19/05; [2005] VSC 29

SUPREME COURT OF VICTORIA

MELBOURNE CRICKET CLUB v CLOHESY

Dodds-Streeton J

2, 18 February 2005 — (2005) 14 VR 206; 56 AILR ¶250-006

EMPLOYMENT – LONG SERVICE LEAVE – ENTITLEMENT OF CASUAL EMPLOYEE TO LONG SERVICE LEAVE – "CONTINUOUS EMPLOYMENT" REQUIRED TO FOUND ENTITLEMENT TO LONG SERVICE LEAVE – HELD BY FULL COURT THAT ENTITLEMENT REQUIRES CONTINUOUS CONTRACT IMPOSING MUTUAL OBLIGATION ON EMPLOYER AND EMPLOYEE TO OFFER AND TO PERFORM EMPLOYMENT – EMPLOYEE EMPLOYED CASUALLY OVER 15-YR PERIOD – WHETHER "CONTINUOUS EMPLOYMENT" – MAGISTRATE'S FAILURE TO APPLY RATIO OF FULL COURT'S DECISION – WHETHER MAGISTRATE IN ERROR – FINDING BY MAGISTRATE THAT EMPLOYEE IN CONTINUOUS EMPLOYMENT AND THAT HE BE GRANTED LONG SERVICE LEAVE – WHETHER MAGISTRATE IN ERROR: *LONG SERVICE LEAVE ACT* 1992, SS56, 62.

Over a 15yr period, C. was employed casually by the MCC to carry out a number of tasks at football matches, concerts and some of the cricket games. C. was subject to an agreement which provided *inter alia* that all employment was casual. C. applied to a magistrate for an order that in accordance with the provisions of the *Long Service Leave Act* 1992 (Act) he be granted long service leave. The magistrate granted the application and in addition ordered that the MCC pay C.'s costs. As part of the case before the magistrate, reference was made to a decision of the Full Court of the Supreme Court of Victoria in *R v Industrial Appeals Court and Automatic Totalisators Ltd; Ex parte Kingston*, unrep, 26 February 1976 whereby the Court held that "continuous employment" for the purposes of founding an entitlement to long service leave was performance of continuous employment with one employer pursuant to a continuing contract imposing mutual obligations to provide services and employment. The magistrate declined to apply the ratio of that case and made the order. Upon appeal—

HELD: Appeal allowed.
The broad *ratio decidendi* of *Ex parte Kingston* is that continuous employment within the terms of s56 of the Act requires a continuous contract imposing an obligation on the employer to offer, and on the employee to render, employment. The learned magistrate was bound to apply that ratio. His failure to do so constituted an error of law pursuant to s109 of the *Magistrates' Court Act*. In *Ex parte Kingston* the Full Court's construction of "continuous employment" was clear, deliberate and fundamental to its reasoning. Successive legislation, including consolidations and amending statutes, has employed the same term substantially unaltered. It may be inferred that, until the terminology is changed, the construction propounded in *Ex parte Kingston* represents Parliament's intention, and should be applied.

DODDS-STREETON J:

Introduction and Background

1. The appellant, Melbourne Cricket Club ("MCC") appeals pursuant to s109 of the *Magistrates' Court Act* 1989 from the order of Mr M Smith, Magistrate, made 5 July 2004[1], by which the learned magistrate ordered that the respondent, Mr Francis Clohesy, be granted long service leave in accordance with the *Long Service Leave Act* 1992 (Vic) ("the Act") and that MCC pay Mr Clohesy's costs. The appellant contends that the learned magistrate erred in failing to apply the decision of the Full Court of the Supreme Court of Victoria in *R v Industrial Appeals Court and Automatic Totalisators Limited; Ex parte Raymond John Kingston* ("*Ex parte Kingston*"),[2] which bound him to construe s56 of the Act as conferring an entitlement to long service leave only if the employee had rendered service over a 15 year period under a continuous contract which imposed an obligation to do so.

2. The Magistrates' Court, by letter dated 11 August 2004, entered an appearance in the matter and advised that it did not intend to be represented at the hearing of the appeal.

Relevant Facts

3. In the present case, the principal facts found by the magistrate are undisputed.

4. MCC is a body corporate established pursuant to the *Melbourne Cricket Club Act* 1974

(Vic). It operates the Melbourne Cricket Ground where, on various occasions throughout the year, events are conducted. The events are usually sporting in nature, but also include concerts and other entertainments.

5. In order to conduct the events, it is necessary for the MCC to have available a large number of staff who can be called upon to meet the anticipated requirements of the day. MCC currently has a `bank' of approximately 800 'casuals' from which it draws its staffing needs. The casual employees are designated 'events personnel'. They carry out a number of different tasks, which fall into various categories.

6. The terms and conditions established by two instruments (certified agreements) of the Australian Industrial Relations Commission, made pursuant to the *Work Place Relations Act* in 1988 and 2001 apply to MCC's engagement of all casual events personnel. The relevant certified agreements are:

> * the Entertainment and Broadcasting Industry (Recreation Grounds etc - Victoria) Award 2000; and
> * the Melbourne Cricket Club Event Employees Certified Agreement 2001.

7. The industrial instruments set out various terms of employment, such as rates of pay and overtime. The certified agreements contain the following provision:

> TERMS OF EMPLOYMENT
> 7. All employment pursuant to the agreement is casual. No employee can be guaranteed any offer of employment beyond shifts offered to him or her as part of a periodic roster. However, employees will not be disadvantaged if their availability for the roster is limited due to parental obligations.

8. The 1988 certified agreement provides that "because of the casual nature of the employment no leave of any kind is due to employees." That provision is not, however, included in the 2001 certified agreement.

9. The respondent, Mr Clohesy, began working with the MCC as an 'events person' in about July 1984. Prior to 1995, staff such as Mr Clohesy would be advised of their next 'shift' by way of a card presented to them at the end of their previous shift. From 1995, the MCC commenced a process whereby it would send out 'appointment sheets' to casual employees, which requested them to indicate their availability on a seasonal basis. For example, prior to the 2004 football season, casuals in the 'bank' were sent a form which required them to indicate alongside each game scheduled at the Melbourne Cricket Ground, their availability or otherwise. Following the return of the availability sheets, events personnel would then be sent an appointment card or would be contacted by telephone with details as to when they were required.

10. Over the years since 1984, Mr Clohesy made himself available for all football matches, for concerts and for some of the cricket games, particularly test match and international games. The evidence indicates that Mr Clohesy was not offered the opportunity to work at, and did not make himself available for, a large number of games in the domestic cricket competition.

11. Mr Clohesy was under no legally enforceable obligation to attend on any day which he had accepted for attendance. It was expected that, as a matter of courtesy, events personnel such as Mr Clohesy would notify the MCC, if for some reason, they were unable to attend. However, a person who did not attend was not penalized for failing to do so, save that a casual may have been allocated less work in the future if he or she became "notoriously unreliable."

***Long Service Leave Act* 1992 (Vic)**

12. The Act provides for long service leave entitlements of certain employees.

13. Section 1 of the Act provides:

> "1. **Purpose** The purpose of this Act is to make provision with respect to the long service leave entitlements of certain employees."

