Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Annual Leave

– Revised Draft Determinations

(AM2014/47)

2 JUNE 2016

Ai GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/47 ANNUAL LEAVE

1. INTRODUCTION

1. On 11 June 2015, the Fair Work Commission (Commission) handed down its decision[1] with respect to claims made by the Australian Industry Group (Ai Group) and other employer associations (Employer Group) concerning annual leave, as part of the 4 yearly review of modern awards (Review). The matters there dealt with have previously been the subject of numerous written submissions, evidence and hearings before the Commission over a period exceeding 18 months.

2. On 15 September 2015, the Commission issued a decision[2] (September 2015 Decision) finalising the model terms to be inserted. On 23 May 2016 a further decision was issued (May 2016 Decision). It deals with the insertion of the model terms in specific awards and plain language redrafts of certain model terms. Draft determinations purporting to give effect to that decision were published on 26 May 2016.

3. This submission is filed in accordance with the Commission's direction to provide written submissions regarding "the form of the determinations including the plain language revisions" by 3 June 2016. It addresses:

    - The plain language re-draft of the model leave in advance provision;
    - Transitional arrangements in the model excessive leave provision; and
    - The terms of certain draft determinations.

[1] [2015] FWCFB 3406.
[2] [2015] FWCFB 5771.

2. THE PLAIN LANGUAGE MODEL LEAVE IN ADVANCE PROVISION

4. We refer to attachment 4 to the Commission's May 2016 decision, which sets out the plain language redraft of the model annual leave in advance clause. Whist we appreciate the purpose and intent underpinning this redrafting, we are concerned that the proposed clause 1.1(d) is potentially unclear in its application and operation.

5. The previous iteration of the model clause, as settled in the September 2015 Decision, was in the following terms: (emphasis added)

> **X.X(b)** Clause X.X(b) applies if an employee takes a period of paid annual leave in advance pursuant to an agreement made in accordance with clause X.X(a). If the employee's employment is terminated before they have accrued all of the entitlement to paid annual leave which they have taken then the employer may deduct an amount equal to the difference between the employee's accrued annual leave entitlement and the leave taken in advance, from any monies due to the employee on termination.

6. Subclause (b) would apply where an employee takes a period of paid annual leave in advance, in accordance with the preceding subclause. Where an employee's employment is terminated before they accrue some or all of that leave taken in advance, the provision would provide an employer with an ability to deduct an amount equal to the difference between the amount of leave taken in advance and the amount of leave accrued.

7. For instance, if an employee took 15 days of annual leave in advance of its accrual and at the time of termination, had accrued 10 untaken days of annual leave, subclause (b) would permit an employee to deduct an amount equal to 5 days of annual leave; that being the difference between the leave taken in advance and the employee's balance of accrued untaken annual leave at the time of termination.

8. The effect of the clause is relevantly similar to that of pre-existing provisions that deal with the taking of annual leave in advance. For instance, clause 41.7 of the *Manufacturing and Associated Industries and Occupations Award 2010* is in the following terms:

> By agreement between an employer and an employee a period of annual leave may be taken in advance of the entitlement accruing. Provided that if leave is taken in advance and the employment terminates before the entitlement has accrued the employer may make a corresponding deduction from any money due to the employee on termination.

9. Similarly, clause 29.4 of the *Clerks – Private Sector Award 2010* is in the following terms:

> An employer may allow an employee to take annual leave either wholly or partly in advance before the leave has accrued. Where paid leave has been granted to an employee in excess of the employee's accrued entitlement, and the employee subsequently leaves or is discharged from the service of the employer before completing the required amount of service to account for the leave provided in advance, the employer is entitled to deduct the amount of leave in advance still owing from any remuneration payable to the employee upon termination of employment.

10. Clause X.X(b) as determined in the September 2015 Decision has been redrafted in the following terms: (emphasis added)

> **1.1(d)** If, on termination of the employee's employment, the employee has not accrued an entitlement to <u>a period of paid annual leave already taken</u> in accordance with an agreement under clause 1.1, the employer may deduct from any money due to the employee on termination an amount equal to <u>the amount already paid to the employee in respect of that annual leave taken</u>.

