FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/47 – COMMON ISSUE – ANNUAL LEAVE

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, MINING AND ENERGY DIVISION ('CFMEU')

ANNUAL LEAVE AND A SHUTDOWN

1. This submission is made in accordance with a decision of the Full Bench, dated 19 December 2016.[1] The Full Bench decision followed its earlier decision wherein it determined to insert the 'model' excessive leave provisions (appropriately modified) into the Black Coal Mining Industry Award ('BCMI Award).[2] As part of this decision, the Full Bench made a consequent variation to the 'shutdown' provisions in the BCMI Award.

2. In the process of settling the draft determination to reflect the excessive leave provision in the BCMI Award, the Coal Mining Industry Employer Group ('CMIEG') sought a variation to what is currently clause 25.10 – Shutdown - in the BCMI Award.[3] This variation was over and above the variation proposed by the Full Bench in the draft determination.

3. The CFMEU is opposed to the variation to the draft determination as sought by the CMIEG and communicated to the FWC to that effect.[4] The FWC consequently convened a conference chaired by Commissioner Hampton who, in turn, reported to

[1] [2016] FWCFB 9074 @ PN [30]
[2] [2016] FWCFB 6838
[3] Submission by the CMIEG to the Fair Work Commission ('FWC'), dated 21 October 2016, PN 7 - 8
[4] Email from the CFMEU to the FWC, dated 25 October 2016

the Full Bench, which led to the decision of 16 December and to the making of this submission.

4. The effect of the variation to the shutdown clause as sought by the CMIEG is twofold:

   4.1. It entitles an employer to direct, upon the giving of 28 days' notice, an employee to take annual leave during a shutdown.

   4.2. It creates a situation where if an employee does not take sufficient annual leave to cover the period of the shutdown, the employee is deemed to be on leave without pay for the period not taken as annual leave.

5. By virtue of clause 25.4 (c), the BCMI Award currently entitles an employer to, upon the giving of 28 days' notice, direct an employee to take annual leave. However, consequent upon the Full Bench determining that clause 25.4(c) is inconsistent with the National Employment Standards, the clause is to be deleted from the BCMI Award.

6. Clause 25.10 of the current BCMI Award permits the taking of annual leave during a shutdown. An employer is required to give its employees 28 days' notice of a shutdown. Each employee affected by the shutdown may elect to take all or part of their accrued leave and in the event of insufficient accrued annual leave, to take annual leave in advance.

7. The critical word in sub clause 25.10, in our submission, is the word "may". On the plain and ordinary reading of clause 25.10 in context and considering its purpose, the use of the term "may" allows an employee to determine whether to take annual leave or not over the period of a shutdown and if so, how much annual leave. It is a decision for the employee to make. The use of the term "may" in our submission, implies that the employee, on the other hand "may not" elect to take annual leave.

8. An alternative argument is that during the period of a shutdown it is not a question of whether an employee may or may not take annual leave but rather that the employee may choose how much annual leave he/she may take. This appears to be one of the effects of the variation sought by the CMIEG. If that is the case, it means that an employee may elect to take all or part of the shutdown period as annual leave. It means, in practical terms that for a 2 week shutdown, an employee who does not wish to take any annual leave, may elect to take a single day's leave and accordingly comply with its provision.

9. In our submission the view that an employee may elect not to take any annual leave during a shutdown is the preferable one as it is consistent with the language and does not result in such outcomes as employees taking single day or couple of days to reluctantly conform to the clause. It is consistent with the notion of choice being reposed with the employee.

10. There is also nothing in the current clause that provides that in the absence of an employee taking sufficient annual leave to cover the period of the shutdown, the employee will be deemed to be on leave without pay. Under the current clause, if an employee does not take such leave, the employee, being ready, willing and able to work, should be provided with work. Any dispute should be dealt with in accordance with the dispute settling procedure.

11. It is submitted that the CMIEG submission acknowledges that clause 25.10 does not permit an employer to direct an employee to take annual leave during a shutdown. Its submission makes clear that employers rely on clause 25.4(c) and 25.10 for the right to direct an employee to take at least some annual leave during a shutdown, as does its proposed variations to clause 25.10.

12. The power to direct an employee to take annual leave, as derived from clause 25.4(c) is being deleted. To circumvent the effect of that action, at least as it concerns shutdowns, it is submitted that the CMIEG in endeavouring to transfer the

power employers are losing under clause 25.4(c) to clause 25.10. We submit that this is not possible.