14. Section 56 of the Act provides:

"**Basic entitlement to long service leave**
56. Basic entitlement to long service leave
An employee is entitled to—
(a) 13 weeks of long service leave on ordinary pay on completing 15 years of continuous employment with one employer; and

(b) 4 1/3 weeks of long service leave on ordinary pay on completing each period of 5 years of continuous employment with that employer after the first 15 years of continuous employment with that employer."

15. Section 60 of the Act modifies the literal meaning of "one employer", setting out "several situations in which an employee is to be regarded, for the purposes of this Division, as having been employed by the one employer, even though the employee may have worked over the relevant period of time for more than one employer in a strict legal sense." Such situations include employment of a person by related corporations, and where there is a change of ownership of a business or a transfer of assets.

16. Section 62 of the Act provides:

"Meaning of "continuous employment"
62. Meaning of "continuous employment"
(1) This section sets out several situations in which an employee is to be regarded, for the purposes of this Division, as having been continuously employed even though in a strict legal sense it could be said that the employee's employment was interrupted.

(2) An employee's employment is to be regarded as being continuous despite—
(a) the taking of any annual leave or long service leave;
(b) any absence from work on account of illness or injury;
(c) the taking of any other leave granted by his or her employer;
(d) any interruption or ending of the employment by the employer if the interruption or ending is made with the intention of avoiding obligations in respect of long service leave or annual leave;
(e) in the case of an employee performing duties in relation to assets of a particular kind, any absence from work arising solely because of a transfer to which section 60(6) applies of those assets from one employer to another employer;
(f) any interruption arising directly or indirectly from an industrial dispute;
(g) the dismissal of the employee, but only if he or she is re-employed within a period not exceeding 3 months after his or her dismissal;
(h) the standing-down of the employee on account of slackness of trade;
(i) if the employee is a woman, any absence from work in respect of her pregnancy for a period not exceeding 12 months or any longer period that may be specified in the relevant employment agreement;

(j) any other absence approved by his or her employer either before or after it occurs.
(3) If the employment of an employee who was apprenticed to an employer is continued by the employer within 12 months after the completion of the apprenticeship, the period of the apprenticeship is to be counted as part of the continuous employment of the employee with that employer.

(4) Sub-section (3) applies regardless of whether the continuation occurred before or after the commencement of this Division.

(5) For the purposes of this Division, the continuous employment by an employer of an employee who is employed by the employer at the commencement of this Division is to be regarded as starting at the actual day (before the commencement of this Division) of that employment."

17. The Act employs only the general term "employee", which it defines in s59 for the purposes of Division 6. It does not refer to, or discriminate between, different categories of employees based on the full-time, part-time or casual nature of their employment.

18. The question determined by the learned magistrate in the present case was whether the relevant provisions of the Act applied to an employee such as Mr Clohesy, whose employment was indisputably "casual" in nature, in the sense that it involved, as the magistrate found, a series of *ad hoc* contracts of employment which lasted only for the duration of each successive event, between which Mr Clohesy neither performed any work for the MCC as a matter of fact, nor had any legal obligation or entitlement to work in future.

19. While the reference in s1 of the Act to the legislative purpose of making provision "*with respect to the long service leave entitlements of certain employees*" indicates that such entitlement is not universal, the Act does not expressly state which employees are excluded from the entitlement, or on what basis. In particular, it does not state that the entitlement does not apply to employees whose employment is casual in nature. The question whether long service leave is available to casual employees such as the respondent must be determined indirectly. It is necessary to consider whether casual employment (in the sense of a series of contracts interspersed between periods when no contractual obligation to provide service subsists) constitutes "continuous employment" within terms of s56 of the Act. Several provisions of the Act throw light on the meaning of "continuous employment".

20. The definition of "employee" in s59 of the Act states that an "employee" for the purposes of Division 6 means "a person employed by an employer to do any work for hire or reward, and includes an apprentice and any person whose contract of employment requires him or her to learn or to be taught any occupation".

21. Section 62, although headed "meaning of continuous employment", does not offer a comprehensive definition of the term. It does not indicate expressly whether "continuous employment" contemplates any one of a number of possible alternatives, including:

> (a) a continuous performance of work on a standard "full-time" basis;
> (b) alternatively, a continuous subsistence of a mutual contractual obligation to offer and perform employment, existing between one employer (as expansively defined in s.60), and an employee.
> (c) both a continuous performance of employment in fact and a continuous mutual contractual obligation to offer and perform employment; or
> (d) requirements other than any of the above.

22. Section 62, in expressly providing that the specified situations will not constitute interruptions of continuous employment for the purposes of Division 6, implicitly acknowledges that, save for the statutory provision, they might do so. Some of the situations set out in s62 involve cessation of the performance of work in fact, in circumstances where the contract of employment would, by reference to the usual criteria, continue.[3]

23. Some of the situations addressed by s62 contemplate, at least potentially, both the cessation of the performance of work in fact and the cessation of contractual obligations.[4] Section 62(2)(f) appears to contemplate an interruption on either or both bases.

24. It might be concluded that because the situations set out in s62 indicate that either an interruption of the contractual relationship or the de facto performance of work could, but for the statutory provision, constitute an interruption of "continuous employment", "continuous employment" contemplates both a continuous contractual relationship and a continuous performance of work.

25. The provisions of the Act relevant to the present appeal have remained substantially unchanged since their introduction in 1953.

Brief History of Victorian Long Service Leave Legislation

26. Entitlement to long service leave was introduced in Victoria for the first time in 1862 with the enactment of the *Civil Service Act*, which provided for six months' leave to persons who had rendered ten years of civil service in the colony. The availability of the entitlement was subsequently extended, and, by 1953, many employees of State and Commonwealth government departments, statutory corporations and certain private employers were accorded an entitlement to long service leave.[5]

27. In 1953 the Victorian Parliament enacted the *Factories and Shops (Long Service Leave) Act* 1953 ("the 1953 Act"). Section 7 of the 1953 Act relevantly states:

> "(1) Subject to this Act every worker shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and same employer.
>
> (2) The amount of such entitlement shall be—

> (a) on the completion by a worker of twenty years continuous employment with his employer-thirteen weeks long service leave and thereafter an additional three and a quarter weeks long service leave on the completion of each additional five years of continuous employment with such employer".

28. The term 'worker' was defined in section 2 of the 1953 Act as:

> "any person employed by any employer to do any work for hire or reward and includes an apprentice and any other person whose contract of employment requires him to learn or to be taught any occupation".

29. Section 3 of the 1953 Act outlined those situations where an worker's employment would be deemed continuous. The section states:

> "For the purposes of this Act employment (whether before or after the commencement of this Act) shall be deemed to be continuous notwithstanding—
> (a) the taking of any annual leave or long service leave;
> (b) any absence from work of not more than fourteen days in any year on account of illness or injury;
> (c) any interruption or ending of the employment by the employer if such interruption or ending is made with the intention of avoiding obligations in respect of long service leave or annual leave;
> (d) any interruption arising directly or indirectly from an industrial dispute;
> (e) the dismissal of a worker if he is re-employed within a period not exceeding two months from the date of such dismissal;
> (f) the standing down of a worker on account of slackness of trade;
> (g) any other absence of the worker by leave of the employer, or on account of injury arising out of or in the course of his employment".

