FEDERAL COURT OF AUSTRALIA

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited [2020] FCAFC 205

Appeal from:	*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited* [2020] FCA 656
File number:	NSD 621 of 2020
Judgment of:	**RARES, BROMBERG AND COLVIN JJ**
Date of judgment:	27 November 2020
Catchwords:	**INDUSTRIAL LAW** – statutory construction – employees stood down under s 524(1) of the *Fair Work Act 2009* (Cth) and under enterprise agreement because of stoppage of work for which employer could not reasonably be held responsible – exigencies of the COVID-19 pandemic – paid personal/carer's leave or compassionate leave under ss 96 or 106 of the Act – whether employee not taken to be stood down under ss 524(3) and 525 if taking personal/carer's or compassionate leave during period of stand down – whether taking of personal/carer's or compassionate leave authorised by employer or otherwise authorises employee to be absent form work pursuant to s 525 –*Held*: employees stood down not entitled to personal/carer's leave or compassionate leave during stand down period – appeal dismissed
Legislation:	*Fair Work Act 2009* (Cth) ss 22, 61, 62, 79, 89, 106, 108, 114, 130, 524, 525, 526, Division 3 Part 3-5, Division 8 Part 2-2 *Workplace Relations Act 1996* (Cth) s 691A *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth)
Cases cited:	*Adams v Director of the Fair Building Industry Inspectorate* [2017] FCAFC 228; (2017) 258 FCR 257 *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 254 CLR 247 *Amalgamated Engineering Union v Metal Trades Employers Association* (1942) 47 CAR 615 *Australian Mines and Metals Association Inc v*

Construction, Forestry, Maritime, Mining and Energy Union [2018] FCAFC 223; (2018) 268 FCR 128

Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435

Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union (2019) 270 FCR 359

Carr v The State of Western Australia [2007] HCA 47; (2007) 232 CLR 138

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross [2012] HCA 56; (2012) 248 CLR 378

Coal & Allied Mining Services Pty Ltd v MacPherson [2010] FCAFC 83; (2010) 185 FCR 383

Coleman v Power (2004) 220 CLR 1

Concut Pty Ltd v Worrell [2000] HCA 64

Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal) [2020] FCAFC 192

Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Ltd [2017] FCAFC 35; (2017) 249 FCR 495

Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40; (2004) 221 CLR 309

Food Preservers Union of Australia v All States Ready Foods (1976) 182 CAR 391

Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd [2005] HCA 9; (2005) 222 CLR 194

Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2020] HCA 29

Nominal Defendant v GLG Australia Pty Ltd [2006] HCA 11; (2006) 228 CLR 529

Pickard v John Heine & Sons Limited ff(1924) 35 CLR 1

R v A2 [2019] HCA 3

Re Rubber Workers Award 1947 [1949] 65 CAR 814

Re Textile Industry (Woollen and Worsted Section) Award 1950 (1963) 5 FLR 328

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362

Taylor v Attorney General (Commonwealth) [2019] HCA 30

Taylor v The Owners - Strata Plan No 11564 [2014] HCA 9; (2014) 253 CLR 531

The Queen v A2 [2019] HCA 35

	Townsend v General Motors-Holden's Ltd [1983] FCA 212; (1983) 4 IR 358 *Vehicle Builders Employees Federation of Australia v British Motor Corporation (Aust) Pty Ltd* (1966) 8 FLR 70 *Vehicle Builders Employees Federation of Australia v British Motor Corporation (Aust.) Pty Ltd* (1966) 8 FLR 70 *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 563
Division:	Fair Work Division
Registry:	New South Wales
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	189
Date of hearing:	30 September 2020
Counsel for the Appellants:	Mr M Gibian SC with Mr AM Slevin
Solicitor for the Appellants:	The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and the Transport Workers' Union
Counsel for the Respondent:	Mr JT Gleeson SC with Mr M Follett
Solicitor for the Respondent:	Ashurst Australia

ORDERS

NSD 621 of 2020

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

ORDER MADE BY:	**RARES, BROMBERG AND COLVIN JJ**
DATE OF ORDER:	**27 NOVEMBER 2020**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

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

REASONS FOR JUDGMENT

RARES AND COLVIN JJ:

1 Qantas Airways Limited (**Qantas**) operates an airline. Faced with the unprecedented consequences for its business of a global pandemic, in March this year it stood down about 20,000 of its ground based employees without pay. The stand down is ongoing. An issue has arisen as to whether, during the stand down, employees who have been stood down can take paid personal/carer's leave (**PPC leave**) or compassionate leave.

2 Section 524(1) of the *Fair Work Act 2009* (Cth) (**Act**) provides that employees may be stood down without pay in certain circumstances. The stand down provision does not apply where an enterprise agreement or contract of employment provides for stand down in the same circumstances: s 524(2). In those instances, the provisions of the enterprise agreement or contract of employment must be given effect.

3 Relevantly for present purposes, the stand down has been effected either in the exercise of the statutory right conferred by s 524 or under cl 18 of the *Qantas Airways Limited (AWU, AMWU, CEPU) Enterprise Agreement 10* (**EA**).

4 It is common ground that the provisions of an enterprise agreement or contract of employment could not operate so as to afford employees lesser protection in the event of a stand down than would apply where the statutory stand down power was exercised. So, if under the Act the employees can take PPC leave and compassionate leave then employees covered by enterprise agreements must also be entitled to do so.

The statutory stand down provisions

5 The statutory authority to stand down an employee is conferred by s 524(1) in the following terms:

> 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.

6 The consequence for payments to the employee of the stand down is stated in s 524(3):

> If an employer stands down an employee during [such] a period …, the employer is not required to make payments to the employee for that period.

7 Section 525 then provides:

> 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.

8 There is a note to s 525 which states:

> 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 s 524(1).

9 As the Act is to be construed according to the *Acts Interpretation Act 1901* (Cth) as in force as at 25 June 2009, the note is not taken to be part of the Act: *Adams v Director of the Fair Building Industry Inspectorate* [2017] FCAFC 228; (2017) 258 FCR 257 at [27]-[31]. However, the note may be considered as extrinsic material: *Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Ltd* [2017] FCAFC 35; (2017) 249 FCR 495 at [118].

The statutory right to PPC leave and compassionate leave

10 The statutory entitlement to PPC leave is conferred by s 96(1) of the Act. In *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29, the High Court considered the construction of s 96(1). The majority (Kiefel CJ, Nettle and Gordon JJ, with whose orders Edelman J agreed in separate reasons) held that s 96(1) created a right for an employee to 10 days of PPC leave for each year of service with the employer equivalent to the amount of the employee's ordinary hours of work in a week over a fortnightly period where a 'day', for the purposes of s 96(1), referred to a 'notional day' consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two week (fortnightly) period. Kiefel CJ, Nettle and Gordon JJ explained that the statutory scheme conferred 'leave entitlements by reference to an employee's ordinary hours of work, rather than the number of days worked by the employee. The purpose of s 96 is to protect employees against **loss of earnings** and it does that by reference to their ordinary hours of work': at [23]) (emphasis added). Where there is no applicable award or enterprise agreement, the Act defines 'ordinary hours of work' in s 20 as either the hours agreed by the employee and

his or her national system employer (s 20(1)) or, if they have not agreed on the hours, those hours provided in s 20(2). The Explanatory Memorandum (at 64) that their Honours set out (at [30]) said relevantly:

> Similarly, the requirement to pay an employee for their absence on the basis of their ordinary hours of work for the period of the absence **means that the employee is entitled to be paid for his or her ordinary hours of work on the days in the week they would have worked but for being absent from work on paid personal/carer's leave (ie, excluding overtime).**
>
> (emphasis added)

11 Importantly, as their Honours emphasised at [19]–[20]:

> … Consistent with the stated objects of the *Fair Work Act*, s 96(1) (as part of the NES) is intended to provide fair, relevant and enforceable minimum terms and conditions.
>
> Payment of the leave is addressed in s 99. It provides:
>
> > 'If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's 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*.' (emphasis added)
>
> That section provides the *rate* at which the leave is paid: it is the employee's *base rate of pay* for their *ordinary hours of work* in the *period*. The term 'base rate of pay' is relevantly defined in s 16 to be 'the rate of pay payable to the employee for his or her ordinary hours of work'. Thus, both ss 96 and 99 compel the conclusion that it is necessary to ascertain an employee's *ordinary hours of work* and the rate of pay payable for that work in order for the employee to be paid for that leave. Moreover, regardless of the period of leave taken – hours or days – employees will be paid at that rate for the *hours* that they are absent from work.
>
> (emphasis in original)

12 Under s 104 an employee is entitled to two days of compassionate leave in respect of a 'permissible occasion' (as that term is defined). The employee may take compassionate leave for a particular permissible occasion under s 105(1) if the leave is taken to spend time with a member of his or her immediate family or household who has contracted or developed a life threatening illness or sustained a life threatening personal injury or dies. The employee may take such leave as a single continuous two day period, two separate periods of one day or separate periods as agreed with his or her employer.

13 Similarly to s 96(1), s 106 provides that where an employee takes a period of compassionate 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**' (emphasis added).

14 Since preparing these reasons in draft, we have the considerable benefit of receiving a draft of the reasons of Bromberg J. Those reasons well expose the issues of statutory construction that this case presents. With respect, we agree with the analysis of Bromberg J, as to how the concept of ordinary hours of work is deployed in the provisions of the *Fair Work Act* concerned with leave and the way in which such matters should usually be viewed in the context of modern industrial practice. However, we take a different view as to the significance of those matters when it comes to dealing with the stand down provisions which contain their own provisions as to payments to be made during a stand down and as to how the provisions intersect with leave and absence from employment during the stand down. Significantly, they do so by adopting a form of language not to be found in the earlier award or statutory provisions dealing with stand down.

Decision of the primary judge

15 The present appellants commenced proceedings seeking declaratory relief to the effect that employees who had been stood down by Qantas were entitled to access PPC leave and compassionate leave entitlements conferred by the Act or relevant enterprise agreements during the stand down. Before the primary judge, it was common ground that the employees had been lawfully stood down. The argument advanced in support of the claim to declaratory relief was, in effect, that relevant leave provisions and s 525 operated in manner that allowed the employees to take PPC leave or compassionate leave during the stand down.

16 The primary judge dismissed the claim for declaratory relief: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Limited* [2020] FCA 656. His Honour reasoned that in circumstances where an employee has been lawfully stood down, there is no work which the employee can perform so as to derive income and therefore there is no loss of income to be protected. Therefore, the circumstances necessary for PPC leave or compassionate leave to be taken do not arise. Further, to allow employees to take such leave during a period when they were not otherwise entitled to any income would defeat one of the principal purposes of the stand down: at [35].

17 His Honour found that s 525(b) is not directed to circumstances in which an employee is seeking to access leave entitlements such as PPC leave and compassionate leave: at [42]. Rather, it is directed to instances where by the Act or industrial instrument there is authority given to an employee to be absent for reasons other than the exercise of an entitlement to take leave.

The grounds of appeal

18 The grounds raised by the notices of appeal reflect the manner in which the case was conducted before the primary judge, namely on the basis that the employees had been lawfully stood down. They were expressed in terms that reflected that concession. Nevertheless, the written submissions filed in support of those grounds flirted with an argument that employees who were exercising an entitlement to take PPC leave or compassionate leave were not stood down. The contention advanced was to the effect that such employees did not fall within s 524(1) because when the statutory conditions for that leave existed, they were entitled to leave and therefore it could not be said that they could not usefully be employed for one of the three specified circumstances. The fact that they were entitled to take leave relieved them of their obligation to present for work and therefore, so it was said, the requisite causal connection between one of the specified circumstances and their inability to be employed could not be established.

19 However, in the appellants' written submissions in reply, those submissions were recast. The appellants stated that they 'do not contend for a conclusion that an employee who takes [PPC leave] or compassionate leave cannot be stood down'. Rather, it was said that s 525 operated so that a person who was taking such leave was not taken to be stood down.

20 Therefore, the issues in the appeal were concerned with the proper construction of s 525 in circumstances where it was accepted that the employees had been lawfully stood down under s 524(1).

21 Nevertheless, the manner in which the issues were joined gave rise to one uncertainty. Qantas accepted that employees who were stood down could take annual leave and long service leave during the stand down period. Further, when the stand down was notified, it had informed employees that, in any period during the stand down when they were taking annual leave or long service leave, they were 'taken not to be stood down for that period'. Employees were also told that the same position applied in any period when they were taking paid parental leave.

22 The fact that these statements reflect the language of s 525 indicates that Qantas is of the view that the stand down applies to all employees who are employed to undertake work of a kind which means they cannot be usefully be employed at all because of one of the three circumstances specified in s 524(1). As a result, on its view, all leave entitlements may only be exercised where the leave has been authorised by Qantas under s 525(a). Therefore, it appears that the position of Qantas is that it has authorised the taking of annual leave, long

service leave and paid parental leave by its employees during the stand down and it is only by reason of that authority that employees may take such leave.

