



Summary of Decision

29 May 2014

Canavan Building Pty Ltd

AG2013/10430

Background

1. This decision deals with an application to approve the *Canavan Building Pty Ltd Enterprise Agreement 2013* (the Agreement). In broad terms, the Agreement provides that annual leave is to be paid for as a loading upon or incorporated into the hourly rate of pay, so that rather than being paid for annual leave at the time that such leave is taken, annual leave is notionally paid for in advance as a component of the payment made for work performed. The general concept is described in clause 9.3 of the Agreement as follows:

“9.3 This agreement provides for workers to be engaged on a fixed hourly rate which includes payment in advance for some entitlements arising under the National Employment Standards.”

2. There have been conflicting decisions relevant to this issue, including a decision of a Full Bench of this Commission and a judgment of the Federal Court, and for that reason President referred the application to a Full Bench for determination pursuant to ss.582 and 615 of the Act.

3. Directions were issued which permitted the Commonwealth and any Peak Industry Council (the ACCI, Ai Group and the ACTU) to file written submissions. The ACCI, Ai Group and the ACTU availed themselves of this opportunity and filed written submissions. The hearing of the application took place on 1 April 2014 and oral submissions were received from the applicant, the ACCI, Ai Group and the ACTU. The Commonwealth did not make any submissions and did not appear at the hearing.

The conflicting decisions

4. In *Hull-Moody Finishes Pty Ltd*¹ Fair Work Australia (O’Callaghan SDP) was required to consider whether the *Hull-Moody Finishes Pty Ltd Enterprise Agreement 2011* was capable of approval under the Act. That agreement was, with respect to the system for the payment of annual leave, the same in all essential respects as the Agreement in this matter, in that it provided for the payment of annual leave “progressively in advance” by way of an amount incorporated into the total hourly rate to be paid to employees for work performed, with the total rate of pay also encompassing a range of other entitlements including overtime. At first instance the Senior Deputy President identified two issues as arising with respect to the agreement’s annual leave provisions - the first being what the base rate of pay in the agreement was for the purpose of the entitlement in s.90(1) to payment for annual leave “*at the employee’s base rate of pay*”, and the second being whether the agreement provided for cashing out of annual leave in a manner not permitted by s.93.² The Senior Deputy President found that the Agreement was inconsistent with the National Employment Standards and refused to approve the Agreement. This decision was appealed and a Full Bench decided, by majority, to uphold the appeal.³

5. The majority (Vice President Watson and Hamberger SDP) firstly determined that the total hourly rate of pay specified in the agreement was not the base rate of pay for the purpose of s.90(1)

because, having regard to the definition of “*base rate of pay*” in s.16(1), it included overtime and annual leave payments. In respect of the issue as to whether, by paying for annual leave in advance, the agreement excluded the NES annual leave entitlement, the majority said:

“[43] In determining this matter the focus must be on whether the benefits provided by the NES are retained or removed by operation of the payment arrangements. As the amount of leave available to be taken is equivalent to that provided for in the NES, and the Agreement provides for payment with respect to annual leave at the level required by s 90, we do not believe that the arrangement is inconsistent with the NES. It is unnecessary to consider the prohibition of cashing out or the conditions in the Act with regard to cashing out as the arrangement cannot properly be described as cashing out.”

6. In *Construction, Forestry, Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd*⁴ (*Jeld-Wen*) the Federal Court (Gray J) considered an application for civil penalties to be imposed under the Act in respect of an employer which, in accordance with the provisions of an Australian Workplace Agreement (AWA) entered into under the *Workplace Relations Act 1996* and remaining in effect by virtue of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, had paid an employee an extra 1.5 hours’ pay each week in lieu of any entitlement to payment when the employee utilised any of his ten days’ sick leave entitlement. The application alleged that this method of payment contravened ss.100 and 101 of the Act, which prohibited the cashing out of personal/carer’s leave except in accordance with terms of a modern award or an enterprise agreement complying with the standards set out in s.101.

