

Summary of Decision

11 June 2015



4 yearly review of modern awards — Annual Leave

AM2014/47

Background

1. This Full Bench decision deals with the variation of modern awards in relation to a number of matters regarding paid annual leave. The decision is issued as part of the first 4 yearly review of modern awards (the Review). Section 156 of the *Fair Work Act 2009* (the Act) provides that the Fair Work Commission (the Commission) must conduct the Review as soon as practicable after each 4th anniversary of the commencement of Part 2-3 of the Act. The Review consists of an Initial stage, dealing with jurisdictional issues, a Common issues stage and an Award stage. Following a period of consultation it was decided that the issue of annual leave provisions in modern awards would be dealt with as a ‘common issue’. A common issue was defined in the initial stage of the Review as a proposal for significant variation or change across the award system, such as applications which seek to change a common or core provision in most, if not all, modern awards.
2. The scope of the matters to be considered in the context of the annual leave common issue was published in a Statement on 7 April 2014. The matters are as follows:
 - (i) cashing out annual leave;
 - (ii) excessive annual leave;
 - (iii) annual close-down;
 - (iv) granting annual leave in advance;
 - (v) purchased leave;
 - (vi) payment of annual leave entitlements on termination; and
 - (vii) EFT and paid annual leave.
3. Claims were made by interested parties relating to each of the matters outlined above. The Australian Council of Trade Unions (ACTU) advanced a claim in respect of the payment of annual leave entitlements on termination. The Australian Industry Group (Ai Group) and the Australian Chamber of Commerce and Industry (ACCI) coordinated discussions with various employer groups (the Employer Group) and presented a common position in respect of proposed variations.
4. Ai Group, ACCI and a number of other employer bodies conducted a joint employer survey in May 2014 about matters relating to annual leave (the Employer Survey). The results of this survey were relied on by the Employer Group in support of their claims. The Full Bench took the survey responses into account in its decision and was satisfied that the Employer Survey provided a ‘valuable insight into the

practical issues facing employers in the management of the existing annual leave arrangements.’

5. The decision discusses the legislative context for the Review, and noted that the Review is broader in scope than the Transitional Review of modern awards which took place in 2012-2013 and is the first full opportunity to consider the content of modern awards.

Excessive annual leave

6. The Employer Group sought to insert a standard clause relating to ‘excessive’ annual leave into 70 modern awards. The ACTU and a number of individual unions opposed the claim. The proposed clause provided that an employer may direct an employee to take paid annual leave if they had accrued at least 6 weeks’ of annual leave, provided that the employer gives the employee 4 weeks’ notice and the employee retains at least 4 weeks of accrued annual leave once the direction is given.
7. The decision deals with the relevant historical and legislative context regarding taking excessive annual leave and notes that prior to the commencement of the NES and modern awards, ‘federal and State legislation and awards commonly provided employers with a right to direct employees to take annual leave’. The Full Bench noted that the evidence before it ‘clearly establishes that most employees accrue a portion of their paid annual leave entitlement and that a significant proportion of employees have six weeks or more of such accrued leave’. The evidence tendered by the Employer Group in support of their claim was in the form of the Employer Survey and various reports and academic articles relating to paid leave and why employees do not utilise their leave entitlements. The evidence supported findings that not taking leave can lead to a serious threat to health and safety of employees and excessive annual leave accruals are a significant issue for employers. Based on the material before it the Full Bench was satisfied that modern awards should include a mechanism for dealing with ‘excessive leave’ however it was not persuaded that varying modern awards to insert the Employer Group clause would be sufficient to address the problem.
8. The Full Bench redrafted the Employer Group clause to provide a model term dealing with the taking of excessive annual leave. The [model term](#) incorporates the employers right to direct an employee to take their excessive annual leave but also makes provision for the circumstance where an employee accrues excessive paid annual leave but no employer direction is made. The model term also provides an avenue for an employee to exercise control over the time at which their leave is to be taken. The decision provides detail on the operation of the clause and examples as to how the model term is intended to operate. The Full Bench outlines a provisional view that a variation of modern awards to incorporate the model term is necessary to achieve the modern awards objective.
9. The Full Bench also observed that ‘greater consistency in the provisions governing the taking of annual leave will make the safety net simpler and easier to understand’ and on that basis formed the provisional view that a model term dealing with excessive leave should be inserted into *all* modern awards.
10. Interested parties will be provided with an opportunity to make further submissions directed at both the model term and the proposition that *all* modern awards be varied to insert the model term. Directions have been issued in relation to the filing of further submissions and a further oral hearing. The Full Bench will reach a concluded view in

respect of the issue after considering any further submission filed.