23 However, for reasons expressed below, it is by no means clear that the nature of a stand down under s 524 means that it will apply to an employee who exercises an entitlement to take leave of a kind that does not depend upon the existence of facts or circumstances of a particular kind that justify or explain an absence from work. Such an entitlement involves the exercise of an accrued right to paid leave whatever the circumstances. An employee who seeks to take annual leave or long service leave does not need to demonstrate any inability to undertake work or any reason for being excused from attending work. The employee has an entitlement to paid leave that accrues as a financial benefit that must be paid for by the employer even if the leave is not taken during the course of employment. Neither annual leave nor long service leave is given in order to authorise an employee not to present in a state of readiness for work by reason of a particular circumstance justifying the employee's absence.

24 If the term stand down only applies to employees who are under an obligation to present in a state of readiness for work (from which they must be excused by exercising an entitlement to leave or by reason of some other permitted absence) then that may have significance for the issue of construction on which the parties are joined. If indeed, the stand down provision does not apply at any time that an employee is exercising an entitlement to annual leave or long service leave then that may be a factor that is relevant when considering the competing constructions advanced by the parties.

25 The parties cannot make a concession that would bind this Court as to the proper construction of the statutory provisions. For that reason, even though all parties accept that the employees have been lawfully stood down and, on that basis, seek to reason as to the outcome by advancing competing contentions as to the proper construction of s 525, in evaluating the merits of the competing contentions concerning the entitlement to take PPC leave and compassionate leave during a stand down, the Court must place the terms of s 525 in their proper statutory context.

The issue as to the proper construction of s 525

26 The appellants contend that s 525 effects a very broad exclusion from the operation of any stand down. They say that s 525(a) refers only to instances where an employee is taking leave under the ad hoc authority of the employer rather than in the exercise of an entitlement to take leave. They then contend that as s 525(b) comprises anyone who is 'otherwise authorised' to

be absent. It is said to include those persons exercising leave *entitlements* however conferred, including PPC leave and compassionate leave and other types of leave that form part of the National Employment Standards (**NES**) as well as instances where the Act *authorises the employee's absence*. They say that the Act uses the terms 'leave' and 'authorised absence' interchangeably or at least to mean the same thing, namely a form of authority to be absent from work. The appellants say that s 525(b) also extends to include *other leave entitlements or authorised absences* conferred under particular industrial instruments.

27 On the appellants' approach, the reference in the note to s 525 to the fact that an employee 'may take paid or unpaid leave' is said to reflect that it is a matter for the employee whether to exercise the entitlement.

28 Qantas contends that s 525 effects a more limited exclusion by deeming certain employees not to be stood down despite the operation of s 524(1). It says that s 525(a) has the effect that, during the period of a stand down, all entitlements to leave are made subject to a requirement that the leave be authorised by the employer. This is said to be effected by s 525 only deeming employees who are taking authorised leave to not be stood down. Necessarily implicit in this interpretation is a view that even accrued entitlements to leave that do not depend upon the existence of facts of a kind that would provide a reason for not attending work (such as annual leave and long service leave) must be authorised by the employer if they are to be exercised during a stand down. As to s 525(b), it is said to apply where there are provisions in the Act or any industrial instrument that authorise an employee to be absent but does not include an entitlement to leave that might be exercised if there was no stand down. Therefore, category (b) is said to be based upon a distinction between leave and authorised absence.

29 On this approach, the purpose of the note to s 525 is to make clear that the paid or unpaid leave that may be taken can be for 'all or part of the period' of the stand down that would otherwise take effect if leave was not taken and the reference to 'may' reflects the need for the authority of the employer before the leave may be taken.

Proper approach to statutory construction

30 The principles to be applied when construing legislative provisions are well established. As stated by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14]:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose.

> Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> (Footnotes omitted)

31 Consideration of context must be understood in its widest sense and is undertaken at the first stage of the process. Although context may provide a reason to depart from the ordinary meaning and usage of the words, a very general purpose will not provide much context and the nature of the task, which requires the interpretation of the language of the statute, must not be lost in the process of contextual construction: *The Queen v A2* (2019) [2019] HCA 35; 373 ALR 214 at [32]-[37] (Kiefel CJ and Keane J).

32 Care must be taken to ensure that any purpose identified as a guide to the resolution of ambiguity in a particular case is specific enough to be deployed in that way: *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11; (2006) 228 CLR 529. Also, the Court must not conjure a purpose that is more specific than the context discloses and then use that purpose to construe the legislation: *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [26]; and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194 at [21].

33 As was noted in *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223; (2018) 268 FCR 128 at [80]-[84] (Allsop CJ, Griffiths and O'Callaghan JJ), there are challenges in applying a purposive approach where it is apparent that interacting purposes were balanced in settling upon the particular terms of legislative provisions. This is evidently the case with a provision of the kind presently under consideration. As the object of the Act in s 3 provides, the Act seeks to achieve a balance between the interests of employers and employees. It has done so by conferring minimum entitlements upon employees covered by the Act's provisions. Many of those entitlements manifest in obligations which circumscribe the payments to be made by employers to employees. However, the Act then relieves employers of the obligation to make payments to employees in the specific circumstances set out in the stand down provisions. In those circumstances, it is difficult to discern from the legislation as a whole a purpose that

would aid in determining a construction issue that requires a conclusion to be reached as to where in ss 524 and 525 the balance between the interests of employers and employees has been struck.

34 Where there is no available indication of a specific purpose that aids the construction, the focus must be upon the textual meaning which requires consideration of the text in the context of the legislation as a whole: *Carr v The State of Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [6].

35 Particularly in a field like industrial law where there is a history of legislative provisions that deploy concepts that have their origins in earlier statutes the terms of which have been interpreted by the Courts to form a body of associated law, the pre-existing law may provide part of the context in which to consider the statutory provisions: *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 at [165] (Gummow, Hayne and Heydon JJ); and *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 254 CLR 247 at [42]. Terms may be carried into legislation on the basis that they have acquired a particular meaning through past usage within the particular context being addressed by the legislation or may be adopted to change or alter the effect of past approaches. In either case, the context may be important in determining the intended meaning.

The consequences of the competing constructions

36 If the position advanced by the appellants is adopted then an employee who is entitled to take PPC leave for reasons of personal illness or carer responsibilities will be paid during a stand down, but a person who is not entitled to such leave will receive no payment. As the primary judge observed, the result would be that the protection against loss of income afforded by the entitlement to PPC leave would actually create an entitlement to income which the employee otherwise did not enjoy during the stand down. It would not protect the employee's right to income; rather, it would increase the employee's income at a time when there was not otherwise a right to receive such income. The same may be said of compassionate leave for which, ordinarily, there is also an entitlement to be paid whilst on leave: s 106.

37 The appellants' construction would also mean that s 525(b) would allow an employee to exercise all leave entitlements during a period of stand down despite not being authorised to do so by the employer. True it is that the exercise of those entitlements, in the ordinary course, does not require any authority from the employer (although there may need to be some agreement reached with the employer as to a particular matter such as the precise timing and

the employer must act reasonably as to such matters). However, if s 525(b) is given the wide ambit contended for by the appellants then the qualification to s 525(a) requiring authority for paid or unpaid leave may be thought to serve little purpose. Further, given the terms of s 525(a), it might be expected that the language of s 525(b) would be expressed in terms that referred positively to the case where an employee was exercising an entitlement to take paid or unpaid leave if that was the intention rather than capturing that right in what would be the more obscure terminology of authorised absence.

38 The result of the appellants' approach would be that despite s 525 referring to the authority of the employer in s 525(a) and being 'otherwise authorised' in s 525(b), the provision would take out of the stand down all employees who were exercising entitlements of a kind that they could exercise if there was no stand down irrespective of whether they were 'authorised' to do so. It would confine the general relief afforded to employers by s 524(3) in the event of stand down to the making of payments in circumstances where the employees otherwise had no entitlement to paid leave or to be paid for not being available to work because the Act, or an industrial agreement, authorised their absence in the particular circumstances.

39 Finally, on the appellants' construction, even though the stand down applied to a period where an employee could not usefully be employed (for one of the three specified reasons) and the employer was not required to make payments during that period, a person who could not usefully be employed would nevertheless be entitled to be paid because they had a paid leave entitlement of a kind that was designed to excuse them from presenting for work when they were otherwise required to do so. As was submitted for Qantas, it would be somewhat paradoxical if a provision that relieved an employer from making payments to employees during a period when they cannot usefully be employed operated in a manner that meant that employees could take paid leave even though there was no work for them to perform and no potential to earn income.

40 On the other hand, the construction advanced by Qantas would impose a marked qualification upon the minimum entitlements conferred by the Act. In that regard, s 524 does not purport to end or suspend the employment relationship. Rather, it confers a specific and circumscribed right that may be exercised by an employer during the currency of employment. The employee continues to be employed upon the same terms and conditions which, for employees covered by the Act, must include the NES guaranteed by the Act. Those rights include the entitlements to PPC leave and paid compassionate leave. The NES cannot be displaced even by an

enterprise agreement: s 61(1). On the construction contended for by Qantas those entitlements, including entitlements to annual leave and long service leave (being entitlements that depend solely upon length of service and agreement of the employer as to when they may be taken, not any fact that would excuse an employee from presenting for work) are all made subject to the need for an authority to be given by the employer.

41 In consequence, a person who happened to be on annual leave at the time that a stand down occurred would not have the right to continue to be paid during that period of arranged leave unless the employer gave its authority for the continued enjoyment of that right to be paid. Because Qantas accepted that paid annual leave and long service leave of the affected employees could be taken, it was not clear what would happen on its construction if an employer did not approve paid leave during a stand down. On the face of s 524(3) an employer was not required to make any payments to the stood down employee. There is no provision in the Act (such as there is in the case of personal illness during a period of annual leave) whereby the approved annual leave may be replaced by a period of absence due to stand down, if it occurred during annual leave.

42 Further, a person who was already on PPC leave for an existing illness or to fulfil carer responsibilities when the stand down occurred would not be entitled to be paid during the stand down.

43 The case for Qantas, if accepted, would also mean that a person who relied upon a permission to be absent that was expressed in terms of an authority to be absent from employment, rather than as an entitlement to take leave, would be taken not to be stood down. So, a person would be paid for public holidays during a stand down because s 114(1) is expressed in terms of an entitlement to be absent on a public holiday. Precisely how s 114(2) would apply (which provides for an employer to be able to request an employee to work on a public holiday) is unclear. Perhaps the stand down means that the request cannot be made. Alternatively, perhaps an employee who could reasonably be subjected to such a request is not entitled to be paid on the public holiday on the basis that they are not 'authorised to be absent' from their employment.

44 Further, the distinction between leave and authorised absence, as maintained by Qantas, if accepted, produces the result that it is necessary to resolve whether a permitted absence for reasons of community service is an authorised absence from employment or an entitlement to leave. Section 108 provides that an employee who engages in 'an eligible community service activity' (which includes jury service) is entitled to absence from employment. However, s 108

forms part of Division 8 of Part 2-2 of the Act which is headed 'Community service leave'. Further, s 22 describes the periods of employment that do not count as service and in doing so refers to 'a period of absence under Division 8 of Part 2-2 (which deals with community service leave)' and s 61(2) in describing the NES refers to 'community service leave (Division 8)'. There are like references in s 79 and s 89(2) which deal with interactions between various leave provisions. Given the context of those references, there is uncertainty as to whether, in cases where the employee is absent for reasons of community service, the employee is on an authorised absence or is taking community leave.

45 It is difficult to identify why the Act might treat a permitted absence from employment as being materially different in character to an entitlement to leave when it comes to the payments to be made to employees consequent upon a stand down. Even more so in circumstances where, in the case of s 108, it may be said to have failed to have maintained any such distinction in the language used to refer to an absence for reasons of community service.

The meaning of stand down

46 The term 'stand down' is not defined in the Act. In ordinary usage, it is a compendious term that has two main meanings. It can refer to the act of withdrawing or resigning from an appointed or elected position. It can also be used to describe the act of release from a duty or requirement to be in a state of preparedness, readiness or alert. So, a person may stand down as the Chair of a meeting, as a director of a company or as the leader of a political party. A soldier or a sentry may be instructed to stand down. An application before the Court may be stood down or a witness may be stood down from giving evidence. A search crew may be stood down. People who have been assembled to evacuate on activation of a fire alarm may be stood down.

47 Given that the Act refers to the circumstances in which an employer may stand down employees (and not stand itself down) it is the second meaning that is germane.

48 It appears that stand down clauses were introduced into awards 'in the 1920's to temper the effect of the change from daily to weekly hiring': *Food Preservers Union of Australia v All States Ready Foods* (1976) 182 CAR 391 (Gaudron J). A provision of that kind was considered in *Pickard v John Heine & Sons Limited*(1924) 35 CLR 1 where the view was expressed that the issue raised as to the clause was of immense general importance. It appears that stand down clauses continued to be used in industrial instruments thereafter. They continued to take the form of an express authority to make a deduction for a stand down of employees when no work

was on offer: *Re Textile Industry (Woollen and Worsted Section) Award 1950* (1963) 5 FLR 328 at 333 (Spicer CJ, Joske and Eggleston JJ).

