Summary of Decision
15 September 2015

4 yearly review of modern awards—Annual Leave
AM2014/47

[2015] FWCFB 5771

Background

1. On 11 June 2015 the Full Bench issued a decision1 (the June 2015 decision) dealing with a range of clauses in respect of annual leave.

2. The June 2015 decision stated that interested parties would be provided with an opportunity to make further submissions directed at the issue of purchased leave and the provisional excessive leave model term. This decision deals with the wording of the provisional model term in relation to excessive leave and with the model terms in relation to the cashing out annual leave and granting leave in advance. A list of all submissions received is set out at Attachment A.

Excessive annual leave

3. In the earlier proceedings, the Employer Group sought to insert a standard clause relating to ‘excessive’ annual leave into 70 modern awards. In the June 2015 decision the Full Bench redrafted the Employer Group clause to create a provisional model term dealing with the taking of excessive annual leave. Consistent with the Employer Group’s claim, the provisional model term incorporated the employer’s right to direct an employee to take their excessive annual leave, but also made provision for the circumstance where an employee accrues excessive paid annual leave but no employer direction is made.

4. In response to the submissions put the Full Bench decided to vary the provisional model term in a number of respects, in summary:

   (i) Subclause 1.2(a): delete ‘request a meeting’ and insert ‘seek to confer’;
   (ii) Subclause 1.2(b): delete the words ‘The directions must state that it is a direction given under subclause 1.2(b) of this award’ (a similar deletion is made to subclause 1.2(c));
   (iii) Subclause 1.2(b): delete the second sentence.
   (iv) Subclause 1.2(c): this subclause will commence operation 12 months after the commencement of subclauses 1.2(a) and (b).
   (v) Subclause 1.2(e)(c): the subclause will be amended such that the maximum period of paid annual leave that may be the subject of a notice by an

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(vi) employee in any 12 month period will be four weeks’ leave if the employee is not a shiftworker and five weeks’ leave if the employee is a shiftworker.

(vii) Subclause 1.2(d): this subclause will be deleted and a note direction attention to the dispute settlement clause in the relevant award will be inserted at the commencement of the model term.

5. The final version of the model term is as follows:

The model term—Excessive Annual Leave Accruals

Note: A dispute in relation to the operation of this clause may be dealt with in accordance with the dispute resolution clause of this award [insert clause number]

1. Excessive Annual Leave Accruals

This clause contains provisions additional to the NES about taking paid annual leave, to deal with excessive paid annual leave accruals.

1.1 Definitions

Shiftworker means [insert definition]

An employee has an excessive leave accrual if:

(a) the employee is not a shiftworker and has accrued more than eight weeks’ paid annual leave; or

(b) the employee is a shiftworker and has accrued more than 10 weeks’ paid annual leave.

1.2 Eliminating excessive leave accruals

(a) Dealing with excessive leave accruals by agreement

Before an employer can direct that leave be taken under subclause 1.2(b) or an employee can give notice of leave to be granted under subclause 1.2(c), the employer or employee must seek to confer and must genuinely try to agree upon steps that will be taken to reduce or eliminate the employee’s excessive leave accrual.

(b) Employer may direct that leave be taken

(i) This subclause applies if an employee has an excessive leave accrual.

(ii) If agreement is not reached under subclause 1.2(a), the employer may give a written direction to the employee to take a period or periods of paid annual leave. Such a direction must not:

• result in the employee’s remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under subclause 1.2(c));

• require the employee to take any period of leave of less than one week;
• require the employee to take any period of leave commencing less than eight weeks after the day the direction is given to the employee;
• require the employee to take any period of leave commencing more than 12 months after the day the direction is given to the employee; or
• be inconsistent with any leave arrangement agreed between the employer and employee.

(iii) An employee to whom a direction has been given under this subclause may make a request to take paid annual leave as if the direction had not been given.

Note: The NES state that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

(iv) If leave is agreed after a direction is issued and the direction would then result in the employee’s remaining accrued entitlement to paid annual leave at any time being less than six weeks, the direction will be deemed to have been withdrawn.

(v) The employee must take paid annual leave in accordance with a direction complying with this subclause.

