FAIR WORK COMMISSION

4 Yearly Review of Modern Awards

Common Issue – Annual Leave

AM2014/47

Consolidated Submission by the Construction, Forestry, Mining and Energy Union, Mining and Energy Division (CFMEU) Re: Excessive Leave Model Clause

1. According to a Statement and Directions issued by the Full Bench on 8 July 2016, the Black Coal Mining Industry Award (BCMIA) 2010 is one of a group of 7 modern awards "which, in effect, provide for accrued leave to be taken within a specified period of time; albeit with different time periods and surrounding provisions and processes".[1]

2. With respect to that group of modern awards, the Full Bench issued Directions providing for written submissions from any interested party seeking to oppose the insertion of the model excessive annual leave clause and/or seeking a variation to existing award provisions as well as submissions from any interested parties in response.[2]

3. A group of employers in the black coal mining industry who combine under the heading of the Coal Mining Industry Employers Group (CMIEG) opposes the insertion of the model excessive annual leave clause in the BCMIA. As the Full Bench has noted the CMIEG had confirmed its opposition and had already made submissions and provided material to the FWC.[3] In accordance with the Directions, the CMIEG filed short submissions that refer to, and rely on, those earlier submissions.[4]

4. The CFMEU supports the inclusion of the model excessive leave clause in the BCMIA. In that regard the CFMEU has filed submissions and materials on11

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[1] [2016] FWCFB 4525, dated 8 July 2016, PN [8}

[2] [2016] FWCFB 4525, dated 8 July 2016, see Directions following PN [10]

[3] [2016] FWCFB 4525, dated 8 July 2016, PN [10]

[4] See Submissions from CMIEG dated 29 July 2016 and 26 August 2016

November 2015, 21 December 2015, 29 January 2016 and 19 February 2016.[5] The submissions also sought to respond to the position being put by the CMIEG.

5. This submission comprises a consolidation of those earlier submissions by way of a "cut and paste" of the relevant parts of those submissions. The submission also supplements those submissions in some respects by considering the data on paid annual leave issued by the FWC on 8 July 2016 and some brief comments on some of the decisions issued by the FWC regarding the model excessive annual leave provision.

6. By way of submission dated 26 October 2015, the CMIEG sought to oppose the insertion of the model excessive annual leave clause (model clause) in the BCMIA. On 11 November 2015, the CFMEU responded to that submission. In that submission the CFMEU stated that it did not oppose the model clause being inserted in the BCMIA and with respect to the specific issues raised by the CMIEG responded:

5. *As we apprehend the CMIEG position, it contends that the existing award provisions regarding the taking of annual leave, namely sub clauses 25.4 and 25.10, "operate satisfactorily" in the interests of employers and employees. Given the existing BCMI Award provisions, the model excessive leave clause is not only unnecessary by "would at the least cause confusion, if not give rise to apparently conflicting rights and obligations concerning the taking of annual leave".*
6. *The existing sub clauses concerning the taking of annual leave in the BCMI Award do not address the notion of excessive leave. The BCMI Award makes no mention of excessive leave. The "taking of annual leave" provisions apply to any period of annual leave accrual. In that regard, whether the current provisions "operate satisfactorily" as contended by the CMIEG is not to the point. The point is whether the BCMI Award addresses the notion of excessive leave as defined by the Full Bench in a way that is consistent with the approach as determined by the Full Bench. It is our submission that the BCMI Award does not address excessive leave, let alone in a manner consistent with the system set out by the*

[5] Each of these submissions and/or materials are available on the FWC web site.

Full Bench. For that reason the CFMEU concluded that there were no grounds to oppose the insertion of the model excessive leave clause in the BCMI Award.

