Local Court
New South Wales

Short Case Title:	**Stephen Edward Ryan** **Applicant** **V** **Whitehaven Coal Mining Pty Ltd**
Jurisdiction:	Civil/Industrial
Date of Hearing:	24 June 2013
Place of Hearing:	Downing Centre
Date of Decision:	26 July 2013
Judgment of:	**Magistrate M. Buscombe**
File number:	
Parties:	
Catchwords:	Payment for untaken annual leave
Legislation Cited:	*Fair Work Act* 2009 (Cth) ss.61, 55, 90
Cases Cited:	Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Texts Cited:	Statutory Interpretation in Australia, DC Pearce, RS Geddes, 7th Edition
Legal Representation:	
Decision:	Applicant entitled to be paid $2,376.25.

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JUDGMENT

Introduction

1. The applicant Mr Ryan has brought an application against the respondent company under the *Fair Work Act* 2009 (Cth) (*Fair Work Act*), claiming an unpaid amount of annual leave which he claims was payable to him upon his resignation from his employment. The application is brought under Part 4-1, Division 2 of the *Fair Work Act* 2009 (Cth).The dispute between the applicant and the respondent essentially concerns the rate of calculation of the unpaid annual leave.

2. The facts are not in dispute in these proceedings. The proceedings themselves have a rather unfortunate history. They were heard on 6 February 2012 by the late Magistrate G. Hart , who was sitting as the Chief Industrial Magistrate. At the end of the proceedings that day his Honour reserved his decision. Sadly his Honour passed away prior to being in a position to deliver a decision in the matter.

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3. The matter was referred to me from the defended list at the Downing Centre on 24 June 2013. The matter was essentially a rehearing before me in that the exhibits that were tendered before his Honour were tendered before me, and the parties made submissions. The transcript of the proceedings before his Honour was also tendered before me. No oral evidence was called before me.

4. It was apparent from the transcript of the proceedings before his Honour that his Honour granted to The Australian Mines and Metals Association leave to intervene and put submissions in the proceedings, primarily as to the appropriate construction to be given to the *Fair Work Act*. Given the history of the proceedings, I provisionally allowed the Association to put submissions to me. I adjourned the matter so that the parties could put submissions to me as to the power this Court has in these proceedings to allow a party to intervene in this way. In my opinion, it is far from clear that this Court, which is an inferior statutory court, does possess such a power.

5. There is no dispute that the applicant was an employee to which the provisions of the *Fair Work Act* applied.

The evidence

6. The evidence establishes that the applicant on 4 August 2008 was engaged to work for the respondent as a mine operator. At the relevant time the applicant was employed pursuant to a contract of employment dated 20 May 2009. Insofar as annual leave is concerned, there were two clauses of that contract which have relevance.

7. Clause 13 which dealt with leave entitlements generally, provided as follows: "*Your entitlements to annual leave, personal leave, and public holidays will be in accordance with legislation including the "Australian Fair Pay and Conditions*

Standard" in the Workplace Relations Act 1996 (Cth) and the provisions of this Agreement set out below."

8. Clause 14 of the applicant's contract of employment provided as follows in relation to annual leave:

"*You will accrue, on a pro rata basis, 5 weeks annual leave per year. When you take annual leave, you will be paid your ordinary rate of pay plus a loading of 20%, or your projected roster earnings, whichever is the greater. If you leave Whitehaven, or if you are terminated, you will be paid any untaken annual leave you have accrued at the ordinary rate."*

9. Clause 14, therefore, provided that a loading of 20% or projected roster earnings on top of the ordinary rate of pay was to be paid if the applicant took annual leave during the course of his employment. If, however, he left the respondent's employ or his employment was terminated, any untaken annual leave would be paid out at what was described as, "the ordinary rate".

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10. From 16 February 2010 the terms and conditions in the Whitehaven Open Cut Operations (Tarrawonga) Enterprise Agreement applied to the applicant's employment. Clause 14 of the Enterprise Agreement dealt with leave entitlements. Clause 14 provided as follows; "*Entitlements to leave are in accordance with the entitlements set out under the applicable FW Act provisions and the provisions of this Agreement set out below."*

11. Clause 14.1 of the Enterprise Agreement dealt with annual leave. Clause 14.1 of the Enterprise Agreement provided as follows; "*employees are entitled to 5 weeks annual leave per year, accruing progressively. For periods of annual leave, employees will be paid the greater of: – their ordinary time rate of pay and an annual leave loading of 20%; or – the projected roster earnings. In each case employees will receive the bonus payment set out at clause 12.3.*"

12. Clause 12.3 of the Enterprise Agreement provided that in addition to normal weekly wages, employees were also to participate in a bonus scheme.