49 In *Re Rubber Workers Award 1947* (1949) 65 CAR 814, the relevant award contained a provision authorising a pay deduction if an employee 'cannot be usefully employed'. The question was whether an employee was entitled to leave of absence due to illness without deduction of pay during a period when the employee could not be usefully employed. The award provided as follows:

> Employment shall be determined only by a week's notice on either side, but such notice may be given at any time during any week: Provided that an employer may dismiss any employee without notice for malingering, inefficiency, neglect of duty or misconduct, and in such case the employee shall be paid up to the time of dismissal only: Provided further that any employer may deduct payment for any day or part thereof an employee cannot be usefully employed because of any strike by the Union, or any other Union, or through any breakdown of machinery, or any stoppage of work by any cause whatsoever which the employer cannot reasonably prevent.

50 There was a separate provision in respect of absence due to illness. It said:

> An employee on weekly hiring after one month's service with his employer who is absent from work on account of personal ill-health necessitating such absence, shall be entitled to leave of absence without deduction of pay, subject to the following conditions.

51 Kelly CJ found that the absent employee would not have been entitled to any pay for the duration of the stoppage, because the entitlement to deduct pay had supervened. Irrespective of the cause of his absence, the employee could not have been usefully employed. Foster J reached a different view finding that because the employee could not be usefully employed on account of his illness, there could be no deduction because of the stoppage. His Honour said of the employee: 'He is sick and his wages are guaranteed free from deduction for the period specified in the award, and that right must persist unless destroyed by some provision of the code of employment'. Dunphy J was also of the view that there could be no deduction for the stoppage on the day the employee was absent for illness because the right to deduct in the event of a stoppage 'gives an employer relief against wage commitments for *employable* workers and has no reference whatever to the case of an employee whose contract of service is still continuing, but who is not employable' (original emphasis).

52 There have been decisions concerned with a common law right to stand down an employee without pay in circumstances where the employee presents for work but refuses to undertake work, often referred to as the 'no work, no pay principle': see the consideration of the

authorities in *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83; (2010) 185 FCR 383. However, as was there observed by Buchanan J at [103], the form of the statutory stand down provision (by then introduced as s 691A of the *Workplace Relations Act 1996* (Cth)) was to be distinguished. It dealt with 'a unilateral decision taken by an employer to withhold work and payment even when an employee is prepared to perform all normal duties as directed': at [103]. The same may be said of the form of stand down provisions in industrial instruments the subject of the cases to which reference has been made.

53 However, the reasoning of Buchanan J reflects earlier views to the effect that the ability to stand down an employee without pay where the employee cannot be usefully employed is to be seen as a qualification to the principle that an employee who was ready and willing to work is entitled to be paid even though told not to report to work because there is no work to do: *Vehicle Builders Employees Federation of Australia v British Motor Corporation (Aust) Pty Ltd* (1966) 8 FLR 70 at 74-75 (Spicer CJ, Joske and Eggleston JJ), cited with apparent approval in *Townsend v General Motors-Holden's Ltd* [1983] FCA 212; (1983) 4 IR 358 at 366-367 (Morling J). In *Vehicle Builders Employees* it appears to have been conceded that the deduction for stoppage of work would not apply to workers on sick leave, annual leave or long service leave or who were receiving workers' compensation payments: at 73.

54 These decisions indicate the significance of paying close attention to the way in which a stoppage of work or stand down provision that entitles an employer to make deductions from wages interacts with other provisions conferring a right for the employee to be absent from work with pay. Of course, in the present case that interaction is the subject of the contentious provision, s 525. Further, s 524(3) provides that an employer is 'not required to make payments to the employee' for the period of the stand down. It is not expressed as a provision authorising a deduction which may be taken to mean a deduction from the weekly wage. A provision that authorises a deduction invites the possibility that if an employee has some entitlement to payment that does not depend upon attending work, such as by reason of taking sick leave, that entitlement cannot be the subject of a deduction. The same cannot be said of s 524(3).

55 However, what the decisions do indicate is that the concept of a stand down or stoppage of work provision was concerned with employees who, but for the unavailability of work, were ready and willing to work. Of course, it has long been recognised that as a matter of general principle, an employee who presents for work is entitled to be paid irrespective of whether the

employer has work for the employee to do: *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 465 (Dixon J).

56 This focus on readiness for work is consistent with the ordinary meaning of the expression 'stand down'. As has been observed, it connotes a release from a state of readiness or preparedness or alert. In the context of an employee, that may be seen to be the state of being ready for work. In that sense, it is a term that presupposes that but for the stand down, the employee would have an obligation to present as ready for work.

57 At the very least, it seems that it would be inapt as a matter of ordinary language to refer to an employer being able to stand down an employee who is already on annual leave or long service leave (to which that person had an accrued entitlement that they had decided to exercise) by reason that the person cannot usefully be employed. Such an employee cannot be required to work during the period of their leave. They have no obligation to be ready and willing to work. They may be absent from work whatever their circumstances or the circumstances at work. It is difficult to see what it is that they would be stood down from doing.

58 However, when it comes to other types of leave, especially leave such as PPC leave and compassionate leave, the issue is not so clear. Employees who seek to exercise leave entitlements of that character do so in order to be excused from having to present for work for identified reasons that justify their absence. They remain subject to a current obligation to present for work unless the specified circumstances trigger their entitlement not to do so by conferring a leave entitlement or an authority to be absent. Importantly, the basis for the leave or the authority to be absent is a fact or circumstances of a particular kind that justifies or explains their absence from work. In such cases there is the type of chicken and egg circumstance that is reflected in the divergent views in *Re Rubber Workers Award*. If the stand down reason is treated as being first in effect then the employee cannot usefully be employed and the obligation to present for work does not arise. In consequence, there is no work to which the leave entitlement may relate.

59 On the other hand, if the leave entitlement is treated as a pre-existing status to which the stand down is applied then the employee is assured of paid leave and is relieved of the obligation to be ready for work. This may be said to be a benefit afforded to employees who are in employment of a kind to which the NES applies. They have a form of guarantee to paid leave in certain circumstances. On that approach, the stand down operates only in respect of those

employees who are not entitled to leave, at least insofar as those entitlements form part of the NES.

60 The difficulty with these distinctions, which seem to be behind some of the submissions advanced in the appeal, is that they do not seem to find any plain expression in the language and structure of the stand down provisions. Nor do they aid in exposing a particular purpose as to the manner in which the stand down right will intersect with the leave provisions. Those matters are at the heart of the competing contentions. Therefore, one is driven back to the text itself to discern where the balance between competing interests was struck.

61 In particular, s 525(a) appears to contemplate that the stand down power conferred by s 524(1) may be exercised in circumstances where there may be an entitlement to paid or unpaid leave and for that reason it is necessary to make provision as to the circumstances in which such leave may be taken in s 525, namely that the employer must authorise the leave. Unless, s 525(a) is confined to an instance where, irrespective of leave entitlements, the employer authorises leave, the terms of s 525(a) indicate that the stand down provided for by s 524(1) would have the consequence, at least in some cases, of applying to employees who might be entitled to take leave during the stand down and those employees would not be entitled to payment unless they were taken outside the effect of the stand down by s 525 (hence its inclusion).

Extrinsic materials

62 It appears that the statutory stand down right was first introduced into Commonwealth legislation in 2006 when s 691A was added to the *Workplace Relations Act*. It took the following form:

> **691A Employer may stand down employees in certain circumstances**
>
> (1) This section applies if:
>
> (a) an employee employed by an employer cannot usefully be employed during a period because of a particular circumstance; and
>
> (b) that circumstance is:
>
> (i) a strike; or
>
> (ii) a breakdown of machinery; or
>
> (iii) a stoppage of work for any cause for which the employer cannot reasonably be held responsible; and
>
> (c) either:

(i) there is no contract of employment, and no industrial instrument, that binds the employer in respect of the employment of the employee and that contains provision for the standing down of the employee during that period because of that circumstance; or

(ii) a contract of employment, or industrial instrument, that binds the employer in respect of the employment of the employee contains provision for the standing down of the employee during that period because of that circumstance, but the employer's right to stand down the employee is dependent on the employer having to apply to the Commission, a State industrial authority or another person or body for an order or determination (however described) authorising the employer to stand down the employee.

(2) If this section applies, the employer:

(a) may stand down the employee during the period referred to in paragraph (1)(a) because of the circumstance referred to in that paragraph; and

(b) if the employer stands down the employee under paragraph (a) of this subsection - may deduct payment for the period during which the employee is stood down.

(3) A period during which an employee is stood down under subsection (2) does not break the employee's continuity of service.

(4) A period during which an employee is stood down under subsection (2) counts as service for all purposes.

(5) A provision of a contract of employment or an industrial instrument that provides as mentioned in subparagraph (1)(c)(ii) has no effect. However, this section does not otherwise affect the operation of any provision of a contract of employment or industrial instrument that provides for the standing down of employees.

(6) In this section:

industrial instrument means any of the following:

(a) a workplace agreement;

(b) an award;

(c) a pre-reform AWA;

(d) a pre-reform certified agreement (within the meaning of Schedule 7);

(e) a preserved State agreement;

(f) a notional agreement preserving State awards;

(g) a workplace determination;

(h) an employment agreement (within the meaning of Division 12 of Part 21);

(i) an exceptional matters order (within the meaning of Schedule 7);

(j) a section 170MX award (within the meaning of Schedule 7);

(k) an old IR agreement (within the meaning of Schedule 7).

63 As to the new provision when introduced, the Supplementary Explanatory Memorandum to the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* (Cth) stated (at paras 247-248):

> If proposed subsection 691A(1) applies, under proposed section 691(2), an employer may deduct payment, otherwise payable to an employee, during the stand down period.
>
> Proposed subsections 691A(3) - (4) ensure the maintenance of entitlements, other than payment, that would otherwise have accrued to an employee who is stood down. Accordingly, proposed subsection 691A(3) would ensure that the period the employee is stood down does not break the employee's continuity of service. Proposed section 691(4) would ensure that the period of stand down counts as service for all purposes. Proposed subsections 691A(3) and (4) are in similar terms to existing subsection 238(1) and (2) (in relation to annual leave), and subsection 260(1) and (2) of the WR Act (in relation to paid personal leave). This means that an employee that is stood down continues to accrue, for example annual and personal/carer's leave, at least to the extent provided under the Part 7 of the WR Act.

64 It can be seen that the Explanatory Memorandum was concerned with whether the stand down would mean that there would be an interruption to the accrual of leave entitlements rather than the question whether those leave entitlements could be exercised during the stand down. Perhaps, in that context, the failure to refer to their exercise is an indication that the stand down would prevail. However, it is to be noted that the right conferred was a right to 'deduct payment'. This allows for the possibility that it operated as a right to deduct from payment for work, rather than a right to deduct from paid leave entitlements.

65 When the present provisions were introduced, the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) stated as to s 525 (at para 2084):

> If an employee is **authorised by the employer to take leave** (paid or unpaid) **or to be absent from employment** then the employee is not taken to be stood down under subclause 524(1). Also, if an employee is entitled to be absent from work, for example on a public holiday, the employee is not stood down.
>
> (emphasis added)

66 Notably, however, unlike what the Explanatory Memorandum envisaged, s 525(b) does not tie authorisation to be absent from work to the action of the employer. Further, the Explanatory Memorandum did not identify any particular purpose to be achieved by ss 524 and 525 even though those sections depart in significant respects from the structure of the language used in

the former s 691A. The unexplained departure from the previous statutory language makes it difficult to infer that the purpose of the current provisions was to give effect in an unqualified manner to the course of earlier authority or industrial practice concerned with provisions that allowed deductions in the event of stand downs in similar circumstances.

67 Similar language is to be found in the Explanatory Memorandum introducing the separate stand down provision that forms part of the JobKeeper amendments recently introduced to the Act as a separate Governmental response to the pandemic: see para 1.52 of the Explanatory Memorandum to the *Coronavirus Economic Response Package Omnibus (Measures No 2) Bill 2020* (Cth).

The dispute resolution provision concerning stand down

68 Within Part 3-5 of the Act (which deals only with stand down), Division 3 provides that the Fair Work Commission may deal with a dispute about the operation of the Part. It provides in s 526(3) as follows:

> The FWC may deal with the dispute only on application by any of the following:
>
> (a) an employee who has been, or is going to be, stood down under subsection 524(1) (or purportedly under subsection 524(1));
>
> (b) an employee in relation to whom the following requirements are satisfied:
>
> (i) the employee has made a request to take leave to avoid being stood down under subsection 524(1) (or purportedly under subsection 524(1));
>
> (ii) the employee's employer has authorised the leave;
>
> (c) an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (a) or (b);
>
> (d) an inspector.

69 In the course of oral argument the possibility was raised that the terms of s 526(3) might provide a contextual indication that aided in the construction of s 525. However, for the following reasons, s 526(3) is expressed in terms that are broadly consistent with each of the competing constructions of s 525.

70 First, paragraph (a) empowers the Fair Work Commission to deal with a dispute about the operation of Part 3-5 on application by an employee who has been stood down or has been purportedly stood down. This is a wide power that would capture employees advancing a case based upon either of the competing constructions. It does not assist.

71 Second, paragraph (b) is dealing with a different instance. It is a case where an employee has made a request for leave under s 524(1) that has been authorised. Significantly, it does not include the case where the employer has refused to authorise the leave or where the leave has been purportedly authorised. It is dealing with cases where leave has in fact been authorised. The effect of an authorisation is that the employee would be taken not to be stood down. As a result, paragraph (a) would not apply. Therefore, paragraph (b) is ensuring that the Fair Work Commission's arbitral power cannot be denied on the basis that the employer has authorised the taking of leave which avoids the employee being stood down. It would enable an employee to dispute any conditions of the approval of the leave or any implementation of the approval.

