DECISION

Fair Work Act 2009
s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

Application to vary the Restaurant Industry Award 2010
(AM2020/11)

Restaurant industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 31 MARCH 2020

Application by Restaurant and Catering Industrial to vary a modern award to achieve the modern awards objective – Application supported by the United Workers' Union, the Australian Council of Trade Unions and the Minster for Industrial Relations – no submissions opposing the application – application approved and variation determination made.

1. Background

[1] This decision concerns an application to vary the *Restaurant Industry Award 2010* (MA000119) (the Restaurant Award) filed by the Restaurant and Catering Industrial (RCI), with the support of the United Workers Union (UWU) and the Australian Council of Trade Unions (ACTU) on 30 March 2020 (the Application). A revised draft determination, in substantially the same terms, was filed on 31 March 2020 and posted on the Commission's website.

[2] RCI, the UWU and the ACTU have been in discussions to reach a consent position on changes to the Restaurant Award that can mitigate against the current impacts COVID-19 on employees and employers covered by the award. The Application is the product of that dialogue and is moved by consent of the parties.

[3] At the request of the parties, the hearing of this matter was expedited.

[4] On 30 March 2020, we issued a statement (the 30 March Statement)[1] setting out the background to the application and expressed a number of *provisional* views including that:

[1] [2020] FWCFB 1715

> '[21] … It is our *provisional* view that the term proposed [clause I.2.3(a)] is a permitted term proposed and that it is 'reasonable' within the meaning of s.93(3). We take the same view in relation to the term dealing with reduced notice of Close-down …
>
> [23] It is our *provisional* view this clause [clause I.2.3(c)] is an ancillary or incidental term permitted by s.55(4).
>
> [24] It is our *provisional* view, taking into account the relevant s.134 considerations, that the variation of the Restaurant Award as proposed in the Application is necessary to achieve the modern awards objective.'[2]

[5] In the 30 March Statement, we invited any interested party to file a written submission supporting or opposing the Application and the *provisional* views set out in the 30 March Statement by 4pm on Tuesday 31 March 2020.

[6] The following submissions were received from:

- the RCI and UWU on 31 March 2020; and
- the Honourable Christian Porter MP, Minister for Industrial Relations (the Minister) on 31 March 2020.

[7] In the 30 March Statement we said that if no submissions were filed opposing the Application and our *provisional* views we would grant the application and vary the award accordingly.[3] No such submissions were received. Accordingly, for the reasons which follow, we grant the application and will vary the award.

[8] By way of background, on 24 March 2020, we granted an application to vary the *Hospitality Industry (General) Award 2010* (the Hospitality Award). Our reasons for that decision were published on 25 March 2020[4] (the Hospitality decision). On 28 March 2020, we granted an application to vary the *Clerks – Private Sector Award 2010* (the Clerks Award). Our reasons for that decision[5] were published on the same day.

[9] In the Hospitality Decision we observed that the notice provided to parties of the hearing of that application was much shorter than the Commission's standard practice. We make the same observation in respect of the present matter. At [9] – [11] of the Hospitality Decision we set out the Commission's obligations to afford procedural fairness and noted the content of the doctrine of procedural fairness is determined by the context, we concluded as follows:

> '[11] Relevantly, s.577(a) and (b) provide that the Commission must perform its functions and exercise its powers in a manner that:

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[2] Ibid, at [21], [23]-[24]

[3] Ibid, at [26]

[4] [2020] FWCFB 1574

[5] [2020] FWCFB 1690

> ‘(a) Is fair and just; and
>
> (b) Is quick, informal, and avoids unnecessary technicalities;’.
>
> [12] The key contextual considerations in the matter before us are:
>
> - the statutory framework;
> - the consent of the key interested parties;
> - the parties’ joint request for expedition; and
> - the need to respond quickly to a rapidly changing industrial environment.
>
> [13] In this instance, the consent of the key industrial parties’ is the central consideration.
>
> [14] In the event that this application had been contested then, plainly, different considerations would have been enlivened, necessitating a more protracted hearing process than the one we have adopted in this matter.’

[10] Similar circumstances arise in the present matter. The Application was made with the consent of the key industrial parties. As we have mentioned, a statement in relation to the Application was published on the Commission’s website and sent to all subscribers on 30 March 2020. Any interested party was provided with an opportunity to respond to the Application. In these circumstances we are satisfied that we have met our obligation to afford procedural fairness to those affected by the Application.

