

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/47 – Black Coal Mining Industry Award 2010
Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)



Black Coal Mining Industry Award – Annual leave – Shutdown provisions

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents around 100,000 members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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1. This submission is made following the decision of the Full Bench on 19 December 2016 (**the December 2016 decision**).¹ This follows the decision on 22 September 2016 where the Full Bench had issued a decision (**the September 2016 Decision**)² where it had concluded that clause 25.4 of the Black Coal Mining Industry Award 2010 (**the Award**), should be deleted in its entirety and be replaced with the revised model excessive leave clause.
2. The FWC issued a Draft Determination on 13 October 2016 varying clause 25 of the Award to give effect to the September 2016 Decision.
3. The Coal Mining Industry Employer Group (**CMIEG**) subsequently filed submissions on 21 October 2016 proposing changes to the shutdown provisions in clause 25 of the Award on the basis that employers had relied on clauses 25.10 and 25.4(c) to direct employees to take annual leave for the period of the shutdown. The CMIEG claims that the removal of clause 25.4 and the insertion of the model clause makes it uncertain as to whether employers can continue to enforce such a direction during a shutdown.

The 'reasonableness' of a direction to take annual leave

4. The AMWU opposes the CMIEG's submission on the basis that the Full Bench has already considered the annual leave provisions in the Award, including how employers relied on those provisions to direct employees to take annual leave during shutdowns.
5. In deleting clause 25.4(c) and inserting the Excessive Leave clause, the Full Bench noted that an;

'...award term whereby an employee can be directed to take all or part of their accrued paid annual leave on the provision of 28 days' notice in writing **without other**

¹ [2016] FWCFB 9074

² [2016] FWCFB 6836

considerations and requirements is not 'reasonable' within the meaning of s.93(3)' **(emphasis added)**.³

6. Section 93(3) of the *Fair Work Act 2009* allows for terms requiring an employee to take annual leave to be included in a Modern Award or enterprise agreement but only if the requirement is reasonable. In the September 2016 Decision, the Full Bench deemed the direction or requirement for an employee to utilise their annual leave entitlement after been given 28 days notice was not reasonable under clause 25.4(c) of the Award.⁴

7. The *September 2015 Annual Leave Decision* in developing the Model Excessive Leave clause outlines the criteria in determining what is reasonable. The Full Bench in *September 2015 Annual Leave Decision*, stated the following:

'The model term establishes a number of procedural requirements for any direction to take leave (that the parties first seek to confer, that the direction be in writing etc.) and **broad constraints on the quantum and timing of the directed leave**. These procedural requirements and constraints go some way to ensuring that any direction to an employee to take excessive accrued leave will be reasonable in terms of s.93(3), but they will not necessarily **ensure proper consideration of the individual needs and circumstances of the employee** so far as the timing of the directed leave is concerned. In order to address that issue, the model term enables the employee to make a subsequent request to take some or all of the leave covered by the direction at a different time or times (and the employer may not unreasonably refuse such a request). **This approach provides greater certainty than the alternative approach outlined above as it minimises the scope for disputes as to the reasonableness of the direction'** **(emphasis added)**.⁵

8. Considering the Full Bench's application of the reasonableness test under section 93(3) in relation to the annual leave provisions, we submit that the CMIEG's proposed employer direction to take annual leave during a shutdown does not meet the reasonable test criteria set

³ [2016] FWCFB 6836, [76]

⁴ Ibid, [83]

⁵ [2015] FWCFB 5771, [95]

out by the Full Bench. In particular, it does not take into account the individual needs and circumstances of the employee.

9. Section 94(5) of the *Fair Work 2009* provides a note about circumstances when it **may** be reasonable to direct an employee to take annual leave such as, during the Christmas and New Year period. We submit that the use of the word 'may' supports our submission that such an employer direction would be subject to the reasonableness test under section 93(3).

The language of the shutdown provisions

10. The shutdown provisions in the Award never included such a direction or requirement but rather under clause 25.10(b) of the Award, employees '*...who have such an entitlement to annual leave **may take all or part of that entitlement during the shutdown period***' (**emphasis added**). There is no direction in the clause that an employee must take annual leave or take unpaid leave during a shutdown.
11. In contrast, under the corresponding shutdown provisions in clause 23 of the *Aquaculture Industry Award*, the term '**must**' has always been used in reference to the taking of annual leave during a close down. The clause also makes clear that if an employee had accrued no or insufficient annual leave, that portion of the close down period must be taken as leave without pay.
12. We submit that on the plain and ordinary meaning of clause 25.10 of the Award, you cannot direct employees to use their leave entitlements during a shutdown as they may chose not to do so. The CMEIG's proposal attempts to create such a direction, including the requirement that an employee take unpaid leave during a shutdown.

Direction to use annual leave for unforeseen events

13. In the September 2016 Decision, the Full Bench also considered the CMIEG's submission that '*...that the utility of the clause (clause 25.4(c)) extends beyond the management of excessive leave accruals...*'. In particular, the CMIEG submitted that there may be circumstances when the operations of a mine would need to cease and that the best course of action would be to direct employees to use their annual leave entitlement during that period. For example, in circumstances where mines had to stop because of an underground longwall shearing machine being put out of action by being buried due to the collapse of the strata in the coal seam.⁶

14. In response, the Full Bench made clear that the circumstances described were better addressed via negotiations between parties and/or through an enterprise agreement to ensure the necessary flexibility.⁷ As the Full Bench explained:

'...to the extent that a particular employer or enterprise is concerned that the award as varied will not provide sufficient flexibility to address the range of unforeseen events identified by the CMIEG, those concerns can be addressed by an enterprise agreement'.⁸

Summary

15. The AMWU submits that the CMIEG's proposed amendment is not reasonable under section 93(3) of the *Fair Work Act* as it does not take into account the individual needs and circumstances of the employee. The amendment would also create unnecessary uncertainty and discourage parties to negotiate when unforeseen circumstances arise.

END

⁶ [2016] FWCFB 6836, [75]

⁷ Ibid, [77]-[79]

⁸ Ibid, [79]