30. On moving the Second Reading of the *Factories and Shops (Long Service Leave) Bill* 1953, the Honourable A. M. Fraser, Minister of Labour described long service leave as "*a period of rest to the employee, so that he might recuperate after a long period of continuous service*".[6]

31. He stated:

> "The employee who, for a continuous period of twenty years, has played the game faithfully with the one employer is entitled to a short period of rest without any financial sacrifice to himself".[7]

32. Sections 7 and 3 of the *Factories and Shops (Long Service Leave) Act* 1953 were re-enacted, without alteration, as sections 154 and 151 respectively of the *Labour and Industry Act* 1953, and subsequently, of the *Labour and Industry Act* 1958 ("the 1958 Act"), both of which consolidated a range of legislation concerning industrial and employment issues.

33. The long service leave provisions contained in the 1958 Act were repealed in 1979, and sections 154 and 151 of the 1958 Act re-enacted as ss.67 and 65 respectively in the *Industrial Relations Act* 1979 ("the 1979 Act"). The 1979 Act introduced a deeming provision in relation to maternity leave, and made minor adjustments to the periods required to establish eligibility for long service leave. All other relevant aspects of the provisions remained substantively unaltered. Neither the explanatory notes accompanying the *Industrial Relations Bill* 1979, nor the Second Reading speech to the Legislative Assembly on the introduction of the Bill,[8] elaborated upon the basis of entitlement to long service leave.

34. The 1979 Act was repealed by the *Employee Relations Act* 1992 ("the 1992 Act"). The basic entitlement to long service leave was re-enacted as section 56 of the 1992 Act in the following terms:

> "An employee is entitled to—
> (a) 13 weeks of long service leave on ordinary pay on completing 15 years of continuous employment with one employer; and
> (b) 4 1/3 weeks of long service leave on ordinary pay on completing each period of 5 years of continuous employment with that employer after the first 15 years of continuous employment with that employer."

35. Whilst the 1992 Act replaced the term `worker' with the term `employee', there were no substantive differences in the definitions.[9] The deeming provision was enacted as section 62 of the 1992 Act. Section 62(1) states:

> "This section sets out several situation in which an employee is to be regarded, for the purposes of this Division, as having been continuously employed even though in a strict legal sense it could be said that the employee's employment was interrupted.

36. Section 62(2) of the 1992 Act outlines those situations deemed not to be an interruption of "continuous employment" for the purposes of the 1992 Act. Again, they are substantially similar to those in prior repealed Acts.

37. The 1992 Act was amended by the *Commonwealth Powers (Industrial Relations) Act* 1996 ("the 1996 Act"), the purpose of which was to refer Victoria's industrial relations powers to the Commonwealth Government. Under s5(1)(d)(v) of the 1996 Act, provision to legislate on the subject of long service leave was excluded from the reference. Those provisions of the 1992 Act no longer required after the referral were repealed, leaving long service leave as the major remaining topic dealt with by the 1992 Act. Accordingly, under section 9 of the 1996 Act, the 1992 Act was retitled the "*Long Service Leave Act* 1992". The 1996 Act did not, however, make any substantive amendment to the provisions of the 1992 Act relating to long service leave entitlement. Further, there was no more than a cursory reference in the extrinsic material to the subject of long service leave.[10]

Long Service Leave Legislation in other Jurisdictions

38. Long service leave was introduced in other states as a minimum legislative entitlement for all employees throughout the 1950s. Such legislation was enacted in broadly similar terms to the 1953 Victorian Act, with entitlement to long service leave appearing to require the existence of an unbroken contract of employment.[11]

39. Subsequent amendments to long service leave legislation in all states, with the exception of Victoria, make specific reference to the long service leave entitlement of casual employees.

40. In New South Wales, section 4(1) of the *Long Service Leave Act* 1955 (NSW) relevantly states:

> "Except as otherwise provided in this Act, every worker shall be entitled to long service leave on ordinary pay in respect of the service of the worker with an employer".

41. 'Service' is defined in section 4(11)(a) of the 1955 Act, which states:

> "For the purposes of this section:
> (a) service of a worker with an employer means continues service, whether on a permanent, casual, part-time or any other basis, under one or more contracts of employment."

42. Section 4(11)(a) was inserted into the *Long Service Leave Act* 1955 (NSW) in 1985.[12] In his Second Reading speech to the Legislative Assembly on the introduction of the Bill, Mr Hills, Minister for Industrial Relations, stated:

> "The *Long Service Leave Act* presently provides that long service leave is earned on the basis of an unbroken contract of employment. This has been a continual problem in respect of long service leave entitlement because it has acted against the interests of casual employees, many of whom have been continuously employed for periods in excess of ten years but whose contract of employment is deemed to be terminated each time they are paid. This amendment will ensure that legal technicalities cannot deprive a worker from a just entitlement to long service leave. It will ensure that so long as the worker has worked continuously for an employer for the qualifying period, the worker will receive a long service leave entitlement, regardless of whether that worker was employed on a permanent, casual, part-time or any other basis, and whether or not under one or more contracts of employment".[13]

43. By comparison, section 47 of the *Industrial Relations Act* 1999 (Qld) states:

> "(1) The service of an employee (a "casual employee") who is employed more than once by the same employer over a period is continuous service with the employer even though—
> (a) the employment is broken; or
> (b) any of the employment is not full-time employment; or
> (c) the employee is employed by the employer under 2 or more employment contract; or
> (d) the employee would, apart from this section, be taken to be engaged in casual employment; or
> (e) the employee has engaged in other employment during the period.

44. The *Long Service Leave Act* 1976 (ACT) similarly contains express provisions relating to casual employees. Section 2 states that the term employee includes "a casual employee", defined as follows:

> "casual employee means a person who is, from time to time offered regular and systematic employment on the basis that the offer of employment might be accepted or rejected and in circumstances where it could be expected by that person that further employment of the same type would or might be offered and accepted, but in respect of which there is no certainty about the period over which it would continue to be offered."

45. The Explanatory Memorandum to the *Long Service Leave (Amendment) Bill* 1997 (ACT) states that the broadening of the definition of "employee" was designed to overcome "any ambiguity in the Act as to its coverage of casual employees".[14]

Ex parte Kingston

46. The Full Court of the Supreme Court of Victoria in *Ex parte Kingston* considered the statutory provisions contained in the *Labour and Industry Act* 1958 (Vic) governing entitlement to long service leave.

47. The Full Court discharged an order nisi granted at the instance of the applicant, who sought a writ of *certiorari* and the quashing of the order of the Industrial Appeals Court setting aside a conviction of the defendant company for failing to pay ordinary pay for long service leave to a certain "casual" employee, Mrs Creed. The applicant had been the informant in proceedings before the Metropolitan Industrial Court, which had convicted the defendant company. The defendant company had successfully appealed to the Industrial Appeals Court, which quashed its conviction. Before the Full Court, the applicant sought to quash the order setting aside the conviction. The Full Court recognised that "[T]he issue before both the Metropolitan Industrial Court and the Industrial Appeals Court was whether Mrs Creed was entitled to long service leave …"[15]

48. The Full Court observed that its own function in deciding whether to grant a writ of *certiorari* was to determine whether there was an error of law on the face of the record. The Court acknowledged that in that context, "It must adopt any finding of fact made by the Appeals Court. This Court's only function is to decide whether the applicant has established that an error of law has occurred, and it is even more limited than that, because the applicant must go further and establish that the error of law appears on the face of the record. In proceedings of *certiorari*, it is emphasised that it is no part of the function of this Court to make findings of fact."[16]

49. The defendant company disputed that "the record" included the Industrial Appeals Court's reasons for decision and certain other documents in which the applicant identified alleged errors of law, but contended that in any event, those documents contained no error on their face. The Full Court assumed, without deciding, that the record was composed as the applicant contended, but considered that it contained no error of law.

