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PARLIAMENT OF TASMANIA

# LAW REFORM COMMISSION

## REPORT No. 24

**Entitlements of Persons Re-employed  
following a Term of Imprisonment**

*Presented to both Houses of Parliament by His Excellency's Command*

By Authority:

T. J. HUGHES, Government Printer, Tasmania

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## LAW REFORM COMMISSION

### Report on Entitlements of Persons Re-employed following a Term Imprisonment

1. By reference dated 31 July 1978 from the Acting Attorney-General, the Law Reform Commission was asked to report upon entitlements of persons re-employed following a term of imprisonment. Such reference was given to the Commission as a result of an industrial dispute at Rosebery. We believe that this arose because two employees were each gaoled for a criminal offence upon conviction in a court of petty sessions and suffered some loss of benefits in consequence thereof when they were re-employed.

2. The Commission wishes to make it clear at the outset that it has accepted this reference on the basis that it is being asked to report generally upon the entitlements of persons re-employed following a term of imprisonment. It would be improper for the Commission to offer any comments on the Rosebery dispute or to become involved as an arbitrator in any industrial dispute. Indeed, the Chairman advised the Acting Attorney-General accordingly when formally acknowledging this reference on 9 August 1978.

3. The Commission does not see that any purpose would be served by taking evidence in respect of this reference. It has, however, obtained some useful information from the Secretary for Labour. The Commission's views, as expressed in this report, are unanimous.

4. The Commission does not know the precise ambit of the 'entitlements' which the Government has in mind and which will be lost following a term of imprisonment. It seems that the main entitlement so lost will be to long service leave benefits, unless an employee can bring himself within section 5 (1) (g) of the Long Service Leave Act 1976. Any loss of other entitlements will presumably be covered by an appropriate award, in which case any dispute concerning such loss will be a matter for consideration by an industrial board, subject to the prescribed right of appeal. We therefore propose to confine ourselves mainly to the long service leave aspect. ✓

5. We should say that we think that the incidence of loss of entitlements resulting from imprisonment would be extremely low. This is not only because of the low percentage of the work force actually imprisoned, but also because a substantial number of employees who are imprisoned have not had the necessary qualifying service to enable them to receive long service leave benefits.

6. The Long Service Leave Act 1976 amended and consolidated the law relating to the granting of long service leave to employees, except any employee who—

- (a) is an employee within the meaning of the State Employees (Long-Service Leave) Act 1950;
- (b) is entitled to long service leave under an award as defined by or under the Coal Mining Industry Long Service Leave Act 1950; or
- (c) is entitled to long service leave under Division III of Part VI of the Local Government Act 1962.

7. A perusal of the relevant legislation and advice given by the Secretary for Labour indicates the following:—

- (1) An employee who is subject to the Long Service Leave Act 1976 does not lose continuity of service if he is dismissed and is re-employed by the same employer within a period not exceeding two months after the date of his dismissal (section 5 (1) (g)).

- (2) An employee subject to the State Employees (Long-Service Leave) Act 1950 or Division III of Part VI of the Local Government Act 1962 loses continuity of employment if he is dismissed and is re-employed.
- (3) An employee under an award as defined by or under the Coal Mining Industry Long Service Leave Act 1950 does not have notional continuity of service between any dismissal and re-engagement.

8. If section 5 (1) (g) of the Long Service Leave Act 1976 is applicable in a case where an employee who is subject to that Act is imprisoned, then he will not necessarily lose his continuity of service if he is imprisoned. His situation will depend upon whether he is dismissed, the length of his imprisonment and whether his employer is prepared to re-employ him. In most cases one could assume that an employee would be dismissed if he were imprisoned. However, if an employee with a good work record is undergoing a short term of imprisonment, his employer might be prepared to allow him to have leave of absence without pay during his imprisonment without dismissing him. His service would then be deemed to be continuous service. If the employee is dismissed and if he is re-employed by the same employer within a period of two months, then, again, he will not lose his continuity of service. Of course, this would only apply if the employee's term of imprisonment did not exceed two months. By virtue of section 5 (2) of the Long Service Leave Act, his period in prison would not be counted as part of his period of employment.

