FEDERAL COURT OF AUSTRALIA

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Qantas Airways Limited [2020] FCA 656

File number:	NSD 376 of 2020 NSD 388 of 2020
Judge:	**FLICK J**
Date of judgment:	18 May 2020
Catchwords:	**INDUSTRIAL LAW** – employees stood down – entitlement to access paid personal/carer's leave or compassionate leave
Legislation:	*Fair Work Act 2009* (Cth) ss 87-90, 96, 97, 99, 100, 104, 105, 107, 108, 111, 114, 524, 525 *Workplace Relations Act 1996* (Cth) ss 691A, 691B *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) Sch 4
Cases cited:	*Australian Education Union v Department of Education and Children's Services* [2012] HCA 3, (2012) 248 CLR 1 *Australian Manufacturing Workers' Union v McCain Foods (Aust) Pty Ltd* (2011) 214 IR 1, [2011] FWA 6810 *Bruck Textiles Pty Limited v Textile, Clothing and Footwear Union of Australia* [2007] AIRC 921, (2007) 167 IR 20 *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83, (2010) 185 FCR 383 *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034, (2016) 152 ALD 209 *Foods Preservers Union of Australia and All States Ready Foods* (1976) 182 CAR 391 *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2019] HCA Trans 250 *Mondelez v Australian Manufacturing Workers Union* [2019] FCAFC 138, (2019) 289 IR 29 *Re Application by Building Workers' Industrial Union of Australia* (1979) 41 FLR 192 *Re Carpenters and Joiners Award* (1971) 17 FLR 330 *Re Distilleries Award 1976* (1976) 180 CAR 786

	Re Steel Works Employees (Broken Hill Pty Co Ltd) (No. 1) (1962) AR (NSW) 334 *Re Textile Industry (Woollen and Worsted Section) Award 1950* (1963) 5 FLR 328 *Townsend v General Motors-Holden's Ltd* (1983) 4 IR 358 *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140
Date of hearing:	28 April 2020
Date of last submissions:	29 April 2020
Registry:	New South Wales
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	59
Counsel for the Applicants:	Mr M Gibian SC with Mr A M Slevin
Solicitor for the Applicants:	The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and the Transport Workers' Union
Counsel for the Respondent:	Mr F Parry QC with Mr M Follett
Solicitor for the Respondent:	Ashurst Australia

ORDERS

NSD 376 of 2020

BETWEEN:	**COMMUNICATIONS, ELECTRONICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA** First Applicant
	THE AUSTRALIAN WORKERS' UNION Second Applicant
	AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION (KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS' UNION) Third Applicant
AND:	**QANTAS AIRWAYS LIMITED (ACN 009 661 901)** Respondent

NSD 388 of 2020

BETWEEN:	**TRANSPORT WORKERS' UNION OF AUSTRALIA** Applicant
AND:	**QANTAS AIRWAYS LIMITED (ACN 009 661 901)** Respondent

JUDGE:	**FLICK J**
DATE OF ORDER:	**18 MAY 2020**

THE COURT ORDERS THAT:

In matter NSD 376 of 2020:

1. The proceeding is dismissed.

In matter NSD 388 of 2020:

1. The proceedings are dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

FLICK J:

1 Australia at present is in the midst of a global pandemic caused by a virus known as COVID-19. The pandemic originated in China. From there the virus spread quickly. Italy, Spain, the United Kingdom and the United States have recorded thousands of deaths. At the time of writing this judgment, the death toll in the United States has exceeded 83,000. In the United Kingdom the death toll has exceeded 32,000. But the current death tolls are only preliminary estimates, and may not reflect the true extent of mortality attributable to the virus. This is due to the inability of many governments around the world to test widely for the virus. The wet-markets in China which have been alleged to be the source of this devastation were originally closed – not surprisingly – and have – even more surprisingly – been re-opened.

2 Australia is experiencing some of the most restrictive measures seen in over half-a-century, to enforce what has been referred to as "*social distancing*". Restrictions to eliminate movement of the population have been imposed, seeking to eliminate non-essential travel and confine people to their homes.

3 The effect on the economy and business has been unparalleled. International travel has all but ceased.

4 One of the commercial victims of the pandemic has been Qantas Airways Limited ("Qantas") and its employees. In mid-March 2020 Qantas announced its intention to stand down approximately two-thirds of its 30,000 employees.

5 Of present concern is the entitlement of Qantas' employees to access paid personal/carer's leave or compassionate leave during their stand down. A number of Unions, on behalf of Qantas' employees, claim that stood down employees are entitled to access such leave entitlements; Qantas denies this entitlement.

6 Two separate proceedings have been commenced in this Court in an endeavour to resolve the dispute. The first proceeding was commenced by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the "Allied Services Union"), the Australian Workers' Union (the "AWU") and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (known as the Australian Manufacturing Workers' Union) (the "AMWU"). The second proceeding was commenced

shortly thereafter by the Transport Workers' Union of Australia (the "TWU"). Both proceedings gave rise to comparable questions and were heard together.