7. *Taking into account the draft Determination, the BCMI Award will have 3 sub clauses that go to the issue of taking annual leave. They are sub clause 25.4 – When leave can be taken, sub clause 25.10 – Shutdown - and sub clause 25.13 – Excessive annual leave accruals.*
8. *As the sub headings of each sub clause reveal, whilst each sub clause addresses the notion of taking annual leave, each sub clause addresses a different set of circumstances or situations. It follows, in our submission that as each sub clause addresses different circumstances/situations, they are separate and distinguishable and, contrary to the CMIEG submission are neither confusing nor "apparently conflicting".*
9. *Sub clause 25.4 addresses the taking of annual leave in circumstances other than a close down or where excessive leave as defined does not exist; sub clause 25.10 addresses the taking of annual leave in circumstances of a closedown and the new sub clause 25.13 addresses the taking of annual leave in circumstances of excessive leave (as defined).*
10. *The current award already distinguishes between the taking of leave in 2 separate circumstances. There is no suggestion of confusion or conflict here.*
11. *The National Employment Standards provide that an "employer must not unreasonably refuse a request by the employee to take paid annual leave". There is no suggestion of confusion or conflict here.*
12. *In its submission, the CMIEG refers to "a number of practical operational exigencies that are met by clauses 25.4 and 25.10 of the BCMI Award". They involve events, which may cause a mine to close temporarily. The only impact of the model excessive leave clause on these circumstances is to change the approach in circumstances where an employee has excessive leave. The excess leave model clause does not prevent an employer, having followed due process, from requiring that an employee take leave, subject to the provisions of the clause. The model excessive leave clause that encourages the taking of leave by agreement by obliging the parties to endeavour to reach agreement in the first instance. A temporary closure for reasons beyond the control of the employer is a situation that may confront employers across a range of industries given the*

various exigencies of industry. In saying that, it is, at least as far as the coal mining industry is concerned, an infrequent situation.

13. *The CMIEG makes reference to difficulties in the interaction between a close down (sub clause 25.10 of BCMI Award) and the proposed new excessive leave provision. As noted above, the sub clauses are distinguishable and apply to different circumstances. The scenario painted by the CMIEG in paragraph 20 goes to taking leave in advance during a shutdown, which an employee is entitled to take under sub clause 25.10 (c). In a situation of leave being taken in advance, the excess leave provision has no application. An employee taking leave in advance would not, self evidently, have a leave accrual that would meet the excess leave definition. Further, an employee currently has an entitlement to take leave during a shutdown pursuant to sub clause 25.10 (b). In any event it is difficult to envisage a situation where, in circumstances of a shutdown, an employer would seek to rely on another clause in the award to deny an employee taking annual leave.*

14. *The CMIEG seek to rely on rostering of leave, the quantum of leave, the entitlement to long service leave and the incidence of enterprise agreements to support its contention that the model excess leave provision be excluded from the BCMI Award. The model excessive leave clause provides a system for the taking of leave in situation where excessive leave exists. The four points raised by the CMIEG in this context would not prevent the possibility of an excess leave situation occurring. For that reason these points cannot justify the exclusion of the model excess leave provision from the BCMI Award.*[6]

7. In response to a request from the President for information regarding whether it is the usual practice that employee requests for leave are granted, the CFMEU provided the following information on 19 January 2016:

4. *In that regard, the CFMEU provides the following information that has been gathered from the four Districts:*

   4.1. *Each District reported an ongoing problem of employees not being able to take annual leave as sought and where 28 day's notice has been supplied. Not unexpectedly it was reported that peak periods*

[6] Extract from CFMEU Submission dated 11 November 2015. Italics added. Footnotes deleted.

such as school holidays, Christmas and Easter are particularly difficult times to obtain leave. Leave is refused on the basis of operational reasons.

4.2. *An example was given where an employee was denied leave for operational reasons, only to be compelled later to take leave because his accrual was seen as too high.*

4.3. *With the qualification of "operational reasons" acting as a barrier to taking leave it is also very difficult for an employee or the CFMEU to effectively challenge a decision to deny leave made on that basis. Neither party has access to the relevant information to present such a challenge. Challenges do occur at a Lodge or District level from time to time but, as the rules are in place, it is a difficult claim to pursue successfully.*

4.4. *An additional problem in challenging a rejection of an annual leave application is the time factor. Pursuing a dispute through the disputes settlement procedure can be time consuming with the disputes procedure still in progress at the time the employee sought to be on annual leave.*

4.5. *In a dispute in Queensland, the employee sought leave around Christmas time only to see the dispute resolved some months later.*