50. The Full Court accepted the findings of fact of the Industrial Appeals Court, which it set out at length.

51. The relevant employee, Mrs Creed, had worked as a betting operator at city race tracks for the defendant company on a number occasions over a 25 year span. The defendant company "kept a register of persons available for employment. This contained not only the names but the preferences and availability of such persons".[17] At some stage prior to the relevant event, an estimate of the number of workers of various categories was made and "a selection was then made from the register of names, having regard to such limitations as have been mentioned and also with the object of being as fair as possible in not giving preference to particular persons".[18] Each person selected was given a ticket for admission, indicating the part of the race course where he or she was to work. The ticket was distributed (or sometimes sent by post in batches) for the future race meeting or meetings. The recipient of such a ticket would simply attend for work as indicated or, if unable or unwilling to do so, was expected to return the ticket as an indication that he or she was not available.

52. When the person worked, he or she was paid at the racecourse in accordance with the

applicable determination, which included certain prescribed allowances, including *pro rata* holiday pay.

53. It was not disputed that Mrs Creed did not work at a significant proportion of race meetings for which she was available.

54. The Industrial Appeals Court had concluded that the defendant company made a separate offer of employment to Mrs Creed at each race meeting, constituted by the delivery of a ticket. "A contract of employment was entered into when the recipient of the ticket attended at the race course or previously notified [the company] that he would attend. The offer of employment was rejected either by the worker returning the ticket or simply not attending".[19] The Industrial Appeals Court set aside the conviction of the defendant company for failing to pay long service leave to Mrs Creed, made by the Metropolitan Industrial Court.

55. The Industrial Appeals Court's conclusions were set out in the judgment of the Full Court as follows:

> "1. If Mrs Creed had presented herself at the totalisator house at a race meeting for which she had not received a ticket or other offer of employment and was told she was not needed, she would certainly have no remedy.
>
> 2. If, without any prior notification, she had suddenly ceased to receive tickets, she would have no legal cause for complaint.
>
> 3. If, having received a ticket for a meeting, she simply did not attend, the Appellant would have no cause of action against her for breach of contract of service.
>
> It follows that Mrs Creed's employment at each meeting she attended was pursuant to a separate contract of service specifically for that meeting and was not different in substance to the occasion of which Mrs Creed gave evidence, when she attended a meeting in her capacity as a union official, was asked by a supervisor on the spot if she would work at a window and agreed to do so.
>
> This being so, there was not, as there was in Mrs Mansfield's case, always a subsisting contract of service over the qualifying period and it follows that she was not in 'continuous employment'.
>
> This finding disposes of the only basis upon which she was entitled to long service leave, and the appeal will be allowed and the conviction and consequential orders quashed."[20]

56. The judgment of the Full Court, constituted by Gillard, Menhennitt and Dunn JJ, was delivered by Menhennitt J. His Honour referred to the following alleged errors of law on the face of the record by the Industrial Appeals Court:

> 1. The finding by the Industrial Appeals Court that if, without any prior notification Mrs Creed had suddenly ceased to receive tickets, she would have no legal cause for complaint.
>
> 2. The finding by that Court that if having received a ticket for a meeting she simply did not attend, the company would have no cause of action against her for breach of contract of service.
>
> 3. On the facts as found by the Industrial Appeals Court, there existed in law a contractual relationship between Mrs Creed and the company continuously from 1944 until 1970.
>
> 4. The Industrial Appeals Court was wrong in not holding that the existence of that contractual relationship with the consequential employment envisaged thereby and carried out pursuant thereto was sufficient to constitute continuous employment within s154 of the *Labour and Industry Act* 1958.[21]

57. The statement of the errors alleged by the applicant in *Ex parte Kingston* is somewhat puzzling. It would appear that paragraph 3 contains a typographical error, as it is clear from a reading of the reasons that the applicant asserted that the Industrial Appeals Court should have held that there was a contractual relationship between Mrs Creed and the company continuously from 1944 until 1970, rather than asserting such a holding to be erroneous.

58. Further, the alleged error in paragraph 4 would make no sense if the applicant were contending that the Industrial Appeals Court should have found that there was no continuous contractual relationship between Mrs Creed and the employer.

59. The Full Court, having noted the alleged errors, stated:[22]

> "Implicit in the last two of these alleged errors, it was being urged that, for a worker to be entitled to long service leave the worker must have served the necessary continuous employment with one and the same employer pursuant to a contract with the employer which required the worker to work that continuous service, subject to the qualifications in s151(1) of the Act. This, we think, must be so. What s154(1) grants is long service leave. Leave from performing work is only necessary if there is a continuing contract which obliges the worker to continue giving service for his hire or reward. The whole concept of long service leave involves as its prerequisite, the existence of a contract between the employer and the worker whereby the worker otherwise would be obliged to work in the absence of any provision relieving him or her from such obligation. The same underlying concept is recognised in s156(4)(b) of the Act. ... "

60. The Full Court rejected the applicant's contention that the Industrial Appeals Court made a finding of fact that the arrangement between Mrs Creed and the company constituted a promise to select her name, with the object of being as fair as possible, thus ensuring her a fair share of suitable work.[23]

61. Rather, the Full Court considered that the Industrial Appeals Court expressly found that Mrs Creed had no entitlement to any tickets on any basis or at all, and the company had no contractual entitlement to her attendance, even if she failed to return the ticket. The fact that the company selected ticket recipients on a particular basis which was known to the pool of recipients, did not make it a term of the contract.[24]

62. The Full Court considered that the Industrial Appeals Court has in substance found as a fact, "that there was no contract between the company and Mrs Creed which required the company to give continuous employment to Mrs Creed, or Mrs Creed to give continuous service. There was no mutual contractual obligation." On the basis of that finding of fact, the Full Court found that it involved no error of law to conclude that Mrs Creed "was not entitled to long service leave".[25]

63. The Full Court took the view that the fact that Mrs Creed worked a considerable number of days was "quite neutral on the question whether such work was done pursuant to a contract calling for continuous employment." It was equally consistent with "continuous employment" as distinct from employment pursuant to a separate contract of service for each meeting.[26]

64. The Full Court concluded that "for all of the reasons we have given, the applicant has failed to show any error of law on the record ..."[27] The order *nisi* was therefore discharged.