7. The Court determined that the sick leave provisions contained in the AWA provided in effect for the cashing out of sick leave in a manner not permitted by s.101 of the Act, and were therefore unenforceable because otherwise they would displace the NES personal/carer’s leave provisions in s.101.

8. Although *Jeld-Wen* is concerned with the NES personal carer’s leave entitlements rather than annual leave, it is nonetheless clear that its reasoning is inconsistent with that of the Full Bench majority in *Hull-Moody*. In *Jeld-Wen*, the Court founded its conclusion on two propositions. The first was that the requirement for payment for personal/carer’s leave under s.99 of the Act was a requirement which applied at the time the leave is taken. The second was that when the Act, in ss.100 and 101, referred to “*cashing out*”, it was referring to the cashing out of *paid* personal carer’s leave, not the leave itself. The decision of the Full Bench majority in *Hull-Moody* adopted conclusions which were directly contrary to these propositions in respect of annual leave provisions.

9. The conflict in reasoning between the majority decision in *Hull-Moody* and *Jeld-Wen* has led to inconsistency in single-member decisions in the Commission.⁵

The Full Bench Decision

10. Section 55(1) of the Act relevantly provides that an enterprise agreement “*must not exclude*” the NES or any provision thereof. It is not necessary that an exclusion for the purpose of s.55(1) must be constituted by a provision in the agreement ousting the operation of an NES provision in express terms. On the ordinary meaning of the language used in s.55(1), the Full Bench considered that if the provisions of an agreement would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES. That was also the approach taken by the Full Bench in *Hull-Moody*.⁶

11. The Full Bench decided not to approve the Agreement. At paragraphs [38] - [39] the Full Bench said:

“[38] There is an immediate reason why the Agreement cannot be approved in its current form, irrespective of whether the Act allows for the payment of annual leave in advance or whether the Agreement provides for the cashing out of annual leave in a manner not permitted by the Act. The obligation for payment for annual leave in s.90(1) requires that the payment be made at the employee’s base rate as it is at the time the leave is taken. This is made clear by the words “*must pay the employees at the employee’s base rate of pay for the employee’s ordinary hours of work in the period*” (underlining added), the “*period*” being the “*period of paid annual leave*” taken by the employee. The ACCI and Ai Group accepted this was the case, and no party submitted otherwise. Because the Agreement provides for payment for annual leave on a progressive basis in advance rather than when annual leave is taken, and also provides for increases in the rates of pay during the life of the Agreement, it permits annual leave to be paid for, at least in part, at an earlier and lower rate of pay rather than the rate of pay applicable at the time that leave is taken. Therefore compliance with the terms of the Agreement does not require compliance with the payment obligation in s.90(1), and may result in that obligation not being complied with. To that extent, the NES provision in s.90(1) is excluded, contrary to s.55(1) of the Act.

[39] The same conclusion would apply to the agreement considered and approved by the Full Bench majority in *Hull-Moody*, which as earlier observed was the same in all relevant respects as the Agreement here. Due to the lack of a contradictor in the *Hull-Moody* appeal, this issue does not appear to have been raised or considered. It nonetheless follows that the Full Bench majority in *Hull-Moody* was in error in approving the agreement under consideration in that matter.”

12. As it was possible that the impediment to approval identified above could be overcome by an undertaking in appropriate terms, it remained necessary for the Full Bench to consider whether the “pre-payment” or “self-funded” system for annual leave contained in the Agreement contravenes s.55(1) even if a mechanism could be developed to ensure that payment is made at the base rate applicable when the employee takes leave.

13. The starting point for the Full Bench’s consideration was to identify the meaning of the expression “*paid annual leave*” as used in Division 6 of Part 2-2 of the Act. The Division consistently uses the expression “*paid annual leave*”, not merely annual leave, in its prescription of the annual leave entitlement. The Full Bench held that the consistent use of the expression strongly suggests its fundamental significance to the nature of the entitlement established by the Division. The Full Bench considered that the expression should be treated as a composite expression, in which payment for the leave is inextricably linked to the leave itself. As a matter of the ordinary understanding of that composite expression, and consistent with the approach taken by Gray J in *Jeld-Wen*. On that basis the Full Bench concluded “*paid annual leave*” means annual leave with pay, in the sense that the pay is provided together with the leave.