4.6. *There are employers and locations where a quota or percentage is applied to how many employees can be on annual leave at any one time, some of which can be found in enterprise agreements. These are a product of concerns being raised about the ability to obtain leave. Nevertheless, problems can and still do arise. Examples have been given of labour hire/contractor employees being taken into account in determining the number of employees already on leave; other forms of leave e.g. long service leave being included in the quota/formula; and employers rigidly applying any such quota/formula. The CFMEU has also been in dispute with Griffin Coal over the application of the formula in the enterprise agreement and, in turn the number of employees who could take annual leave at a particular time.*

4.7. *The incidence of annual shutdowns at coalmines has diminished significantly over time, to be replaced by coalmines that operate all days of the year other than Christmas Day and Boxing Day. Shutdowns used to occur at Christmas time. Consequently, the opportunity to take annual leave at a peak demand period has diminished.*

4.8. *There is also a need to consider that probability that a number of employees who have their annual leave claim rejected do not make any complaint and simply accept it, particularly given the reason of "operational reasons" is not easily challenged let alone successfully challenged.*

5. *In summary, the response of the CFMEU to the question asked by the Full Bench is that the information provided by the relevant Districts is that an employee cannot rely on sub clause 25.4 (a) in order to obtain annual leave at a time sought and that the employers regularly rely on "operational reasons" to reject applications. In that regard it is submitted that based on the information provided by the Districts, it cannot be said that it is the" usual practice that employee requests for leave are granted".*[7]

8. The CFMEU concluded that an employee cannot rely on sub clause 25.4(a) of the BCMIA – a provision that states that an employee can give 28 days notice of taking leave – and that employers regularly rely on the grounds of "operational reasons" –as provided in sub clause 25.4(a) – to deny the employee his/her annual leave as sought.[8] It followed that it could not be said that it is the usual practice that employee requests for leave are granted.[9]

9. As part of the consideration process of the model clause, the CMIEG, on 21 December 2015, provided data concerning the accrual of annual leave by employees of various employers in the black coal mining industry. The CFMEU undertook an analysis of that information and responded as follows:

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[7] Extract from CFMEU Submission dated 29 January 2016. Italics added. Footnotes deleted.

[8] CFMEU Submission, 29 January 2016, para. 5

[9] CFMEU Submission, 29 January 2016, para. 5

3. *With respect to the material filed by the CMIEG and in particular the table of annual leave accruals as at December 2015, we draw the following results:*
    - 3.1. *For the purpose of commentary and in the absence of more refined data, the 10 years and over tier is taken as the 2 year annual leave limit for applying the model excessive leave provision.*
    - 3.2. *The data supplied by the CMIEG identifies that 15% of employees would fall into the excessive leave category. This is the sum of the three percentages for the three tiers (10 to 15, 15 to 20 and 20+).*
    - 3.3. *The 15% figure translates into 2986 employees.*
    - 3.4. *At 4 corporations there are 40 or more employees with an annual leave accrual of 20 weeks or more and at 7 corporations there are more than 20 employees with 20 or more weeks of annual leave accrual.*
    - 3.5. *The table shows that 32 % of employees are heading in the direction of having 2 years of accrued leave and that nearly half of them, based on the current situation, will cross the line into an excessive leave situation.*
    - 3.6. *The table shows that slightly less than half (47%) have an annual leave accrual of more than a year.*
4. *In our submission it is not reasonable to conclude, as does the CMIEG, based on the data provided by the CMIEG "that accrual of annual leave is not at a level that is problematic in the industry." In the context of this matter a figure of 15% of accruals being at 10 weeks or more is not marginal or inconsequential, nor can it be said that where 2986 employees have 10 or more weeks of annual leave accrual that it is not "problematic" from an excessive leave perspective as determined by the Full Bench. There is clearly an issue. What the figures also reveal is a flow into the 10-week plus region, with 15% of employees having 10 or more weeks accrued leave. Further, the CMIEG position looks even less persuasive when it is considered in the context of an already existing award provision which provides a process for the taking of leave and a provision that the CMIEG relies on to contend that*

the current award provision is sufficient. Whilst leave accrual does reduce over time it does so at a rate that cannot lead the Full Bench to be satisfied that the model excessive leave clause is unnecessary.