The Appeal

65. The appellant identifies the questions of law raised by the appeal as:

> (i) whether the learned magistrate erred in failing to find that the judgment of the Full Court of the Supreme Court of Victoria in *R v Industrial Appeals Court and Automatic Totalisators Limited; Ex parte Raymond John Kingston* (unreported 26 February 1976) prohibited him from holding that the Respondent had completed fifteen years continuous employment with the appellant and was entitled to long service leave under the Act;
> (ii) whether the learned magistrate erred in the construction that he must be taken to have given the expression "continuous employment" in section 56(a) of the *Long Service Leave Act* 1992 (Vic) ("the Act");
> (iii) whether the learned magistrate erred in construing section 56(a) of the Act to mean that the respondent was entitled to long service leave under the Act because he had given continuous "service" during 15 years as an employee to the appellant as employer;
> (iv) whether the learned magistrate, having found that the Respondent was under no legally enforceable obligation to attend for work on any day which he had accepted for attendance, erred by not construing section 56(a) of the Act to mean that in those circumstances the respondent had not been in "continuous employment" for 15 years;
> (v) whether the learned magistrate erred by construing section 56(a) of the Act to mean that in circumstances where the Respondent had not completed fifteen years of continuous employment with the Appellant pursuant to a contract whereby the Appellant was legally obliged to provide the respondent with work and the respondent was legally obliged to perform work for the appellant, the respondent was entitled to long service leave under the Act.

66. Section 109 of the *Magistrates' Court Act* provides:

"109. Appeal to Supreme Court from final order made in civil proceeding
(1) A party to a civil proceeding in the Court may appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding.

(2) An appeal under sub-section (1)—
(a) must be instituted not later than 30 days after the day on which the order complained of was made; and
(b) does not operate as a stay of any order made by the Court unless the Supreme Court so orders.

(3) Subject to sub-section (2), an appeal under sub-section (1) must be brought in accordance with the rules of the Supreme Court.

(4) An appeal instituted after the end of the period referred to in sub-section (2)(a) is deemed to be an application for leave to appeal under sub-section (1).

(5) The Supreme Court may grant leave under sub-section (4) and the appellant may proceed with the appeal if the Supreme Court—
(a) is of the opinion that the failure to institute the appeal within the period referred to in sub-section (2)(a) was due to exceptional circumstances; and
(b) is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay.

(6) After hearing and determining the appeal, the Supreme Court may make such order as it thinks appropriate, including an order remitting the case for re-hearing to the Court with or without any direction in law.

(7) An order made by the Supreme Court on an appeal under sub-section (1), other than an order remitting the case for re-hearing to the Court, may be enforced as an order of the Supreme Court.

67. It is not disputed that the order of the learned magistrate was a final order.

68. The principles governing an appeal from the final order of a magistrate are well established. The question of the law the subject of the appeal must be a question which was involved in the decision of the lower court. Although the question itself need not have been decided by, as distinct from involved in, the decision below, it must have been raised.

69. The appeal is an appeal in a strict sense. It is not a rehearing.[28]

The Magistrate's Decision
70. Magistrate Smith identified the ultimate issue as whether Mr Clohesy had satisfied the requirements of s56 of the Act by the completion of 15 years continuous employment. He found that the respondent had satisfied that requirement.

71. Magistrate Smith observed that the Act is remedial or beneficial legislation. The current context for the interpretation of remedial legislation was "the prevailing workplace realities that the permanent five days per week 9-5 employee is no longer the dominant species on the industrial landscape. The concept of service as an employee therefore must take into account the nature of the business of the employer and the manner in which that employer chooses to conduct that business, including the manner in which it chooses to obtain and utilise the services of employees."[29]

72. He noted that the Act does not have a definition of contract of employment and does not distinguish between casual, part-time or permanent employees or employment. As such, "employment" bore its common law meaning of "any agreement whereby a person is employed by an employer to do any work for hire or reward. When, therefore, section 56 of the Act speaks in terms of `completing 15 years of continuous employment with one employer', it means that the employee had been in service of one employer for 15 years",[30] but did not require services pursuant to any single contract of employment for the time.

73. The magistrate rejected the MCC's contention that there was a distinction between "continuous service" and "continuous employment". He held the terms to be interchangeable.

74. He held that the category of "casual" employees did not have a precise legal meaning and

recognised that a part-time or casual employee might fall within the qualifying requirements of long service leave established by the Act depending on the particular facts or circumstances of the relationship.

75. In that context, the magistrate relied upon *Licensed Clubs Association of Victoria v Re Christine Higgins,*[31] which set out a number of criteria relevant to determining whether a relationship was a continuing relationship between employer and employee, rather than a series of separate contracts or engagements.

76. He considered that although *Licensed Clubs Association of Victoria v Re Christine Higgins* was not concerned with the Act, or with long service leave, its approach to identifying continuing employment was "generally apposite" to the present case.[32]

77. The magistrate rejected the MCC's argument that s56 of the Act implicitly requires continuous employment at common law, as s62 of the Act implicitly assumes that and sets out exhaustively the exceptions to that basic requirement. He did not consider that the specified exceptions were comprehensive.

78. The magistrate held that although the 1998 certified agreement expressly disavowed any entitlement to long service leave, that agreement, and any underlying award, had been replaced by the 2001 certified agreement. Thus, even if the Act specified terms and conditions of employment, there was no inconsistency with the applicable certified agreement within terms of the s170LZ of the *Workplace Relations Act* 1996 (Cth).

79. Most significantly to this appeal, the magistrate expressly rejected the MCC's contention that the construction by the Full Court of the Supreme Court in *Ex parte Kingston* of statutory provisions which were relevantly identical to s56 of the Act was binding on him and governed the question whether the requirements of s56 of the Act were satisfied.

80. The learned magistrate acknowledged that the factual situation of Mrs Creed's employment in *Ex parte Kingston* bore strong similarities to those of the case before him. Indeed, he apparently regarded any distinctions as immaterial.[33] However, he considered that the Full Court in *Ex parte Kingston* accepted the facts as found by the Industrial Appeals Court and "the decision of the Full Court therefore was a determination that the lower court did not fall into error of law in reaching its decision in applying the findings of fact which it had made."[34]

81. The learned magistrate considered that the passage in *Ex parte Kingston* in which the Full Court construed "continuous employment" s154 of the *Labour and Industry Act* 1958 to require an ongoing contract imposing a mutual obligation to offer and perform employment was *obiter dicta*. In consequence, he took the view that he was not bound by the Full Court's statement, with which he disagreed.

82. He further stated:

> "The Full Court then in effect considered the rationale adopted by the lower court in reaching its determination, and concluded that the applicant's contention as to the proper conclusion on the facts as found could not be sustained, and that the Industrial Appeals Court was not in error, in not finding on the basis of those facts that the contractual relationship between the parties was sufficient to qualify Mrs Creed on the basis of 'continuous employment' for long service leave ... ".[35]

83. The magistrate concluded that the statement of principle in *Ex parte Kingston* was merely *obiter* and observed that he disagreed "with the apparent emphasis and interpretation made by the Full Court. In particular I do not agree with the statement "the whole concept of long service leave involves as its prerequisite the existence of a contract between the employer and the worker whereby the worker otherwise would be obliged to work in the absence of any provision relieving him or her from such obligation."[36]

84. The magistrate accepted that "given the nature of the proceeding before that Court [in Ex parte Kingston], neither its decision nor its reasons can be binding in this proceeding. As the Full Court itself specifically made no findings of fact and any apparent endorsement of or comment either upon the findings of fact made by the lower court, or the application by the lower court

of those findings of fact to its determination, can only be obiter".[37] He accepted that "to find otherwise would be in effect to require this Court to be bound not by a decision of the Full Court but by the decision of the Industrial Appeals Court."[38]

85. The learned magistrate concluded that continuous employment or service for the purposes of the Act did not arise only where there are legally enforceable mutual obligations between the parties, such that one party is obliged to provide work and the other party is obliged to provide service. He stated that, "It is sufficient in my opinion for a state of affairs to have existed whereby an employer has in fact offered employment which can be said in all the circumstances to be continuous, and where the employee has reciprocally, provided that service".[39]

86. He concluded that "continuous service" depended on the facts and circumstances of the particular case and that "In all the circumstances, it is my opinion that Mr Clohesy can fairly be said to have given 15 years of continuous service to the defendant. He is therefore entitled to long service leave to be properly calculated in accordance with the relevant provisions of the Act."[40]

The Parties' Main Contentions

87. Mr Ginnane, senior counsel for the appellant, contended that the decision of the learned magistrate was in error on two closely-related but distinct bases. First, the magistrate failed to apply the decision of the Full Court in *Ex parte Kingston,* by which he was bound.