9. It is of interest to note that the State Employees (Long-Service Leave) Act 1950, applicable to persons employed in any capacity by the State or by any State authority, does not contain a provision similar to section 5 (1) (g) of the Long Service Leave Act 1976. Nor does such a provision apply to local government employees.

10. The Secretary for Labour has suggested to us that if an employee is imprisoned the contract is terminated by the doctrine of 'frustration' and the question of dismissal is therefore 'superfluous'.

We agree that if an employee is imprisoned for committing an unlawful act it is impossible for him during the term of his imprisonment to perform his part of the contract and the employer would be justified in dismissing him. If, however, the employer were able to, and did re-employ the employee within two months of the dismissal, then the service would we think be deemed continuous by virtue of section 5 (1) (g).

If it were held that there had been a frustration of the contract by the conduct of the employee rendering himself incapable of continuing to perform the contract, then the result would be that the contract was terminated anyway and no question of continuous service could arise.

Whether or not a contract is discharged by frustration is a matter of interpretation of each particular contract. We can do no more than say that, in our opinion, there might well be some contracts of service in which the Court might conclude that the contract as a whole had been terminated by reason of the imprisonment of the employee, due to misconduct on his part, making it impossible for him to complete his contract. In other circumstances, a court might hold that there had been not total but only partial frustration of the contract or might make some other order in regard to the interpretation of the contract which it considered 'just and equitable' in the circumstances.

Discharge of a contract by frustration may end a contract but it is not the equivalent of dismissal so cannot bring section 5 (1) (g) into play even if there is re-employment by the same employer within two months of the termination of the contract.

11. The Commission does not consider that an employer should be compelled by law to retain an employee who has been sentenced to a term of imprisonment. Nor do we consider that an employer should be compelled to re-employ an employee who has been dismissed as a result of being sentenced to a term of imprisonment. At common law, an employee has a duty not to incapacitate himself in such a way as to be

unable to carry out his duties. It is well established at common law that an employer may dismiss an employee who is guilty of criminal conduct, whether in the course of his duties or not. See *Diamond on the Law of Master and Servant* (2nd Edition) at page 188. We can see no reason in principle why an employer should not have the right to dismiss an employee if the employee is imprisoned as a result of being convicted. By his conviction and imprisonment the employee has prevented himself from carrying out his duties. We would regard it as unreasonable that an employer should be obliged to keep the job open until the employee's release from prison. We would point out that, in these enlightened times, a term of imprisonment is not imposed without good reason. Either the offence is a serious one and/or the offender is a recidivist.

12. As a matter of principle, we can see no reason for having special provisions to assist an employee who is imprisoned following upon a conviction. If there were such provisions then such an employee could be placed in an advantageous position by comparison with an employee who left his employment on account of other unavoidable circumstances and who was subsequently re-employed by the same employer.

13. Whether or not an employer exercises his right to dismiss an employee as a result of his conviction for criminal conduct seems to us to be a matter for his determination. There will be cases where he may decide not to do so because of the employee's record of service and the shortness of the term of imprisonment. Again, it is a matter for the employer whether he desires to reinstate the employee. If he does so within two months of the employee's dismissal, then the employee's continuity of service is not lost. Subject to the two special categories which we mention in the following paragraph, we do not see any need to extend beyond two months the period within which an employer may re-employ a dismissed employee without loss of continuity of service. We have already said that a sentence of two months' imprisonment does not result from some trifling matter in these days.

14. In the preceding paragraphs we have used the expression 'sentenced to a term of imprisonment' and other references to imprisonment as meaning a sentence of imprisonment as a result of a conviction which has not been reversed on appeal. Furthermore, we have not used such expressions to include custody pending trial unless a person is subsequently convicted.