2. COVID-19 Pandemic

[11] The application arises from the unique set of circumstances pertaining to the COVID-19 pandemic.

[12] The Commission has published an information note on the Government responses to the COVID-19 pandemic on its website. The information note outlines the measures taken by both federal and state governments to put restrictions on social gatherings and non-essential businesses, as well as the assistance provided to support businesses and households.

Impact on the Restaurant industry

[13] The Application notes (at [54] – [59] of Annexure B) the following impacts of the COVID-19 pandemic upon the Restaurant industry:

> ‘The restaurant and catering industry is currently materially impacted by CoV.
>
> Restaurants, cafes and food court outlets can no longer trade, save for the provision of takeaway and/or delivery services.

> Those still attending work are adopting new work patterns to reduce the level of exposure to colleagues and clients.
>
> This includes rostering a limited number of employees into work at any one time and spacing employees out in the relevant worksite.
>
> Some workplaces are closing to enable them to transition their business from a traditional restaurant model to a take away delivery business. These closures will necessitate placing employees on leave for a period, whilst the business explores transition to a new business model.
>
> The businesses have no choice in this matter, given the directives issued by the Federal Government and supported by State Government public health orders.'[6]

3. The Application

[14] The Application seeks to add a new schedule; Schedule I—Award Flexibility during the COVID-19 Pandemic, to the Restaurant Award. It is proposed that the new schedule operate until 30 June 2020. Schedule I proposes flexibilities in the relation to:

(a) the range of duties an employee can be required to perform, with this scope being limited by safety considerations and an employee's skill and competency, license or qualification (see I.2.1);

(b) the hours of work required to be provided to full-time and part-time employees. Any such variation is subject to certain safeguards including a requirement to consult and an obligation to accrue, calculate and pay leave entitlements on the basis of the employee's hours of work that prevailed prior to variation (see I.2.2);

(c) flexibility in relation to the taking of leave with:

  (i) employers being afforded the flexibility to direct the taking of annual leave on 24 hours' notice; and

  (ii) employees being afforded the flexibility to take accrued leave at 'half-pay' (this will double an employee's leave entitlement); (see I.2.3); and

(d) close down provisions of the Award, increasing the ability for an employer to require an employee to take annual or unpaid leave during a period of close-down (see I.2.5).

[15] The provisions contained in the Draft Determination at Annexure A to the Application mirror the provisions which we have already made in the Hospitality Award and the Clerks Award. Specifically:

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[6] Joint Application, 30 March 2020, at Annexure B at [54]-[59]

(a) Clause I.2.1 mirrors clause L.2.1 which was inserted into the Hospitality Industry (General) Award 2010.

(b) Clause I.2.2 mirrors clause L.2.2 which was inserted into the Hospitality Industry (General) Award 2010.

(c) Clause I.2.3 mirrors clause L.2.3 which was inserted into the Hospitality Industry (General) Award 2010.

(d) Clause I.2.4 mirrors clause I.2.7 which was inserted into the Clerks - Private Sector Award 2010.

(e) Clause I.2.5 mirrors clause L.2.4 which was inserted into the Hospitality Industry (General) Award 2010.

[16] RCI and the UWU filed a joint submission in support of the Application in which they characterised the changes proposed as follows:

> 'In broad terms, the Application provides employers in the Restaurant Industry with a measured level of flexibility during a period of unprecedented crisis. This may facilitate employers being able to offer workers paid work in circumstances where, if the Award was not varied, they would be unable to do so. At the same time, the Application seeks to preserve the fundamental basics of restaurant industry wage structures under the Award. The parties submit that it is a measured and appropriate modification to deal with an extraordinary situation facing the Restaurant Industry.'

[17] RCI and the UWU jointly submit that four aspects of the Application warrant emphasis.

(i) The application is made by consent

[18] Both RCI and UWU advance the Application by consent and agree that the variations sought are permissible pursuant to s 139 of the Act and necessary pursuant to s 157 to meet the requirements of s 134. The Application is also supported by the ACTU.