88. In that context, the appellant contended that the ratio of *Ex parte Kingston* was contained in the statement of principle that "continuous employment" within terms of s154(1) of the *Labour and Industry Act* 1958*,* founding an entitlement to long service leave, was performance of continuous employment with one employer pursuant to a continuing contract imposing mutual obligations to provide services and employment.

89. The appellant contended that the identification of the ratio of the case must be approached as a matter of substance. Mr Ginnane argued that the magistrate placed undue emphasis on the formulation of the alleged errors of law submitted by the applicant for the writ in *Ex parte Kingston*. Further, his focus on the dispute over what facts the lower court had or should have found, led him to disregard the fact that the Full Court's clear construction of the term "continuous employment" underpinned its conclusion that there was no error of law and was necessary to explain its decision.

90. Secondly, Mr Ginnane submitted that even if the *ratio decidendi* of *Ex parte Kingston* did not apply to the present case, the construction of the term "continuous employment" in s154(1) of the *Labour and Industry Act* 1958 by the Full Court in *Ex parte Kingston* was highly authoritative and constituted settled law. The relevant section had since been successively re-enacted, and now appears as s56 of the Act without any substantial alteration. That circumstance attracted the principle recognised in cases such as *Re Alcan Australia Ltd and ors v Ex parte Federation of Industrial Manufacturing and Engineering Employees' ("Re Alcan")*[41] that Parliament, when it repeated language to which a meaning had been judicially attributed, intended it to bear that meaning. In the present case, there was a strong presumption, in the light of the repeated re-enactment of the provision in similar terms, that the construction adopted by the Full Court accurately reflected legislative intention. The appellant argued that the presumption applied whether or not the Full Court's construction of the term "continuous employment" in *Ex parte Kingston* constituted, on analysis, the ratio of that case. As such, the magistrate's decision disclosed an error of law in terms of s109 of the *Magistrates' Court Act,* on the independent ground of his failure to apply the settled construction of the statutory term.

91. Mr Farouque, counsel for the respondent, conceded that if the Full Court's construction of "continuous employment" in *Ex parte Kingston* constituted the ratio, or part of it, it was binding on the magistrate and the failure to apply it would constitute an error of law within the terms of s109 of the *Magistrates' Court Act.* The present appeal would be allowed on that basis. He argued, however, that the magistrate's failure to apply the construction adopted in *Ex parte Kingston* would constitute an error of law only if it were, or formed part of, the ratio of the case.

92. Mr Farouque further contended that the magistrate's construction of "continuous employment" in s56 of the Act as service which has in fact been continuously rendered over the

course of 15 years, (rather than employment pursuant to an "ongoing" contract of employment involving mutual obligations), was correct. It was, he argued, supported by statements in the second reading speech of the *Factories and Shops (Long Service Leave) Act* 1953 regarding the underlying purpose of long service leave, which remained relevant in the absence of any further parliamentary statement of significance. Mr Farouque asserted that such statements demonstrated that the primary purpose of long service leave was to reward a continuous period of service by a period of leave without financial penalty.

93. Further, he submitted that the magistrate's construction accorded with the terms of the legislation and the reality of modern patterns of employment. It obviated unjust anomalies produced by the construction adopted in *Ex parte Kingston*. In particular, Mr Farouque argued that the requirement for a "continuous contract" operated not only to deprive casual workers of the benefit of long service leave, but could also destroy the entitlement of an employee who had provided 15 years' continuous service pursuant to different consecutive contracts executed to reflect promotion or other changed circumstances. He rejected the appellant's contention that such anomalies could be satisfactorily addressed by the negotiation of the parties.

94. The respondent argued that the ratio of *Ex parte Kingston* was simply that "in the absence of a mutuality of obligation on the part of the company to provide work, and on the part of an employee or a worker to perform work, … there is no ongoing contract of service". Mr Farouque submitted that "that was the principle of law to decide the issue before the Full Court, being whether Mrs Creed was engaged under an ongoing contract of service". It was, in his submission, unnecessary for the Full Court to turn to the construction of the term "continuous employment" under s154 of the *Labour and Industry Act* 1958 in order to decide the issue that was before it. As such, the Full Court's observations on the meaning of the term "continuous employment" were *obiter* and not binding on the learned magistrate, who was entitled to adopt and apply his preferred construction.

Scope of *Ratio Decidendi*

95. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[42] the High Court considered, *inter alia*, whether the *ratio decidendi* of *Bryan v Maloney*[43] applied to the case before it. McHugh J stated:

> "The common law distinguishes between the holding of a case, the rule of the case and its *ratio decidendi*. The holding of a case is the decision of the court on the precise point in issue – for the plaintiff or the defendant. The rule of the case is the principle for which the case stands – although sometimes judges describe the rule of the case as its holding. The *ratio decidendi* of the case is the general rule of law that the court propounded as its reasons for the decision. Under the common law system of adjudication, the *ratio decidendi* of the case binds courts that are lower in the judicial hierarchy than the court deciding the case. Moreover, even courts of co-ordinate authority or higher in the judicial hierarchy will ordinarily refuse to apply the *ratio decidendi* of a case only when they are convinced that it is wrong. *Prima facie*, the *ratio decidendi* and the rule of the case are identical. However, if later courts read down the rule of the case, they may treat the proclaimed *ratio decidendi* as too broad, too narrow or inapplicable. Later courts may treat the material facts of the case as too broad, too narrow or inapplicable. Later courts may treat the material facts of the case as standing for a narrower or different rule that was formulated by the court that decided the case. Consequently, it may take a series of later cases before the rule of a particular case becomes settled. … If later courts take the view that the rule of a case was different from its stated ratio decidendi, they may dismiss the stated ratio as a mere *dictum* or qualify it to accord with rhe rule of the case as now perceived."[44]

96. His Honour's analysis of the reasoning in *Bryan v Maloney* assumed that both the stated reasons of the court and the material facts of the case were relevant to the determination of the ratio of a case. Further, it recognised that the ratio of a case is not an immutable statement, but is, of its nature, susceptible to reformulation by reference both to developments subsequent to the decision and to the particular perspective from which the analysis is made.