14. The Full Bench rejected the submission that the provisions in the Agreement concerning “pre-payment” for annual leave can be characterised as provisions merely ancillary or incidental to the operation of the NES annual leave entitlement and are thus authorised by s.55(4) of the Act. The Full Bench reasoned that the scheme of self-funded or pre-paid annual leave provided for by the Agreement does not constitute “*paid annual leave*” as contemplated by the Act at all. To the extent that an enterprise agreement may under s.55(4) contain ancillary or incidental provisions concerning when payment for annual leave is to be made, such provisions would necessarily have to be consistent with the concept of “*paid annual leave*”. Provisions which require payment immediately before the leave is taken, or at identified intervals during the period of leave, or in accordance with the normal pay cycle at the time leave is taken, are the type of provisions in this respect which would be authorised by s.55(4). Modern award provisions concerning payment for annual leave, may provide for payment in advance for an actual period of annual leave which has been arranged to be taken, not a payment made in respect of any future annual leave entitlement whenever it is taken or whether taken at all.

15. The Full Bench rejected the approach taken by the majority in *Hull-Moody*, as follows:

“On the contrary approach taken by the majority in *Hull-Moody* and advanced in this appeal, namely that Division 6 of Part 2-2 establishes no connection between the taking of and payment for annual leave, no practical work can be assigned to s.323(1)(c) in respect of annual leave, because there is never any time at which payment for annual leave falls due, and therefore any part of the amount may be paid at any time. We note in this connection that the majority in *Hull-Moody* recognised a difficulty in this approach in that while they said that “there is no obligation in the NES to make a payment for annual leave at a particular time”, they went on to say that “a delay in payment may be in a different category” without identifying why that would be the case. In fact, on the *Hull-Moody* majority’s approach, there would be no statutory impediment to payment for annual leave being made at any time before or after the taking of annual leave. The detrimental consequences of that result are obvious and are strongly suggestive of fallacy in that approach. The interpretation of the expression “paid annual leave” in Division 6 of Part 2-2 and of ss.90(1) and 323(1)(c), which we favour, avoids that result.”⁷

16. The Full Bench concluded that in providing that the employees are required to fund any time off work by way of annual leave the Agreement excludes the National Employment Standard provisions for annual leave, contrary to s.55(1) of the Act. The Agreement was contrary to s.55(1) in two interrelated respects:

- (i) it excludes the entitlement to ‘paid annual leave’ in s.87(1); and
- (ii) it excludes the requirement for payment in respect of annual leave in s.90(1).

17. The Full Bench also considered that the scheme of ‘pre-payment’ of annual leave in the Agreement constitutes cashing out of annual leave in a manner inconsistent with s.93 of the Act.

18. The Full Bench concluded that as the Agreement currently stands it cannot be approved because the Commission cannot be satisfied for the purposes of s.186(2)(c) that the terms of the Agreement do not contravene s.55.

[\[2014\] FWCFB 3202](#)

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission’s reasons.***

- ENDS -

For further information please contact:

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¹ [\[2011\] FWA 5618](#)

² Ibid at [21]

³ See *Mr Irving Warren; Hull-Moody Finishes Pty Ltd; Mr Romano Sidotti* [\[2011\] FWAFB 6709](#)

⁴ [2012] FCA 45; (2012) 213 FCR 549

⁵ See *BM & KA Group as trustee for BM & KA Group Unit Trust* [2013] FWC 3654 and *Robjohn Enterprises Pty Ltd* [2013] FWCA 6685

⁶ At [26]; see also *Re Armacell Australia Pty Ltd* (2010) 202 IR 38 at [18]-[19]

⁷ [\[2014\] FWCFB 3202](#) at [45]