(ii) The variation is temporary

[19] The proposed variations are intended to be short-term variations, justified only by the unique and unprecedented nature of the current crisis facing the Restaurant Industry. Accordingly, prima facie, the variations are only intended to operate until 30 June 2020. The parties' contemplate that the proposed variations may be extended on application.

[20] Discussions between the parties envisage that any extension of the proposed arrangements beyond 30 June 2020 would:

(a) only be for a further temporary period;

(b) only be justified where adverse conditions relating to the COVID-19 pandemic continued; and

(c) proceed with the consent of the parties.

[21] All parties reserve their rights to agree or oppose any future attempt to extend the variations sought by the Application beyond 30 June 2020.

(iii) Requirement to consult

[22] The Application envisages that where flexible work arrangements sought by the Application are pursued, consultation with affected employees must occur and, where appropriate, this must also occur with the UWU.

(iv) Employees should not be disadvantaged in respect of leave entitlements

[23] The intention of the parties is to ensure that employees whose hours are varied under new arrangements are not disadvantaged with respect to the accumulation or payment of their leave entitlements. The Application envisages that following the cessation of the temporary variation to the Award, employees will be in the same position in respect of leave accrual and payment as they would have been if the variation had not been made. This means:

(a) leave entitlements will continue to accrue based on an employee's ordinary hours of work which existed prior to the variation;

(b) where leave occurs during the period in which a variation is in place, it will be paid based on the employee's ordinary hours of work which existed prior to the variation; and

(c) entitlements based on period of service, if they arise during the period, will be calculated based on an employee's ordinary hours of work which existed prior to the variation.

[24] The Minister filed a submission in support of the Application, in the following terms:

> 'As with previous applications, the Minister strongly supports the granting of the application, and notes the similarity between the agreed amendments and those previously granted by the Full Bench in relation to other Awards.
>
> In these circumstances, the Minister does not intend to make a formal submission at this stage, other than to again congratulate RCI, and the UWU and the ACTU, on their preparedness to respond collaboratively to find practical solutions to reduce the hardship suffered by employers and employees created by this extraordinary crisis. In addition, the Minister would like to again thank the Fair Work Commission and, in particular, the Full Bench as constituted for its similar preparedness to respond in a practical, flexible and timely way to this situation.

If a submission opposing the application is received, and a hearing is required, the Minister will immediately provide a comprehensive written submission in support of the Application.'[7]

4. Consideration

[25] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in s.134 of the *Fair Work Act 2009 (Cth)* (the Act) and provides as follows:

'*What is the modern awards objective?*

134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.'

This is the **modern *awards objective***.

[7] Minister's submission, 31 March 2020

> *When does the modern awards objective apply?*
>
> (2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:
>
> (a) the FWC's functions or powers under this Part; and
>
> (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.
>
> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[26] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[27] The modern awards objective is very broadly expressed.[8] It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[9] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[10]

[28] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[11] No particular primacy is attached to any of the s.134 considerations[12] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[29] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[13] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[14] In giving effect to the modern awards objective the Commission is performing an evaluative

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[8] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]

[9] (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

[10] [2018] FWCFB 3500 at [21]-[24]

[11] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

[12] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

[13] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106]

[14] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review

function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[30] Section 138 of the Act emphasises the importance of the modern awards objective:

> '**Section 138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[31] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[15]

[32] We now turn to the modern awards objective.

[33] We have set out [14] above the changes proposed by the Application. We note that proposed Schedule I is about matters that may be included in a modern award pursuant to ss.136(1)(a) and (c), and ss.139(1)(a), (c) and (h) of the Act.

[34] It was common ground that the consideration in s 134(b), (da), (e) and (g) were not relevant. We deal with the other considerations below.

s. 134(1)(a): relative living standards and the needs of the low paid

[35] A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid,'[16] within the meaning of s.134(1)(a).

[36] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. On the basis of the data from the CoE survey for August 2019, two-thirds of median weekly earnings for full-time employees is $920.00. Data on median weekly full-time earnings are also available from the EEH survey for May 2018, and two-thirds of median earnings is equal to $973.33.

[37] Using the two-thirds of median full-time wages as the benchmark, employees paid at classification levels 1 to 5 in the Restaurant Award are 'low paid' within the meaning of s.134(1)(a).