7 In the proceeding commenced by the Allied Services Union, AWU and AMWU, the enterprise agreement of relevance is the *Qantas Airways Limited (AWU, AMWU, CEPU) Enterprise Agreement 10* (the "*Enterprise Agreement 10*"). In the TWU proceeding, the enterprise agreement of relevance is the *Qantas Airways Limited and QCatering Limited – Transport Workers Agreement 2013* (the "*QCatering Agreement*").

8 In the Allied Services Union, AWU and AMWU proceeding, the employees were stood down pursuant to either cl 18 of *Enterprise Agreement 10* or s 524 of the *Fair Work Act 2009* (Cth) (the "*Fair Work Act*"). Those employees seek to access those entitlements conferred by cl 29 of *Enterprise Agreement 10* or ss 97 and 105 of the *Fair Work Act.* In the TWU proceeding the employees were stood down pursuant to s 524(1) of the *Fair Work Act*. Those employees seek to access those entitlements conferred by either cl 32 of the *QCatering Agreement* or ss 97 and 105 of the *Fair Work Act.*

9 It was common ground that the employees have been lawfully stood down.

10 Whatever the source of the claimed entitlement, it has been concluded that the claims fail. So much, it is respectfully concluded, follows from:

- the terms of ss 97, 105, 524 and 525 of the *Fair Work Act;*
- an understanding of the object and purpose sought to be achieved by the power to stand down employees; and
- a proper understanding of the object and purpose of the leave entitlements in issue in the present proceeding.

11 Although some aspects of both proceedings are "*hypothetical*" and involve assumptions as to what may happen in the future, it is considered that there is no question as to the Court's jurisdiction to entertain and resolve the issues now before it.

12 Both *Originating Applications* are to be dismissed.

The object & purpose of the right to stand down employees

13 There is no common law right of an employer to stand down an employee without pay in circumstances where there is no work the employee can usefully perform. At common law, an employee who is stood down is entitled to be paid even though they cannot usefully perform

any work: *Re Application by Building Workers' Industrial Union of Australia* (1979) 41 FLR 192 at 194. Justice J B Sweeney was there considering an award provision which entitled an employer "*to deduct payment for any day an employee cannot be usefully employed*" and observed:

> … There was no existing right in the employer to deduct payment in the circumstances set out at common law. *Halsbury's Laws of England* (3rd ed.), vol. 25, at p. 468 says: "Where, however, a written agreement, which appears on the face of it to include all the terms agreed to by the parties, provides only for the payment of wages or salary at certain times, no implied obligation to find work for the servant will be added, and he is not entitled to damages for not being given employment, although, if he remains ready to perform his services during the period covered by his contract, he is entitled to the agreed wages."…

14 Any right of an employer to stand down an employee without pay is to be found in either legislative provisions or in the terms of an industrial agreement.

15 Legislative provisions directed to the ability of an employer to stand down an employee are of comparatively recent origin.

16 It would seem that the first statutory provision is to be found in the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth). Schedule 4 to that Act introduced ss 691A and 691B into the *Workplace Relations Act 1996* (Cth). Prior to those provisions, any power of an employer to stand down employees was to be found in industrial awards: cf. *Re Textile Industry (Woollen and Worsted Section) Award 1950* (1963) 5 FLR 328 at 332-333 per Spicer CJ, Joske and Eggleston JJ.

17 In *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83 at [15], (2010) 185 FCR 383 at 387, Marshall and Cowdroy JJ provided the following examples of where the power could be exercised:

> [15] Properly understood, a stand down, in that context, encompasses a large range of situations where, for various reasons, an employer is unable to provide useful work for its employees, for a particular period of time, for circumstances beyond its control. The employer may be temporarily deprived of electricity to run its operation. It may not have sufficient component supplies to manufacture its goods, due to industrial disputation by the employees of its suppliers. The employer's factory may have been flooded. Numerous examples readily come to mind. The need for clauses in industrial instruments dealing with stand downs of this type has long been recognised because, in the absence of such a provision, an employee is prima facie entitled to wages for attending work even if no work is available: …
>
> (citation omitted).

18 At a very general level, Qantas was correct in submitting that the power of an employer to stand down employees who are otherwise ready and willing to perform their contractual services serves two important purposes. One purpose is to provide "*financial relief*" to an

employer from paying wages in circumstances where, through no fault of its own, the employer has no work that the employees can usefully perform; the other purpose is to protect the employees from what would otherwise flow from the termination of their services.

19 As to the former purpose, Morling J in *Townsend v General Motors-Holden's Ltd* (1983) 4 IR 358 was resolving a claim for the imposition of penalties and for the payment of monies in circumstances where it was contended that General Motors-Holden's Ltd had wrongfully stood down employees. It was claimed that there had been contraventions of the *General Motors-Holden's Ltd (Part 1) General Award 1978*. In the course of so doing, his Honour referred to *Re Carpenters and Joiners Award* (1971) 17 FLR 330 and continued (at 368):

> … Their Honours' adoption of the notion of "net benefit" seems to indicate that they accepted that factors affecting the economics of the employer's business must be considered in deciding whether an employee can be usefully employed. That this is so seems to me to be basic to the meaning and operation of cl. 6(g)(i). The reason for the inclusion of the clause in the award is to afford GMH financial relief from the consequences of a strike or a breakdown in machinery or a stoppage of work for which it cannot reasonably be held responsible. In that context the words "usefully employed" must surely justify, indeed require, consideration of the question whether employment of an employee would be of economic advantage to GMH ...

