, scheme or trust means (a) any rules contained in the trust instrument, other document or legislation or combination of them; (b) any unwritten rules governing the establishment or operation of the fund, scheme, or trust.*

PN328

I guess our primary submission there would be we're not sure that the whole legislative scheme of superannuation comes in over 'governing rules'. The word 'governing' implies governance and, in our submission, would suggest rules of a sort of constitutional nature. So this would include trust deeds, obviously. It would also include, in this instance, the Construction Industry Long Service Leave Act 1997, because that governs the establishment of the fund, but we're not sure that you could include ATO rulings within the meaning of governing rules, under the Act.

PN329

Having said that, we don't think much turns on it because even if it did include that, we don't see any conflict or inconsistency between what's provided for in the award and what's provided for in the Act, in the sense that the award adds to what's in the Act, it doesn't fall below the minimums. There's nothing that would prevent or ought to prevent the parties, based on these clauses, from adding to their existing entitlements.

PN330

DEPUTY PRESIDENT GOSTENCNIK: Mr Lettau, if you weren't adding to the entitlement why would you need the clause at all?

PN331

MR LETTAU: That's our submissions, isn't it? Which goes back to the point I was making earlier about this presumption against replication. You don't replicate, you supplement, and that's the way the award clauses work. They'll give general - I mean the modern award, I forget the clause actually. Gives the situation, under the existing legislation and then it says, 'These are supplemented by the following', because you add to, you don't replicate.

PN332

It was raised earlier, this issue of order of time, how could an ATO ruling from 2005 be in the industrial mind of parties in 1999, who were drafting these original clauses.

PN333

DEPUTY PRESIDENT GOSTENCNIK: Save for the fact the form of words used in the modern award was different to the formulation used in the '99 - - -

PN334

MR LETTAU: Yes, and in our submission it was more expansive. It expressly intended to preserve, not to reduce.

PN335

I would just say that overall we rely on the very in depth submissions that have been already put in the first decision. My instructor has provided some meaty analysis of the dramatic construction of the clause and we rely on our written submissions on appeal. Unless there are any further questions those are my submissions.

PN336

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr Lettau.

PN337

Anything in reply, Mr Howard?

PN338

MR HOWARD: Firstly, I look forward to telling the bargaining unit, in the future, that they don't need to replicate matters. I look forward to the 1992 Victorian Industrial Commission's Awards being taken out of the Locomotive Industry, the 1992 Victorian Industrial Commission's Awards being taken out of

Local Government Industry. Of course industrial parties replicate because they want to preserve entitlements, that's the game. So that's my answer to your Honour's question.

PN339

DEPUTY PRESIDENT GOSTENCNIK: Sometimes they don't know what they want to replicate which is why they have provisions in agreements which provide the status quo, as it existed immediately prior to or whether it's custom or practice or any other thing that some (indistinct) in the cupboard knows (indistinct) form part of this agreement.

PN340

MR HOWARD: I can tell that your Honour's also been party to a number of bargaining units.

PN341

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN342

MR HOWARD: So that's my answer to that question. Can I turn to the history? I do need to hand up just a couple of pages of the history that my friends took you to. It's a cake I prepared earlier, your Honour.

PN343

DEPUTY PRESIDENT GOSTENCNIK: Does Mr Lettau have a copy of this?

PN344

MR LETTAU: Yes.

PN345

MR HOWARD: Yes, I do have one for my friend.

PN346

MR LETTAU: No objection.

PN347

DEPUTY PRESIDENT GOSTENCNIK: Any objection to us receiving it, Mr Lettau? No objection to us receiving it at all?

PN348

MR LETTAU: No objection.

PN349

MR HOWARD: These are just extracts of what you were taken to, your Honour.

PN350

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN351

MR HOWARD: Number 7, which was the '98 award decision. Please turn over the page. You were taken to paragraph 156, which appears below, and the Commonwealth submission that 'governing rules' should be taken to mean section

10 of the Supervision Act, which was adopted. Now, that results what 'governing rules' means in the enterprise agreement and the award and we say that 'governing rules' picks up SIS(?) Act and the Superannuation Guarantee Administration Act. Thus has the SIS Act and the Superannuation Guarantee Administration Act operate, with respect to (indistinct).

PN352

Over the page you were taken to those clauses and it, in part, explains the history of how the clause in the award and the agreement came to be.

PN353

A submission was made at this juncture that this paragraph or paragraphs demonstrated the parties and the Commonwealth had in mind third party trust fund schemes in the making of this clause. That paragraph 156 does not demonstrate that submission and I ask your Honours to reject that submission.

PN354

Over the page you were taken to this clause - - -

PN355

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Mr Howard, can I just take you back to the governance rules point?

PN356

MR HOWARD: Yes?

PN357

DEPUTY PRESIDENT GOSTENCNIK: Paragraph 156, the observation that 'Governing rules is more accurate than trust deed', and then there's a reference to section 10 of the Supervision Act, and it's 'Governing rules in relation to a fund scheme means these things' and then the words, 'Governing the establishment and operation of the fund, scheme or trust', but it says nothing about contributions by an employer. So the broad proposition that it also includes legislation which governs the contribution rate is difficult to accept.

PN358

MR HOWARD: The 'Governing rules in relation to the fund, scheme or trust is subject to legislation'.

PN359

DEPUTY PRESIDENT GOSTENCNIK: 'Governing the establishment and operation of the fund, scheme or trust'.