Cashing out annual leave

11. The Employer Group sought to insert a standard clause relating to cashing out of annual leave into 120 modern awards, which reflects the requirements of s.93(2) of the Act. The union parties opposed the insertion of cashing out provisions in modern awards.
12. The Full Bench noted that under previous legislative regimes, predecessor bodies to the Commission consistently rejected proposals for the cashing out of annual leave on the basis that they undermined the purpose of annual leave. However, the Act now makes specific provision for the cashing out of annual leave in ss.92-94. Based on the evidence, the Full Bench noted that provisions permitting the cashing out of annual leave are a relatively common feature of enterprise agreements approved by the Commission, and that while most of these terms simply reflect the requirements in s.93, a significant proportion contain additional safeguards. The Full Bench stated that while the safeguards provided in s.93(2) set out the *minimum* requirements of such a term, they do not constitute a code and modern awards may also include terms that supplement the NES.
13. The Full Bench granted the Employer Group's claim in relation to cashing out of annual leave, subject to the incorporation of four additional safeguards as follows:
 - a maximum of two weeks' paid annual leave can be cashed out in any 12 month period (in the case of part-time employees, this is based on the employee's weekly ordinary hours);
 - specific requirements relating to record keeping and the content of any agreement relating to cashing out accrued annual leave;
 - if the employee is under 18 years' of age the agreement to cash out a particular amount of accrued paid annual leave must be signed by the employee's parent or guardian; and
 - notes are inserted at the end of the model term drawing attention to the general protections in Part 3-1 of the Act against undue employer influence and misrepresentation in relation to rights under the clause.
14. The Full Bench held that the variation of *all* modern awards to incorporate the [model term](#) would ensure that each modern award provides a fair and relevant minimum safety net; is necessary to achieve the modern awards objective; and is consistent with the objects of the Act.
15. The Full Bench was not persuaded by the contentions advanced by the union parties that if granted, the claim would undermine the NES entitlement to leave and would be inconsistent with the encouragement of enterprise bargaining. While acknowledging that the purpose of annual leave is to provide a period of rest and recovery from work, the Full Bench stated that the enactment of s.93 is a clear legislative statement that a modern award term which permits the cashing out of accrued annual leave, and meets the minimum requirements of s.93(2), is consistent with the NES entitlement to annual leave.
16. The Full Bench noted that the evidence indicates that there is a significant demand for a provision which facilitates the cashing out of accrued leave. The Full Bench concluded that that the considerations in favour of inserting the model term into modern awards

outweigh any potential reduction in the incentive to bargain about this issue.

Annual close-down

17. The Employer Group sought to insert a model 'close-down' clause into 65 modern awards. The Employer Group submitted the purpose of the model clause is to enable businesses to shut down and require annual leave to be taken at the best time in terms of production or service delivery fluctuations. The ACTU and a number of individual unions opposed the claim.
18. The Act does not contain a specific provision in relation to 'shut downs' or 'close-downs', but s.93(3) allows for a close-down provision to be included in modern awards and enterprise agreements. Section 139(1)(h) also provides that a modern award may include terms about 'leave, leave loadings and *arrangements for taking leave*'.
19. The Full Bench was not persuaded to grant the Employer Group claim for three reasons. Firstly, the Full Bench was not satisfied that the model term proposed was 'reasonable' in the sense contemplated by s.93(3), due to the broad nature of the provision and the limited notice period required. Secondly, while the Full Bench generally agreed with the proposition that it is desirable for provisions dealing with taking annual leave to be uniform across modern awards, it found that close-down provisions are an exception to this general proposition and warrant consideration on an award by award basis. The Full Bench observed that the circumstances in the industries covered by existing award close-down provisions and the need for such provisions vary considerably. Thirdly, the Employer Group submitted that it is desirable for employees to take leave and the proposed model term would provide a mechanism by which employers could reduce their leave liability. The Full Bench noted that these issues have been addressed in the consideration of the 'excessive leave' claim.
20. The Full Bench stated that interested parties who wish to seek a variation to a modern award to either vary an existing close-down provision or to insert an appropriate provision may do so during the award stage of the Review.