13. The Enterprise Agreement did not specifically deal with what was to occur when an employee's employment came to an end and the employee had annual leave which he or she had not taken. Contrast that with the applicant's original contract of employment.

14. On 30 May 2011 the applicant tendered his resignation from his position as a mine operator and indicated that he would conclude his employment in one weeks time.

15. The applicant submitted that the rate at which the amount to be paid for his untaken annual leave is that provided for in clause 14.1 of the Enterprise Agreement. The respondent submitted that the calculation of the amount to be paid for untaken paid annual leave was to be at the applicant's base rate of pay. It was accepted by the respondent that if the rate at which the amount for untaken annual leave is to be calculated, is that provided for in clause 14 of

the Enterprise Agreement, the amount owed to the applicant, exclusive of any interest, totals $2376.25 as set out in his application.

16. As I understand it, no court has considered the construction of s.90(2) of the *Fair Work Act*.

The parties' submissions

17. The applicant submitted that section 61 of the *Fair Work Act* provides the National Employment Standards (NES) which are minimal employment standards applying to all employees.

18. Section 61 of *The Fair Work Act* relevantly provides:

61 The National Employment Standards are minimum standards applying to employment of employees

(1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).

Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.

(2) The minimum standards relate to the following matters:

(d) annual leave (Division 6);

19. In so far as the NES are concerned, annual leave is dealt with in Division 6 of Part 2-2.The applicant says that section 90 of the *Fair Work Act* is included in the NES and provides for the payment of annual leave. The applicant relies upon section 90 of the *Fair Work Act*, in particular section 90 (2).

20. Section 90 of the *Fair Work Act* provides as follows:

90 Payment for annual leave

(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.
(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

21. The applicant says that s.90(2) applies whenever and however an employee's employment comes to an end. According to the applicant's submission, if the applicant had taken his annual leave prior to the end of his employment he would have been paid in accordance with his entitlement under the relevant Enterprise Agreement. It follows, according to the applicant's argument, when his employment came to an end he was to be paid an amount calculated in the same way as a consequence of s.90(2). The applicant submits that the terms of s.90(2) are not ambiguous and should be given their ordinary English meaning.

22. The respondent submitted that the applicant upon resignation of his employment should be paid an amount for untaken annual leave calculated at his base rate of pay.

23. The respondent stressed Clause 14 of the relevant Enterprise Agreement which was in the following terms:

"*Leave*

*Entitlements to leave are **in accordance with the entitlements set out under the applicable FW Act provisions** and the provisions of this Agreement set out below".* (Respondent's emphasis.)

24. The respondent submitted that the Enterprise Agreement made it clear that an employee's entitlement to payment of accrued but untaken annual leave upon termination was to be dealt with under the *Fair Work Act*, not pursuant to the Enterprise Agreement.

25. The respondent also pointed to clause 14 of the applicant's contract of employment, which I set out earlier, which provided that if the applicant left the respondent's employment or was terminated, he would be paid accrued untaken annual leave "at the ordinary rate".

26. The respondent submitted that on its proper construction, s.90 of the *Fair Work Act* required accrued and untaken annual leave to be paid at the "base rate of pay" as defined in s.16 of the *Fair Work Act*.

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27. The respondent points to the need to construe s.90 in its statutory context and submitted that the approach of the applicant was contrary to the modern approach to statutory interpretation discussed by the High Court in cases such as *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-2.

28. The respondent submitted that what s.90(1) of the *Fair Work Act* provided for was that when an employee took a period of annual leave an employer "must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in that period". That was, the respondent submitted, the minimum condition that the legislature required, i.e., employees be paid at their base rates of pay, and not at their full rate of pay. The respondent contrasted s.90(1) with other provisions in the *Fair Work Act* which required an employee to be paid at the full rate of pay; see s.81(5) for example.

29. The respondent submitted that regard was to be had to the fact that s.90(1) provided for employees to be paid annual leave at the base rate of pay when construing s.90(2). The result of doing so, according to the respondent, was that at the end of employment an employee was to be paid for accrued untaken annual leave at the "base rate of pay". The respondent submitted that any other construction would be at odds with the clear purpose and intent of s.90 of the *Fair Work Act* read as a whole.

