

IN THE FAIR WORK COMMISSION

AM2014/47 –4 YEARLY REVIEW OF MODERN AWARDS – ANNUAL LEAVE

SUBMISSION

BY

**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION – MINING AND
ENERGY DIVISION**

1. On 27 March 2017, a Full Bench of the Fair Work Commission ('FWC') published a decision regarding the shutdown provision in the *Black Coal Mining Industry Award 2010*.¹ In that decision the FWC reached a "provisional view" on a "revised shutdown provision" to be inserted into the Black Coal Mining Industry Award ("BCMI Award").
2. The decision was the outcome of proceedings regarding the shutdown provision in BCMI Award and our submissions were directed to that end. It is acknowledged that the circumstances in other awards may vary widely and as such our submissions need to be seen in that context. It is also acknowledged that the wording in other awards is not the same as that in the BCMI Award or as proposed in the clause under consideration.
3. As modern award provisions vary, it is submitted that the precise wording for any modern award would need to be considered on an award-by-award basis.

¹ [2017] FWCFB 959

4. The Mining and Energy Division of the CFMEU makes the following comments on the draft shutdown clause as set out in paragraph [34] of the Decision of 27 March 2017.
5. We submit that the provisions of clause 25.10 (d) (ii), at least as far as the direction to take unpaid leave is concerned, are tantamount to a stand down. This is so because the clause gives the employer the authority to direct an employee to not attend work, as he/she cannot (at least ostensibly) be usefully employed over the period (in full or in part) of the shutdown and not be paid for such non-attendance². Where an employee does not agree to take leave without pay in the context of a shutdown, then to the extent any direction to take unpaid leave constitutes a stand down its power lies in the FW Act.
6. It is noted that in its decision the Full Bench observes that the current provision in the BCMI Award does provide any capacity for employees to be placed on leave without pay other than where an excessive leave situation exists.³ The Full Bench goes on to explain that a shutdown clause “should be clear and serve its evident purpose” and well as taking into account how it “operated prior to the impending insertion of the excessive leave provision”⁴ In that regard, we submitted that the shutdown clause did not provide for the taking of unpaid leave by direction of the employer.⁵ As such the notion of leave without pay as directed by the employer is a new one, at least for the BCMI Award. Like other awards the BCMI Award does not have a stand down provision. As such the question of the power of an employer to rely on an award provision to effectively stand down an employee arises.

² In that regard, it is noted that clause 25.10 (e) applies the notion of reasonableness to any direction by an employer and as such whether an employee cannot be usefully be employed can arise in this consideration.

³ [2017] FWCFB 959 @ PN [31]

⁴ [2017] FWCFB 959 @ PN [32]

⁵ This was addressed in our submission of 31 January 2017, see PN [7] – [10]

7. It is acknowledged that an employee may agree to take leave without pay.
8. It is also recognized that a significant number of modern awards provide for the taking of leave without pay, but we are not aware of any decision that considers this issue.
9. Where the employee agrees to take unpaid leave and if the FWC is against us on the stand down point and finds that a direction to take unpaid leave can be inserted in an Award, it is submitted that the shut down provision needs to be tightened in the following respects:
 - 9.1. The BCMI Award needs to provide that the period of leave without pay during a shutdown is taken into account for the purposes of continuous service.⁶
 - 9.2. The BCMI Award needs to provide that where a public holiday falls during a period of leave without pay, the employee is entitled to the public holiday payment.⁷
10. The provisions in PN 9 meet the modern awards objective. A shutdown is initiated by the employer and is essentially for its purposes e.g. to undertake major maintenance. In general terms an employee would otherwise be working. An employee should not be denied these entitlements in such circumstances.

Construction, Forestry, Mining and Energy Division
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⁶ See for example, manufacturing and Associated Industries and Occupations Award 2010, clause 41.8(d).

⁷ See for example the Aquaculture Industry Award 2010 in Attachment A to [2017] FWCFB 959