72 There are some minor aspects that tend to support the construction advanced by Qantas. Section 526(3)(b)(i) refers to a 'request to take leave to avoid being stood down'. This suggests that the employee is making a request for authority to exercise an entitlement to leave. It is not expressed as a request for leave. Further, if the employee was entitled to take such leave under s 525(b) and s 525(a) was directed at cases where the employee was requesting leave where there was no entitlement (as contended for by the appellants) it is difficult to see why there would be a right to apply to the Commission to deal with a dispute where there has been a refusal, in effect, of an indulgence on the basis that there was a dispute. In effect, there would be a request unsupported by any entitlement that was refused. However, it is to be noted that the Fair Work Commission in dealing with any dispute is directed to 'take into account fairness between the parties concerned'. It is possible that form of language may apply to a 'dispute' which takes the form of a complaint by the employee that the employer should have granted the indulgence sought.

Evident purpose of s 525

73 In our view, the contextual materials do not assist in any real way in indicating a purpose for the terms of s 525 that aids in resolving the particular question of construction raised by this appeal. It is plain that the general purpose of the stand down provision is to confer a power on an employer in circumstances where employees cannot usefully be employed for certain reasons to be released from the requirement to make payments to the employees. Further, s 525 operates as a form of qualification to that power. However, such a purpose will be given effect irrespective of the nature and extent of the qualification to that power. All that may be said is that the larger the qualification the less advantageous to the employer the power. However, the construction advanced for the appellants on behalf of the employees would still mean that

payments for many employees would be the subject of the power. Therefore, both constructions are consistent with the general purpose that may be discerned.

Contextual construction of s 525

74 For the following reasons the construction advanced by the appellants is, to borrow the language of Gageler and Keane JJ in *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at [66], 'less immediately obvious' and 'more awkward' than the construction advanced by Qantas. It is a strained interpretation that is not justified by the articulation of any identified statutory object or policy. Importantly, it would result in s 525(a) being reduced to little operative effect. The construction contended for by Qantas is a more natural reading of the statutory language. It reflects the focus of the language of the provision on authorisation rather than the reservation of a right to exercise leave entitlements. It is therefore to be preferred.

75 Section 524(1) confers a power to stand down during a period when an employee cannot be usefully employed because of one of three circumstances. They include a stoppage of work for any cause for which the employer cannot reasonably be held responsible. In that event, the employer is not required to make payments to the employee for that period. The provision speaks generally as to payments and generally as to the period of the stand down. The stand down continues for so long as the relevant circumstances pertain and while it does the employer is 'not required to make payments…for that period'.

76 Section 525 then provides for two instances where an employee 'is not taken to be stood down'. That form of words recognises that the stand down has operative effect for a period, but then undoes the stand down for the period when one of those instances applies. The section does not express a qualification or proviso as to the extent of the stand down. Rather, it interrupts the period of the stand down. This structure indicates that the matters that may take an employee outside of the stand down are of a kind that may not be known until after the stand down is in place.

77 In our view, the somewhat unusual form of s 525 is explained by the fact that the scope of its operation as to particular employees will likely depend upon events that occur after the stand down. It is not operating as a form of deeming provision or statutory fiction. Rather, it is a mechanism by which an employee may be taken outside of the stand down (not fictionally, but actually) which continues to apply in respect of other employees. It engages with a practical

difficulty that arises where it is future events that will determine whether particular employees will not be subject to the stand down for a time.

78 Although certain examples were advanced to illustrate how the competing constructions might apply in different instances, the parties were not joined as to any distinction to be drawn as to those cases where an employee was already on leave when the stand down occurred. An employee who is already on annual leave, PPC leave or some other form of leave that will last beyond the time that the employer exercises the power to stand down employees may be in a different category. Such employees have exercised an accrued entitlement to take paid (or unpaid) leave by steps taken or for reasons in existence before the stand down. It may be that such employees cannot be stood down because they have already been released from their obligation to present for work for the duration of the leave that has accrued as a result of prior events. However, it is not necessary to deal with such matters because the issue in respect of which the declaration was sought concerned whether there was an ongoing entitlement to take PPC leave or compassionate leave during the stand down, that is by reason of events that occur during the stand down.

79 In that context, the principal textual difficulty with the construction advanced by the appellants is that it would make the exercise of a leave entitlement a way that an employee could be taken outside of the stand down without any express statement in s 525 to that effect despite the provision dealing expressly with taking paid or unpaid leave. Further, given the importance of leave entitlements and the extent to which they form part of the provisions in the Act articulating the content of the NES, the text of s 525 would be an obscure way of providing that an employee is taken not to be stood down if taking paid or unpaid leave (even if the leave is not authorised by the employer). If that were indeed the intention (and it was also intended, as it plainly was, to allow for a category of leave where the leave was authorised by the employer) then all leave authorised or not would take an employee out of the operation of the stand down. The obvious way to express that intention would be for the first criteria in s 525 to be expressed as 'is taking paid or unpaid leave'. It would not matter whether it was authorised or not. Instead, s 525(a) qualifies the reference to paid or unpaid leave by referring to leave that is authorised by the employer.

80 Having dealt with authorised leave as a reason for absence, s 525(b) then deals with instances where the absence is 'otherwise authorised'. When it refers to 'otherwise authorised to be absent' it indicates absence otherwise than by taking leave authorised by the employer. If

s 525(b) was meant to include leave that is not authorised by the employer then it is difficult to see why it would be necessary to have the earlier provision that requires the leave to be authorised. Under the second criterion, an employee could be taken out of the effect of the stand down by exercising an entitlement to leave.

81 If, as was suggested, the terms of s 525(a) are to be explained on the basis that it deals with instances where the employer agrees to permit leave even though there is no entitlement to leave then it is difficult to see why such an instance would require express provision. The language does not indicate a consensual dealing by which leave of a kind not conferred by the employee's entitlements is arranged. An employer and an employee would be free to agree that the stand down did not apply to the employee even if there was no provision to that effect. That is especially so in circumstances where s 524(3) relieves the employer from any obligation to make payments to the employee, but is not expressed in mandatory terms. Even if that were the intention, the word 'authorised' in s 525(a) does not effectively capture that intent. The word ‘authorised’ indicates that some deliberate decision to grant permission is required in order for paid or unpaid leave that is taken by an employee to qualify as an instance of a period of a stand down in which the employee is not taken to be stood down. In other words, s 525(a) presupposes that an employee is not entitled to take leave during a stand down unless, before the stand down, the employer has already authorised, or subsequently authorises, him or her to do so.

82 Finally, as was contended by the appellants, it may be accepted that leave is a form of authorised absence from employment. Yet, the Act does differentiate between leave and authorised absence. There are several provisions which are expressed to operate in respect of leave or absence: s 22(2)(b), s 62(4), s 89(2) and s 130(1). Also, as has been noted, some entitlements are expressed as an entitlement to leave and others are expressed as an authorised absence. In that context, where s 525 refers to leave and then to authorised absence, it appears that the provision reflects a distinction that is maintained elsewhere in the Act. In that context, the fact that there is some uncertainty as to whether s 108 confers an entitlement to leave or an authority to be absent is not a compelling reason to reach a different view of the construction of s 525(b). We note, in any event, that the operative terms of s 108 are expressed as an entitlement to be absent, a form of words also to be found in s 114 dealing with public holidays, but not in other provisions by which leave entitlements are conferred.

83 As Gleeson CJ, Gaudron and Gummow JJ observed in *Concut Pty Ltd v Worrell* [2000] HCA 64 at [17], employment relationships usually are not purely contractual. Their Honours noted that statutes can impose obligations to observe industrial or, now, modern awards and (now) enterprise agreements, and in some cases the relevant terms of employment may be found in the terms of the award or enterprise agreement that binds the parties at the relevant time. In addition (although not presently relevant) they said that the relationship of employer and employee is an accepted fiduciary relationship. Thus, s 525 addresses situations in which, under the employment relationship, the employer has power (eg. under a contract of service or, subject to s 88(2) of the Act), to agree to or authorise the employee taking annual leave (s 525(a)) or where the provisions of a statute, such as the Act, or a modern award or enterprise agreement, may confer an entitlement or authorisation for the employee to be absent from his or her employment (s 525(b)).

84 The appellants questioned why an authorised absence would mean that an employee is taken not to be stood down, but an entitlement to leave would not, when both afforded a basis upon which an employee was entitled to be absent from work. Further, they submitted that, because the authority to be absent might be conferred by an industrial instrument which might refer to leave or authorised absence (and need not conform to any distinction between those terms evident in the Act), the construction advanced by Qantas would mean that the operation of s 525(b) would turn upon the choice of words adopted in an industrial instrument.

85 The answer to that submission is to be found in the manifest intention in the Act to require any form of leave entitlement to be authorised before the employee is taken out of the operation of a stand down for a period. For reasons that have been given, the language used indicates that s 525 means that an employer is not required to pay for leave during a stand down unless the exercise of the entitlement is authorised. It was open to the Parliament to provide, as s 525 does in effect, that an employee will not be taken to be stood down if the authority to be absent derives from a different source than an unauthorised exercise of a leave entitlement. For reasons that have been given, the distinction between leave and some other authority to be absent from one's employment is sufficiently clear as a matter of substance that s 525 could be applied irrespective of the wording that might be adopted in the industrial instrument. It would be a question of construction as to whether the absence from work was, in substance, the exercise of a leave entitlement. If it is was, and the leave was not authorised by the employer, then by operation of s 524(3) the employer is not required to pay the employee.

86 For the stand down provisions to operate in the way that has been described is consistent with their character in providing authority to an employer to be relieved of the requirement to make payments to employees during a period when the employees cannot usefully be employed because of one of the circumstances specified in s 524(1). It does not produce an outcome that is inconsistent with that purpose. The balance might be set in a different way, but given the language used in s 525, for reasons that have been given, the construction advanced by Qantas is to be preferred.

87 Therefore, when s 525(b) refers to a period during a stand down when an employee is otherwise authorised to be absent from his or her employment, the provision means otherwise authorised than by taking any form of paid or unpaid leave (which under s 525(a) must be authorised by the employer).

88 The terms of the note to s 525 are consistent with the above approach to the construction issue. They makes clear that s 525 may operate during all or part of the period of the stand down. This reflects the fact that the stand down operates for a period and the matters stated in s 525 have the effect of taking the employee out of the stand down for a period.

89 The significance of s 525(a) is that it deems the employee not to have been stood down during a period when he or she is taking leave, paid or unpaid, that the employer has authorised. Accordingly, the effect of an employer's authorisation, within the meaning of s 525(a), is that the ordinary hours of work in the period by reference to which the employee is entitled to be paid (under ss 90(1), 99 and 106) will be a period during which he or she 'is not taken to be stood down'. The authorisation of the leave causes s 525 to deem that the particular employee is not stood down so that he or she will have leave entitlements to be calculated by reference to ordinary hours of work.

90 In reaching that conclusion it is not necessary to decide whether a stand down only applies to employees who must present for work during the stand down or are excused from presenting for work by reason of an event or circumstances that results in them being unable to be reasonably required to present for work. For reasons already given it may be that an employee taking annual leave or long service leave cannot be stood down. They might be said to be exercising an entitlement to be absent from work that does not depend upon whether there is work nor on pointing to a reason to justify why they are unable to be at work or should be excused from being at work. Therefore, issues that would arise if s 524(1) did not affect the exercise of entitlements to annual leave or long service leave need not be addressed. All that

need be noted is that if there was such a qualification it would favour the construction advanced by Qantas because it would remove the consequence that such entitlements (which accrue as a form of financial benefit which must be met by the employer) also require the employer's authority before they can be exercised during a stand down.

Stand down under cl 18 of the EA

91 As has been noted, where there is a stand down provision in an enterprise agreement that applies in the same circumstances as s 524(1) of the Act then it is the enterprise agreement provision that applies. It was common ground that for employees covered by the EA it is the stand down provisions in that instrument that apply if the claim under the Act fails. Again, there was no issue as to whether there had been a stand down of employees.

92 The EA provides (cl 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.

93 Then, it deals with continuity of service (cl 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.

94 There is express provision that an employee who is stood down may take other employment (cl 18.1.6).

95 Then, the EA provides as to annual leave (cl 18.1.8) and public holidays (cl 18.1.9) as follows:

> 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.
>
> 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.

96 Under the EA, there is an entitlement to be paid wages. It also contains provisions for various types of leave in addition to annual leave. It treats public holidays together with other leave entitlements by describing them all as authorised leave.

97 It can be seen that the EA takes the form of allowing for a deduction of payments. Under the EA, the payments to be made are for wages. Wages are to be paid when the employee is working and where the employer takes leave. They depend upon the employee's ordinary hours. Unlike the Act, there is no express provision for payment to be made for leave. Rather, there is an entitlement to wages when absent on leave.

98 The appellants rely upon the decision in *Re Rubber Workers Award* considered above. As has been noted there was a divergence of views expressed in that case. In any event, the language of the EA differs from that of the award. It engages with the way leave entitlements may be exercised in the event of a stand down. It does so in two ways. First, it provides that annual leave may be taken. Second, it deals with payment entitlements in the event of a public holiday.