[38] RCI and the UWU submit that:

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[15] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

[16] [2017] FWCFB 1001 at [166]

> 'The variations proposed by the Application will facilitate the maintenance of income-generating work in circumstances where, in the absence of the variations, such work would be unlikely.'[17]

[39] We accept that the proposed variation may result in low paid employees working less hours and consequently receiving less pay. It is axiomatic that such a reduction in pay will mean that they are less able to meet their needs. But, as noted in the Hospitality decision, employers and employees face an invidious choice and the retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority.

[40] We also note the agreed measures to mitigate the impact of reduced hours, particularly by maintaining relevant accruals and the requirement for consultation with affected employees and, where appropriate, with the UWU.

> *s. 134(1)(c) the need to promote social inclusion through increased workforce participation*

[41] This consideration is directed at obtaining employment. RCI and the UWU submit that 'the variations will facilitate the parties shared objective of retaining as many employees in employment as practicable in the current crisis.'

> *s. 134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.*

[42] It is convenient to deal with these considerations together. The proposed variation will promote flexibility and the 'efficient and productive performance of work' and will reduce the regulatory burden on business. This is a factor which weighs in favour of making the variation sought.

> *s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

[43] RCI and the UWU submit that 'given the restaurant industry is a significant component of the national economy, the variations sought … will have a positive impact on the sustainability, performance and competitiveness of the national economy.'

[44] We accept the submission put. This is a factor that weighs in favour of making the variation sought.

[45] Additional considerations apply to the proposed annual leave and close down flexibilities.

[46] Subsections 93(3) and (4) of the Act are relevant in this regard and provide as follows:

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[17] RCI and UWU joint submission, 31 March 2020, at [20]

'Terms about requirements to take paid annual leave

(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

Terms about taking paid annual leave

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.' (emphasis added)

[47] Section 93 is part of the NES. Modern awards and the NES interact in different ways:

- A modern award may include any terms that the award is expressly permitted to include by a provision of Part 2-2 (which deals with the NES) (ss.55(2) and 136(1)(c)).[18]

- A modern award may include terms that:

  (i) are ancillary or incidental to the operation of an entitlement of an employee under the NES; or

  (ii) terms that supplement the NES (s.55(4)).

[48] Subject to the requirement to take leave being reasonable, a modern award term which provides that an employee can be required to take a period of annual leave is a term of the type contemplated by s.93(3) of the Act.

[49] The issue before us is whether these provisions are 'reasonable' within the meaning of s 93(3).

[50] We note that the terms in question are of limited duration to address an extraordinary set of circumstances. A direction to take annual leave requires the giving of at least 24 hours' notice and in issuing such a direction to take annual leave the employer is required to consider an employees' personal circumstances.

[51] Similarly, the proposed close down term modifies existing clause 35.3 by reducing the notice required to 'at least 1 weeks' notice.'

[52] We are satisfied that the terms proposed are permitted terms and are 'reasonable' within the meaning of s.93(3).

[53] In relation to proposed clause I.2.3(c) – the ability to take twice as much annual leave at a proportionally reduced rate by agreement – the statutory notes to s.55(4) provides a relevant example. Note 1 states:

[18] Section 127 provides that the Regulations may permit modern awards to include terms that would or might otherwise be contrary to Part 2-2 or s.55, or prohibit modern awards from including terms that would or might otherwise be permitted by Part 2-2 or s.55. No such regulations have been made

> "Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:
>
> (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay.

[54] We are satisfied that proposed clause I.2.3(c) is an ancillary or incidental term permitted by s.55(4).

5. Conclusion

[55] As we have noted the terms in Schedule I may be included in a modern award pursuant to ss.136(1)(a) and (c), and ss.139(1)(a), (c), (h) and (j) and s.142(1) of the Act.

[56] We are satisfied that the variation proposed is necessary to achieve the modern awards objective (s.157) and in so deciding we have taken into account the considerations in s.134(1)(a) to (h) insofar as they are relevant. Further, once varied the Restaurant Award will only include terms to the extent necessary to achieve the modern awards objective (s.138).

[57] For the reasons set out above we will make the variation determination sought. The determination will come into operation on 31 March 2020. As required by s.165(3) the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

[58] A copy of the variation determination is at **Attachment A**.