(c) Employee may require that leave be granted

(i) This subclause applies if an employee has had an excessive leave accrual for more than six months and the employer has not given a direction under subclause 1.2(b) that will eliminate the employee’s excessive leave accrual.

(ii) If agreement is not reached under subclause 1.2(a), the employee may give a written notice to the employer that the employee wishes to take a period or periods of paid annual leave. Such a notice must not:

• result in the employee’s remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under this subclause);
• provide for the employee to take any period of leave of less than one week;
• provide for the employee to take any period of leave commencing less than eight weeks after the day the notice is given to the employer;
• provide for the employee to take any period of leave commencing more than 12 months after the day the notice is given to the employer; or
• be inconsistent with any leave arrangement agreed between the employer and employee.
(iii) The maximum amount of leave that an employee can give notice of under this subclause is: four weeks’ leave in any 12 month period if the employee is not a shiftworker, and five weeks’ leave in any 12 month period if the employee is a shiftworker.

(iv) The employer must grant the employee paid annual leave in accordance with a notice complying with this subclause.

**Cashing out annual leave**

6. 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.

7. In the June 2015 decision the Full Bench granted the Employer Group’s claim in relation to cashing out of annual leave, subject to the incorporation of a number of additional safeguards.

8. In the present proceedings ACCI and a number of other employer organisations submitted that the words ‘and retained as an employee record’ in subclause 1.2(a)(i) of the model term was not necessary having regard to the terms of Regulation 3.36 of the *Fair Work Regulations 2009* (Cth). The Full Bench considered it necessary to include a provision in these terms in the context of such a substantive change to the modern award system.

9. The AMWU proposed that the model term explicitly provide for leave loading to be paid. Subclause 1.2(b) of the model term makes it clear that the employee must be paid “at least the full amount that would have been payable to the employee had the employee taken the leave at the time that it is cashed out”. It follows that if the employee is entitled to be paid leave loading when taking annual leave then the leave loading must be paid when such leave is cashed out. The Full Bench decided that this is a matter best dealt with on an award by award basis.

10. No changes were made to the model term proposed in the June 2015 decision.

**Granting leave in advance**

11. 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. In the June 2015 decision the Full Bench was satisfied that the proposed clause could be included in a modern award pursuant to s.93(4) and was supplementary to the NES for the purposes of s.55(4).

12. The Full Bench was persuaded that an award term which facilitates agreements to take leave in advance would operate in a mutually beneficial manner and was appropriate. The model term additionally contains requirements to provide leave in advance and the employer’s obligation to keep such agreements as an employee record.
13. A similar issue to that raised in relation to cashing out annual leave regarding record keeping was raised by the parties in the present proceedings and again the Full Bench stated that such a provision was required, particularly given the uncertainty as to the application of Regulation 3.36 to agreements in respect of the granting of leave in advance.

14. No changes were made to the model term proposed in the June 2015 decision.

**Purchased leave**

15. 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.

16. A discussion paper was published dealing with the issue of purchased leave and interested parties were asked to make submissions regarding whether a provision for purchased leave should be included in modern awards. None of the submissions filed supported the development of a model term dealing with purchased leave so the Full Bench determined that no further steps would be taken towards the development of a purchased leave term.

**Draft determinations**

17. A number of parties raised specific issues with the draft determinations published on the Commission’s website on 29 June 2015. The issues raised generally concerned the interaction between a model term and other award provisions, some technical and drafting issues and the removal of obsolete provisions. Apart from three exceptions, the variations proposed will be adopted and revised draft determinations will be published on the Commission website, by 30 September 2015.

**Award specific issues**

18. Interested parties will be provided with an opportunity to make submissions and adduce evidence in relation to whether the various model terms contained in the decision should now be inserted into particular modern awards. Directions in relation to the next phase of these proceedings will be issued shortly. The matter will be listed for further hearing before the Full Bench at 9.30 am on 23 November 2015 in Sydney.

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*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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For further information please contact:

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Attachment A—Index of material

• 14 July 2015—Accommodation Association of Australia and another submission
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• 24 July 2015—Australian Council of Trade Unions correspondence
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• 13 July 2015—Australian Higher Education Industrial Association submission
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• 13 July 2015—Construction, Forestry, Mining and Energy Union – Construction and General Division submission
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