Granting leave in advance

21. The Employer Group sought to vary 48 modern awards to include a provision allowing for the taking of annual leave in advance of an entitlement to such leave accruing, by agreement between an employer and employee. The provision would also allow an employer to make a deduction from monies payable to an employee on termination of employment. The ACTU and a number of individual unions opposed the claim.
22. The Full Bench was satisfied that the proposed clause is one which can be included in a modern award pursuant to s.93(4) and is supplementary to the NES for the purposes of s.55(4).
23. The Full Bench noted that there was no evidence to establish, or even suggest, that clauses that permit the taking of annual leave in advance of accrual that currently exist in 76 modern awards have operated to disadvantage employees or been misused by employers. It also accepted that the Employer Survey establishes that requests of this kind are commonplace.
24. The Full Bench was persuaded that an award term which facilitates agreements to take leave in advance will operate in a manner beneficial to employees and will align the

entitlements of modern award covered employees with those of award/agreement free employees. It was also persuaded that it will further the modern award objective of ensuring that modern awards, together with the NES, provide a fair and relevant minimum safety net. The Full Bench redrafted the proposed Employer Group claim to provide a [model term](#) dealing with the provision of paid annual leave in advance of accruing an entitlement to such leave. The main difference between the model term and the Employer Group claim are the requirements regarding the content and form of any agreement to provide leave in advance and the employer's obligation to keep such agreements as an employee record. These requirements are consistent with an employer's existing obligations under Regulation 3.36 of the *Fair Work Regulations 2009*.

25. The Employer Group claim was directed at 48 modern awards and the Full Bench was satisfied that the variation of those modern awards to incorporate the model term was necessary to meet the modern awards objective. The Full Bench also expressed the provisional view that it was necessary to vary *all* modern awards to insert the model term, in order to achieve the modern awards objective. Any interested party wishing to express a contrary view will have an opportunity to do so in response to the draft variation determinations arising from the decision.

Payment of annual leave entitlements on termination

26. The ACTU sought to vary 118 modern awards in relation to the payment of annual leave entitlements on termination, to provide that an employer must pay an employee the amount that would have been payable to the employee had the employee taken that period of leave. Ai Group and a number of other employer bodies opposed the ACTU claim.
27. The merit of the ACTU's claim turns on the proper construction of s.90(2) of the Act and that issue is the subject of an appeal before the Full Court of the Federal Court and is yet to be determined. The Fair Work Amendment Bill 2014 which is currently before the Senate also proposes to amend s.90(2).
28. The Full Bench concluded that as there is a degree of uncertainty surrounding the operation of s.90(2), consideration of the ACTU's claim should be adjourned. However, any interested party may seek to have the matter called back on for further programming and submissions.

EFT and paid annual leave

29. The Employer Group sought to vary 51 modern awards, which currently require the employer to pay an employee for annual leave *prior* to the employee taking the leave. The effect of the proposed variation is that when employees are paid by electronic funds transfer (EFT) they may be paid in accordance with their usual pay cycle while on paid annual leave. The union parties opposed the Employer Group claim.
30. The Full Bench noted that the existing award provisions which require annual leave to be paid prior to taking leave do not appear to have been the subject of any detailed arbitral consideration. In considering whether such a requirement is still relevant in contemporary circumstances, the Full Bench relied on evidence that a substantial majority of respondents pay their employees by EFT, and data showing a trend away from cash based transactions and towards either credit card usage or direct transfer and BPAY methods.
31. The Full Bench was persuaded that the claim should be granted as the variation will

ensure modern awards provide a fair and relevant minimum safety net, taking into account the particular considerations set out s.134(1)(a) to (h). The Full Bench rejected any argument that s.90 requires annual leave to be paid in advance, and was satisfied that the proposed clause is an ancillary or incidental term within the meaning of s.55(4) of the Act.

Purchased leave

32. Ai Group initially proposed a model clause to be inserted into each modern award that would allow an employer and an employee to agree to a “purchased leave” arrangement under which the employee could choose to forgo an amount payable in relation to the performance of work but would receive a corresponding additional amount of annual leave. This claim was not pressed during the proceedings.
33. Based on the material before it, the Full Bench noted that there seems to be a level of interest in providing arrangements which facilitate the ‘purchase’ of additional annual leave, the Act permits such a provision to be inserted in modern awards, and on its face, such a provision may meet the objective in s.3(d) of the Act.
34. A Fair Work Commission discussion paper will be published dealing with the issue of purchased leave. Interested parties will have the opportunity to make submissions regarding whether a provision for purchased leave should be included in modern awards and if so, the wording of such a provision. The matter will be listed for further hearing before the Full Bench on Friday 7 August 2015.

[2015] FWCFB 3406

- ***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.***

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