As to the latter purpose, it has also been recognised that there may be "*circumstances when both employer and those employed would want to avoid the extreme measure of terminating employment*": *Re Distilleries Award 1976* (1976) 180 CAR 786 at 787 per Sharpe J. Cited in: *Bruck Textiles Pty Limited v Textile, Clothing and Footwear Union of Australia* [2007] AIRC 921 at [26], (2007) 167 IR 20 at 27 per Watson SDP.

20 Stand down provisions, Gaudron J has observed, are invoked as a last resort and attempt to preserve "*as many facets of the employment relationship as possible*": *Foods Preservers Union of Australia and All States Ready Foods* (1976) 182 CAR 391 at 392. Her Honour there said:

> The purpose of a stand down clause ought no longer to be seen as an automatic, albeit partial, safeguard for the employer against economic loss. Society now claims and expects reasonable economic security for the wage earner and recent decisions of this Commission illustrate the growing trend to grant stand down clauses only as a variation of an award to deal with specific situations and then as a last resort so as to preserve as many facets of the employment relationship as possible. Where such stand down clauses have been granted, there has also been a tendency to provide some relief to the employee by granting the right to take annual leave and/or to terminate on short notice.

In issue in the present proceedings is the entitlement to take personal/carer's leave (s 97 of the *Fair Work Act*) and compassionate leave (s 105 of the *Fair Work Act*). Not in issue is the entitlement to take other forms of leave such as annual leave (ss 87 – 90 of the *Fair Work Act*).

21 Common to both proceedings now before the Court is the power conferred by s 524 of the *Fair Work Act* to stand down employees. That section provides as follows:

> **Employer may stand down employees in certain circumstances**
>
> (1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
>
> (a) industrial action (other than industrial action organised or engaged in by the employer);
>
> (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
>
> (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.
>
> (2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:
>
> (a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and
>
> (b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.
>
> Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.
>
> Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).
>
> (3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.

It is a question of fact as to whether an employee "*cannot usefully be employed*" and in resolving that question regard may be had to the "*economic consequences*" to the employer. As to whether an employee may be "*usefully employed*", Morling J in *Townsend v General Motors-Holden's Ltd* (1983) 4 IR 358 at 370 concluded:

> In my opinion the question whether an employee cannot be usefully employed because of a strike is largely a question of fact. No doubt, as a matter of law, some considerations will be irrelevant in determining the question of fact. But I reject the argument that the economic consequences to the employer are to be ignored in deciding whether employees can be usefully employed. I accept that it is a material matter that work has been scheduled to be done by an employee on a day when, in fact, he is stood down. In many cases that will be a powerful indication that the work which was scheduled to be done was work which would have been useful to the employer. If the employee is stood down in those circumstances the employer will necessarily have to establish that because of circumstances that arose after the work was first scheduled to be done, the employee could not be usefully employed.

This approached was endorsed by Watson VP in *Australian Manufacturing Workers' Union v McCain Foods (Aust) Pty Ltd* (2011) 214 IR 1 at 5, [2011] FWA 6810 at [16].

22 Section 525 of the *Fair Work Act* provides as follows:

> **Employee not stood down during a period of authorised leave or absence**
>
> An employee is not taken to be stood down under subsection 524(1) during a period when the employee:
>
> (a) is taking paid or unpaid leave that is authorised by the employer; or
>
> (b) is otherwise authorised to be absent from his or her employment.
>
> Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down under subsection 524(1).

23 Sections 524 and 525 are to be construed according to their terms and according to the legislative scheme to be discerned from the *Fair Work Act* as a whole – and not, as correctly submitted on behalf of the Unions – according to some "*judicially constructed policy*": *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3 at [27]-[28], (2012) 248 CLR 1 at 13-14. French CJ, Hayne, Kiefel and Bell JJ there observed:

> *The approach to construction*
>
> [26] The disposition of this appeal turns upon the correct construction of s 9(4). The process of construction begins with a consideration of the ordinary and grammatical meaning of the words of the provision having regard to their context and legislative purpose. …
>
> [27] There are textual and purposive indicators to be considered in determining the preferred construction. Also applicable is s 22(1) of the *Acts Interpretation Act 1915* (SA) …
>
> [28] The reasoning in the IRC was informed by the view that it was desirable that the Minister have flexibility in the appointment of teachers and that Pt III of the Act might be "unnecessarily prescriptive" … in its application to the ad hoc appointments of relief teachers in diverse circumstances. This approach, with respect, emphasised a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose. In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose …The statutory purpose in this case was to be derived from a consideration of the scheme of the Act as a whole, the respective functions of Pts II and III of the Act, and the regulatory requirements of Pt IV of the Act.
>
> (citations and footnotes omitted).

24 In the context of the present case, it is respectfully concluded that the proper construction and application of ss 524 and 525 mirror the object and purpose of stand down provisions as summarised by Morling J in *Townsend v General Motors-Holden's Ltd* (1983) 4 IR 358. Contrary to the submissions advanced on behalf of the Unions, to so construe ss 524 and 525

is not the imposition upon these terms of a "*judicially constructed policy*" but rather a construction of these provisions by reference to their terms as discerned from the legislative context out of which these provisions emerged.

