

From: Trent Sebbens
Sent: Monday, 30 January 2017 1:36 PM
To: AMOD
Subject: AM2014/47 - 4 yearly review of modern awards - Annual leave

Dear Registrar

AM2014/47 - 4 yearly review of modern awards - Annual leave

We confirm that we act for the Coal Mining Industry Employer Group (**CMIEG**) in relation to the Black Coal Mining Industry Award 2010 (**BCMI Award**).

We **attach**, by way of filing, submissions on behalf of the CMEIG in respect of annual leave shutdown clause in BCMI Award.

Yours faithfully

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FAIR WORK COMMISSION

Four yearly review of modern awards – Annual leave **AM2014/47**

Submissions - Coal Mining Industry Employer Group

1. These submissions are made for the Coal Mining Industry Employer Group (**CMIEG**) in accordance with the Decision of the Full Bench issued on 19 December 2016 ([2016] FWCFB 9074) at [30].
2. As previously noted in the submissions of the CMIEG filed on 21 December 2016, the Full Bench determined to delete clause 25.4 of the Black Coal Mining Industry Award 2010 (**BCMI Award**) in its entirety, and that the BCMI Award be varied to insert the revised excessive annual leave model term (September Decision, [2016] FWCFB 6836 at [84]). On 13 October 2016, the Commission then published a Draft Determination for the variation to clause 25 of the BCMI Award to give effect to the September 2016 Decision.
3. The deletion of clause 25.4 in its entirety has led to uncertainty about the operation of clause 25.10 concerning shutdowns.
4. In the case of a shutdown, employers covered by the BCMI Award would rely upon the operation of both clauses 25.10 and 25.4(c) to direct employees to take annual leave for the period of the shutdown, in order to avoid possible disputation.
5. The deletion of clause 25.4(c) makes unclear the ability of the employer to require, or direct, the taking of paid annual leave during the period of a shutdown. While a construction is available that an employer who "shuts down or all or any part of its operation" and gives notice to its employees of 28 days of that shutdown, is consequently giving those employees notice of the requirement to take annual leave, it is desirable that this requirement to take leave be made express in the clause.
6. The CMIEG has, consequently, sought an amendment to clause 25.10 to read as follows:

25.10 Shutdown

- (a) When an employer shuts down all or part of its operation, clauses 25.4 and 25.6 do not apply to employees directly affected by the shutdown and this clause will apply.

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- (b) An employer that shuts down all or any part of its operation must give employees at least 28 days' notice of the shutdown or such shorter period as agreed between the employer and the employees affected.
- (c) Subject to (d), employees directly affected by the shutdown who have an entitlement to annual leave may be required by the employer to take a period of paid annual leave during the period of the shutdown.
- (d) Employees who are directly affected by the shutdown:
 - (i) may elect to take all or only part of that the employee's entitlement to annual leave during the shutdown period, with the balance of the shutdown period being unpaid leave; or
 - (d) ~~Employees who are directly affected by the shutdown and~~ who are not yet entitled to sufficient annual leave may, during the shutdown period, elect to take any annual leave in advance accrued in accordance with clause ~~25.9~~ 25.8, or otherwise be placed onto unpaid leave.

7. The CMIEG makes the following submissions in support of the amendments to clause 25.10.
8. **First**, the amendments are necessary to ensure that the construction of clause 25, as a whole, is clear and operates in the manner intended once the existing clause 25.4 is removed and the new clauses 25.4, 25.5 and 25.6 are inserted into the BCMI Award.
9. **Second**, the amendment also makes express what is otherwise implicit in that clause, that employees who do not "elect" to take annual leave that is accrued, or if they have insufficient leave accrued to take annual leave in advance, would otherwise be on unpaid leave.
10. **Third**, it is orthodox for shutdown clauses to expressly provide for the requirement of employees affected by a shutdown to take annual leave accrued, or in advance, or otherwise be on unpaid leave.
11. For example, modern awards in comparable industries to the black coal mining industry provide shutdown clauses that include an ability for the employer to "direct" or "require" the taking of annual leave (see clause 23.6, Mining Industry Award 2010;¹ clause 19.7, Coal Export Terminals Award 2010;² clause 29.4, Quarrying Award 2010.³)

¹ Clause 23.6, "An employer may direct an employee to take paid annual leave during all or part of a period where the employer shuts down the business or part of the business where the employee works."

² Clause 19.7, "An employer may direct an employer to take paid annual leave during all or part of a period where the employer shuts down the business or part of the business where the employee works."

³ Clause 29.4, "Where an employee has given notice pursuant to clause 29.4(a) or (b) and the employee has (i) accrued sufficient annual lave to cover the full period of the closing, the employee must take paid annual leave for the full period of the closing; (ii) insufficient accrued annual leave to cover the full period of closing, the employee must

12. **Fourth**, such a clause is also consistent with section 93(3) of the *Fair Work Act 2009* (Cth) (**FW Act**) which permits the inclusion in modern awards of terms that require an employee, or allow for an employee to be required to take paid leave in particular circumstances, but only if the requirement is reasonable. It is trite that requiring employees to take annual leave for a period of a shutdown is reasonable. In that regard, the circumstance of a shutdown is included in the "Note" to section 94(5), as an example of an instance in which an employer requiring an award/agreement free employee to take a period of paid leave would be reasonable.
13. **Fourth**, the amendment to clause 25.10 will make the clause "simple" and "easy to understand" in accordance with the modern awards objective (section 134(1)(g), FW Act). Correspondingly, the amendment would lessen the likelihood of disputation between parties covered by the award, in instances of shutdowns.
14. **Finally**, the CMIEG notes that in its December decision (([2016] FWCFB 9074) at [23]-[24] and Attachment 1) the Full Bench determined to include a shutdown clause in the Aquaculture Industry Award 2010 and 17 other modern awards, that includes a requirement for employees to take annual leave upon notice by an employer (see Draft Determination issued on 23 December 2016). By parity of the reasoning in respect of the amendments made to the shutdown clause considered by the Full Bench in respect of those awards, the CMIEG submits that the amendments proposed by the CMIEG are appropriate and necessary to be made to clause 25.10 of the BCMI Award.
15. The CMIEG submits that its amendments to clause 25.10 ought be made, for these reasons.

Alternate submission

16. The CMIEG would, in the alternative to the amendments proposed to clause 25.10, as set out above, also be content for the proposed clause which is to be inserted into the Aquaculture Industry Award 2010 and the 17 other awards, to be inserted also in the BCMI Award in place of the existing clause 25.10.

Ashurst Australia Solicitors for the CMIEG

30 January 2017

take paid annual leave to the full amount accrued and leave without pay for the remaining period of the closing; (iii) no accrued leave, the employee must take leave without pay for the period of the closing."