

IN THE FAIR WORK COMMISSION

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

**SUBMISSION BY THE CONSTRUCTION, FORESTRY, MINING AND ENERGY
UNION, MINING AND ENERGY DIVISION**

**SUBMISSION IN RESPONSE TO THE PROPOSED REVISED SHUTDOWN
CLAUSE PREPARED BY THE COAL MINING INDUSTRY EMPLOYER GROUP**

Introduction

1. In response to a direction from the Full Bench during proceedings held on Friday 5 May 2017, the Coal Mining Industry Employer Group ('CMIEG') prepared a revised draft shutdown provision to be inserted in the Black Coal Mining Industry Award 2010 ('BCMI Award').
2. A copy of that revised draft clause was received by the Construction, Forestry, Mining and Energy Union, Mining and Energy Division ('CFMEU') on Thursday 11 May 2017.
3. On Monday 15 May 2017, the President, Justice Ross, released a statement seeking that any interested party who wanted to make a submission in relation to the CMIEG draft clause should do so by Thursday 18 May 2017.¹

¹ [2017] FWC 2662 @ PN [4]

4. This submission provides the position of the CFMEU regarding the revised draft clause.

Clause 25.10 (b)

5. The amendment to clause 25.10(b) comprises the deletion of the reference to “one month’s” written notice and its replacement with “28 day’s” written notice. Further, the words “or such shorter period as agreed between the employer and the employees affected” is added to the clause.
6. As advised during the proceedings on 5 May 2017, the CFMEU does not oppose these amendments. In that regard, it is noted that the proposed amendments are already terms of the current BCMI Award.²

Clause 25.10 (b (i))

7. The amendment in this clause is the inclusion of the words in parentheses “(or a combination of both of paid and unpaid annual leave)”.
8. The term “unpaid annual leave” is a concept that is not known to us. We are not aware of its use in a legal sense, or an industrial relations sense or any other sense. Further, it stands in a confused contrast to the use of the term “unpaid leave” earlier in the same sentence.
9. In the event that the clause is meant to provide an employee with the option of taking annual leave or leave without pay or a combination of the two, then the reference should be consistently to “unpaid leave”. It is acknowledged that the current provision in the BCMI Award allows for the taking of unpaid leave where the employee agrees to take a period of unpaid leave.

² BCMI Award, clause 25.10 (a)

10. It is also submitted that it may be worthwhile including the taking of leave in advance in accordance with clause 25.9 in this clause as a further option available to an employee. Whilst it is, of course, available to an employee whether or not there is any specific reference in this clause, its inclusion brings it directly to the employee's attention.

Clause 25.10 (d) (ii)

11. The CFMEU is opposed to this clause for a number of reasons.

12. Firstly, contrary to the current award provision, it entitles an employer to compel an employee to take a period of accrued paid annual leave during a shutdown. This is, in effect, a new provision. During the proceedings held on 5 May 2017, the Full Bench was clear that if the CMIEG wanted to insert a new provision in the shutdown clause, it would be required to run a case and provide the relevant probative evidence that would satisfy the Full Bench that such a clause was necessary as a matter of merit and consistency with the modern awards objective. The CFMEU position is that there are no grounds for the inclusion of a term that entitles an employer to direct an employee to take a period of annual leave during a shut down. The CFMEU would also reserve its position in the event that the CMIEG determines to run such a case.

13. Secondly, contrary to the current award position, the clause entitles an employer to compel an employee to take annual leave in advance in circumstances where the employee has an insufficient accrual of annual leave. The same ground of objection as set out in paragraph 12 above applies equally here.

14. However our objection to compelling an employee to take annual leave in advance is based on its inconsistency with the application of annual leave in advance as per clause 25.9 of the BCMI Award. In that regard it is submitted:

- 14.1. The notion of leave in advance as expressed in modern awards is based on consent between the parties. The Full Bench hearing the annual leave common issues as part of the modern award review described it as “an award term that facilitates agreements”³ The Full Bench also noted that it would permit employees to take leave at a time of necessity or at a time of personal preference.⁴ The ACCI saw it as a term that “principally focused upon facilitating the taking of employee entitlements at times that are most convenient to employees”⁵ The AiGroup used a shutdown as an example of where an employee may wish to take annual leave where an entitlement does not exist.⁶
- 14.2. Interestingly, opposition to a leave in advance clause from the ACTU and various Unions was based on a concern that it would be used to exert pressure on employees to take a period of annual leave.⁷ This clause would, however, compel an employee take leave in advance against their will or preference. This clause releases an employer from resorting to applying the “pressure” that the ACTU and Unions were concerned would be applied.
- 14.3. The notion of consent is shown in the relevant state legislation that permits leave in advance, the explanatory memorandum to the FW Act and the note in s 94 of the FW Act.⁸
- 14.4. The effect of this clause is to compel an employee to take annual leave that he/she has not accrued at a time that he/she does not want to take annual leave. In this regard the proposed revised

³ [2015] FWCFB 3406 @ PN [411]

⁴ [2015] FWCFB 3406 @ PN [414]

⁵ [2015] FWCFB 3406 @ PN [403]

⁶ [2015] FWCFB 3406 @ PN [402]

⁷ [2015] FWCFB 3406 @ PN [406]

⁸ Each of these matters was described by the Full Bench – see [2015] FWCFB 3406 @ PN [388]-[391]

shutdown clause includes a requirement that it not reasonable in the context of s 93 (3).