The object & purpose of compassionate leave

25 Sections 96 and 105 of the *Fair Work Act* both are to be found in Pt 2-2 of the *Fair Work Act*, namely that Part of the Act which sets forth the *National Employment Standards*.

26 Section 96 provides that for "*each year of service … an employee is entitled to 10 days of paid personal/carer's leave*". It is s 97 which confers the entitlement of an employee to access such leave and provides as follows:

> **Taking paid personal/carer's leave**
>
> An employee may take paid personal/carer's leave if the leave is taken:
>
> (a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or
>
> (b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
>
> (i) a personal illness, or personal injury, affecting the member; or
>
> (ii) an unexpected emergency affecting the member.
>
> …

27 Section 99 provides that if an employee takes such leave, the employer must pay the employee at the employee's base rate of pay. Section 107 provides for the giving of notice by an employee to the employer. See: *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034 at [344] to [346], (2016) 152 ALD 209 at 266-267 per Katzmann J. The entitlement to take such leave, it may be noted, is not contingent upon obtaining the employer's consent: *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140 at [8]. Siopis, Collier and Katzmann JJ there observed:

> [8] The entitlement to take leave is not contingent upon obtaining the employer's consent, either in advance of taking the leave or at all. It is, however, contingent on the employee complying with s 107. Section 107 imposes obligations on an employee to give his or her employer notice as soon as practicable (which may be a time after the leave has started), and to advise the employer of the period, or expected period, of the leave. If required to do so by the employer, the employee must also give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in s 97.

28 Section 105 provides as follows:

Taking compassionate leave

(1) An employee may take compassionate leave for a particular permissible occasion if the leave is taken:

(a) to spend time with the member of the employee's immediate family or household who has contracted or developed the personal illness, or sustained the personal injury, referred to in section 104; or

(b) after the death of the member of the employee's immediate family or household referred to in section 104.

(2) An employee may take compassionate leave for a particular permissible occasion as:

(a) a single continuous 2 day period; or

(b) 2 separate periods of 1 day each; or

(c) any separate periods to which the employee and his or her employer agree.

(3) If the permissible occasion is the contraction or development of a personal illness, or the sustaining of a personal injury, the employee may take the compassionate leave for that occasion at any time while the illness or injury persists.

…

29 The leave entitlement conferred by s 96 is a "*form of income protection*": *Mondelez v Australian Manufacturing Workers Union* [2019] FCAFC 138 at [148], (2019) 289 IR 29 at 57 ("*Mondelez*"). Bromberg and Rangiah JJ there observed:

[147] The entitlement to paid personal/carer's leave involves two components. The first is that ss 96(1) and 97 authorise the employee to be absent from work when the employee is unable to work because of a relevant illness or injury to the employee, or illness, injury or unexpected emergency affecting a member of the employee's immediate family or household. The second is that s 99 confers an entitlement upon the employee to be paid for such absences. In contrast, while s 352 prohibits dismissal of an employee who is temporarily absent from work because of illness or injury of a kind prescribed by regulation, that provision does not *authorise* the employee's absence, nor does it require that such an employee be *paid*.

[148] Section 96(1) of the FW Act must be understood as establishing a statutory form of income protection for all national system employees, other than casual employees. That protection is provided by *authorising* employees to be absent from work during periods of illness or injury and requiring employers to *pay* employees as if they had not been absent. The legislative purpose is to protect employees against loss of earnings when unable to work due to relevant illness, injury or unexpected emergency.

[149] However, there are limits upon the entitlement to paid personal/carer's leave. Section 96(1) itself limits the entitlement in two ways: firstly, it is limited to the number of days of leave that an employee has accrued; and secondly, the rate of accrual is limited to ten days for each year of service. Section 97 limits the purposes for which the leave may be taken. Section 99 limits payment to the base rate for the employee's ordinary hours of work in the period. The exercise of the entitlement is subject to the notice and evidence requirements imposed by s 107.

An application for special leave to appeal from this decision was granted in December 2019: *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2019] HCA Trans 250. Although the Unions were correct in their

submissions that *Mondelez* was not concerned with ss 524 and 525 of the *Fair Work Act*, it is a case which authoritatively addresses the role of s 96 in the legislative scheme.

An entitlement to leave whilst stood down

30 It is the intersection of the object and purpose of an ability to stand down employees, and the entitlement of those employees to access personal/carer's leave or compassionate leave, which is at the heart of the present proceeding.

31 And at the very heart of the ultimate conclusion, namely that an employee cannot access such leave entitlements whilst stood down, is the determination that such leave entitlements are an entitlement on the part of the employee to take leave from otherwise performing the work they are required to perform. It is the very characterisation of the leave entitlement conferred by s 96 as a "*form of income protection*" which presupposes that an employee is in receipt of income. As Qantas has repeatedly submitted, and correctly so, "*'income' is not being protected if there is no available or required work from which to derive income in the first place*".