99 The principles to be applied in interpreting an enterprise agreement were summarised in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 563 at [197]. They emphasise the practical character of such instruments which are to read in a manner that is informed by the circumstances of the relevant industry rather than according to legal nicety.

100 The EA contemplates that an employee who is stood down may undertake other employment. It goes so far as to provide that an employee who has been stood down for more than 5 days and has exercised the right to take other employment is entitled to work out the notice period for such other employment of up to one week (cl 18.1.7). As can be seen from the public holiday provision there is an allowance for how payment for public holidays is to be made where the employee takes up other employment.

101 In those circumstances, it may be reasonably concluded that the parties have addressed expressly the extent to which there may be payment associated with leave entitlements in the event of a shut down. They do not, for example, deal with the taking of PPC leave while an employee is undertaking alternative employment during a stand down. In that context, there being no express provision qualifying the general authority to deduct wages in circumstances where PPC leave or compassionate leave is taken (or any other leave), there is no relief from the deduction provision in such instances.

102 In short, under the terms of the EA an employee who has been stood down is subjected to the operation of cl 18.1.1 of the EA which allows Qantas to deduct payment for any day the employee is stood down. Therefore, a (properly) notified employee is deemed to be stood down: cl 18.1.2. Thereafter, it is the stand down that operates to mean that an employee is not required to present for work. Such an employee, cannot be said to take leave or be absent because the stand down is in operation and there is no obligation to present for work from which leave may be taken or absence may be authorised. And, obviously enough, if Qantas approved an employee taking some form of paid or unpaid leave under the EA, that approval would govern.

103 As has been noted, the manner in which the case was conducted before the primary judge and on appeal did not raise a contention that the relevant employees had not been stood down. Rather it claimed that employees who had been stood down had the right to take PPC leave and compassionate leave without deduction. In our view, the EA provides for no qualification of that kind to the provision that entitles deduction of payment for any day when the employee has been stood down.

Conclusion and orders

104 For those reasons, the appeal should be dismissed.

I certify that the preceding one hundred and four (104) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rares and Colvin.

Associate: 

Dated: 27 November 2020

REASONS FOR JUDGMENT

BROMBERG J:

105 I have had the benefit of reading a draft of the reasons for judgment of Rares and Colvin JJ but the misfortune of disagreeing with the conclusions arrived at by their Honours. Those reasons provide both the factual and procedural background which I need not here repeat.

106 My reasons are divided into two sections both of which deal with similar issues concerning the entitlement of employees of Qantas to take personal/carer's leave (colloquially known as 'sick leave') or compassionate leave (collectively "**PC&C leave**"). I will commence with the issues raised by reference to the *Fair Work Act 2009* (Cth) ("**FW Act**") and then deal with those issues that must be resolved largely by reference to the enterprise agreement that covers some but not all of the relevant employees.

Sections 524 and 525 of the Fair Work Act

107 The issue between Qantas and the appellant unions is whether, during a stand down period authorised by s 524 of the FW Act, Qantas is obliged to pay the wages of employees who are on PC&C leave. Broadly expressed, the position of Qantas is that:

(1) an employee who is lawfully stood down in accordance with s 524 of the FW Act cannot generate an entitlement to take PC&C leave; and

(2) s 524(3) of the FW Act relieves Qantas of any requirement to pay such an employee any monies in respect of PC&C leave.

108 Qantas resists the contention made by the appellant unions that s 525 of the FW Act permits an employee to take PC&C leave during a stand down period and therefore requires Qantas to pay the wages due to that employee whilst that leave is taken. In particular, the unions contend that access to paid leave (including but not limited to PC&C leave) is provided by s 525(b).

109 Responding to those contentions, Qantas argued that s 525(a) only permits access to leave that "is authorised by the employer" and that the leave contemplated by that paragraph is essentially limited to annual leave because, so it was said, that kind of leave requires employer authority. In that respect Qantas referred to s 88(1) of the FW Act which it asserted required employer authorisation as to the taking of annual leave. As for s 525(b), Qantas contended that that paragraph is not dealing with leave at all but only addressing those entitlements that the FW Act expressly refers to as an entitlement of an employee to be "absent". As that is done only in

relation to eligible community service by s 108 of the FW Act, jury service by s 111 of the FW Act and public holidays by s 114 of the FW Act, Qantas contended that s 525(b) is only addressing access to those entitlements and not to an entitlement to PC&C leave or any other form of leave.

110 The competing contentions of the parties raised questions as to the proper construction of s 524 and s 525 of the FW Act. The relevant principles which guide statutory construction are not contentious, are referred to at [30]-[35] of the reasons of Rares and Colvin JJ, and need not here be repeated save that the irresistible clarity of the following summation deserves being mentioned. In *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The **Bay Street Appeal**)* [2020] FCAFC 192 at [3]-[5] Allsop CJ said this:

> Much has been written by the High Court on statutory construction over 35 years, in particular about the relationship between text and context, including purpose. That discussion in the authorities reflects the perennial debate focused on particular statutory provisions, as they arise from time to time for consideration, between so-called clarity of plain meaning (as if such can reliably exist without context) and the ascription of meaning to words in their context. Whilst there can, naturally, often be differences of opinion about the effect and influence of context, including purpose, in respect of any particular provision, there can be no doubt that words are not read in isolation as if they can have meaning without context.
>
> Whatever may be the form of expression by individual judges or groups of judges, the task requires the search for applicable principle, not an emphasis on the literality of words of judgments as if they were the text of a statute: *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1085 (Lord Reid). Sentences from High Court judgments seen to be favourable to an argument should not be strung together in a particular order to support an argument about the construction of a particular statute, almost as if to create a new, virtual, High Court judgment. The principle is clear: Meaning is to be ascribed to the text of the statute, read in its context. The context, general purpose and policy of the provision and its consistency and fairness are surer guides to meaning than the logic of the construction of the provision. The purpose and policy of the provision are to be deduced and understood from the text and structure of the Act and legitimate and relevant considerations of context, including secondary material: See *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 381 [69]; Mason J in *K&S Lake City Freighters Proprietary Limited v Gordon & Gotch Limited* [1985] HCA 48; 157 CLR 309 at 315 which drew upon *Viscount Simonds in Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461 (cited in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1 at 28 [57] and in the other authoritative decisions of the High Court referred to in *Federal Commissioner of Taxation v Jayasinghe* [2016] FCAFC 79; 247 FCR 40 at 43 [5]); *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at 519 [39]; *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664 at 671–672 [22]–[23]; and *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at 368 [14].
>
> There can be no doubt that the search for principle in the High Court reveals a settled approach of some clarity: *R v A2* [2019] HCA 35; 373 ALR 214 at 223–225 [31]–[37].

> The notion that context and legitimate secondary material such as a second reading speech or an Explanatory Memorandum cannot be looked at until some ambiguity is drawn out of the text itself cannot withstand the weight and clarity of High Court authority since 1985: see *Jayasinghe* 247 FCR at 42–44 [3]–[12]; and *CPB Contractors Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 70 at [8], [50]–[60].

111 There are some observations about the constructional task required which ought to be made at the outset. I have found the assistance provided by the submissions made by the parties substantially diminished by reason of what was said to be common ground before the primary judge. In particular, Qantas sought to put its contentions about the proper construction of s 524 and s 525 upon the platform of what appears to have been common ground before the primary judge that "the employees have been lawfully stood down" (at [9] of the primary judge's reasons). That common ground entails an implicit acceptance about the proper construction of s 524 and, as Qantas contended, a concession about its operation made by the appellant unions.

112 Sections 524 and 525 are related provisions and must be read together. The proper construction of s 525 cannot be arrived at without a proper understanding of what s 524 provides for and in particular the circumstances in which the relief provided to an employer by s 524(3) is engaged. It would be erroneous for this Court to construe s 525 upon a view about the proper construction of s 524 fixed by the parties even if it can be said that the common ground adopted by the parties entails a concession. As Rares and Colvin JJ have stated in their reasons at [25] "[t]he parties cannot make a concession that would bind this Court as to the proper construction of the statutory provisions"; see also *Coleman v Power* (2004) 220 CLR 1 at [243] (Kirby J).

113 I turn then to consider s 524 including so that my analysis of the meaning and intent of s 525 may be assisted by a proper understanding of the provision to which it relates.

114 Section 524 of the FW Act provides:

> **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.

115 Subject to the qualifications made by s 524(2) (which are of no present relevance), s 524(1) authorises an employer to stand down an employee during a period in which the facts and circumstances there specified pertain. Section 524(3) relieves an employer of an obligation to make a payment to the employee for a period in which the employee has been stood down under s 524(1).

116 The phrase "during a period" appears in each of sub-sections (1), (2) and (3) of s 524. The references made to a "period" are obviously references to a period of time, the duration of which (whether an hour, a day or a month) depends on the continued existence of the requisite facts and circumstances specified by s 524(1) which both enliven and control the extent of the period in which a stand down is lawful. In other words, at any moment in time, a lawful stand down is dependent upon the coexistence of the facts and circumstances which define the period because it is only whilst the requisite period pertains that s 524 is engaged.

117 The other necessary observation to make is that the focus of s 524 is upon circumstances affecting a particular employee rather than a class of employees. The "period" of which s 524(1) speaks (and in turn s 524(3) as well) is personal to the particular employee whose susceptibility to being stood down is being addressed. That is principally because the facts and circumstances which define the very existence of the period of which s 524(1) speaks are those facts and circumstances applicable to the particular employee. That is not to say that the defining or requisite facts and circumstances specified by s 524(1) may not be common across a number of employees in the same workforce at the same time, but it is to say that, because

those requisite facts and circumstances may not be universally applicable across all employees, some employees may be lawfully stood down whilst others may not be.

118 The central pre-condition specified by s 524(1) is that "the employee cannot be usefully employed". In an analogous context that expression has been correctly referred to as "a fact": *Amalgamated Engineering Union v Metal Trades Employers Association* (1942) 47 CAR 615 at 616 (O'Mara J). It is an essential fact upon which the existence of a lawful stand down period and the engagement of s 524 depend. However, as will be apparent, the "period" of which s 524(1) speaks is not a period in which the employee cannot usefully be employed for any reason whatsoever. The period is confined to a time during which the employer cannot be usefully employed "because of" one or other of the circumstances specified, namely, industrial action, or a breakdown of machinery or equipment or a stoppage of work for which the employer cannot reasonably be held responsible. The period in which an employee may be lawfully stood down is circumscribed by the causal requirement imposed by s 524(1) that the inability of the employer to usefully employ the employee be one or other of the particular circumstances specified by that provision. Thus, it is only when and for as long as the essential fact exists in relation to the particular employee, by reason of one or other of the causes specified by s 524(1), that the employee is stood down in accordance with the authority provided by s 524.

119 Having made those observations about what appears to be the plain operation of s 524, I turn to consider whether an employee in a period of leave is able to be stood down in accordance with the authority provided by s 524.

120 It may be accepted that whilst in a period of leave from work, an employee cannot be usefully employed during that period. The obvious reason for that inability is that the employee is not available to perform work as the employee is authorised to be absent from the performance of work because of the employee's entitlement to take leave. The basis for such an absence will differ depending upon the kind of leave in question. The absence and any entitlement of the employee to be absent may be because the employee is ill or caring for a family member and therefore taking personal/carer's leave of the kind statutorily conferred by s 96 of the FW Act. Alternatively, an employee's unavailability to perform work may be because the employee is exercising an entitlement to be absent from work for the purpose of taking annual leave, or study leave, or parental leave or long-service leave. Alternatively, the entitlement to be absent may be founded upon the existence of a public holiday, or the employee being required to

perform jury service or the activities identified in Div 8 of Pt 2-2 of Ch 2 of the FW Act under the heading "Community service leave".

121 Irrespective of the kind of leave and whether the entitlement is statutory or conferred by an industrial instrument or by contract, an entitlement to take a period of leave is by its very nature an entitlement to be absent from the performance of the work ordinarily performed by the employee: *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 at [226] (Bromberg J). An employee is not able to be usefully employed whilst in a period of leave because the employee is absent and therefore not available to be usefully employed. The authorised absence of the employee is the reason the employee cannot be usefully employed and that circumstance is not one of the causal circumstances specified by s 524(1).

122 That conclusion does not depend upon which cause may be said to be first in time – for instance the illness or alternatively a cause specified by s 524(1). That is because s 524(1) is only engaged if one or other of the causes it specifies is responsible for the fact that the employee cannot be usefully employed. The fact that the employee cannot be usefully employed because she is ill is irrelevant to the operation of s 524(1). That fact neither engages nor disengages the operation of s 524. The only fact relevant to whether s 524 is engaged is whether the employee cannot be usefully employed because of one or other of the causal circumstances specified by s 524(1). Whilst that positive and essential fact does not exist, s 524 is not engaged.

123 It should be noted as well that the word "because" in s 524(1) is not qualified in the way that the multiple uses of that expression in Pt 3-1 of the FW Act dealing with "general protections" are qualified by s 360. Section 524(1) requires that one or other of the causal circumstances it specifies to be **the** reason for the incapacity of the particular employee to be usefully employed, not **a** reason. For instance, if an employee could not be usefully employed because of the breakdown of one machine for which the employer is not reasonably responsible but is also unable to be usefully employed because of the breakdown of another machine for which the employer is responsible, s 524(1) is not engaged. The existence of a cause which is not specified by s 524(1), such as the employee being ill, as a contributing cause for the inability to employ the employee is irrelevant. The operation of s 524 depends upon the existence of the positive fact it requires as **the** cause for the particular employee not being able to be usefully employed. In the absence of that positive fact, the provision is simply not engaged.

