

4 yearly review of modern awards – Family Friendly Work Arrangements

Matter No. AM2015/2

SUBMISSION

NATIONAL FARMERS' FEDERATION

Date: 21 June 2018

1. These submissions respond to the Commission's statement of 3 May 2018 inviting interested parties to file submissions on, inter alia, the terms of the provisional model clause contained in the Full Bench's decision published on 26 March 2018.

“Responsibly for care of a child”

2. Pursuant to clause X.2(a) an employee may request family friendly work arrangements (**FFWA**) if the employee has responsibility for the care of the child”. Once that very basic threshold requirement has been satisfied, the type of FFWAs which the employee may request — and the employer may only deny on “reasonable business grounds” — is essential unrestricted. The only other limitation is found in the chapeaux to X.1 which indicate that the FFWA which the employee requests should “relate” to the employee's “circumstances as a parent or carer”; this appears to add little if anything to the basic “threshold” requirement.
3. The NFF is concerned that the provision does not link the right to make the request for FFWAs to the specific requirements of the employee in terms of the nature and degree of care responsibilities which he/she bears. Furthermore, the arrangements which the employee may request is not determined by the nature/extent of his/her carer responsibilities. Indeed, there may be instances where an employee is the parent or has responsibility for the care of a child, but that responsibility does not in itself require a change in working arrangements.

Alternative arrangements

4. Clause X.10(c)(i) requires an employer's written response to an employee's request to set out any FFWA which the employer can offer the employee.
5. In the NFF's submission this requirement is too broad and may unnecessarily generate dispute. For example, the extent that the employer must go to consider and identify changes which would accommodate the business requirements of the employer and the carer duties of the employee is unclear.

6. Furthermore, depending on the construction of the clause¹ there will be a degree of opinion in determining what arrangements the employer “can offer” the employee. Disputes may therefore arise where the employee, on the one hand, believes the employer can offer an arrangement which the employer, on the other hand, believes may be denied on “reasonable business grounds”. If the employer consequently fails to include that “arrangement” in the written reasons then, at least from the employee’s perspective, the reasons are defective. Accordingly, the employee could commence action under the dispute resolution clause of the relevant award, ultimately referring the employer’s decision to the Commission for arbitration. This, in turn, could mean that an employer’s decision that an arrangement is not possible on “reasonable business grounds” may be reviewed by the Commission.
7. It appears that the employer could successfully argue that the Commission is being asked to deal with a dispute “that it is about whether the employer had reasonable business grounds to refuse a request” and is therefore prohibited by clause X.11. However, there is at least a counter-argument that the dispute is simply about the content of the notice, a dispute which the Commission may entertain.
8. As such, as currently drafted we see potential for the clause to give rise to unnecessary dispute. This problem is resolved by restricting subclasses X.10(c)(i) to including those changes in working arrangements which the parties agree could be offered by the employer. Accordingly, the clause should be amended to read:

(c) If the employer and employee could not agree on a change in working arrangements under clause X.9, the written response under clause X.6 must:

(i) state whether or not the employer and employee agree there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee’s responsibilities as a parent or carer; and

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¹ i.e. if “can offer” means “is objectively capable of offering”, as opposed to meaning “is prepared to offer” or “will offer”.