32 The reference by Bromberg and Rangiah JJ in *Mondelez* to s 96 entitlements being a "*form of income protection*", it should be noted, was not an isolated reference to the character of the leave being an entitlement to be relieved from the obligation to otherwise attend work. The balance of their Honours' reasoning characterises the leave as relief from doing the work otherwise contractually required to be undertaken.

33 In issue in *Mondelez* was the correct construction and application of the reference in s 96(1) of the *Fair Work Act* to "*10 days of paid personal/carer's leave*…". The employer was advancing a submission that the phrase referred to a "*notional day*" such that a "*day*" was to be calculated by reference to an employee's average daily ordinary hours based on an assumed five-day working week; the respondent Union contended that the word referred to a calendar day. The difference assumed importance because "… *different constructions may produce different practical outcomes between, on the one hand, employees who work the same number of hours each day over a five-day week, and, on the other hand, employees who work shifts that compress their weekly hours into a shorter number of days, or who work different hours on different days of the week*": [2019] FCAFC at [6], (2019) 289 IR at 33.

34 In determining that the correct construction of s 96 refers to a "*working*" day, namely the portion of a 24 hour period that would otherwise be allotted to work, and in characterising the entitlement to leave, Bromberg and Rangiah JJ thus reasoned in part as follows:

> [93] However, in s 96(1) of the FW Act, "day" is used in the specific context of an authorised absence from work. ...

When concluding that the "*working day*" construction of s 96(1) was to be preferred and rejecting a submission put forward by Mondelez that the "*calendar day*" construction would "*lead to serious anomalies and unreasonable results that [could not] have been intended*" (at para [135]), Bromberg and Rangiah JJ reasoned in part as follows:

> [150] The ordinary, or "working day", construction of s 96(1) of the FW Act, is consistent with the purpose of providing, within the delineated limits, income protection for all part-time and full-time national system employees. Under that construction, all part-time and full-time employees, whatever their pattern of shifts, are entitled to payments reflecting the income they would have earned had they been able to work. To return to the example of employees who work 36 ordinary hours per week, whether an employee works 7.2 hours every day over five days, or 12-hour shifts over three days, under the "working day" construction, both will be paid at their base rate for the ordinary hours they would have worked if not for the illness or injury. Neither will lose that income. Further, the leave balance for each will be debited with one "working day" for each day of leave taken. The effect of this construction is that, subject to the delineated limits, no employee who is unable to work because of illness or injury will lose income.
>
> …
>
> [155] The recognition of paid personal/carer's leave as a form of income protection against loss of earnings during periods when employees are unable to work because of illness or injury supports the "working day" construction. That purpose demonstrates that the "anomalies" suggested by Mondelez are not unintended outcomes, but predictable consequences of the intended operation of s 96(1) of the FW Act.
>
> [156] Mondelez' submission that it is "inequitable" that an employee who works fewer, longer shifts effectively gets more personal/carer's leave than an employee who works a standard five-day week cannot be accepted. If both employees are able to take an equal number of "working days" of paid personal/carer's leave and neither loses income, how can there be inequity or unfairness to one of them? Neither has had to work on the relevant days. Neither has suffered a loss of earnings as a consequence of not working.
>
> [157] Mondelez' submission that the "working day" construction makes the treatment of the five standard day employee inequitable may also be tested in another way. Illness and injury generally strike randomly. On that basis, there is a greater chance that an employee who works a standard five-day week will fall ill on a day of work and have to take personal/carer's leave than an employee who works three days of longer shifts. Is it inequitable to the three-day employee that he or she is less likely than the five-day employee to use his or her accrued entitlement to paid personal/carer's leave? Since the leave is intended to act as a form of income protection during periods of inability to work due to illness or injury, rather than a mere entitlement to paid time off work, there is no inequity.
>
> [158] Mondelez' submission that the "working day" construction makes the treatment of the standard five-day employee inequitable is, in part, based upon a misconception of the nature of the entitlement under s 96(1) of the FW Act. Mondelez submits that, "An employee who works longer shifts effectively gets more personal/carer's leave than an employee who works a standard five-day week". The entitlement of employees under s 96(1) is *to* ten days personal/carer's leave for each year of service. It is not an entitlement *to take* ten days paid personal/carer's leave. The entitlement to take the leave arises only if one of the conditions in s 97 arises. Therefore, it cannot be said that any employee will necessarily "get" more personal/carer's leave than others. As we have said, randomness is inherent in the concept of personal/carer's leave. The leave

> may only be taken if the employee or a member of his or her family or household is ill or injured or there is an unexpected emergency. There may be almost as many variations in the need to take personal/carer's leave as there are employees. Under the "working day" construction of s 96(1), each employee accrues an entitlement to the same number of working days of paid personal/carer's leave for each year of service. That entitlement to leave may or may not eventually be used, and if used, it is uncertain whether it will be used in full or in part, and what part. Therefore, the mere entitlement of some employees to what may amount to a greater number of hours of paid personal/carer's leave than other employees, will not necessarily translate to a difference in the entitlement to take leave. However, each employee will be equally protected against his or her loss of earnings should the need to take leave arise. That does not seem inequitable.
>
> …
>
> [160] Mondelez submits that the "working day" construction leads to anomalies when accounting for part-days of paid personal/carer's leave. Mondelez submits that under that construction, if an employee has accrued a half-day of paid personal/carer's leave, then he or she is entitled to be absent for a whole shift while using only a half-day of leave. The basis of this argument is unclear….
>
> [161] The purpose of paid personal/carer's leave is as a form of income protection during periods when employees are unable to work because of illness or injury. That purpose supports the "working day" construction, and demonstrates that the "anomalies", "inequities" and "unreasonable results" that Mondelez submits are produced by that construction are not only anticipated consequences, but are more apparent than real.