124 That analysis is supported by the observations made by the majority in ***Re Rubber Workers Award 1947*** [1949] 65 CAR 814. In that case the Full Court of a predecessor of this Court, the

Commonwealth Court of Conciliation and Arbitration, considered the operation of a clause in an industrial award which permitted an employer to:

> …deduct payment for any day or part thereof an employee cannot be usefully employed because of any strike by the Union, or any other Union, or through any breakdown of machinery, or any stoppage of work by any cause whatsoever which the employer cannot reasonably prevent.

125 The issue was whether during a period in which other employees of an employer had been stood down because of a stoppage of work, the employer was entitled under the award clause just quoted to deduct the payment due to an employee absent from work because of ill-health. Each of Foster and Dunphy JJ considered whether the employee was unable to be usefully employed because of the stoppage of work and concluded that the cause of the employee's inability to be usefully employed was ill-health and not by reason of one or other of the causal circumstances specified by the award provision. At 817, Foster J said this:

> Because of his illness he could not be employed "usefully" or otherwise and strikes or breakdowns, etc., do not affect his position. He is sick and his wages are guaranteed free from deduction for the period specified in the award, and that right must persist until destroyed by some provision of the code of employment.
>
> We may test this by looking at the position of an employer who asks himself: Am I entitled to deduct pay in this case? Am I able to say I could not usefully employ him on account of strike, etc.? The answer surely must be that he could not employ him at all because of his illness and not because of strike, etc.

126 Referring to the authority given by the award for the employer to make a deduction, at 818 Dunphy J said this (emphasis in original):

> If, by reason of the matters referred to in the proviso, an employee cannot be usefully employed, then the employer can make a wage deduction. In other words, although the worker is able and willing to work, the employer's duty either to provide work or to pay the weekly wage is suspended. This proviso, however, has nothing whatever to do with clause 22 [dealing with paid sick leave]. It gives an employer relief against wage commitments for *employable* workers and has no reference whatever to the case of an employee whose contract of service is still continuing, but who is not employable. A man who is absent by reason of illness obviously cannot be usefully employed whether there was a strike or a break-down of machinery or any other stoppage of his employer's plant or machinery.

127 Whilst in a period of leave, an employee is not in a period in which the employee cannot usefully be employed because of one or other of the causal circumstances specified in s 524(1). Accordingly, an employer is not authorised by s 524(1) to stand down an employee during such a period. Consequentially, an employer is not authorised by s 524(3) to withhold payments due to the employee in respect of that period.

128 In ***Townsend*** *v General Motors Holden's Ltd* [1983] 4 IR 358, Morling J referred at 366-367 to *Vehicle Builders Employees Federation of Australia v British Motor Corporation (Aust.) Pty Ltd* (1966) 8 FLR 70 where a Full Court of another predecessor of this Court, the Commonwealth Industrial Court (Spicer CJ, Joske and Eggleston JJ), in dealing with a stand down provision similar to that dealt with in *Re Rubber Workers Award*, said (at [74]-[75]) that an employee is entitled to be paid "unless the employer can show that the employee cannot be usefully employed on that day *for a reason falling within the clause above quoted*" (emphasis added). At 364 Morling J said (emphasis added):

> Clause 6(g)(i) gives GMH the right to make a deduction from an employee's wages in certain specified circumstances. *If those circumstances do not exist, then GMH does not have the right to make the deduction*.

129 I have reached those conclusions as to the proper construction and the extent of the operation of s 524 having considered the proper construction of s 525. I will return to that provision to explain its purpose and operation. But before doing that it is convenient to consider whether the meaning and operation of s 524 which seems apparent on a literal reading of its text, is supported by the discernible purpose of the provision.

130 The mischief to which s 524 is directed is apparent from the very rationale for a stand down provision. As Gaudron J recounted in ***Food Preservers*** *Union of Australia v All States Ready Foods* (1976) 182 CAR 391 at 391, stand down provisions were "introduced into awards of the Conciliation and Arbitration Commission in the 1920's to temper the effect of the change from daily to weekly hiring". In circumstances where an employee who "stands and waits" is entitled to be paid irrespective of whether that employee can be usefully employed (*Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 466 (Dixon J)), the weekly hire of employees was more prone to impose upon employers the burden of paying the cost of employing an employee during a period in which that employee could not be usefully employed. Stand down provisions enabled employers to be relieved of that burden in certain circumstances. However, such provisions have never been open-ended because to do that would effectively have given to the employer the capacity unilaterally to convert ongoing (even if only weekly) employments into casual employments. Accordingly, limitations upon an employer's capacity to stand down an employee who could not be usefully employed were typically included in stand down provisions. Those limitations commonly took the form of those now found in s 524(1). For example, the clause to which Gaudron J referred in *Food*

Preservers as having existed in the Food Preservers Award since 1935, is in familiar terms and was relevantly as follows:

> An employer may deduct wages for any day on which the employee has not commenced work and on which the employee cannot be usefully employed because of any strike or through any breakdown of machinery or any stoppage of work for any reason for which the employer cannot reasonably be held responsible…

131 Where a stand down provision is confined by causal pre-conditions which limit the scope of relief provided to an employer, the mischief to which that provision is directed must be understood by reference to those limits. Correspondingly, the purpose of the provision must also be so understood. The purpose of providing relief to an employer must bear a connection to the mischief sought to be avoided. The intended relief is not open-ended but consequential upon the existence of certain circumstances. It is intended to relieve an employer from the financial consequence of the employer's inability to usefully employ the employee whose inability to be usefully employed has been brought about by one or other of the causal circumstances which limit the scope of the stand down provision. That the intended nature of the relief provided by a stand down provision is not open-ended but is consequential upon the causal circumstances that typically limit the operation of a stand down provision, is reflected in the following observations made by Morling J in *Townsend* at 368 (emphasis added):

> 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.

132 The financial burden upon an employer which a stand down provision seeks to address is a particular burden imposed upon the employer by particular circumstances. The financial burden upon an employer of providing leave to an employee is not a burden which is a consequence of a strike or breakdown in machinery or a stoppage of work for which the employer cannot reasonably be held responsible. It is a burden which arises as an incident of an employment referrable to an entitlement which usually accrues by reason of the employee having provided service to the employer. That is so irrespective of when the leave is taken or the burden is discharged including where leave is taken when a strike, breakdown in machinery or stoppage of work has resulted in other employees having no work to do at all. The financial burden of providing leave to an employee as and when leave is due is not the burden to which a stand down provision such as that contained in s 524 is directed. To relieve the employer of that financial burden would, by reference to the discernible purpose of a stand down provision such as s 524, provide an unintended windfall to the employer. It would result in the employer

being relieved of a financial burden with no connection whatsoever to the employer's inability to utilise the employee because of a strike, a breakdown in machinery or other stoppage of work beyond the control of the employer. To construe s 524 as having that purpose would effectively re-write the provision so as to include the taking of leave as one of the causal circumstances for the employer's inability to usefully employ the employee.

133 To relieve the employer of the burden of providing leave would also disadvantage employees in a manner beyond the consequences contemplated by the discernible purpose of a stand down provision such as s 524. The relief provided to an employer by a stand down provision shifts rather than extinguishes the burden to which the provision is directed. The financial burden of there being no useful work to do is essentially shifted from the employer to the employee or those employees who cannot be usefully employed. Those employees rostered and available to work carry the wage-based consequence of there being no useful work for **them** to perform during a stoppage of work. If a work stoppage occurs on a Wednesday, it is the employees rostered and available to work on that day who are denied the wages for the day and not those employees rostered to work on the following day. That is because it is Wednesday's wage costs that would impose the relevant burden and not the cost of employing those employees who worked on Thursday. Likewise, in relation to an employee who is absent from work on the Wednesday on annual leave. The burden of that leave has nothing to do with Wednesday's wage costs and in particular the costs of those employees who could not be usefully employed on that day. There may well be fairer ways to spread the burden brought about by a particular employee having no useful work to do, but s 524 does not adopt any such mechanism.

134 On the construction contended for by Qantas, during a work stoppage of a kind referred to by s 524(1), an employee already on an extended period of sick leave would be denied paid leave from the moment the work stoppage commenced until it ended. If the work stoppage lasted an hour, the employee would lose an hour's pay, if a day, a day's pay and so on. Similarly for an employee in the midst of a period of annual leave or of parental leave. An employee who happened to fall ill on the second day of the work stoppage would be denied personal/carer's leave and similarly, an employee who happened to tragically lose a relative on that day, would be disentitled to compassionate leave. There is no discernible basis for thinking that those were the intended consequences of the operation of a stand down provision like s 524. Neither the authorities provided by the parties nor my own research of the authorities reveals that consequences of that kind have ever been experienced as a result of the operation of a stand down provision.

135 Insofar as the authorities to which the Court was taken demonstrate what may be regarded as the operation of the typical stand down provision, those authorities show that employees have not been denied leave entitlements as a consequence of the operation of a stand down provision. Relatedly, the authorities demonstrate that stand down provisions operate upon employees who are available to perform work during the stoppage of work and not upon those who are not. Some of the relevant authorities have already been referred to, other of those authorities are referred to in the reasons of Rares and Colvin JJ at [48]-[53]. It is of course necessary to acknowledge that the stand down provisions addressed by those authorities were considered in the particular context in which those provisions were found including the context provided by other provisions of the awards in question. Having said that, I do not regard either the wording or context of those provisions to have been materially different from those of s 524 in relation to the issue currently being addressed. Of more importance perhaps to the identification of the purpose and scope of the stand down authorised by s 524(1), is the fact of there being no demonstrated history of stand down provisions impacting upon the entitlements of employees whilst on leave. I say that principally because statutory stand down provisions in federal industrial legislation are a relatively recent phenomenon and it is likely that the purpose, scope and operation of those statutory provisions were modelled upon the common purpose, scope and operation of stand down provisions which, as indicated above, have been a feature of industrial awards since the 1920s.

136 Turning then to the legislative history of s 524 of the FW Act, the legislative predecessor to that provision is s 691A of the *Workplace Relations Act 1996* (Cth) ("**WR Act**"). That provision was introduced by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth), shortly after the WR Act was substantially altered by what have become commonly known as the 'WorkChoices amendments'.

137 Section 691A of the WR Act was the first federal statutory provision which authorised an employer to stand down an employee in circumstances of the kind now addressed by s 524(1). The provision is fully set out in the reasons of Rares and Colvin JJ, but it is convenient to set out again those parts of the provision of immediate relevance:

> 691A **Employer may stand down employees in certain circumstances**
>
> (1) This section applies if:
>
> (a) an employee employed by an employer cannot usefully be employed during a period because of a particular circumstance; and

(b) that circumstance is:

(i) a strike; or

(ii) a breakdown of machinery; or

(iii) a stoppage of work for any cause for which the employer cannot reasonably be held responsible;

…

(2) If this section applies, the employer:

(a) may stand down the employee during the period referred to in paragraph (1)(a) because of the circumstance referred to in that paragraph; and

(b) if the employer stands down the employee under paragraph (a) of this subsection - may deduct payment for the period during which the employee is stood down.

138 There are some differences between those sub-sections of s 691A and the equivalent provisions of s 524 being subsections (1) and (3) thereof. Section 691A(1) of the WR Act was somewhat broader than s 524(1) of the FW Act in setting out the causal circumstances specified by that provision. Thus, s 524(1)(a) excludes industrial action organised or engaged in by the employer and s 524(1)(b) effectively excludes a breakdown in machinery for which the employer bears reasonable responsibility. In comparison to s 691A of the WR Act, those changes tend to contract the causal circumstances which engage an employer's authority to stand down an employee and thus narrow the operative scope of s 524 as compared to s 691A. However, the provisions in question nevertheless bear a great deal of similarity. Each is focused upon, and its operation is dependent upon, the existence of a period specific to a particular employee in which that employee cannot be usefully employed because of one or other of the causal circumstances specified in the provision, those circumstances being largely the same but not identical for the reasons just given. Whilst the drafting style and structure is somewhat different, there are no material differences between the two provisions other than those previously mentioned. In particular, the language of s 524(3) that an "employer is not required to make payments to the employee for the [stand down] period" is not materially different from the authority that was given by s 691A(2)(b) that an employer "may deduct payment for the period in which the employee is stood down". Each expression conveys that a payment that would otherwise have been payable if the provision had not been engaged, is not payable during the stand down period. Neither formulation addresses the basis for which the payment would otherwise have been payable. On that issue, each formulation is equally unqualified and the

nature of the payment that need not be made is left to be inferred from the remainder of the provision.

139 The reasons which I have earlier given for concluding that s 524 of the FW Act is not engaged, in relation to an employee during a period in which the employee is taking authorised leave, apply equally to s 691A of the WR Act. Neither provision provides authority to stand down an employee whilst an employee is in a period of authorised leave or to not make a payment due in respect of that leave.