11. Clause 1.1(d) is expressed to apply where an employee has not accrued an entitlement to "<u>a period of paid annual leave</u> already taken in accordance with an agreement under clause 1.1". Relevantly, clause 1.1(a) permits an employer and employee to agree to the employee taking "<u>a period of paid annual leave</u> before the employee has accrued an entitlement to the leave".

12. We are concerned that clause 1.1(d) does not make clear that it operates in circumstances where an employee has taken leave in advance and the employee has not accrued <u>some or all</u> of the entitlement to that leave. Rather, clause 1.1(d) may be construed as referring to the entire period of paid annual leave already taken, as agreed under clause 1.1(a).

13. We also raise the following concern arising from the concluding words of the clause. They enable an employer to deduct any amount of money due to an employee on termination that is equal to "the amount already paid to the employee in respect of <u>that annual leave taken</u>". When read in conjunction with the clause as a whole, the underlined words appear to refer to the entire period of annual leave taken in advance. The provision does not contemplate the subsequent accrual of annual leave by the employee. That is to say, the provision makes no accommodation for the possibility that an entitlement to part of the annual leave taken in advance may since have accrued to the employee.

14. The issue identified is best explained through the provision of an example. As we have earlier set out, under the previous proposal, if an employee took 15 days of annual leave in advance but at the time of termination had accrued 10 days of annual leave that he or she had not yet taken, the employer could deduct an amount equal to 5 days of annual leave. By contrast, the redrafted clause enables the employer to deduct from an amount equal to the amount already paid to the employee in respect of the annual leave taken; that being 15 days. The notion that regard is to be had to any annual leave that has since accrued to the employee in determining the amount to be deducted, is absent in the redrafted clause.

15. Such an interpretation of the provision is inconsistent with the intended operation of the clause and would deviate from the earlier draft wording that was determined by the Commission. As we understand it, the plain language redrafting is not intended to change the substantive effect of the model terms. So much as is made clear by Commission in its May 2016 Decision at paragraph [59]:

> [59] As the September 2015 model terms have not yet been incorporated into modern awards, the Full Bench has reviewed the model terms to ensure that they are expressed in plain language. The plain language model terms have been restructured to make the clauses more straightforward for employers and employees to understand and use. The language is simpler and clearer and uses commonly

understood words rather than jargon or archaic words. Importantly, the substantive legal effect of the model terms has not been changed.[3]

16. Accordingly, we propose that the proposed clause 1.1(d) be replaced with the following:

> If the employee's employment is terminated before they have accrued all of the entitlement to paid annual leave which they have taken, then the employer may deduct an amount equal to the difference between the employee's accrued annual leave entitlement and the leave taken in advance, from any monies due to the employee on termination.

3. TRANSITIONAL ARRANGEMENTS IN THE MODEL EXCESSIVE LEAVE PROVISION

17. Clause 1.5 of the redrafted model excessive leave clause (previously clause 1.2(c)) gives employees the ability to require that they be granted annual leave. Ai Group has previously submitted that this element of the new excessive leave scheme should not come into force until 12 months after the commencement of the balance of the clause. The basis for this proposal was that it would address situations where a significant proportion of an employer's workforce currently has excessive leave accruals.

18. In its September 2015 Decision, the Full Bench accepted our proposal:

> [148] The second limitation proposed has merit. We acknowledge that a provision such as subclause 1.2(c) is a significant change to the modern award system and it is appropriate that employers are provided with some lead time to adjust. Subclause 1.2(c) will commence operation 12 months after the commencement of subclauses 1.2(a) and (b).[4]

19. The final form of the model term was set out at paragraph [172] of the September 2015 Decision. Despite the above comments, it did not contemplate a delayed commencement date in respect of clause 1.2(c). Similarly, the draft determinations published by the Commission on 30 September 2015 did not contain such a provision.

