Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Annual Leave – Shutdown Provisions (AM2014/47)

27 APRIL 2017

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AM2014/47 ANNUAL LEAVE – SHUTDOWN PROVISIONS

AI GROUP'S SUBMISSIONS IN REPLY

.

1. Introduction

1. The AMWU and CFMEU have questioned whether awards can include terms which enable an employer to direct an employee to take unpaid leave.[1] The contention appears to be that such provisions operate in a manner that is similar or tantamount to the operation of s.524 of the *Fair Work Act 2009* (FW Act) and that their inclusion in awards is consequently inconsistent with the framework of the legislation. The AMWU also appears to contend that a direction to take unpaid leave in the context of a shutdown is akin to industrial action by an employer. Such concerns should be rejected.

2. The AMWU has additionally raised the following matters:

    - The reasonableness of the period of notice to be provided in the context of a shutdown;
    - A contention that paid annual leave in advance should be allowed in the context of a shutdown; and
    - A contention that paid leave or unpaid leave should be allowed to an employee stood down under s.524.

3. These submissions respond to the abovementioned matters.

[1] AMWU submissions of 13 April 2017; CFMEU submissions of 13 April 2017

2. The capacity for awards to includes terms requiring the taking of unpaid leave

4. Pursuant to s.139(h) of the FW Act, an award can include a term enabling an employer to require an employee to take unpaid leave. The section provides that awards can include terms about:

> "(h) leave, leave loadings and arrangements for taking leave;"

5. The wording of s.139(h) does not suggest that awards are limited to including terms about *paid* leave. Nor does the context in which the word "leave" is used elsewhere in the Act suggest that it is intended to only constitute paid leave.

6. Similarly, the wording of s.139(h) does not provide any support for the proposition that the section only permits terms about leave that an employee requests, rather than leave that they are directed to take.

7. Moreover, section 139(h) does not limit the reason for which the leave must be taken. This can be contrasted with previously applicable statutory schemes. For example, prior to the Work Choices reforms, s.89A(2) of the *Workplace Relations Act 1996* identified annual leave, long service leave and parental leave as allowable award matters but did not permit awards to deal with leave generally. Consequently, the scope of awards to regulate leave generally is arguably now greater than it has been in the past. Relevantly, in the context of the current award review the ACTU is seeking that awards include terms dealing with unpaid leave in the context of their family and domestic violence leave claim.

8. Consistent with our contentions, many awards already deal with arrangements for the taking of unpaid leave in the context of shutdowns. If the unions' contentions were correct it would require a significant reassessment of such award provisions. It would also raise questions about the validity of employer directions to take unpaid leave that have been issued pursuant to such provisions in the period since the commencement of modern awards.

9. At paragraph 28 of their submissions, the AMWU appears to acknowledge the possibility that s.139(1)(h) may provide "*a power for stand down under "leave*"." We assume their reference to "stand down" here is intended to mean unpaid leave. However, they also say that, *"… for this interpretation of the legislation to be correct, it would require the FWC to determine that an employer power to direct unpaid leave, is different to a power to stand down without pay*."

10. The AMWU's submissions at paragraph 28 do not assist them. The source of an employer's power to direct the taking of unpaid leave *is* different to the source of their power to stand down an employee. Section 524 provides an employee with an entitlement to stand down an employee in a limited range of circumstances. An employer may also have separate capacity to direct an employee to take unpaid leave arising from the terms of an applicable industrial instrument and/or the contractual arrangements underpinning their employment. This should not be controversial and is a fundamental reason why there is no proper basis for questioning the capacity for an award clause to deal with arrangements concerning the taking of unpaid leave.

3. The legislative provisions governing stand downs

11. The Act enables an employer to stand down an employee in very specific circumstances. It also relieves an employer from providing any payment for the period of a stand down. Relevantly, s.524 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.

12. Sections 526 and 527 establish a framework under which the Commission may deal with disputes about the operation of the Part of the Act that enables an employee to be stood down.

13. Significantly, the Act draws a distinction between an employee being stood down pursuant to s.524(1) and taking "leave". This includes a distinction between an employee being stood down and taking unpaid leave. Relevantly s.525 provides (emphasis added):

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).

