



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards

(AM2015/6)

EDUCATIONAL SERVICES (TEACHERS) AWARD 2010

[MA0000077]

Educational services

VICE PRESIDENT CATANZARITI

DEPUTY PRESIDENT KOVACIC

COMMISSIONER JOHNS

SYDNEY, XX APRIL 2017

4 yearly review of modern awards – common issue – annual leave – insertion of model terms.

A. Further to the Full Bench decision issued by the Fair Work Commission on 26 April 2017¹, the above award is varied as follows:

1. By inserting clause B.6 as follows:

B.6 Annual leave

B.6.1 Annual leave in advance

- (a) An employer and employee may agree in writing to the employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.
- (b) An agreement must:
 - (i) state the amount of leave to be taken in advance and the date on which leave is to commence; and
 - (ii) be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

¹ [\[2017\] FWC FB 2098](#)

Note: An example of the type of agreement required by clause B.6.1 is set out at Schedule E. There is no requirement to use the form of agreement set out at Schedule E.

- (c) The employer must keep a copy of any agreement under clause B.6.1 as an employee record.
- (d) If, on the termination of the employee's employment, the employee has not accrued an entitlement to all of a period of paid annual leave already taken in accordance with an agreement under clause B.6.1, the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued.

B.6.2 Cashing out of annual leave

- (a) Paid annual leave must not be cashed out except in accordance with an agreement under clause B.6.2.
- (b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause B.6.2.
- (c) An employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee.
- (d) An agreement under clause B.6.2 must state:
 - (i) the amount of leave to be cashed out and the payment to be made to the employee for it; and
 - (ii) the date on which the payment is to be made.
- (e) An agreement under clause B.6.2 must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.
- (f) The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.
- (g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.
- (h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.
- (i) The employer must keep a copy of any agreement under clause B.6.2 as an employee record.

Note 1: Under section 344 of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause B.6.2.

Note 2: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause B.6.2.

Note 3: An example of the type of agreement required by clause B.6.2 is set out at Schedule F. There is no requirement to use the form of agreement set out at Schedule F.

B.6.3 Excessive leave accruals: general provision

Note: Clauses B.6.3 to B.6.5 contain provisions, additional to the National Employment Standards, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Fair Work Act.

- (a) An employee has an **excessive leave accrual** if the employee has accrued more than 8 weeks' paid annual leave.
- (b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual.
- (c) Clause B.6.4 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.
- (d) Clause B.6.5 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

B.6.4 Excessive leave accruals: direction by employer that leave be taken

- (a) If an employer has genuinely tried to reach agreement with an employee under clause B.6.3(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave.
- (b) However, a direction by the employer under paragraph (a):
 - (i) is of no effect if it would result at any time in the employee's remaining accrued entitlement to paid annual leave being less than 6 weeks when any other paid annual leave arrangements (whether made under clause B.6.3, B.6.4 or B.6.5 or otherwise agreed by the employer and employee) are taken into account; and
 - (ii) must not require the employee to take any period of paid annual leave of less than one week; and

- (iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and
 - (iv) must not be inconsistent with any leave arrangement agreed by the employer and employee.
- (c) The employee must take paid annual leave in accordance with a direction under paragraph (a) that is in effect.
- (d) An employee to whom a direction has been given under paragraph (a) may request to take a period of paid annual leave as if the direction had not been given.

Note 1: Paid annual leave arising from a request mentioned in paragraph (d) may result in the direction ceasing to have effect. See clause B.6.4(b)(i).

Note 2: Under section 88(2) of the Fair Work Act, the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

B.6.5 Excessive leave accruals: request by employee for leave

- (a) Clause B.6.5 comes into operation from XX April 2018.
- (b) If an employee has genuinely tried to reach agreement with an employer under clause B.6.3(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (c) However, an employee may only give a notice to the employer under paragraph (b) if:
 - (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
 - (ii) the employee has not been given a direction under clause B.6.4(a) that, when any other paid annual leave arrangements (whether made under clause B.6.3, B.6.4 or B.6.5 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (d) A notice given by an employee under paragraph (b) must not:
 - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause B.6.3, B.6.4 or B.6.5 or otherwise agreed by the employer and employee) are taken into account; or

- (ii) provide for the employee to take any period of paid annual leave of less than one week; or
 - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
 - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.
- (e) An employee is not entitled to request by a notice under paragraph (b) more than 4 weeks' paid annual leave in any period of 12 months.
- (j) The employer must grant paid annual leave requested by a notice under paragraph (b).

2. By inserting Schedule E—Agreement to Take Annual Leave in Advance as follows:

AGREEMENT TO TAKE ANNUAL LEAVE IN ADVANCE

Name of employee: _____

Name of employer: _____

The employer and employee agree that the employee will take a period of paid annual leave before the employee has accrued an entitlement to the leave:

The amount of leave to be taken in advance is: ____ hours/days

The leave in advance will commence on: ____/____/20____

Signature of employee: _____

Date signed: ____/____/20____

Name of employer representative: _____

Signature of employer representative: _____

Date signed: ____/____/20____

[If the employee is under 18 years of age - include:]

I agree that:

if, on termination of the employee's employment, the employee has not accrued an entitlement to all of a period of paid annual leave already taken under this agreement, then the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in

respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued.

Name of parent/guardian: _____

Signature of parent/guardian: _____

Date signed: ___/___/20___

3. By inserting Schedule F—Agreement to Cash Out Annual Leave as follows:

AGREEMENT TO CASH OUT ANNUAL LEAVE

Name of employee: _____

Name of employer: _____

The employer and employee agree to the employee cashing out a particular amount of the employee's accrued paid annual leave:

The amount of leave to be cashed out is: _____ hours/days

The payment to be made to the employee for the leave is: \$_____ subject to deduction of income tax/after deduction of income tax (strike out where not applicable)

The payment will be made to the employee on: ___/___/20___

Signature of employee: _____

Date signed: ___/___/20___

Name of employer representative: _____

Signature of employer representative: _____

Date signed: ___/___/20___

Include if the employee is under 18 years of age:

Name of parent/guardian: _____

Signature of parent/guardian: _____

Date signed: ___/___/20___

4. By updating the table of contents and cross-references accordingly.

5. By deleting clause B.6.5 and inserting the following:

B.6.5 Excessive leave accruals: request by employee for leave

- (a) If an employee has genuinely tried to reach agreement with an employer under clause B.6.3(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (b) However, an employee may only give a notice to the employer under paragraph (a) if:
 - (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
 - (ii) the employee has not been given a direction under clause B.6.4(a) that, when any other paid annual leave arrangements (whether made under clause B.6.3, B.6.4 or B.6.5 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (c) A notice given by an employee under paragraph (a) must not:
 - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause B.6.3, B.6.4 or B.6.5 or otherwise agreed by the employer and employee) are taken into account; or
 - (ii) provide for the employee to take any period of paid annual leave of less than one week; or
 - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
 - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.
- (d) An employee is not entitled to request by a notice under paragraph (a) more than 4 weeks' paid annual leave in any period of 12 months.

- (e) The employer must grant paid annual leave requested by a notice under paragraph (a).

B. Items 1 to 4 of this determination come into operation from XX April 2017. In accordance with s.165(3) of the Fair Work Act 2009 these items do not take effect until the start of the first full pay period that starts on or after XX April 2017.

C. Item 5 of this determination comes into operation from XX April 2018. In accordance with s.165(3) of the Fair Work Act 2009 this item does not take effect until the start of the first full pay period that starts on or after XX April 2018.

VICE PRESIDENT