We think that special considerations should apply in the case of an employee who has served a term of imprisonment before having his conviction set aside on appeal. Under such circumstances he would, in effect, have been wrongfully imprisoned.

We also think that special considerations should apply in the case of an employee who is held in custody pending trial and who is subsequently acquitted. An employee may be charged with a serious offence and be held in custody, having been refused bail. He may be dismissed from his employment in consequence but be subsequently tried and acquitted. His employer may refuse to re-employ him or he may re-employ him after a lapse of two months.

In each of the above cases, we would regard it as just that the employee's position should be protected to the extent possible. The difficulty, of course, is to balance the interests of the employee against those of the employer. One cannot reasonably expect an employer, especially one running a small business, to leave an imprisoned employee's position open indefinitely. We consider that the most that we can reasonably ask is that, *in those special cases*, continuity of service should not be broken and absence from work should be counted as part of the period of employment if an employee is dismissed and is re-employed by the same employer within a period of *six* months. We think that this extended period is necessary in order to allow for delays in bringing serious cases to trial and in hearing appeals. The effect of our proposals would be that, *in those special cases*, an employee who is dismissed *may* be re-employed without loss of long service leave benefits at any time within six months of his dismissal. However, his re-employment would still be a matter for his employer. To make it mandatory for an employer to re-employ such an employee would, we think, be imposing too great a burden upon most employers.

15. It will have been observed that State and local government employees suffer some discrimination at present in respect of any re-employment after dismissal for the purpose of calculating continuity of service. There may be policy reasons for this difference. The Long Service Leave Act 1976 applies to all employment not covered by other legislation and embraces a range of employment situations which might be uncommon in government service. In the private sector, the continuity of employment is much more likely to be affected by the needs of the market place and special protection might be regarded as necessary. However, we consider that it would be desirable to have a uniformity of approach, to the extent possible, for all employees in so far as continuity of service is concerned. This will require appropriate amendments to the State Employees (Long-Service Leave) Act 1950 and to Division III of Part VI of the Local Government Act 1962. It seems that any action on behalf of employees under the Coal Mining Industry Long Service Leave Act 1950 will be a matter for the appropriate Commonwealth authority.

We would recommend that a provision similar to section 5 (1) (g) of the Long Service Leave Act 1976 should be included in the State Employees (Long-Service Leave) Act 1950 and in the Local Government Act 1962.

16. The Commission proposes, after this report has been tabled in Parliament, to send a copy to each of the magistrates calling attention to section 5 (1) (g) of the Long Service Leave Act 1976 and to the fact that a term of imprisonment could affect an employee's continuity of service.

#### Summary

17. We can summarise our views and recommendations as follows:—

- (1) An employer should not be compelled to retain or re-employ an employee who has been imprisoned.
- (2) For the sake of uniformity in respect of continuity of service where an employee is dismissed and re-employed by the same employer, consideration should be given to amending the State Employees (Long-Service Leave) Act 1950 and Division III of Part VI of the Local Government Act 1962 so that each contains a provision similar to section 5 (1) (g) of the Long Service Leave Act 1976.
- (3) The Long Service Leave Act 1976, the State Employees (Long-Service Leave) Act 1950 and Division III of Part VI of the Local Government Act 1962 should each contain a special provision that continuity of employment shall not be broken and absence from work shall be counted as part of the employment where an employee is dismissed as a result of being imprisoned and is re-employed by the same employer within a period not exceeding six months after the date of the dismissal *if the following conditions are satisfied:*
  - (a) his imprisonment was the result of a conviction which has been set aside on appeal, or
  - (b) his imprisonment was the result of being refused bail in respect of a charge upon which he has been subsequently acquitted.

This provision will be additional to the existing statutory provisions (including section 5 (1) (g) of the Long Service Leave Act 1976) relating to continuity of employment.

- (4) Apart from these minor amendments, there should be no legislative changes.

This report is signed by the Chairman on behalf of the Commission and with its authority.

Dated this nineteenth day of September, 1978.

C. BRETTINGHAM-MOORE, Chairman.

**END**