14. Given the operation of s.525, any contention that the inclusion of award clauses dealing with unpaid leave is somehow inconsistent with the operation of s.524 is unsustainable. In circumstances where an employee is directed by their employer to take unpaid leave because of a shutdown it falls within the scope

of s.525(a). This removes any doubt about the nature of the interaction between the operation of a shutdown provision and s.524. It also undermines any assertion that the Legislature did not envisage the possibility of some overlap between the circumstances in which an employee may be on unpaid leave and the circumstances in which they may be stood down.

15. The mere fact that the Act affords employers a right to stand down employees in certain limited circumstances does not provide a basis for reading down the scope of s.139(h). Rather, the Legislature has simply left it to the Commission to determine what award clauses 'about leave' are necessary to ensure that the modern awards objective is achieved and what provisions they should include. This is entirely appropriate. It means that the Commission can, for example, not only establish additional entitlements or obligations to take unpaid leave but can also place restrictions or conditions upon the arrangements for taking leave that are not otherwise contemplated under the Act. For example, shutdown clauses often require the provision of a minimum period of notice. In other instances there are limitations on the duration, frequency or purpose for which a shutdown giving rise to the taking of unpaid leave can be implemented.

16. The AMWU has rightly observed that s.139 does not permit awards to include stand down provisions. This differs from previous comparable regulatory regimes. Awards no longer need to contain terms about stand downs because s.524 of the Act now affords an employer a right to stand down an employee. In contrast, the *Workplace Relation Act 1996* (prior to the Work Choices Amendments) utilised awards as the vehicle for regulating stand downs.[2] It does not however follow that s.139(h) should be somehow read down to prohibit awards from requiring an employee to take unpaid leave just because there may be some similarities between an employee being stood down and an employee being directed to take unpaid leave.

[2] See s.126

17. Even if this were not the case, it does not follow that the inclusion of s.524 is indicative of an intention to in any way prevent awards from enabling employers to direct employees to take unpaid leave in circumstances where the Commission deems it necessary to ensure they achieve the modern awards objective.

18. Award terms dealing with shutdowns that enable an employee to be required to take a period of unpaid leave apply in very different circumstances to those contemplated by s.524. They are different concepts. Hence, some federal awards have historically included both a stand down provision (in terms similar to those now found in s.524) and an annual leave provision that provided, in effect, for the taking of unpaid leave. For example, clause 4.6 of the *Metal, Engineering and Associated Industries Award 1998* (the Metals Award) contained the following provision:

> "**4.6 STANDING DOWN EMPLOYEES**
>
> *Summary*
>
> *The employer has the right to stand down an employee without pay in certain circumstances.*
>
> The employer has the right to deduct payment for any day the employee cannot be usefully employed because of any strike or through any breakdown in machinery or any stoppage of work by any cause for which the employer cannot reasonably be held responsible."

19. Clause 4.6 was an entirely separate provision to the award clause enabling employees to, effectively, be placed on either paid or unpaid leave to facilitate the implementation of a close down. Instead, close down arrangements were dealt with under the annual leave provisions of the award.[3]

20. Contrary to the assertion by the AMWU, s.524 does not limit the circumstances in which an employee can be stood down,[4] or directed to take leave without pay. Instead, it *enables* an employee to be stood down in certain limited circumstances. Whether an employee can be stood down, or directed to take unpaid leave, in other circumstances will be dependent upon the terms of any

[3] Cl. 7.1.12

[4] Paragraph 27 of the AMWU submissions

industrial instrument that may have application and/or the contractual terms of their engagement. The mere fact that the Legislature has recognised that employers should have a right to stand down an employee in certain circumstances does not constitute a contextual indication that s.139(h) was not intended to permit terms enabling an employer to direct the taking of unpaid leave.

21. The current Act was not enacted in a vacuum. Many awards have long afforded employers a right, in effect, to shut down and either direct an employee to access annual leave entitlements or a period of a unpaid leave. Indeed, as has already been recognised by the Full Bench, the explanatory memorandum accompanying the *Fair Work Amendment Bill 2008* expressly contemplated the operation of shutdowns. Having regard to this backdrop, it could be expected that the Legislature would have cast s.139 in much narrower terms if it had intended to preclude the possibility of any overlap between its operation and that of s.524. Indeed, it could simply have prohibited awards from including terms requiring, or enabling an employer to require, the taking of unpaid leave.