30. The respondent submitted that s.87(2) of the *Fair Work Act* provided that an employee's entitlement to paid annual leave accrued progressively during a period of service according to the employee's ordinary hours of work, and accumulates from year to year. The respondent submitted that s.87(2) and s.90(2) were interconnected and that payment of annual leave at the "full rate of pay" would be at odds with accrual and payment of that entitlement based upon "ordinary hours of work". This was, so the respondent submitted, because the definition of "full rate of pay" in s.18 of the *Fair Work Act* included

items such as overtime or penalty rates, which are based upon hours worked outside an employee's "ordinary hours of work".

31. The respondent further submitted that the applicant's contention as to the construction of s.90(2) "*would lead to the absurd result that an employee in the position of the applicant would be entitled under the NES safety net to payment of annual leave at only the "base rate of pay" during his/her employment, but at his/her "full rate of pay" upon termination".*

32. The respondent further submitted that the applicant's submissions were at odds with the operation of the NES as a discrete and standalone "minimum safety net". The respondent pointed to to s.55(4) which provides:

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

33. In drawing attention to s.55(4) the respondent pointed out that an enterprise agreement might contain terms which supplement , or are ancillary or incidental to an entitlement under the NES, but only in a way where the effect would not be detrimental to an employee. The respondent then drew attention

to one aspect of the legislative notes to that provision. The relevant note provides:

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

34. The respondent's submission in relation to that legislative note contained the following:

"This legislative note reinforces that s.90 of the FW Act provides only for a minimum entitlement to payment at the base rate of pay, although the parties may come to an agreement to improve this position. This is precisely what the parties in this case decided to do in relation to entitlements during the term of the employment, leaving the entitlement upon termination to be governed by s.90 of the FW Act."

35. According to the respondent, the NES are a discrete and standalone set of minimum entitlements and are to be construed as a minimum safety net. The respondent further submitted that the NES must be read as an independent source of entitlements. The respondent contended that the applicant's contention as to the construction of s.90(2) of the *Fair Work Act* required the Court to construe the provision by reference to the terms of the applicable enterprise agreement which was inconsistent with the NES being a stand alone safety net.

36. The respondent submitted that ; "*Where s.90(2) of the FW Act requires the employer to "pay the amount that would have been payable to the employee had the employee taken that period of leave*", it requires the employer to pay the amount that would have been payable under s.90(1) of the FW Act which prescribes the "base rate of pay."

37. The respondent further submitted that as the Enterprise Agreement was silent as to the method and rate of payment of untaken annual leave upon termination, it was clear that the parties left this as a matter to be determined by reference to the minimum safety net contained within the NES. The respondent submitted that therefore the payment of accrued and untaken annual leave was to be calculated by reference to s.90 only, and was to be calculated on the base rate of pay. The respondent submitted that the contract of employment which provided for the base rate of pay to be used when calculating accrued untaken annual leave, was consistent with the approach taken in the Enterprise Agreement, i.e., the rate was to be determined solely under s.90.

38. The intervener adopted and supported the respondent's submissions on the construction to be given to s.90(2) of the *Fair Work Act.* In doing so the intervener drew attention to the fact that "*of the Fair Work Commission's 122 modern awards, 112 provide for annual leave loading, 29 state explicitly or implicitly that annual leave loading is not paid on termination, 9 provide that annual leave loading is paid out on termination and 74 are silent."* According

to the intervener's submissions, if the applicant's suggested construction is correct, 29 modern awards are in breach of the NES and that in relation to the 74 modern awards that provide for annual leave loading but are silent as to what is to occur on termination, on termination the employer would be required to pay the leave loading. The intervener also drew attention to the historical reason behind the payment of annual leave loading. That historical reason being that employees sought to not lose income while on annual leave because they would not work during a period where overtime and allowances may be payable. That reasoning was not applicable once an employee's employment was at an end.

Resolution of the competing submissions

39. Both parties and the intervener drew the Court's attention to statements of principle derived from higher court authority relevant to the approach the Court should take to the construction of s.90 of the *Fair Work Act.*

40. I will set out some brief statements of general principle from the authorities as to the approach a court should take to the construction of a statute. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 McHugh, Gummow, Kirby and Hayne JJ referred to a number of relevant principles which I set out below:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the

provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"[46]. In Commissioner for Railways (NSW) v Agalianos[47], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed[48].

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[49]. .....

Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision[52]. In The Commonwealth v Baume[53] Griffith CJ cited R v Berchet[54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent". (See pages 381-382)

However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[56] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. In Statutory Interpretation, Mr Francis Bennion points out[57]:

> *"The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not*

remedy the mischief that Parliament intended to deal with."
(footnotes omitted) (See page 384)

41. The above statements of principle should be seen as being consistent with the terms of s.15AA of the *Acts Interpretation Act* 1901 (*Cth*); see the discussion in "*Statutory Interpretation in Australia*" DC Pearce, RS Geddes 7th Edition, Lexis Nexis Butterworths.

42. I have also had regard to s.15AB of the *Acts Interpretation Act* 1901 (Cth) and the discussion of the authorities in relation to that provision contained in "*Statutory Interpretation in Australia*".

43. The objects of the *Fair Work Act* are set out in s.3. In so far as the NES are concerned, those objects include the following:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system;

44. The NES are contained in Part 2-2 of the *Fair Work Act*. The interaction between the NES and modern awards, and relevantly here, enterprise agreements is dealt with in Division 3 of Part 2-1. Section 55(1) of the *Fair Work Act* provides that an enterprise agreement must not exclude the NES or any provision of the NES. Section 55(2) of the *Fair Work Act* provides that an enterprise agreement may include any terms that the agreement is expressly permitted to include by a provision of the NES or by regulations made under s.127. Pursuant to s.55(3) the NES have effect subject to terms included in a modern award or enterprise agreement as referred to in s.55(2).

45. An enterprise agreement may include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES. It may also include terms that supplement the NES "*but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the NES*"; see s.55(4).

46. Section 61(1) of the *Fair Work Act* states as follows:

This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).

47. Section 61(2) provides that the minimum standards relate to the matters listed in the sub-section. Paragraph (d) refers to annual leave which is dealt with in Division 6 of Part 2-2.

48. In Division 6 of Part 2-2, s.87 provides for the amount of annual leave that is the minimum standard and how it is to accrue. Section 88 deals with the minimum standard in relation to the taking of annual leave. Section 89 provides that where a public holiday or some other form of leave occurs during a period of taken annual leave, the employee is taken not to be on paid annual leave for the period of the public holiday or other type of leave.

49. Section 90 deals with payment for annual leave and is in the following terms.

> *(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.*
>
> *(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.*

50. There appears to be no dispute between the parties about the meaning of s.90(1). Section 90(1) provides as the minimum standard, that an employee must be paid annual leave at the employee's base rate of pay for the employee's ordinary hours of work in the period. The "base rate of pay" is set out at s.16 which excludes a number of matters, including loadings.

51. Consistent with s.90(1) providing a minimum standard, the minimum standard is that an employee who takes annual leave is to be paid at his or her base rate of pay. Pursuant to the terms of s.55 of the *Fair Work Act*, an enterprise

agreement may or may not provide that an employee when he or she takes paid annual leave, is to be paid at a rate more favourable than his or her base rate of pay. (The parties agree that is what the appellant's situation was.) What is not permissible is for an employee on annual leave to be paid at a rate which is less than his or her base rate of pay.

52. The effect of what can be done under s.55 of the *Fair Work Act* in terms of the NES, and in particular in relation to the payment of annual leave, is that an employee is to be paid annual leave under s.90 either at the base rate of pay, which is the minimum standard, or at a rate of pay that is not the base rate of pay, but which is not detrimental to the employee. That means that an employee is either to be paid at his or her base rate of pay, or at a rate of pay that is higher than his or her base rate of pay.

53. What rate is applicable depends upon the terms of the enterprise agreement. If the enterprise agreement provides that the base rate of pay is to apply or is silent as to what rate of pay is to apply, annual leave is to be paid at the base rate of pay. If the enterprise agreement provides for annual leave to be paid at a rate that is higher than the base rate of pay, that is the rate that is to apply when annual leave is taken.

54. In this way it can be seen that in relation to an employee whose employment comes to an end, and who has untaken paid annual leave, there are two categories into which the employee may fall. The employee may be a person where the enterprise agreement provided that when paid annual leave was taken, the person was to be paid at a rate more favourable than the base rate

of pay. The other possibility is that the employee was to be paid, when he or she took annual leave, at the base rate of pay either because that is what the enterprise agreement provided or the enterprise agreement was silent as to how taken paid annual leave was to be paid, and the NES applied by virtue of s.90(1).