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[3] *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3177 at [59].

[4] *4 yearly review of modern awards – Annual leave* [2015] FWCFB 5771 at [148].

20. The issue was raised by Ai Group in its submissions of 7 December 2015 and we proposed that the model clause be amended by inserting a new subclause (i) in the following terms:

> **(i)** Clause 1.2(c) comes into operation from [insert date 12 months after the commencement date of clauses 1.2(a) and (b)].

21. In the May 2016 Decision, the Commission reaffirmed that a transitional provision is to be included and determined that a clause in the terms proposed by Ai Group would be inserted into each variation determination giving effect to the Commission's decision to insert the new excessive leave model clause:

> [87] As we decided in the *September 2015 decision*, any variation determination inserting the model excessive leave term into a modern award will provide that subclause 1.2(c) commences operation 12 months after the commencement of subclause 1.2(a) and (b). The transitional subclause proposed by Ai Group will be inserted into each variation determination.[5]

22. The Full Bench went on to state that the variation determinations will also provide for the deletion of the transitional subclause after 12 months.

23. Notwithstanding the aforementioned decisions, the draft determinations published on 26 May 2016 would not insert the proposed transitional clause or provide for an additional order regarding its subsequent deletion. Consistent with our earlier submission and the Commission's decisions, the draft determinations should be amended to include these provisions.

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[5] *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177 at [87] – [88]. See also [303].

4. DRAFT DETERMINATIONS

24. Whilst we have not undertaken a comprehensive review of each of the revised draft determinations published by the Commission on 26 May 2016, we have identified the following concerns arising from those that relate to awards in which we have a significant interest.

Aircraft Cabin Crew Award 2010

25. The May 2016 Decision deals with a submission made by Ai Group in respect of the *Aircraft Cabin Crew 2010* dated 7 December 2015: (emphasis added)

> [123] The 22 modern awards identified by Ai Group fall into three categories:
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> …
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> (iii) Ai Group contends that the particular employment arrangements in the airline industry 'may not be amenable to the model excessive leave cause' The two modern awards which are the subject of this submission are:
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> - *Air Pilots Award 2010* – clause 27.4; and
> - *Aircraft Cabin Crew Award 2010* – clause 25.5.
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> …
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> [125] As to the two modern awards in category (iii), Ai Group submits that a determination as to whether these awards should be varied to include the excessive leave model clause 'be deferred until the Award stage of the review'. The two awards are in Group 4 of the Award stage of the Review. In support of this proposition Ai Group submits that such a deferral:
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> > '…would provide us with an opportunity to make further relevant enquiries in order to assess whether the insertion of the model excessive leave provision in the … awards would in fact be problematic.'
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> [126] We are content to defer our consideration of the insertion of the excessive leave model term into these two modern awards in order to give Ai Group and other interested parties an opportunity to make further relevant inquiries. The matter will remain before this Full Bench and will be the subject of further proceedings in the second half of this year.[6]

26. The draft determination published in respect of the *Aircraft Cabin Crew Award 2010*, at paragraph 1, would delete the current provision that enables an employer to direct an employee to take leave where there is an excessive

[6] *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177 at [123] – [126].

accrual (clause 25.4). The reason for this is unclear. As the passage cited above indicates, the award will not, at this stage, be varied to introduce the model excessive leave clause. Rather, the Commission has deferred its determination of this matter until a later stage of the Review. The deletion of the current excessive leave provision has not, to our knowledge, been the subject of any express consideration or decision by the Commission.

27. Accordingly, the current excessive leave provision should be preserved until the aforementioned matter raised by Ai Group has been dealt with.

Black Coal Mining Industry Award 2010

28. The CFMEU – Mining and Energy Division contended that the *Black Coal Mining Industry Award 2010* should not be varied to insert the EFT and paid annual leave model term.

29. At paragraphs [166] – [179] of the May 2016 Decision, the Commission dealt with the unions' submissions and determined that the award would nonetheless be so varied. Further, at paragraph [179] it set out an amendment to clause 25.8 as it presently appears in the award, to "avoid any confusion between the operation of the model term and clause 25.8".