5. *In the CFMEU response to the question whether it was the usual practice that employee requests for leave are granted, the CFMEU provided feedback from the relevant Districts that the ability to obtain leave as sought was a problem. The report to the Full Bench provided information that in the experience of District Officials employees do have applications to take annual leave rejected and the reason most relied upon by employers is "operational reasons". In our submission, the data provided by the CMIEG and as analysed above supports this position. The data shows that 47% of employees have 5 or more weeks accrued annual leave. It is, in our submission, unsurprising, given the data supplied by the CMIEG that District Officials are approached with complaints about having applications for annual leave rejected.*
6. *In our submission a combination of the data provided by the CMIEG and the information supplied by the CFMEU provides for a conclusion that sub clause 25.4 of the Black Coal Mining Award 2010 is an inadequate tool in addressing excessive leave. This is because, unlike the model excessive leave clause, it does not provide an employee with an entitlement to take leave at an appropriate time - an employer can (and does) rely on the qualification of "operational reasons" to reject applications when it suits.*[10]

10. In addition to the data and information provided by the CMIEG and the CFMEU, the FWC published data on 8 July 2016 that addressed the taking of annual leave in the mining industry.[11] Whilst it is acknowledged that the reference to the mining industry is wider than black coal mining and, thus, the figures should be treated with caution, they do show a comparison with industry in general. By comparison with other industries the FWC has stated that data shows among non-casual employees in mining a similar proportion took a period of paid annual leave over the previous 12 months in 2010-2012, a lower

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[10] Extract from CFMEU Submission dated 19 February 2016. Italics added. Footnotes deleted.

[11] Fair Work Commission, BACKGROUND PAPER, dated 8 July 2016. See table 9

proportion in 2013 and a higher proportion in 2014; and with respect to the average number of paid annual leave days taken the average in mining was lower in all years except 2013.[12] On that basis, as the FWC has determined a model clause to apply across all awards unless some reason for not doing so exists, the comparison of mining with industry in general does not give any grounds for thinking that such reasoning exists to exclude the black coal mining industry.

11. In its June 2015 Decision, the Full Bench found that not taking a reasonable portion of annual leave can give rise to a serious threat to employee health and safety and that the data analysed suggested that employers are not creating workplaces that allow for employees to use their entitlements.[13] These factors, together with others, led the FWC to conclude: "a model clause dealing with the taking of annual leave should be consistently inserted in all modern awards."[14]

12. In addition to its deliberations on the material provided at a general level and specific level concerning various industries, the FWC has been provided with data and information specific to the black coal mining industry. There is nothing in that data and information that should prompt the FWC to take a different approach to excessive leave in the black coal mining industry than that provided in the model clause. The data and information on the taking of annual leave in the black coal mining industry supports the Commission reaching a positive conclusion that the model clause should be inserted in the BCMIA.

13. For the reasons set out above and from earlier submissions, the CFMEU submits that the FWC should insert the model clause in the BCMIA.

14. In the event that the FWC determines to include the model clause in the BCMIA, there is a matter that needs to be taken into account in drafting the Determination. It appears clear from the June 2015 Decision that the definition

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12 [2016] FWCFB 3177 dated 23 May 2016, PN [280]

13 [2015] FWCFB 3406, dated 11 June 2015, PN [138], [144]

14 [2015] FWCFB 3406, dated 11 June 2015, PN [169]

of excessive leave is based upon 2 years accumulated annual leave for other than shiftworkers (4 week's annual leave per year) and 2 years accumulated annual leave for shiftworkers as defined in the modern award for the purposes of an additional week's leave under the National Employment Standards (an additional week's leave).[15]

15. The BCMIA does not provide for the four or five weeks of annual leave per annum depending on whether the employee is a shiftworker (as defined) or not. The BCMIA provides for 5 week's annual leave per year for all employees other than 7 day shiftworkers or shiftworkers who work a roster which requires ordinary hours on public holidays and not less than 272 ordinary hours per year on Sundays.[16] On that basis, the criteria for excessive leave would be 10 weeks for all employees other than 7 day shiftworkers or shiftworkers who work a roster which requires ordinary hours on public holidays and not less than 272 ordinary hours per year on Sundays, and 12 weeks for 7 day shiftworkers or shiftworkers who work a roster which requires ordinary hours on public holidays and not less than 272 ordinary hours per year on Sundays.

Construction, Forestry, Mining and Energy Union
Mining and Energy Division
8 September 2016

[15] [2015] FWCFB 3406, dated 11 June 2015, PN [191]

[16] BCMIA, sub clause 25.2