And, similarly, their Honours further reasoned:

> [195] The overtime that an employee may otherwise have been required to work assists to explain why the accrual of paid personal/carer's leave under s 96(1) of the FW Act is expressed in terms of "days" and not "hours". As has been discussed, the entitlement to take such "leave" is an authorisation to be absent from work in the circumstances described in s 97. Since the basis of the entitlement is an inability to work because of illness, injury or unexpected emergency, the legislative intention must be to authorise employees to be absent, not only for their ordinary hours of work, but also any overtime hours they would otherwise have been required to work. That intention is given effect by the expression of the entitlement under s 96(1) in terms of "days". In other words, the employee is authorised to be absent from work for the portion of a 24 hour period that would otherwise be allotted to work — irrespective of whether that work is ordinary time, or overtime.

Common to all of this reasoning is the idea that s 96 operates as a form of "*income protection*" such that an employee who is entitled to and does in fact take leave is thereby protected from a loss of income. Also common to this reasoning is the idea that s 96 and personal/carer's leave entitlements are not of themselves a source of income due to the "*randomness*" inherent in the concept.

35 In circumstances where an employee has been lawfully stood down, and thus in circumstances where there is no work which the employee can perform and thereby derive income, an employee is not entitled to access the leave entitlements conferred by ss 96 or 105. To enable the employee to do so would go against the very object and purpose of conferring those entitlements – namely an entitlement to be relieved from the work which the employee was

otherwise required to perform. If there is no work available to be performed by the employee, there is no income and no protection against that which has not been lost. Conversely, to expose the employer to a liability to pay leave entitlements after lawfully having invoked the power to stand down an employee would defeat one of the two principal purposes of standing the employee down – namely, to protect the employer against such claims.

36 Such a conclusion is founded upon an understanding of the object and purpose of conferring the leave entitlements in the form of personal/carer's leave and is consistent with one of the principal purposes sought to be achieved by standing down an employee.

Section 525(b) – authorised to be absent

37 The Unions' reliance upon s 525(b) of the *Fair Work Act* leads to no different conclusion.

38 Section 525(b) provides that an employee is not taken to be stood down during a period when they are "*otherwise authorised to be absent from his or her employment*".

39 The submission of the Unions is that an employee who takes personal/carer's leave is not to be taken as having been stood down – the entitlement to take such leave is said to be an "*authorised absence*" or an *"authorised absence from work*". For the purposes of s 525(b), the submission was that an employee who takes leave pursuant to ss 97 or 105 was *"authorised to be absent from his or her employment*". The source of that authority was said to supported by the note to s 525, which provides that an "*employee may take*…". If that be correct, the submission is that the employee is thereafter not to be taken as having been stood down, and s 524(3) does not operate to relieve the employer of the obligation "*to make payments to the employee for that period*".

40 The submission is to be rejected.

41 The submission, with respect, fails at the outset.

42 Although s 525(b) is a statutory provision which is susceptible to the construction being urged by the Unions, it is respectfully concluded that the preferable construction is that s 525(b) is not directed to circumstances in which an employee is seeking to access "*leave*" entitlements of the kind now in issue. Section 525 is unquestionably a provision which seeks to "*carve out*" those circumstances in which an employee is "*taken [not] to be stood down*" and those circumstances in which those employees are to continue to receive payments from their employer. The first of those circumstances arises where an employer has "*authorised*" the employee to take "*paid or unpaid leave*". Not surprisingly, s 525(a) permits an employer the

choice of "*authorising*" an employee to take such leave. Although a purpose of permitting an employer to stand down employees is to alleviate the financial necessity to continue to pay employees, if an employer wishes to do so, that is a matter for the employer. Section 525(b), by way of contrast, does not refer to any choice open to an employer – s 525(b) makes no reference to an "*authority*" to be absent having to emanate from the employer. Properly construed, it is concluded that s 525(b) is directed to those circumstances in which provisions of the *Fair Work Act* themselves "*authorise*" or "*entitle*" the employee to be absent. Examples of such provisions are to be found in ss 108 (eligible community service activity); s 111 (jury service) and s 114 (public holidays). Section 108 (by way of example) provides as follows:

> **Entitlement to be absent from employment for engaging in eligible community service activity**
>
> An employee who engages in an eligible community service activity is entitled to be absent from his or her employment for a period if:
>
> (a) the period consists of one or more of the following:
>
> (i) time when the employee engages in the activity;
>
> (ii) reasonable travelling time associated with the activity;
>
> (iii) reasonable rest time immediately following the activity; and
>
> (b) unless the activity is jury service—the employee's absence is reasonable in all the circumstances.

