



DECISION AND ORDERS

Fair Work Act 2009

s.789GV - Application to deal with a dispute in relation to a jobkeeper direction

Cassandra Powell

v

H & M Hennes & Mauritz Pty Ltd

(C2020/3231)

COMMISSIONER MCKINNON

MELBOURNE, 13 MAY 2020

Application to deal with a dispute about a jobkeeper direction to take paid annual leave.

[1] This decision is about whether a request has been given by H&M Hennes & Mauritz Pty Ltd to Cassandra Powell to take paid annual leave and whether her refusal of that request is unreasonable.

[2] On 8 May 2020, I issued an edited version of an opinion and recommendation given on transcript in this matter to the parties on 6 May 2020. The recommendation was as follows:

“My recommendation to you both is that Ms Powell agree to take paid annual leave on the basis that her minimum balance not fall below two weeks. I will give you seven days to try to reach agreement on the schedule for taking annual leave, noting the request from Ms Powell that if annual leave is to be taken, it not be in full week blocks. It may be that you can reach agreement for the annual leave to be taken in days at a time, or some other schedule that allows you both to reduce the impact of the request on Ms Powell, but also to achieve the overall strategy of improving the business's financial ability to recover from the pandemic.

If the matter can be resolved in the next seven days there is no need to take further action other than to implement the agreement that you have reached. However, if the matter is not resolved by agreement within seven days, I propose to relist it on the basis that a decision as to a schedule of taking annual leave will be determined.”

[3] The parties were unable to resolve the dispute by agreement within the required timeframe. This decision now deals with the dispute.

[4] There is no dispute that H&M qualifies for the jobkeeper scheme and that Ms Powell is entitled to jobkeeper payments.

[5] The COVID-19 pandemic has had a significant effect on H&M. All of its stores were closed on 2 April 2020 for approximately one month. Since early May 2020, stores have gradually opened in line with relevant state guidelines and restrictions.

[6] Ms Powell was one of the employees affected by the store closures. She is a part-time employee working 2.5 days per week. She was stood down from 2 April 2020 until the first weekend of May 2020 when the Indooroopilly store at which she works in Brisbane re-opened. She was paid for the initial two weeks and two days of stand-down as additional leave. Since that time, payment has been made to Ms Powell in accordance with the jobkeeper scheme.

[7] H&M has asked permanent employees, including Ms Powell, to take paid annual leave so that it can reduce its contingent liabilities and support its overall financial position in response to the pandemic. The request is made on the basis that employees will retain at least two weeks' leave in balance. Ms Powell has not taken any paid leave in the past 12 months and her accrued leave balance is approximately five weeks.

[8] Ms Powell does not believe that she has formally been requested to take paid leave, as the only written advice she had received at the time of hearing was a clarification from human resources about the nature of the request. She is also concerned about the short notice given to take leave, particularly at the time that the request has been made, when stores are starting to reopen. She notes that full-time sales assistants have been made redundant, which is likely to increase demand for hours amongst the remaining employees.

[9] Ms Powell does not want to take leave because she feels it is unfair that her employee entitlements are attributed less value than the financial position of H&M. She does not agree that she should be asked to carry H&M's burden by having her entitlements eroded to reduce its liabilities. She says her employment is not affecting H&M's profitability because her wages are wholly covered by the jobkeeper scheme. Notwithstanding her concerns, she recognises the broader impact of the current situation on others and on the business.

[10] Ms Powell submits that she has not accrued excessive leave as defined in the relevant enterprise agreement. As she works two full days and two part-time days, she enjoys a work-life balance such that she does not ordinarily need to take annual leave for the purposes of rest and recreation.

[11] Ms Powell wants to save her leave for when she can take proper holidays. She has plans for two separate weeks of holidays in the future, but as there is no certainty about when travel restrictions will be lifted, she is reluctant to lock in leave dates. In essence, what she wants is to be able to enjoy her holidays when she has the opportunity to take them. If compelled to take annual leave, she asks that it not be on the basis of full weeks at a time.

[12] Finally, Ms Powell anticipates a family separation and legal proceedings that may require her to take leave in the future. She does not know when or how much leave might be required.

[13] H&M submits that it is doing what it can to keep as many people as possible employed. It has lost a number of employees including through redundancy and is seeking to retain the remaining workforce, including by asking team members to take leave. Overall its aim is to counteract the economic effect of the pandemic and ensure its return to a pre-COVID-19 trading environment.

[14] The company's financial position has been significantly affected in recent months, not only to the level which makes it eligible for the Jobkeeper scheme, but in some periods by up

to 80 or 90 per cent. The company is now gradually looking to resume trading but expects that it will take some time for the situation to turn around.

[15] A range of measures have been taken by H&M to keep its employees employed. It has sought to maintain or top up wages for employees who are ineligible for the jobkeeper scheme or whose earnings are higher than that amount. It provided approximately two additional weeks' paid leave for employees during the initial stand down period. Its request for employees to take paid annual leave is part of a broader strategy to reduce its overall liabilities and improve its economic position.

[16] I accept that the COVID-19 pandemic has had a genuinely adverse economic effect on H&M and that it is taking a number of reasonable steps to support its future, which in turn supports the economic security of its employees. Ordinarily, the taking of annual leave is a matter for agreement between the employer and employee, with the purpose of annual leave to ensure that employees have adequate rest and recreation by taking at least some of their leave each year. The position has been modified somewhat in response to the COVID-19 pandemic and in light of the various public interest considerations underpinning the jobkeeper scheme. For a time, eligible employers can now direct that paid annual leave be taken even if employees do not have an excessive leave accrual. Employees must not unreasonably refuse the request.

[17] In my view, the need to support business continuity and job security for all employees of H&M outweighs the inconvenience to Ms Powell of not being able to plan her annual leave at a time of her choosing. While she may have a future need for leave to deal with family issues, there is no certainty as to when that might arise or how much leave will be required if it does. In circumstances where Ms Powell will retain a minimum accrued leave balance, and because I find it to be a secondary reason for not wanting to take annual leave, the matter does not carry significant weight.

Conclusion

[18] I find that Ms Powell has been given a request by H&M to take paid annual leave and that the request will not result in Ms Powell having a balance of less than two weeks paid annual leave. I find that Ms Powell has considered and refused the request, although she has subsequently indicated a willingness to reconsider her position. The refusal to take paid annual leave was unreasonable in the circumstances. That is not to say that Ms Powell does not have understandable reasons for wanting to preserve her leave for a later time, but rather that the current situation requires compromise and contribution from all concerned.

Orders

[19] Ms Powell is ordered to take paid annual leave on the basis of one full day's leave per week. The order will operate from Thursday 21 May 2020 until Ms Powell's accrued annual leave balance is reduced to two weeks or until terminated by agreement or until 27 September 2020, whichever is the earlier. Leave is to be taken on Thursday of each week on the basis that Thursday would otherwise be a full rostered working day for Ms Powell. The actual day of taking leave can be varied by agreement between the parties.

[20] The dispute is determined accordingly.



COMMISSIONER

Appearances:

C Powell on her own behalf.
J Johnson for the respondent.

Hearing details:

2020.
Melbourne (by telephone):
May 6, 13.

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