PRESIDENT

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Final written submissions:

Restaurant and Catering Industrial and United Workers' Union Joint Submission, 31 March 2020
Minister for Industrial Relations Submission, 31 March 2020

ATTACHMENT A

MA000119 PR717978

DETERMINATION

Fair Work Act 2009
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Restaurant & Catering Industry Association of Australia T/A Restaurant & Catering Australia
(AM2020/11)

RESTAURANT INDUSTRY AWARD 2010
[MA000119]

Restaurant industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT MELBOURNE, 31 MARCH 2020

Application to vary the Restaurant Industry Award 2010.

A. Further to decision [[2020] FWCFB 1741] issued by the Full Bench on 31 March 2020, the above award is varied as follows:

1. By inserting Schedule I as follows:

Schedule I—Award Flexibility During the COVID-19 Pandemic

I.1 Schedule I operates from 31 March 2020 until 30 June 2020. The period of operation can be extended on application.

I.2 During the operation of Schedule I, the following provisions apply:

I.2.1 Classifications and duties

(a) As directed by their employer, where necessary employees will perform any duties that are within their skill and competency regardless of their classification under clause 19—Classifications and Schedule B—Classification Structure and Definitions, provided that the duties are safe and the employee is licensed and qualified to perform them.

(b) Clause 29—Higher duties will apply to employees engaged on duties carrying a higher rate than their ordinary classification.

I.2.2 Hours of work—full-time and part-time employees

(a) Subject to clause I.2.2(c), and despite clause 11—Full-time employment and requirements for notice in clause 31.6 (Roster), an employer may direct a full-time employee to work an average of between 22.8 and 38 ordinary hours per week. The employee will be paid on a pro-rata basis. The arrangements for working ordinary hours in clause 31—Hours of work will apply on a pro-rata basis.

(b) Subject to clause I.2.2(c), and despite clause 12.3(a) (Part-time employment), and the requirements for notice in clause 31.6 (Roster), an employer may direct a part-time employee to work an average of between 60% and 100% of their guaranteed hours per week, or an average of between 60% and 100% of the guaranteed hours per week over the roster cycle.

(c) Prior to any employer issuing any direction under clause I.2.2(a) or (b) an employer must:

(i) consult with the affected employee/s in accordance with clause 8A—Consultation about changes to rosters or hours of work and provide as much notice as practicable; and

(ii) if the affected employee/s are members of the United Workers Union, notify the United Workers Union of its intention to implement these arrangements.

(d) An employee given a direction under clause I.2.2(a) or (b) will continue to accrue annual leave and personal leave, and any other applicable accruals under this award, based on each full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule I.

(e) If an employee given a direction under clause I.2.2(a) or (b) takes a period of paid annual leave or personal leave, the payment for that leave will be based on the full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule I.

I.2.3 Annual leave

(a) Despite clauses 35.4, 35.5 and 35.6 (Annual leave), an employer may, subject to considering an employee's personal circumstances, direct the employee to take annual leave with 24 hours' notice.

(b) Clause I.2.3(a) does not prevent an employer and an employee agreeing to the employee taking annual leave at any time.

(c) During the period of operation of Schedule I, instead of taking paid annual leave at the rate of pay required by s.90 of the *Fair Work Act 2009 (Cth)*, an employer and an employee may agree to the employee taking twice as much annual leave at half the rate of pay for all or part of any period of annual leave.

I.2.4 Close-down

(a) Instead of clause 35.3 (Annual leave), and subject to clause I.2.4(b), an employer may:

(i) require an employee to take annual leave as part of a close-down of its operations, or part of its operations, by giving at least one week's notice, or any shorter period of notice that may be agreed; and

(ii) where an employee has not accrued sufficient leave to cover part or all of the close-down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the close-down.

(b) Clause I.2.4(a) does not permit an employer to require an employee to take leave for a period beyond the period of operation of Schedule I.

(c) Where an employee is placed on unpaid leave pursuant to clause I.2.4(a), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

I.2.5 Dispute resolution

Any dispute regarding the operation of Schedule I may be referred to the Fair Work Commission in accordance with Clause 9—Dispute Resolution.

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

B. This determination comes into effect on 31 March 2020. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect until the start of the first full pay period that starts on or after 31 March 2020.

PRESIDENT

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