13. This leaves the question of why we say that it is not possible to transfer such power or indeed the creation of such a power.

14. In determining to delete clause 25.4 (c) (and related clauses), the Full Bench found that it fell foul of the NES. In that regard it said:[5]

"Clause 25.4(c) is a term allowing for an employee to be required to take annual leave. The power to include such a term in a modern award is s. 93(3), which provides that the requirement to take paid annual leave must be 'reasonable'. 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 considerations and requirements is not 'reasonable' within the meaning of s. 93(3)"

15. The import of the quote above is that the Full Bench held that in the absence of other considerations and requirements, the provision of 28 days' notice in writing of a requirement to take leave is not reasonable within the NES. In that respect the only other considerations or requirements in the clause proposed by the CMIEG is that the direction is in the context of a shutdown, the election by an employee as to the quantum of leave and the alternative of leave without pay.

16. By analogy with the excessive leave provision and a consideration of what constitutes "reasonable" in the application of the NES the Full Bench addressed the reason why it may be reasonable for an employer to direct an employee to take a period of annual leave and if so, under what circumstances. It is acknowledged that these issues were addressed in the context of excessive leave as defined.

[5] [2016] FWCFB 6838 @ PN [76]

17. It is submitted that the notion of a shutdown, unlike the definition of excessive leave is, as it appears in the BCMI Award, both vague and broad. Traditionally, as understood, a shutdown is a period in which a company shuts down all or part of its production to permit major maintenance, perhaps some construction work, renewals and modifications to plant and equipment; being work that cannot be undertaken whilst the plant is in operation. At least some employees – both production and maintenance – are usually involved in the shutdown work. However, it may be that because of an absence of definition an employer may choose to shut down all or part of its operations for other reasons, such as simply to clear annual leave, or to run down a stockpile. The problem is that whether the reason for directing employees to take annual leave or not is, under the CMIEG proposal, simply not a consideration as long as it results in the cessation of some work for a period.

18. During the conference before Commissioner Hampton, reference was made to the note under s 94(5), which gives an example of a shutdown over the Christmas/New Year period. In response, it is firstly observed that as a note, it does not form part of the legislation. Secondly, it reinforces the point we are making. The note does not say that such a shutdown will be reasonable. It says it may be reasonable. And that may well be so depending on the circumstances. The problem with the CMIEG approach is that the circumstances of a shutdown cannot be tested against the concept of reasonableness. If an employer decides to have a shutdown then, regardless of the reason, clause 25.10 is invoked.

19. The clause as proposed by the CMIEG also removes the individual focus of s 93(3) of the FW Act. With respect to the excessive leave model provision, the issue is whether it is reasonable for an individual employee to be directed to take, or conversely, require an employer to provide, a period of annual leave. The CMIEG clause provides that irrespective of an individual employee's circumstances, annual leave is to be taken. An employee may not have much accrued leave and may wish to take it at a later time, whilst not being in a position to lose pay through leave without pay. An employee may be accruing leave to take a holiday with his/her

family at a later time. Some may find it important to save some annual leave for the proverbial “rainy day”. Whatever the reason, the CMIEG proposal, unlike the excessive leave provision, will not allow it to be dealt with and resolved by the parties.

20. By way of analogy, the excessive leave provision, based as it is on meeting the requirements of the NES, not only makes it clear upon what basis an employer or employee can initiate a claim that leave be taken/required but it provides a number of parameters and processes to be met before the final step and upon which the final step can be taken. No such situation exists with the CMIEG proposal.

21. It is acknowledged that there are other modern awards that provide for shutdowns and for employees to take annual leave. However, to our knowledge, the FWC has not considered the provision of shutdowns in other awards for the purposes of their consistency with the NES.

22. In summary, the CFMEU submits that the CMIEG proposal to vary the shutdown clause in the BCMI Award should be rejected because:

    22.1. It is inconsistent with the Decision of the Full Bench on the model excessive leave provision and seeks to invest employers covered by the BCMI Award, through the mechanism of broadening their entitlements during a shutdown, with a power that has just been removed by the FWC.

    22.2. The CMIEG proposal is inconsistent with the “reasonableness” provision in s 93(3) of the FW Act.

23. Other than the variations proposed by the CMIEG to which the CFMEU has not taken objection to, the determination should be made in the form as published by the FWC.

Construction, Forestry, Mining and Energy Union

Mining and Energy Division

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