22. Moreover, the wording of s.139(1) is broader in scope than comparable provisions of predecessor legislation. For example, under the *Workplace Relations Act 1996* (prior to the Work Choices reforms) awards could only deal with certain categories of leave (i.e. annual leave, long service leave and parental leave). There are no such caveats in the FW Act. If anything, this context suggests that there is a legislative intention to empower the Commission to determine what award terms relating to leave, of any nature, are appropriate.

23. Finally, we observe that an award term permitting an employer to direct an employee to take unpaid leave for the duration of a shutdown could be included in an award pursuant to s.142. It is impractical for an award term to operate to afford an employer a right to direct the taking of annual leave so that it can shut down for the purpose of granting paid annual leave to all or the majority of employees if the employer is still required to provide work (or at the very least payment) to any employee that did not have sufficient paid annual leave

accruals to cover the duration of the shutdown. There would be many employers that would be unable to find meaningful work for employees in circumstances where the majority of their workforce has accessed annual leave. Take, for example, an employer operating a production line. The utility of the shutdown provisions would be fundamentally undermined if there was any limitation placed on an employer's ability to direct the taking of unpaid leave.

4. There is nothing unusual about a requirement for an employee to take unpaid leave

24. The unions' argument that a direction to take unpaid leave is akin to a "stand down" is not sustainable. The two concepts are different as is readily apparent from the terms of the FW Act.

25. "Stand down" is dealt with in Part 3-5 of the Act. Section 73 of the Act enables an employer to require a pregnant employee to take unpaid leave within 6 weeks before the birth. Clearly, the right of an employer under s.73 is not a "stand down".

26. Further, ss.471(4) and 476 of the Act enable an employer to refuse to accept the performance of work by an employee and withhold payment, because of the employee's failure to perform all of his or her normal duties. The exercise of these employer rights is not a "stand down".

27. Similarly, a provision in an award about unpaid leave which includes an employer right to direct the taking of such leave in specified circumstances (i.e. where an employer shuts down and the employee has insufficient annual leave accrued) is not a "stand down".

5. Response to AMWU contention that paid leave in advance should be allowed

28. The AMWU contends that in circumstances where an employer directs an employee to take unpaid leave the employer should be compelled to grant any request for paid leave in advance.[5] This proposal should be rejected.

29. It is obviously unfair to *require* an employer to grant an employee an entitlement that they have not yet accrued. Such unfairness would be compounded in circumstances where the leave in advance that might be required to be granted would not be able to be deducted from other amounts that may be payable to the employee on termination. This might occur, for example, in circumstances where an employee might seek to access leave in advance that exceeds the duration of the applicable payment period either permissible under the award or adopted by the employer.

30. In considering this issue, the Full Bench should be mindful that the reason an employee may have insufficient leave to cover the duration of a shutdown may be because the employee has already accessed their paid annual leave entitlements to suit their own personal circumstances or because they have, as a result of their own choices, only recently commenced employment with their current employer.

6. Response to AMWU submissions regarding reasonableness of the notice period

31. At paragraphs 35 to 39 the AMWU set out a ludicrous suggestion that the notice period for a shutdown should mirror the period of time taken to accrue sufficient leave to cover the duration of the shutdown.

32. The AMWU proposal simply represents a blatant attempt to restrict an employer's capacity to manage leave arrangements.

[5] At paragraphs 24 to 26

33. The rate at which leave accrues is a product of the overall quantum of leave. There is no reason why this should determine the amount of notice that must be provided to an employee who is required to take annual leave in the context of a shutdown. Many awards currently provide that a month's notice of the requirement to take leave must be provided in the context of a shutdown. Awards should not require a greater period of notice than this.

7. Response to AMWU proposal that paid leave or unpaid leave should be allowed when an employee is stood down under s.524

34. The AMWU submission proposes that where an employer stands down an employee pursuant to s.524, an employee should be allowed to take annual leave or unpaid leave.[6]

35. There is no need for awards to include a term requiring an employer to grant paid annual leave in circumstances where they have been stood down under s.524. The NES already requires that an employer not unreasonably refuse to agree to a request by an employee to take annual leave. This adequately deals with this issue.

[6] See paragraph 43