Section 114(1), likewise, employs the language of an employee being "*entitled to be absent from his or her employment ...*".

43 This construction of s 525(b) thus gives effect to the difference between taking "*leave*" as opposed to an entitlement to be "*absent from employment…*". The taking of "*compassionate leave*" (for example) pursuant to s 105 is the exercise by an employee of the entitlement conferred by s 104 and is the exercise by an employee of an entitlement to be absent from the "*work*" which he would otherwise be required to attend. Similarly, the taking of personal/carer's leave (s 97) is the exercise by an employee of an entitlement to be absent from "*work*" because they are (for example) personally unwell. In both cases the employee is required to notify their employer (s 107). When lawfully taking leave, the employee is "*absent*", but nevertheless entitled to continue to receive income. In the absence of the "*income protection*" afforded by the leave entitlements, the employee would otherwise suffer loss by reason of their non-attendance at "*work*". Whilst stood down the employee has no work to attend – but their contract of "*employment*" persists. In circumstances, moreover, where there is no work for an employee to perform and where they have been stood down, an employee

presumably need not notify their employer if they are unwell and not "*fit for work*" (s 97(a)). Whether or not they are fit for work, there is no work for them to do. To permit such an employee to nevertheless access personal/carer's leave whilst stood down would be to allow them to "*cash out*" their leave entitlements contrary to the prohibition in s 100.

44 Section 525 thus addresses those circumstances in which an employee may take "*leave*" and thereby is taken not to have been stood down (s 525(a)), and those other circumstances not directed to the taking of leave, but rather where the source of authority to be absent from work is to be found in those provisions where the Legislature has itself stated that an employee (for example) "*is entitled to be absent from his or her employment*".

45 An employee who has been stood down and who seeks to take personal carer's leave or compassionate leave is, accordingly, not "*authorised to be absent from his or her employment*" for the purposes of s 525(b).

Enterprise Agreement 10 & clauses 18 & 29

46 In the Allied Services Union, AWU and AMWU proceeding, some employees were stood down pursuant to cl 18 of *Enterprise Agreement 10* and other employees were stood down pursuant to s 524 of the *Fair Work Act*. It was common ground that cl 18 applied to some employees and further common ground that cl 18 fell within s 524(2) of the *Fair Work Act* – namely *Enterprise Agreement 10* was an enterprise agreement which applied to those employees (s 524(2)(a)) and cl 18 "*provided for the employer to stand down the employee*" (s 525(2)(b)) – such that s 524(1) was precluded from operating in respect to those employees.

47 The entitlement of these employees to access their leave entitlements is to be found in cl 29 of *Enterprise Agreement 10* or ss 97 and 105 of the *Fair Work Act*.

48 But no different conclusion is reached if the source of power to stand down employees and the entitlement of employees to access their leave entitlements is to be found in *Enterprise Agreement 10* as opposed to the *Fair Work Act*. And no different conclusion is reached if reference is made to cl 29.

49 Clause 18 provides (in part) as follows:

> **STAND DOWN OF EMPLOYEES**
>
> 18.1 The following clause applies only to employees employed in classifications set out in Tables 1A and 1B and 3 of Appendix A.

> 18.1.1 Subject to the following, Qantas may deduct payment for any day an employee cannot be usefully employed because of a strike or stoppage of work through any cause for which Qantas cannot reasonably be held responsible.
>
> 18.1.2 When Qantas proposes to stand down an employee, it must notify the employee. During the period such notification remains in force the employee is deemed to be stood down for the purpose of this subclause.
>
> 18.1.3 An employee who is stood down must be treated for all purposes (other than payment of wages) as having continuity of service and employment notwithstanding such standing down.
>
> …
>
> 18.1.8 An employee who Qantas proposes to stand down may elect to take, for the period of the stand down only and for such further time as is reasonably required for the employee to return to his or her normal place of abode, any annual leave to which the employee is entitled or which is accruing to the employee, and upon such election being exercised the employee's annual leave must be reduced accordingly.
>
> 18.1.9 Qantas must not deduct payment for any day prescribed by the Agreement or any agreement affecting Qantas as a public holiday which occurs during the period of stand down of an employee (other than an employee who is engaged in a strike or stoppage at any establishment of Qantas) except to the extent that such employee has become entitled to payment for the holiday in other employment. An employee claiming for a holiday must, if required by Qantas, furnish a statutory declaration setting out details of any other employment during this period and the remuneration received therein.

Clause 18, it may be noted, employs much of the "*curious language*" referred to by J B Sweeney J in *Re Application by Building Workers' Industrial Union of Australia* (1979) 41 FLR at 193. But it was common ground in the present case that cl 18 does in fact confer a right upon an employer to stand down an employee without pay in circumstances where there is no work the employee can usefully perform.

