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Calculating Long Service Leave in New South Wales

A Redefined Test:

Wipro Limited v State of New South Wales [2022] NSWCA 265

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One of the lasting impacts of COVID-19 has been the level of movement of employees. With "work from anywhere" policies and the popularity of remote working, employees are increasingly working interstate or overseas. One issue often forgotten in these arrangements is whether employees' service in these other locations is "service" for the purposes of state-based long service leave legislation.

The New South Wales (NSW) Court of Appeal recently provided some much-needed clarity, confirming that service performed outside of NSW without a substantial connection to NSW will not be counted as continuous service under the Long Service Leave Act 1955 (NSW) (LSL Act).

Position Prior to the *Wipro* Decision

Prior to Wipro, establishing if an employee's service was continuous service for the purpose of the LSL Act required an assessment of whether, at the time the entitlement crystallised, the employee's service could "fairly be said to be NSW service".[1] However, this did not necessarily require all of the employee's service to be substantially connected to NSW. Rather, it required consideration of the overall employment relationship at the time the entitlement crystallised (for example, when the employee's employment terminated or the employee sought to use their long service leave) in order to determine if the employee's service was NSW service.[2]

Infosys Decision

In 2021, the position in Victoria was clarified by the Victorian Court of Appeal. The decision of *Infosys Technologies Limited v State of Victoria* [2021] VSCA 219 (Infosys) confirmed that an employee's service must be "in and of Victoria", which requires the service to have a sufficient connection to Victoria at the time the service is undertaken.

The court in Infosys accepted that an employee did not necessarily need to be in Victoria in order for the service to be "in and of" Victoria. Rather, service with a sufficient connection to Victoria would be counted as continuous service for the purposes of long service leave, including, for example, where an employee is seconded outside of Victoria by a Victorian employer or where the directions provided to the employee emanate from Victoria.

Key Facts From *Wipro*

Background of Employment

Mr. Rawat was employed in India for six years prior to moving to Australia. Mr. Rawat subsequently worked in NSW for a further five years under a "deputation agreement", before resigning from his employment in 2019. Notably, throughout his employment, Mr. Rawat was employed by Wipro Limited, an entity incorporated and headquartered in India (and registered in Australia as a foreign company).

Decision of Court

The court held that Mr. Rawat's service in India was a distinct period prior to his employment in NSW, with no "substantial connection" between Mr. Rawat's service in India and NSW. Accordingly, Mr. Rawat's service in India did not constitute service for the purposes of long service leave under the LSL Act.

The court confirmed that an assessment as to whether service has a "substantial connection" to NSW should be made when the service is performed (i.e. throughout the employment relationship) rather than retrospectively once the entitlement has crystallised, with this approach allowing employees and employers to have knowledge of their entitlements and liabilities over time.

On this basis, Mr. Rawat only had five years of service in NSW, insufficient to attract any entitlement to a payment in lieu of long service leave upon termination.

In a move reflecting more closely the position in Victoria, the court noted that various factors may connect an employee's service with NSW, including:

- An employee's contract being formed in NSW
- The employer requiring an employee to work outside the state

It is also possible that an employee's service will have sufficient connection to NSW in circumstances where an employee based outside NSW is subject to direct control from the state.

1 *International Computers (Australia) Pty Ltd v Weaving* [1981] AR (NSW) at 74.

2 Ibid at 76.

Key Takeaways

This decision means that employees who have worked interstate or overseas, who cannot demonstrate a continuous connection with NSW, will not have that part of their service recognised under the LSL Act. Much-needed certainty has now been provided to employers.

In light of this decision, all NSW-based employers (or employers with employees based in NSW) should:

- Undertake an audit now to ensure all employees' long service leave entitlements are being correctly accrued
- To the extent that an employee has worked interstate or overseas, assess, on a case-by-case basis, whether this service had a substantial connection to NSW when it occurred
- Ensure that payroll is correctly understanding and accruing long service leave for any employees working outside of NSW or overseas

Our Labour & Employment team regularly provides advice to clients in relation to employee entitlements to long service leave. Please get in touch if you would like assistance with understanding how these changes impact your employees.

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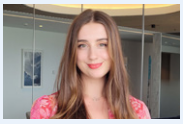

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