PN360

MR HOWARD: And as part of the operation of the trust, scheme or fund they accept contributions.

PN361

DEPUTY PRESIDENT GOSTENCNIK: I accept that. But what the funds don't do is govern the contribution rate.

PN362

MR HOWARD: Not always.

PN363

DEPUTY PRESIDENT GOSTENCNIK: Because that's imposed on the employer at a level which would avoid the superannuation guarantee charge.

PN364

MR HOWARD: Yes. We would accept your Honour's point that the superannuation guarantee charge duty is not imposed on a scheme, fund or trust but it still governs the trust.

PN365

DEPUTY PRESIDENT GOSTENCNIK: I understand your submission.

PN366

MR HOWARD: We say that because the breadth of that definition, which is that the governing rules have to, in relation to a fund, means legislation that governs its operation. So the superannuation guarantee charge contribution touches upon that governance and that operation.

PN367

DEPUTY PRESIDENT GOSTENCNIK: Well, taking a hypothetical, governing rules of a fund might prohibit receipt of contributions, other than in respect of earnings by an employee from an employer, hypothetically. In which case, subject to the governing rules, paid leave, as described by Mr Lettau, contributions on that would not be able to be received by the fund therefore the obligations to make payments to that fund couldn't be made. So I can see how that might work. I'm just having some difficulty accepting that there's a general proposition of the legislation scheme is embraced by those words, I think they have a more limited operation, but I understand the submission you make. Ultimately, I'm not sure that much turns on it.

PN368

MR HOWARD: I think I agree with that sentiment, as does my friend. I don't think this case turns upon this. My friend did say that legislation means long-term legislation, we wouldn't embrace that as a - - -

PN369

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN370

MR HOWARD: Thank you.

PN371

Now, if you just turn over the page to clause 11 in the old '98 award. You were taken to this clause and that clause is an obvious predecessor where you find point 1, paid leave; point 2, unpaid leave; point 3, work related injury or illness.

PN372

The difference between that clause and the award clause is that point 2 is omitted and the clause otherwise is rationalised. So point 2 says, 'Contributions shall not

be required in respect of absence from work without pay', but that's just a correlative of 1. Why do you need 2 when you have 1, 1ne dealing with paid leave? That's the difference between the two obligations.

PN373

A submission was made that 1 extended to CoInvest leave, that's not the case. CoInvest leave is unpaid leave. We went to the legislation this morning, it's not paid leave.

PN374

Now, in response to Hampton DP's observations, which we treat objectively, about the making of the award, which is over the page, 'We see that rationalisation in the award today, in 2020'. I just want to take your Honours to the final page of this bundle, in which the Industrial Commission, as it was known back then, had an obligation, under section 576W of the Workplace Relations Act and was duty bound, under subsection (2), to express themselves in plain English and not include terms that are obsolete. Objectively speaking, that function was performed when they deleted that second obligation because it's obsolete.

PN375

So that's all I need to say about history. I don't think it governs the disposition of this case.

PN376

A submission was made that the clause has work to do, and I'm talking about 4.8.1(a), because it clarifies for everyone that it doesn't extend to leave paid by other employers. My response to that is that's not a legitimate contextual observation. Industrial parties make agreements that pertain to employment relationships and not matters pertaining to other employment relationships. So I would invite you to reject that observation.

PN377

Submissions were made and an exchange occurred about the nature of the CoInvest scheme. Now, I just wanted to elaborate upon that. Programmed is not privy to the calculation of ordinary time payments from CoInvest. Ordinary time earnings is not simply just what you're getting paid at the time, it can involve a number of concepts, such as the national minimum award, it can involve applicable enterprise agreements, it can involve a calculation of averaging across employers. We do not know what they're getting paid and if this clause is intended to regulate CoInvest payments, one would expect there to be provisions facilitating Programmed to go and get that information. It's not there.

PN378

The same observation extends to any unauthorised absence for which payment is received. Programmed will never know what payments have been received from income protection insurance providers and CoInvest might be helpful but I very much doubt that Programmed would be able to obtain that private information (indistinct).

PN379

Submissions were made about 'must also' and the proposition was put that some meaning had to be given to it. Now, obviously this is a cut and paste and that's where 'must also' comes from. That's the only explanation and that's why we say it should be given a diminished emphasis. Parties are just trying to replicate something. 'Must also' does have work to do because it secures superannuability on Defence Force leave, parental leave, et cetera. That's not exactly achieved by the first clause.

PN380

What the first clause is doing is locking in a contribution rate. That's the obligation in 4.8. It's not providing a complete obligation, it's just providing the contribution rate. The latter part of 4.8 defines a boundary, it doesn't create an obligation.

PN381

Finally, there was an articulation of my friend's case to the effect that his position is that clause 4.8.1 extends to leave from the employer, in any sense, or words to that effect. Now, the problem with that articulation is this; that's not the words of the clause and it's omitting a particular word. 4.8.1(a) is 'Paid leave from the employer'. You have to give a meaning to the word 'paid leave' and it's the one we all know, which is leave for which remuneration attaches. Then it's from the employer, not very difficult to construe those ordinary words.

PN382

Those are my submissions.

PN383

DEPUTY PRESIDENT GOSTENCNIK: Thank you, Mr Howard.

PN384

We will reserve our decision and we thank the parties for their written and oral submissions and wish you a good day.

ADJOURNED INDEFINITELY **[11.55 AM]**