50 Justice J B Sweeney nevertheless also referred with approval to the following observations of the Full Bench of the Industrial Commission in relation to a clause permitting an employer to "*deduct*" monies (at 196):

> The earlier judgment of Richards J. to which I have referred [(*Re Iron and Steel Works Employees (Australian Iron and Steel Ltd – Port Kembla Award*, (1956) AR (NSW) 615] was considered by a Full Bench of the Industrial Commission of New South Wales in *Re Steel Works Employees (Broken Hill Pty Co Ltd) (No. 1)* when the Commission said: "The existing provision in this regard is expressed in a somewhat curious way: 'This clause shall not affect the right of the Company to deduct payment for any day or portion thereof during which the employee is stood down by the Company as the result of refusal of duty, malingering, inefficiency, neglect of duty, or misconduct on the part of the employee....' Such wording might suggest that, independently of the award provision, the company had a right to deduct payment in respect of time during which an employee was stood down by the company for the specified reasons. But no such right would have existed at common law. In *Re Dispute at Metal Manufactures Ltd. (Re Hutchinson)* [(1948) AR (NSW) 818] a Full Bench of the Commission had referred to and acted upon an English decision to that effect. It would seem that the provision as to standing down made by the steel industry awards was intended not to preserve an existing right of the employers but to confer a new right. Richards J. so held in *Re Iron and*

Steel Works Employees (Australian Iron and Steel Ltd. – Port Kembla) Award"…

(footnotes omitted)

51 Clause 18, by its terms, only applies to those employees "*employed in classifications set out in Tables 1A and 1B and 3 of Appendix A*" to the *Agreement*: cl 18.1. The clause thereafter proceeds to (*inter alia*) provide for the giving of notice to employees and to identify those circumstances in which Qantas "*may deduct payments*" or rather "*must not deduct payments*": cll 18.1.1 and 18.1.9.

52 Clause 18 was said, on behalf of the Allied Services Union, the AWU and the AMWU, to be an exhaustive statement of the rights of the employer and employees in circumstances where employees are stood down pursuant to that power. Nothing in cl 18, it was said, deprived an employee of an entitlement to access benefits conferred by cl 29. Rather, the inference from those two clauses was said to be an entitlement to access the cl 29 entitlements whilst stood down.

53 But cl 18 evidences no different object or purpose to that encapsulated by ss 524 and 525 of the *Fair Work Act*. In particular, cll 18.1.1 and 18.1.9 merely confer a right to deduct payments in the circumstances there set out – a right which an employer would not otherwise have: cf. *Re Steel Works Employees (Broken Hill Pty Co Ltd) (No. 1)* (1962) AR (NSW) 334.

54 That the objects and purposes of the stand down provisions found in ss 524 and 525, and the objects and purposes of the leave entitlements in issue in this proceeding, remain common to an understanding of cll 18 and 29 of *Enterprise Agreement 10*, is evident if reference is made to the terms of cl 29. That clause provides in part as follows:

PERSONAL LEAVE, CARER'S LEAVE AND COMPANSSIONATE LEAVE

29.1 Amount of paid sick leave

29.1.1 Paid personal leave is available to an employee, other than a casual, when he or she is absent due to personal illness or injury.

…

29.3 Compassionate leave

29.3.1 **Bereavement Leave**

29.3.1.1 An employee, other than a casual employee, is entitled to three days of paid bereavement leave on each occasion of the death of a member of the employee's immediate family or household.

29.3.1.2 Employees must produce satisfactory evidence of the death to Qantas.

…

Those clauses are again totally consistent with such leave entitlements as are thereby conferred being a form of "*income protection*" (cf. *Mondelez* [2019] FCAFC, (2019) 289 IR). The term "*absent*" in cl 29.1.1, for example, refers to an employee being absent from their place of employment. If there is no available work, it would be curious to describe an employee as "*absent*" from a workplace which they were not required to attend because they had been stood down.

55 Clauses 18 and 29 cannot operate to confer an entitlement to access personal/carer's leave or compassionate leave entitlements. Clause 18 authorises the "*deduction*" of monies – but where an employee has been stood down there is no relevant payment to be deducted because there is no entitlement to payment. Moreover, it would be a questionable conclusion if s 525 were an exception to s 524 which did not permit an employee to access leave entitlements of the kind now in issue, but an employee could access those entitlements under an enterprise agreement. In the absence of clear language in an enterprise agreement, such a departure from that provided for in the *Fair Work Act* should be resisted.

56 The argument is rejected that those employees who have been stood down pursuant to cl 18 of *Enterprise Agreement 10* may access personal/carer's leave or compassionate leave. Nothing in cl 18, with respect, runs counter to a fundamental purpose of a right to stand down employees, namely the objective of thereby providing "*financial relief*" to employers (cf. *Townsend v General Motors-Holden's Ltd* (1983) 4 IR 358 at 368).

CONCLUSIONS

57 Given the importance of resolving the present dispute as quickly as possible, time has not permitted of a greater and more detailed consideration of the relevant authorities.

58 But the conclusion which has been reached is one which is respectfully considered to be one supported by relevant terms of the *Fair Work Act*; the decision in *Mondelez* and general principle. In such circumstances, the preferable course is to publish the decision and make orders sooner rather than later.

59 In both proceedings, the *Originating Applications* should be dismissed.

THE ORDERS OF THE COURT ARE:

In matter NSD 376 of 2020:

2. The proceeding is dismissed.

In matter NSD 388 of 2020:

1. The proceeding is dismissed.

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate: 

Dated: 18 May 2020