97. Similarly, the approach of Gleeson CJ, Gummow, Hayne and Heydon JJ, in their joint judgment, was to ask, as a matter of substance, "What did *Bryan v Maloney* decide?" and to "identify the reasoning that underpinned [the Court's] conclusion".[45] Their Honours then identified the considerations which had led to the Court's conclusion that a relationship of proximity existed between the builder of a dwelling house and its subsequent owner. They recognised, in that context, that the principal conclusion that the builder owed a duty of care to the subsequent owner to avoid

economic loss depended upon conclusions the Court had already reached on the relationship of the first owner and the builder, and, in particular, on the "anterior step" of concluding that the builder owed the first owner such a duty.

98. Their Honours also observed that "both the anterior step and the conclusion drawn from it were considered in the context of the facts of the particular case."[46]

99. The approach of the High Court in *Woolcock* to the determination of the ratio of a case was to analyse, as a matter of substance, the chain of reasoning underpinning the principal conclusion within the particular factual context of the case.

100. Maher, Waller & Derham, in their analysis of the meaning of "*ratio decidendi*", state:

> "*Ratio decidendi* means, literally, either the 'reason of decision' or the 'reason for deciding'. Many text writers and some judges have used the term to refer to —
> (a) the principle or principles of law on which the decision of a case is based; or
>
> (b) the principle or principles of law for which a case is authority; and many writers have asserted or assumed that (a) and (b) go together so that in almost all cases both definitions are appropriate. Further, they believe that it is only the *ratio decidendi* which *binds* as law anyone other than the parties to the case. This is a misleading view, for decisions of particular issues may bind subsequent courts if the same issues arise again and yet decisions themselves are not aptly referred to as *rationes decidendi*.
>
> We prefer to use the term *ratio decidendi* to refer to *the proposition of law expressed or necessarily implied by a court as providing the legal justification for deciding a case, or a particular issue in a case, in a particular way*. This is then the legal 'reason for deciding'. Judicial *reasoning* may establish such propositions as *rationes decidendi*.
>
> *Obiter dictum* is used in contradistinction to *ratio decidendi* to refer to a legal rule or concept (or to its application to another different set of facts) enunciated by a judge not as a 'reason for deciding' but by the way and as it were gratuitously. *Obiter dicta* may shed important and persuasive light on the law but they bind no judge or court."[47]

101. The report of the arguments advanced in *Ex parte Kingston* is, in some respects, ambiguous. However, it would appear that the applicant in *Ex parte Kingston* did not dispute that "continuous employment" under s154 of the *Labour and Industry Act* 1958 (founding an entitlement to long service leave) required service under a continuous contract which required the worker to render service (subject to certain statutory qualifications). The Full Court endorsed that construction by its own observations on the necessity for a continuing contract which obliges the worker to continue giving the service for his hire or reward,[48] (which were repeated at other points of the judgment.) Further, the Full Court at a later point made clear that the relevant contract must also oblige the employer to offer employment. Thus, *Ex parte Kingston* was determined on the basis of an apparently common assumption that "continuous employment" involved a mutual contractual obligation requiring the employer to offer continuous employment and the employee to render continuous service.[49]

102. The applicant's alleged errors of law assumed the correctness of that construction. The applicant contended that the errors of law were all founded upon the failure to recognise that, on the facts as found, the requirement for such a contractual relationship was satisfied.

103. At the hearing of the appeal, Mr Farouque argued that the Full Court's finding that there was no such factual finding was sufficient to dispose of all the errors of law alleged to depend on it. The finding that there were no such errors of law thus did not depend on the court's construction of "continuous employment" under s154.

104. In my view, the Full Court's finding that there was no error in the Industrial Appeals Court's failure to find "continuous employment" within the meaning of the section due to the absence of a finding of a "continuous contract", necessarily depends on the Full Court's underlying assumption that a continuous contract was a necessary requirement. But for that assumption, the Full Court would not necessarily have concluded that there was no error in the Industrial Appeals Court's holding that Mrs Creed's employment was not "continuous employment".

105. The Full Court was only able to reach its conclusion that there was no error in the holding that the requirements of continuous employment were unsatisfied because that conclusion was underpinned by a definition of the elements which were, as a matter of legal principle, required.

106. In the present case, the respondent has identified, as the ratio of *Ex parte Kingston*, a discrete element in the decision-making process of the Full Court. Although the proposition advanced by the respondent is a necessary constituent of the logical chain of reasoning, it is not in itself sufficient to explain or justify the decision, and, when divorced from the logical context, does not illuminate it.

107. The respondent's approach to the identification of the *ratio decidendi* of *Ex parte Kingston* is informed by unduly narrow and artificial distinctions which arise from the technical form of action by which the case was brought. Such an approach, which elevates form over substance, is inconsistent with the High Court's approach to the identification of the ratio of a case.

108. The logical flaw in the respondent's analysis is that it has identified as the ratio a mere "anterior step" in a logical chain which is a necessary foundation of, but does not, in itself, dictate, explain, or justify the decision in the case. It is not, in my view, "the general rule of law that the court propounded as the reasons for its decision."

109. In my opinion, the broad *ratio decidendi* of *Ex parte Kingston* is that continuous employment within terms of s56 of the Act requires a continuous contract imposing an obligation on the employer to offer, and on the employee to render, employment. The learned magistrate was bound to apply that ratio. His failure to do so constitutes an error of law pursuant to s109 of the *Magstrates' Court Act*.

110. Further, although it is unnecessary to determine the issue, given the view expressed above, I am satisfied that if the *ratio* of *Ex parte Kingston* were not, when accurately identified, applicable to the facts of the present case, the Full Court's clear and deliberate construction of the statutory term "continuous employment" must be assumed to be correct and to accord with legislative intention, on the basis of the established principle recently reaffirmed by the High Court in *Re Alcan*.

111. The High Court in *Re Alcan* declined to reconsider the construction in *R v Portus; Ex parte ANZ Banking Group Ltd*[50] of the term "industrial dispute" in industrial relations legislation. Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, in their joint judgment, stated:

> "There are, in our view, three matters which tell persuasively against reconsideration of *R v Portus*. The first is that the principle on which it proceeds, namely, that for a matter to 'pertain to the relations of employers and employees' it must affect them in their capacity as such, has been accepted as correct in a number of subsequent cases, with no question ever arising as to whether the principle was correctly applied in the case. The second is that Parliament re-enacted, in s4(1) of the Act, words which are almost identical with those considered in *R v Portus*. There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]', although the validity of that proposition has been questioned. But the presumption is considerably strengthened in the present case by the legislative history of the Act. ... The third matter that tells against a reconsideration of *Reg v Portus* is that, academic criticism notwithstanding, there is no reason to think it is in any way affected by error."[51]

112. While the joint judgment observes that the validity of the proposition has, on occasion, been questioned, it assumes that the presumption will apply, whilst recognising that its strength will vary according to particular circumstances. The High Court's articulation of the presumption does not limit its application to constructions which form part of the ratio of the case. It indicates that it will *prima facie* apply where there has been a judicial attribution of meaning to certain words, which parliament subsequently repeats in legislation.

113. While the respondent relied on statements in relevant authorities that the presumption did not apply in relation to consolidations,[52] in the case of s56 of the Act, re-enactment of the provision construed by the Full Court has not been confined to consolidations.