140 Given the absence of any material distinction between the terms of s 524 and s 691A, if I am right as to those conclusions in relation to s 691A of the WR Act, but wrong as to the same conclusions in relation to s 524, it can only be because of the terms of s 525 of the FW Act which had no counterpart in the WR Act. Section 525 of the FW Act is in the following terms:

> **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).

141 To my mind and for the reasons I will shortly develop, s 525 is confirmatory of the operation of s 524 and, specifically, confirmatory of the conclusion that an employee in a period of authorised leave does not engage the terms of s 524. On the basis that my construction of s 691A of the WR Act is correct, as I believe it to be, it is I think untenable to construe s 525 as intended to bring about significant legislative reform by, for the first time, extending the operative reach of the statutory stand down provision to an employee on authorised leave. No competent draftsperson would have approached the task of bringing about such a reform by essentially repeating the text of s 691A and then adding the text of s 525. Nor is any such significant reform heralded or even faintly suggested by any of the relevant extrinsic material, including the particularly detailed Explanatory Memorandum which accompanied the Fair Work Bill 2008 (**"Explanatory Memorandum"**).

142 Qantas' case is premised upon s 525 being a "statutory deeming provision which creates a fiction", the fiction being that an employee who is stood down under s 524(1) is not taken to be stood down during a period in which the employee is taking leave of the kind contemplated

by s 525(a) or an authorised absence of the kind contemplated by s 525(b). The use of the phrase "is not taken to be" is the basis for the contention that the provision is a deeming provision which operates upon a fiction, although Qantas acknowledged that the intended deeming was couched in awkward language because the expression "is not taken to be" suggests that s 525 is reversing a fiction, rather than reversing the reality provided for in s 524. Accordingly, Qantas contended that the expression "is not taken to be stood down" was intended to mean "taken not to be stood down". On that contention, the assumed reality is that s 524(1) does authorise an employee to be stood down during a period when the employee is on authorised absence or leave.

143 The first difficulty with the construction of s 525 for which Qantas contends is that the assumed reality as to the operation of s 524 is not the reality at all for the reasons already addressed. The reality being that s 524 does not engage an employee during a period when the employee is on authorised absence or leave, suggests that what s 525 must be intended to do is to confirm the reality provided for by s 524 rather than reverse it. That suggests that the phrase "is not taken to be stood down" was simply intended to mean "not stood down". Notably and in respect of s 525, the Explanatory Memorandum (at [2884]), used the expressions "is not taken to be stood down" and "is not stood down" interchangeably (emphasis added):

> If an employee is authorised by the employer to take leave (paid or unpaid) or to be absent from employment then the employee *is not taken to be stood down* under subclause 524(1). Also, if an employee is entitled to be absent from work, for example on a public holiday, the employee *is not stood down*.

144 The Note to s 525 serves to confirm that the provision is dealing with an employee not stood down under s 524 as a matter of fact rather than fiction. It refers to the employee addressed by s 525 as an employee who "would otherwise be stood down under subsection 524(1)" if the employee was not at that time taking leave. The Note confirms the construction of s 524, which I prefer, that during the period of leave an employee is not stood down.

145 Although there is some initial attraction to the idea that the words "taken to be" invoke some attempt to create a fiction, on closer examination including by reference to context and purpose, it becomes clear that in truth, there is nothing in the text of s 525 which purports to alter the operation of s 524. That realisation demonstrates again the wisdom of the observation that "the context, general purpose and policy of the provision and its consistency and fairness are surer guides to meaning than the logic of the construction of the provision" (*Bay Street Appeal* at [4]).

146 The construction advanced by Qantas would characterise the function of s 525 as carving out an exception from the rule provided by s 524 that an employee in a period of leave is able to be stood down in accordance with that provision. But that is clearly not the rule and it is clear that s 525 does not seek to make it so. The rule under s 524 is that employees on authorised absence or leave are excepted from its operation. Section 525 must be understood as explaining or confirming that exception. It cannot be understood as creating an exception when the exception already exists.

147 To adopt the language of Kiefel CJ and Keane J in *R v A2* [2019] HCA 35 at [51], s 525 "is properly read as a clarification inserted for the avoidance of doubt, and not as an exception to [s 524]". The provision achieves that objective by setting out expressly the exception impliedly made by s 524 that an employee in a period of authorised absence or leave is not an employee in a period of the kind specified by s 524(1) and is therefore not capable of being stood down. Another example of a provision inserted for the avoidance of doubt rather than to qualify the operation of a related provision, is found in *Taylor v Attorney General (Commonwealth)* [2019] HCA 30 (see at [44] per Kiefel CJ, Bell, Gageler and Keane JJ).

148 Furthermore, the scope of the exception being confirmed (rather than being made) by s 525, is not to be construed as Qantas would have it construed. The exception, as implicitly made by s 524, extends to all forms of authorised absence or leave. No qualification to that exception and, in particular, no qualification in respect of either personal/carer's leave or compassionate leave is discernible from the text, context or purpose of that provision. As a reflection of the exception made by s 524, s 525 cannot be construed as qualifying that which it is intended to mirror.

149 That being so also demonstrates that there was no material distinction intended by the use of the word "leave" in s 525(a) and the reference to an authorised absence in s 525(b). As earlier indicated, Qantas' case was fundamentally constructed upon that being a distinction of significance.

150 As a matter of ordinary language, leave is an authorised absence and, as the appellant unions submitted, the FW Act is prone to use the terms interchangeably: see for example s 22(2), which defines 'service'; s 62(4), which treats any absence or leave as hours worked; s 130(1), which prohibits taking leave while receiving workers' compensation payments; s 352, which prohibits dismissal by reason of an absence but which clearly has in mind personal leave; and

the heading to Div 8 of Pt 2-2 "Community service leave" followed by s 108 which refers to the activities dealt with by that Division as an entitlement to be absent.

151 The distinction made between paras (a) and (b) of s 525 is not made by reference to the nature of the absence, but it is made by reference to the source of the authority for the absence. Paragraph (a) is addressing an authorised absence sourced in the consent of the employer, whilst para (b) is addressing an authorised absence as of right, that is an absence authorised by an entitlement to be absent conferred by statute, by an industrial instrument, by contract or otherwise. To my mind that distinction has been made to emphasise that, as well as leave available as of right, leave may be taken even where there is no entitlement to take leave providing that the employer has consented. Thus, for instance, annual leave may be taken in advance of an employee's entitlement to take leave, if authorised by the employer. The taking of leave by an employee during a period where the employee would not have been able to be usefully employed is likely to serve the interests of both the employee and the employer. That the provision has sought to emphasise that all forms of leave, however authorised, are available to be taken is not, in the context of the circumstances with which s 525 deals, surprising.

152 Further, the points made by Qantas in support of the distinction it sought to make were unconvincing. *First,* Qantas' reliance on the purported need for employer authorisation to take annual leave was misguided. That the time annual leave is taken is to be a period agreed between the employee and the employer, where the employee's request is not to be unreasonably refused (s 88 of the FW Act), is not a basis for characterising annual leave as an entitlement "authorised" by an employer. Annual leave may be so characterised where it is conferred not by the statute but by the employer's consent, such as annual leave provided in advance. However, all manner of leave may be so characterised where conferred by the employer including PC&C leave which Qantas sought to say was not a kind of leave contemplated by s 525 at all. Unpaid or paid personal leave can be authorised by an employer and often is, especially where an employee suffers a serious injury but has exhausted the statutory entitlement to paid personal leave. That observation serves to confirm that the distinction drawn between paragraphs (a) and (b) of s 525 is a distinction based on the source of the authorisation for leave and not on its nature.

153 Nor is it likely that the purpose of the distinction between paras (a) and (b) is directed to limiting the leave that may be taken by employees to that which their employer is prepared to countenance, as a means of diminishing the financial burden upon the employer. That

contention is founded upon the incorrect proposition (for the reasons earlier given) that a purpose of a stand down provision is to relieve an employer of that burden.

154 *Third*, if the distinction sought to be made by Qantas was intended, whether or not a form of absence was within the scope of para (b) would depend upon whether the statute, industrial instrument or contract conferring the entitlement describes it as an authorised absence or alternatively as authorised leave. It is, I think, untenable to contend, in circumstances where every kind of authorised absence from work is capable of being described as leave, that Parliament intended that access to the entitlement would depend upon the descriptor chosen by the instrument which conferred it. Nor is it likely that Parliament intended that the distinction between leave and absence should depend upon the substance of the entitlement irrespective of how it is described. What is the difference in substance between an authorised absence and leave? If there is a difference, it is not a difference that can be clearly articulated or easily discerned.

155 To avoid the force of the argument made in response by the appellant unions, that the descriptor chosen for the entitlement by the instrument conferring it could not have been intended to dictate whether or not the entitlement was accessible, Qantas contended that paras (a) and (b) were only dealing with entitlements conferred by the FW Act. But s 525 cannot be construed as confined to FW Act entitlements when s 524 is obviously not so confined. To so construe s 525, would require that the "payments" that an employer is authorised not to make by s 524(3) be limited to payments required by the FW Act and would exclude payments required by any other source including any applicable industrial instrument and the contract of employment. There is no discernible basis for confining either s 524 or s 525 to entitlements conferred by the FW Act.

156 Further, if para (b) was intended to be confined to entitlements described by the FW Act as authorised absences, in circumstances where there are but three provisions that so describe the entitlement, it would be surprising that a general descriptor was used in s 525(b) rather than specific reference made to the provisions actually in sight.

157 If, despite my own view, the distinction sought to be drawn by Qantas between the subject matter dealt with by paras (a) and (b) of s 525 is open, it is I think a distinction that is only open by reason of the logic of the construction of the provision. Again, a surer guide to what the provision intends, as the authorities have so often emphasised, is the "context, general purpose and policy of the provision and its consistency and fairness" (see above at [110]). Each of

those considerations have already been addressed and are decisive. In particular, Qantas' reliance upon s 525 cannot stand in light of the fact that whilst in a period of leave an employee is not stood down pursuant to the authority given by s 524(1) and that, consequently, there is no authority given by s 524(3) for the leave payment due to the employee being withheld.

158 Qantas asserted that its conclusion that an employee who has been stood down in accordance with s 524(1) cannot generate an entitlement to PC&C leave is consistent with the operation of the statutory provisions which confer that leave. It is not clear to me why any such consistency needs to be demonstrated. If an employee in a period of PC&C leave can be stood down in accordance with s 524(1), then s 524(3) would negate the requirement made by s 99 of the FW Act that whilst an employee (other than a casual employee) "takes a period of paid personal/carer's 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". The same would apply in relation to compassionate leave where s 106 of the FW Act provides that if an employee (other than a casual employee) "takes a period of compassionate 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". On the premise that an employee on such leave is stood down in accordance with s 524(1) and that consequently s 524(3) is engaged, there is no need to demonstrate that s 99 and s 106 would not in any event have been engaged because even if those provisions were engaged they are overridden by s 524(3).

159 The contention was really put for the broader purpose of demonstrating that, irrespective of whether an employee is stood down in accordance with s 524(1), an employee who is stood down (as Qantas put it) "cannot generate any entitlement" to paid PC&C leave by reason of the operation of s 99 and s 106.

160 Whether put for that broader purpose or to demonstrate consistency, the contention is without merit.

161 Qantas relied upon the terms of s 99 and s 106 and in particular the expression "ordinary hours of work in the period" to contend that for an employee stood down, there can be no ordinary hours of work because there is no work at all and therefore no entitlement to be paid is generated under s 99 or s 106. The submission involves a fundamental misconception of what is meant by the expression "ordinary hours of work". It proceeds on the basis that "ordinary hours of work" means the hours in which an employee has work to do.

162 That definition of "ordinary hours of work" would turn the long-standing meaning of a well-worn industrial phrase of great importance, on its head.

163 As Allsop CJ (with whom Rangiah J agreed) said at [39] of *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union* (2019) 270 FCR 359, "[t]he notion of standard or ordinary working hours has long had a place in the industrial relations landscape of Australia". With respect to his Honour, Allsop CJ correctly observed that in the context of the payment of salaries and wages in the workplace:

> …the word "ordinary" and the phrase "ordinary hours" have assumed different meanings depending on context and circumstance. There are circumstances and contexts where the word and phrase can be seen to refer to regular, normal, customary or usual hours; and there are circumstances or contexts where the word and phrase can be seen to refer to the hours of work referred to in applicable industrial instruments as standard hours to be paid at ordinary rates, as opposed to additional hours (even if required, usual, regular, normal or customary) and paid at a special or higher rate. As such, the word and phrase can be seen to reflect the long-recognised distinction between ordinary hours of work and overtime: cf *Thompson v Roche Bros Pty Ltd* [2004] WASCA 110 at [31].

164 As the Chief Justice went on to observe at [40] the meaning of "ordinary hours of work" is given by s 20 of the FW Act in relation to award/agreement free employees. For those employees, s 20(1) relevantly provides that "[t]he **ordinary hours of work** of an award/agreement free employee are the hours agreed by the employee and his or her national system employer as the employee's ordinary hours of work".