- 14.5. The effect of this clause is to compel an employee to assume a debt that the employee neither wants nor sought. Or put another way, a loan you do not want for a purpose to which you do not consent. In this regard, the proposed revised shutdown clause includes a requirement that it not reasonable in the context of s 93 (3).
- 14.6. It is self evident that an employer cannot compel an employee to use an entitlement the employee has yet to accrue. Or put another way, an employee cannot be compelled to use something that he/she has not got. Even if it were possible, it would not be reasonable in the context of s 93 (3).
- 14.7. It raises issues about the right to deduct wages in the event the employee resigns without having made up the appropriate period of time. In particular, how can any deduction be reasonable (s 326) in circumstances where an employee is compelled to take leave in advance against his/her will? It is noted in that context that the provision for leave in advance by agreement makes specific provision for the deduction of wages upon termination if necessary.⁹ It is submitted that this provision would offend s. 326 of the FW Act.
- 14.8. It is a mechanism that operates as an illegitimate stand down avoidance mechanism. In the absence of such a provision, the only way that an employer could compel an employee to take an unpaid period of time off work is by a stand down. And, of course, there are other considerations that govern a stand down e.g. whether an employee can be usefully employed and whether the circumstances were beyond the control of the employer (s 524).

⁹ BCMI Award, clause 25.9 (d)

The FWC should not permit such a mechanism. Again, it is not reasonable in the context of s 93 (3).

Clause 25.10 (e), (f), (g) (h)

15. These provisions are consequential upon or complementary to the clause 25.10 (d) (ii). As that clause is opposed, it follows that these clauses will not be necessary.

The notion of compulsory leave without pay

16. The notion of compulsory leave without pay was raised during the proceedings on 5 May 2016. As we understand it, it is a matter that would be addressed in the event the CMIEG pursued it and that it would then be a wider question than the BCMI Award.

17. As the proposed revised shutdown clause does not provide an employer with a right to compel an employee to take leave without pay, this submission does not address the notion. In the event that the Full Bench wants to deal with this issue further, the CFMEU would reserve its right to make a submission.

A further issue

18. In our earlier submission in response to the draft shut down clause prepared by the Full Bench, the CFMEU submitted that where a clause contains a provision for leave without pay as part of a shut down, the period of unpaid leave should count as part of an employee's continuous service and that where a public holiday falls during a period of leave without pay taken during a shut down, the employee should be entitled to the benefit of the public holiday.¹⁰

¹⁰ CFMEU Submission, 11 April 2017, paragraph 9.

19. These points have not been addressed in the CMIEG proposal.
20. In that regard we say that with respect to the issue of continuous service, the BCMI Award does not use the term “for each year of service” in determining an employee’s entitlement to annual leave, personal/carer’s leave and redundancy.¹¹ Rather the BCMI Award uses the term “year of employment”, “commencing employment” or “each anniversary of employment”. As the use of the term “employment” rather than “service” means that any period of leave without pay is taken into account in determining an employee’s entitlement to redundancy, annual leave and personal/carer’s leave, the inclusion of a term including leave without pay as a component of “service” is not necessary in the BCMI Award. However, it may be a consideration in other modern awards.
21. With respect to public holidays, whilst it is a new provision as far as the BCMI Award is concerned, it is submitted that it is an eminently reasonable requirement in the context of an employee taking leave without pay as part of a shut down period where the leave is not taken solely as a matter of choice on the part of the employee. Whilst an employee may elect to take leave without pay during a shut period, this could be for a number of reasons including a desire to take annual leave at another time and in the absence of the shut down the employee would have continued working.

Conclusion

22. For the reasons as outline above the CFMEU submits:
- 22.1. The amendments to clause 25.10 (b) are acceptable.
- 22.2. The term “unpaid annual leave” as it appears on clause 25.10 (d) (i) has no acceptable meaning and should not appear in any clause.

¹¹ BCMI Award, clauses 14.3, 14.4, 25.2, 26.2

22.3. Clause 25.10 (d) (ii) is opposed in total for the reasons that it goes well beyond the existing award term for no identifiable and justifiable reasons; that it compels employees to take annual leave at the discretion of the employer during a shutdown and that it compels employees to take annual leave in advance during a shutdown in the event an employee does not have sufficient annual leave accrual.

23. The effect of proposed revised shutdown clause is to place an employee covered by the BCMI Award in a far worse position with respect to a shutdown than is currently the case.

24. In the event that the Full Bench wishes to hear further from the CMIEG on this clause, the CFMEU reserves its right to make a further response including evidence if necessary.

Construction, Forestry, Mining and Energy Union

Mining and Energy Division

18 May 2017