55. This analysis of the operation of s.90(1) of the *Fair Work Act* is relevant, in my opinion, when the construction of s.90(2) of the *Fair Work Act* is approached. In my opinion, the legislature has had in mind the two possible categories into which an employee may fall when it has used in s.90(2) the phrase; "the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave".

56. In my opinion what s.90(2) provides, in so far as untaken paid annual leave is concerned, is a minimum standard. That minimum standard is that an employee, whose employment comes to an end, is to be paid the amount that he or she would have been paid if they had taken the unpaid annual leave as at the date that the employment ends. This is consistent with the intention of the legislature evident both in s.3 and s.61 of the *Fair Work Act*, to provide through the NES minimum standards in relation to aspects of employment, including in relation to the payment of annual leave.

57. This construction, in my opinion, is consistent with the legislative purpose behind s.90 and Part 2-2 of the *Fair Work Act* in that it provides for a minimum standard to be applied to the payment of untaken paid annual leave when an

employee's employment comes to an end. The construction is consistent with the purposive approach to statutory construction referred to in the authorities I have referred to earlier.

58. This construction also, in my opinion, has proper regard to the principle that meaning should be given to all the words contained within a statutory provision. See the principles I discussed earlier in this judgment. It gives the phrase "*the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave*" a construction consistent with the ordinary meaning of the words contained in it. The phrase requires a determination as to the amount that an employee would have been paid if in fact he or she had taken the untaken paid annual leave.

59. I do not accept the respondent's submission that this construction is somehow inconsistent with the legislative purpose behind the establishment of the NES. As I have endeavoured to explain, this construction is consistent with the legislative purpose being that the NES contained in Part 2-2 of the *Fair Work Act* provide a set of minimum standards for employees to which the provisions apply.

60. Nor do I accept the respondent's submission that this construction in some way derogates from the principle that the NES should be seen as a discrete and standalone set of minimum standards. The construction which I consider is the correct construction of s.90(2) is consistent with the NES setting a

standalone set of minimum standards. That minimum standard, in relation to the amount an employee is to be paid for untaken paid annual leave upon the end of employment, is that the employee is to be paid the amount he or she would have been paid if the employee had taken the paid annual leave.

61. The fact that to determine the precise amount to be paid it is necessary to have regard to the terms of the relevant enterprise agreement does not mean that the minimum standard cannot be ascertained from the NES itself. Section 55 makes clear, in my opinion, that it may be necessary to have regard to the terms of an enterprise agreement to determine the precise monetary entitlement of an employee under the NES. The objective standard, however, can be determined from the terms of s.90(2).

62. I also do not accept the respondent's submission that an employee in the position of the applicant, would be paid at the base rate of pay when paid annual leave was taken, but that he or she would be paid at a higher rate in relation to untaken paid annual leave upon the end of employment. As I have explained, if either by the terms of an enterprise agreement or s.90 of the *Fair Work Act* , an employee is to be paid taken annual leave at the base rate of pay, upon the end of that employee's employment he or she is to be paid an amount for untaken paid annual leave at the same rate. That result comes about because of the construction of s.90(2) which I have found to be the correct construction.

63. The respondent's submission in effect was that the phrase, *"the employer must pay the employee the amount that would have been payable to the*

employee had the employee taken that period of leave", should be read as "the employer must pay the employee the amount calculated on the base rate of pay". To read the section in that way would be to in effect completely re-write it. There is no principle of statutory construction applicable here which leads the Court to give the section that interpretation. To do so would be to totally ignore the words used by the legislature, words, as I have endeavoured to explain, consistent with the legislative purpose evident in the *Fair Work Act*, and with the context in which the provision appears.

64. If the Commonwealth Parliament had wanted to provide that the minimum standard in relation to the payment of untaken paid annual leave upon the end of employment was to be payment at the base rate of pay, it would have been a very easy matter for it to do so. The words it did use in s.90(2) are, in my opinion clear, ordinary English words, which I have interpreted consistent with the legislative purpose and the statutory context in which they appear.

65. The enterprise agreement under which the applicant was employed provided for payment of taken paid annual leave at a rate of pay greater than the base rate of pay. The amount to be paid for untaken annual leave upon the end of the applicant's employment was to be calculated at that rate. That, in my opinion, is the affect of s.90(2) of the *Fair Work Act*.

66. I noted earlier that the respondent accepted that if the applicant's construction of the legislation was correct, the applicant was entitled to the amount of

$2,376.25. The respondent is to pay the applicant $2,376.25I will hear the parties on the question of interest.

Magistrate M. Buscombe

The Local Court

Downing Centre.