165 At [41] the Chief Justice then referred to the Explanatory Memorandum in which he observed "the importance of ordinary hours of work to the National Employment Standards was explained". At [234] and [235] the Explanatory Memorandum said this:

> There are a number of concepts that are used regularly in Part 2-2. These are explained below.
>
> Various employee entitlements under the NES are based on the employee's ordinary hours of work.
>
> - The ordinary hours of work for an employee to whom a modern award applies will be the ordinary hours set out in the modern award (all awards are required to provide ordinary hours, or a means of determining ordinary hours) (see clause 147).
> - The ordinary hours of work for an employee to whom an enterprise agreement applies will be the hours identified in the enterprise agreement. (An agreement should identify ordinary hours, or a means of determining ordinary hours, in order for the agreement to pass the better off overall test.)
> - The ordinary hours of work for an award/agreement free employee (as defined in clause 12) are calculated in the manner set out in clause 20.

166 Sections 99 and 106 of the FW Act use the expression "ordinary hours of work" so as to identify the extent of the employee's entitlement to be paid wages or salary whilst in a period of leave. The payment for the period in which leave is taken is to be calculated by reference to "the employee's base rate of pay for the employee's ordinary hours of work". The distinction there sought to be made by the use of the expression "ordinary hours of work" is between ordinary or standard hours of work and overtime hours and, as stated in the Explanatory Memorandum, for employees like those here in question who are covered by an enterprise agreement "[t]he ordinary hours of work for an employee to whom an enterprise agreement applies will be the hours identified in the enterprise agreement". For example, the *Qantas Airways Limited (AWU, AMWU, CEPU) Enterprise Agreement 10* ("**EA**") specifies in cl 25 the ordinary hours of work for both shift workers and day workers. For shift work, cl 25.1.1 provides:

> The ordinary hours of work shall be an average of 38 hours per week to be worked on the basis of 152 ordinary hours within a work cycle not exceeding 28 consecutive days to be worked (in the case of full time day workers) at eight hours per day nineteen days per cycle.

167 For day work (and subject to various provisos set out in the clause) cl 25.1.2 relevantly provides:

> The ordinary hours for day workers shall not exceed 40 per week, worked on five days of eight hours each worked continuously between 0600 and 1800, Monday to Friday.

168 An employee's "ordinary hours of work" is an expression of the standard number of non-overtime hours the employee may be required to work and the spread of hours over a week or a longer cycle during which work may be required. An employee's "ordinary hours of work" are fixed until altered. They may be fixed by the contract, the award or the relevant enterprise agreement. An employee's "ordinary hours of work" do not depend upon work being available for the employee to perform. They are not varied by an absence of useful work for the employee to perform. An employee's "ordinary hours of work" are the same irrespective of how many hours of work are performed or are available to be performed. Whether an employee is in a period of leave or not, an employee's "ordinary hours of work" are the same.

169 Qantas relied on the observations made by various members of the High Court in *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29 which have been conveniently set out in the reasons of Rares and Colvin JJ. To my mind, those observations were made on the basis of the expression "ordinary hours of work" having the long-standing meaning to which I have referred. So understood, those observations provide no support for Qantas' contention.

170 It may be accepted that it is possible for a provision providing an entitlement to either personal/carer's leave or compassionate leave to impose a condition upon that entitlement, being that the entitlement is not available during a period when the employee could not have been usefully employed for a reason other than the employee's unavailability because the employee was absent on leave. As entitlements to leave can be conferred by an industrial instrument or a contract of employment as well as the FW Act, any of those sources of the entitlement could impose such a condition. However, as both personal/carer's leave and compassionate leave are provided for by the FW Act as minimum standards which form part of the "National Employment Standards", neither a contract, an award or an enterprise agreement can derogate from those entitlements by imposing conditions which would limit access to them (see s 55(1) and s 56 of the FW Act).

171 Section 97 of the FW Act sets out the conditions that govern the taking of personal/carer's leave. There are essentially two conditions. Section 97 provides that an "employee may take paid personal/carer's leave if the leave is taken…(a) because the employee is not fit for work…or…(b) to provide care or support to a member of the employee's immediate family…". Neither condition is qualified by any requirement that during the period in which leave is to be taken there be useful work for the employee to perform.

172 Section 104 sets out the "permissible occasions" when an employee may take compassionate leave. The occasions specified are in each case occasions where either a member of the employee's immediate family or a member of the employee's household contracts or develops an illness or sustains an injury that poses a serious threat to that person's life or, alternatively, that person dies. The "permissible occasions" are not qualified by any requirement that during the period in which leave is to be taken there be useful work for the employee to perform.

173 There is, however, one qualification that is implicit. The entitlement to either personal/carer's leave or to compassionate leave only applies in respect of a day or during a period in which the employee would ordinarily have been performing work. Neither entitlement falls on a day when the employee is not ordinarily working or, more precisely, at a time otherwise than during the employee's ordinary hours of work. That implication flows from the fact that the entitlement is an entitlement to leave and, of its nature, leave is an entitlement of an employee to be absent from work during a period in which the employee is ordinarily rostered to work. The same implication is equally applicable to every kind of entitlement to leave.

174 But Qantas contends for a broader implication. Qantas contends for an implicit condition that the entitlement to leave is limited to a time when the employee would have been ordinarily required to work but only if, during that time, the employee could have been usefully employed. As discussed no such implication is available to be drawn from s 99 or from s 106. It needs to be further stated, however, that if such a condition is implicit in relation to PC&C leave there is no reason for the same implication not to be equally applicable across all forms of leave. Further, if such a condition is implicit there is nothing to confine its operation to a situation where the employee cannot be usefully employed by reason of one or other of the circumstances specified by s 524(1). The corollary of this contention is that there is no entitlement to any kind of paid leave whatsoever, whenever an employee cannot be usefully employed for any reason whatsoever. That notion is startling in its reach and effect yet Qantas cannot point to a single historical example, whether by reference to entitlements conferred by the FW Act, predecessor federal legislation, state-based legislation (remembering that long service leave is usually a state-based entitlement) or an award or enterprise agreement, in which an employee's entitlement to leave has been held to be conditioned by the limitation that, during the period of the leave, the employee must have been able to have been usefully employed.

175 There are no such examples because the entire foundation for the contention is without any merit. Employee entitlements to paid leave are not dependent upon an employer having useful work for the employee to do during the period of the leave just as employee entitlements to be paid wages when not on leave are not dependent upon the employer having useful work for the employee to do, unless, of course, a provision such as s 524(3) is engaged. That all goes to demonstrate that Qantas' case stands or falls on s 524 and not upon the operation of either ss 96-103 dealing with personal/carer's leave or ss 104-106 dealing with compassionate leave.

176 Nor is there anything particularly incongruous or paradoxical about some employees being entitled to paid leave whilst other employees are stood down without pay. The timing of and extent to which leave such as PC&C leave is taken is random. It is in the nature of such leave that there will be variable rather than equal access to leave of that kind across a range of employees of the one employer. Further, once taken and irrespective of when taken, the entitlement diminishes and, unlike the employee lawfully stood down, the employee who takes PC&C leave pays a price for utilising that entitlement. Furthermore, the utilisation of these entitlements when there would be no useful work for the employee rather than when there is useful work for that employee to do, tends to better serve the interests of the employer. When those matters are put together with the obvious and significant disruption and disadvantage that

an employee would be faced with if denied PC&C leave, particularly an employee already on personal leave who would then likely be more reliant on the certainty of being paid than at most other times, there is no discernible policy-based imperative that supports Qantas' case. To the contrary, particularly given the far-ranging effects that would logically follow from the acceptance of Qantas' case across all manner of leave entitlements, there are strong reasons for thinking that what appears to have been the long-standing industrial practice in which stand down provisions have not impacted upon employee entitlements to leave, is based upon cogent policy.

177 For all those reasons, with great respect to the primary judge, his Honour erred in dismissing the application for a declaration made by the appellant unions. Although I would not make a declaration in the form sought by the appellant unions before the primary judge, a declaration should be made to the effect that Qantas is not authorised by s 524 or s 525 of the FW Act to stand down and withhold the payment due to an employee during a period in which the employee is taking personal/carer's leave or compassionate leave.

Clause 18 of the Enterprise Agreement

178 I turn then to the position of those employees covered by cl 18 of the EA. There is a short answer as well as a longer answer to Qantas' claim that those employees are not entitled to PC&C leave.

179 The short answer is that those employees are entitled to personal/carer's leave and compassionate leave under the National Employment Standards of the FW Act and that, by operation of s 55 and s 56 of the FW Act, the EA has no effect insofar as it may seek to deprive those employees of those entitlements including the entitlements to paid PC&C leave. So much was conceded by Qantas, whose only possible answer was the proposition already rejected above at [161]-[176] that an employee has no entitlement to personal/carer's leave under ss 96-99 of the FW Act or no entitlement to compassionate leave pursuant to ss 104-106 of the FW Act, during a period when the employer has no useful work for the employee to do.

180 The longer answer which need not strictly be given, is that cl 18 of the EA can only relevantly be addressing entitlements conferred by the EA itself and, insofar as it does that, the preferable view is that it does not authorise the deduction of payment due when an employee is taking leave during a period of personal leave or carer's leave or compassionate leave.

181 This issue is to be considered without reference to s 524 of the FW Act because the authority to stand down given by s 524(1) is not applicable where an enterprise agreement, such as the EA by cl 18, provides for an employee to be stood down "during a period in which the employee cannot usefully be employed because of a circumstance referred to in [s 524(1)]": s 524(2) of the FW Act.

182 Nevertheless, there are sufficient similarities between the terms and structure of s 524(1) and cl 18 of the EA that assist to demonstrate that the stand down provision found in cl 18, like the stand down provision in s 524(1), does not engage the circumstances of an employee on leave during a period of authorised PC&C leave.

183 The relevant terms from cl 18 of the EA have already been set out in the reasons for judgment of Rares and Colvin JJ. There are three sub-clauses which it is convenient to set out again:

> 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.
>
> …
>
> 18.1.8 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.

184 The EA also provides for personal leave (sick leave) and for personal leave to be taken as carer's leave. Provision is also made for compassionate leave. Under cl 29.1 of the EA, paid personal leave is "available to an employee, other than a casual, when he or she is absent due to personal illness or injury". Clause 29.3 provides an entitlement to compassionate leave in two parts. *First*, 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. *Second*, other than a casual employee, an employee is entitled to be paid compassionate leave when a member of the employee's immediate family or household contracts, develops or

sustains a personal illness or injury that poses a serious threat to that person's life. Whilst the entitlements conferred by those provisions are subject to the giving of notice and/or the production of specified evidence, there is neither an expressed nor implied requirement in any of the clauses in question which conditions the entitlement of that leave to a day or period on which the employee would otherwise have been able to be usefully employed during the period of leave in question.

185 Clause 18.1.1 addresses when a deduction may be made from what, it must be inferred, is the payment that an employee would normally receive for the ordinary hours usually worked. Like s 691A of the WR Act and s 524 of the FW Act the clause authorises an employer to withhold payments otherwise due to the employee during a period (in the case of cl 18 "for any day") in which an essential fact pertains, being that the employee "cannot be usefully employed". Also like both s 691A and s 524(1), the existence of that essential fact is contingent on it having been brought about or caused by the circumstances described in the provision – those circumstances being the same or similar in respect of each of cl 18, s 691A and s 524.

186 As is the case for s 691A of the WR Act and for s 524 of the FW Act, the causal circumstances specified in cl 18.1.1 do not include the circumstance that the employee is absent on authorised leave. When an employee is taking a day of PC&C leave the employee is not in a "day an employee cannot be usefully employed because the strike or stoppage of work through any cause for which Qantas cannot reasonably be held responsible".

187 Clause 18 is in substantially the same terms as the award provision dealt with in *Re Rubber Workers Award*. For the reasons given by the majority in that case and those earlier given about the operation of both s 691A of the WR Act and s 524 of the FW Act, including those reasons which address the purpose of stand down provisions such as cl 18, that clause does not authorise an employer to withhold payment due to an employee whilst on paid personal leave, paid carer's leave or paid compassionate leave conferred by the EA.

188 I should add that to my mind there is nothing in either cl 18.1.8 or 18.1.9 which suggests that that conclusion is misplaced. Clause 18.1.8, to some extent, serves a function similar to that served by s 525 of the FW Act. It confirms that annual leave is available to be taken but extends that availability to include the time an employee may require to return to the employee's normal place of abode. Clause 18.1.9 confirms that no deduction is authorised for a day which is a public holiday, but excepts a public holiday in which the employee engages in a strike or stoppage at Qantas or where the employee has taken other employment (as cl 18.1.6 permits)

and has an entitlement to be paid for the public holiday under that other employment. Each of the subjects dealt with by those clauses needed to be addressed because they specify exceptions or extensions to what would otherwise had been applicable on the operation of cl 18.1.1. They are not a code in which the parties should be taken to have expressed the full extent to which payments in relation to leave may be withheld under cl 18.1.1.

189 For those reasons and with great respect to the primary judge, his Honour erred in dismissing the appellant unions' application for a declaration as to the operation of the EA. Although a declaration in the terms sought by the appellant unions was not appropriate, in my view, a declaration should be made to the effect that, in relation to employees covered by cl 18 of the EA, Qantas is not authorised by that clause to withhold the payment due to an employee during a period in which the employee has taken personal leave, carer's leave or compassionate leave conferred by either the FW Act or the EA.

I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromberg.

Associate:

Dated: 27 November 2020