114. Similarly, the recent authoritative exposition of the relevant principle or presumption in the

joint judgment of all seven justices of the High Court, does not support the restricted application to constructions which form part of the ratio, for which the respondent contends. The High Court's approach in *Re Alcan* is, of course, consistent with the view that the presumption would be weaker if the construction were merely incidental or peripheral to the principal issues for determination in the case.

115. In the early case of *Williams v Dunn's Assignee*[53] Barton J stated:[54]

> "If there is a succession of decisions arrived at upon full argument and consideration upon the exact point, it may be assumed that Parliament has acted upon the basis of those decisions and adopted them. But if the decisions are not of that kind, and are, moreover, doubtful in themselves, I do not think it can be assumed that Parliament paid attention to them at all. Because, upon the discovery of the slender basis upon which the original decision, which was afterwards followed, rests, and especially upon finding that a Court of superior authority has in the interim given a different decision, the expectation would be that Parliament, in using the words again, would not use them in the sense attributed to them by decisions found to be weak in their authority, and not founded upon sufficient discussion. That being, as a matter of common sense, the way in which we should interpret the much discussed rule as to the circumstances in which Parliament may be taken to act upon judicial construction, it is not to be supposed that Parliament attributed to the words used here the construction that had been put upon them by the Courts."

116. His Honour's observation does not, in my view, support the restriction advocated by the respondent. Rather, it requires that the construction be deliberate and central to the reasoning in the case rather than gratuitous, inadvertent or marginal.

117. In *Ex parte Kingston* the Full Court's construction of "continuous employment" was clear, deliberate and fundamental to its reasoning. Successive legislation, including consolidations and amending statutes, has employed the same term substantially unaltered. It may be inferred that, until the terminology is changed, the construction propounded in *Ex parte Kingston* represents parliament's intention, and should be applied.

118. In such circumstances, the failure of the learned magistrate to apply a construction enunciated by the State's highest court and endorsed by the legislature's subsequent re-enactment in substantially identical terms, constitutes an independent error of law within terms of s109 of the *Magistrates' Court Act*.

Conclusion

119. As the learned magistrate observed, widespread casual work appears to be a feature of modern patterns of employment. Casual workers may have little real control over their employment status. The impact of the restrictive requirement of a "continuous contract", upon such workers may, as the respondent contends, be anomalous and in some circumstances, potentially unjust. Courts, however, rarely command the comprehensive information necessary to reach conclusions on the wide-ranging effects of differing patterns of employment. Moreover, it is no part of their valid function indirectly to effect legislative amendment, however desirable amendment may seem.

120. In my opinion, for the reasons set out in detail above, the errors of law identified by the appellant are established. The appeal should be allowed.

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[1] *Francis Clohesy v Melbourne Cricket Club* (Victorian Magistrates' Court, Smith M, 5 July 2004) hereinafter referred to as "*Clohesy v MCC*".
[2] (Full Court, Supreme Court of Victoria, Unreported 26 February 1976, Gillard, Menhennitt and Dunn JJ) hereinafter referred to as "*Ex parte Kingston*".
[3] See s62(2)(a) - (c), (h), (i) and (j).
[4] Section 2(d) and (g) and s62(3).
[5] Victoria, *Parliamentary Debates*, Legislative Council, 22 September 1953, 981-984 (A.M. Fraser).
[6] *Ibid* at 984.
[7] *Ibid*.
[8] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1979 (Mr Ramsay, Minister of Labour and Industry).
[9] Compare s59 of the 1992 Act, s150(1) of the 1958 Act and s2(1) of the 1953 Act.
[10] Victoria, *Parliamentary Debates*, Legislative Assembly, 19 November 1996 (Mr J. Kennett, Premier of Victoria), 1300; Victoria, *Parliamentary Debates*, Legislative Council, 3 December 1996 (Mr M. Birrell, Minister for Industry, Science and Technology), 913.

[11] See, for example, *Long Service Leave Act* 1956 (Tas); *Long Service Leave Act* 1955 (NSW); *Long Service Leave Act* 1957 (SA); *Long Service Leave Act* 1958 (WA).
[12] *Long Service Leave (Amendment) Act* 1985 (NSW), s.4.
[13] New South Wales *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 5051, Mr P.D. Hills, Minister for Industrial Relations).
[14] Explanatory Memorandum, *Long Service Leave (Amendment) Bill* 1997 (ACT), cl.4(g).
[15] *Ex parte Kingston* at 3.
[16] *Ex parte Kingston* at 2.
[17] *Ex parte Kingston* at 5.
[18] *Ex parte Kingston* at 5.
[19] *Ex parte Kingston* at 7.
[20] *Ex parte Kingston* at 7.
[21] *Ex parte Kingston* at 7.
[22] *Ex parte Kingston* at 8.
[23] *Ex parte Kingston* at 10.
[24] *Ex parte Kingston* at 10 - 11.
[25] *Ex parte Kingston* at 11.
[26] *Ex parte Kingston* at 12.
[27] *Ex parte Kingston* at 13.
[28] *Carter v Reid* [1992] VicRp 22; [1992] 1 VR 351 at 354; (1991) 13 MVR 229.
[29] *Clohesy v MCC* at 7.
[30] *Clohesy v MCC* at 6.
[31] (1988) 30 AILR 497.
[32] *Clohesy v MCC* at 12.
[33] *Clohesy v MCC* at 17.
[34] *Clohesy v MCC* at 19.
[35] *Clohesy v MCC* at 18.
[36] *Clohesy v MCC* at 19 - 20.
[37] *Clohesy v MCC* at 20.
[38] *Clohesy v MCC* at 20.
[39] *Clohesy v MCC* at 21 - 22.
[40] *Clohesy v MCC* at 22.
[41] [1994] HCA 34; (1994) 181 CLR 96; (1994) 123 ALR 193; (1994) 68 ALJR 626.
[42] [2004] 78 ALJR 628.
[43] (1995) 182 CLR 609.
[44] [2004] 78 ALJR 628 at [59] - [61].
[45] *Ibid* at [9] and [11].
[46] *Ibid* at [15].
[47] F.K.H. Maher, L. Waller and D. Derham, *Cases and Materials on the Legal Process*, 1979.
[48] *Ex parte Kingston* at 8 - 9.
[49] *Ex parte Kingston* at 11.
[50] (1972) 127 CLR 353.
[51] [1994] HCA 34; (1994) 181 CLR 96 at 106-107; (1994) 123 ALR 193; (1994) 68 ALJR 626.
[52] That approach was adopted by Griffiths CJ in *Williams v Dunn's Assignee* [1908] HCA 27; (1908) 6 CLR 425 at 441 where his Honour observed that:

> "The doctrine that, where a particular provision in a statute has received definite judicial interpretation and the legislature afterwards repeals that provision and substitutes for it another in the same language, it should be presumed that they intended to adopt the interpretation that had been put upon the words by the courts, has no application unless it appears that the legislature intended to apply their minds to the subject. In the present case it appears from the nature of the legislation that the legislature intended a mere consolidation of existing statutory provisions, whatever they might mean"; see, also, *Nolan v Clifford* [1904] HCA 15; (1904) 1 CLR 429 at 447.

[53] [1908] HCA 27; (1908) 6 CLR 425.
[54] *Ibid* at 446.

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