30. The draft determination published in respect of the *Black Coal Mining Industry Award 2010* does not require a variation to clause 25.8. For the purposes of ensuring that the determination properly reflects the Commission's decision, the draft determination should be amended such that it makes the relevant variation to clause 25.8 of the award.

Food, Beverage and Tobacco Manufacturing Award 2010

31. The cross reference contained in the proposed new clause 34.7(a) should be to clause 34.3 (instead of clause 31.3). Clause 34.3 of the award contains the definition of "shiftworker" for the purposes of the NES. This appears to be a drafting error.

Market and Social Research Award 2010

32. The draft determination in respect of the *Market and Social Research Award 2010* would replace the current clause 23.3 with the model leave in advance clause. The draft determination would also insert the EFT provision as a new clause 23.4.

33. The current clause 23.3(b)(ii) requires, for the purposes of leave taken in advance, payment for that leave before it commences. We understand that the insertion of the EFT clause was sought by the Employer Group and granted by the Commission in light of this obligation. That is, the EFT clause is intended to provide an exception to an award term that expressly requires that payment for a period of leave be made prior to the commencement of that leave.

34. The Commission's decision to replace the current clause 23.3 in its entirety with the proposed annual leave in advance provision will necessarily mean that clause 23 no longer deals expressly with *when* an employee must be paid for a period of annual leave. This is because clause 23.3(b)(ii) will be deleted. As a result, the EFT clause is no longer necessary. Clause 23 will hereafter not expressly require an employer to pay an employee before the commencement of their leave and therefore, the EFT clause, which effectively provides an exemption to such a provision, is not necessary.

35. Accordingly, it is our submission that the EFT provision need not be inserted in the *Market and Social Research Award 2010*.

Waste Management Award 2010

36. An employee covered by the *Waste Management Award 2010* has sought the insertion of a definition of "shiftworker" for the purposes of s.87(1)(b) of the Act. The effect would be to entitle employees who meet that definition to an additional week of annual leave for each year of service with their employer. Ai Group opposes the claim.

37. The procedural history of this matter was summarised in the May 2016 Decision as follows: (emphasis added)

> [55] Paragraph [8] of the November Statement noted that an employee covered by the *Waste Management Award 2010* had submitted that a definition of shiftworker for the purpose of the additional week of annual leave should be inserted in this award. Given that the award provides for shiftwork we expressed the *provisional* view that the variation determination include the following definition:
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> > 'For the purposes of the additional week of annual leave provided in s.87(1)(b) of the Act, a shiftworker is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays.'
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> [56] Parties were invited to file written submissions regarding the *provisional* view expressed (including the terms of the proposed variation). Submissions were filed by the Australian Industry Group (Ai Group), supported by the Waste Contractors and Recyclers Association of NSW, contending this issue should be dealt with during the Award stage on the basis that a similar application made by the Transport Workers' Union of Australia is currently being dealt with in the Award stage in AM2014/216. In the December Statement we agreed with the proposal by Ai Group and accordingly the employee's submission will be referred to the Award stage for consideration.[7]

38. Accordingly, the claims made by the relevant employee and the TWU have not yet been heard or, to our knowledge, determined. Despite this, the draft determination published in respect of the *Waste Management Award 2010* orders the insertion of a new clause 33.2, which would introduce a definition for "shiftworker" in the terms sought. The draft determination would suggest that the claims for such a definition have been determined, notwithstanding the Commission's comments in the May 2016 Decision and absent interested parties having an opportunity to be heard.

39. For present purposes, we proceed on the basis that paragraph 2 of the draft determination has been included inadvertently, given that it is clearly inconsistent with the Commission's ruling that the matter will be referred to the award stage of the Review and submit that it should be removed.

40. We also note that the new clause 33.6(a) contained in the draft determination refers to the above definition of "shiftworker". If the definition is not to be inserted, this reference should also be removed.

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[7] *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177 at [55] – [56].