



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Family and Domestic Violence Leave (AM2015/1)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER SPENCER

MELBOURNE, 6 JULY 2018

4 yearly review of modern awards –leave to deal with family and domestic violence model term.

Background

[1] This decision finalises the content of a model term for unpaid leave to deal with family and domestic violence. The model term will be inserted into all modern awards as part of the 4 yearly review of modern awards (the Review).

[2] As part of the Review, the Australian Council of Trade Unions (ACTU) made a claim to include an entitlement to 10 days' paid domestic violence leave in all modern awards.¹

[3] On 3 July 2017, a Full Bench rejected the ACTU's claim for *paid* family and domestic violence leave,² but the Majority Decision (Gooley DP and Spencer C) expressed the preliminary view that all employees should have access to *unpaid* family and domestic violence leave. The Majority Decision also expressed the preliminary view that employees should be able to access personal/carer's leave for the purpose of taking family and domestic violence leave.³

[4] In a decision issued on 26 March 2018 (the *March 2018 Decision*)⁴ a Full Bench confirmed the preliminary view expressed in the Majority Decision, that all employees should have access to unpaid family and domestic violence leave.

[5] The Full Bench decided to provide five days' *unpaid* leave per annum to all employees (including casuals) experiencing family and domestic violence. It was also decided that such leave will be available in the event that an employee needs to do something to deal with the

¹ [ACTU submissions](#), 28 October 2014.

² [\[2017\] FWCFB 3494](#).

³ [\[2017\] FWCFB 3494](#) at [6].

⁴ [\[2018\] FWCFB 1691](#).

impact of the family and domestic violence and it is impractical for them to do that thing outside their ordinary hours of work.

[6] The Full Bench considered a number of matters relating to access to the entitlement to five days' unpaid leave, and decided that the unpaid leave entitlement:

- will apply to *all* employees (including casuals);
- will be available *in full* at the commencement of each 12 month period rather than accruing progressively during a year of service;
- will *not* accumulate from year to year; and
- will be available *in full* to part-time and casual employees (i.e. not pro-rated).⁵

[7] The Full Bench also decided not to require employees to access any available paid leave entitlement before accessing unpaid family and domestic violence leave.⁶

[8] After determining all of the contested issues, the Full Bench was satisfied that the model term was a 'permitted term' within the meaning of s.136(1)(a) of the *Fair Work Act 2009* (Cth) and concluded that the variation of modern awards to include the model term was necessary to ensure that such awards achieve the modern awards objective.⁷

[9] The Full Bench deferred consideration of access to personal/carer's leave until June 2021.⁸

Finalising the Model Term

[10] We subsequently drafted a model term to give effect to the *March 2018 Decision*. In a Statement issued on 3 May 2018, we invited interested parties to comment on the draft model term, by 1 June 2018.⁹ Such comments were to be directed to whether the draft model term accurately reflected the outcome of the *March 2018 Decision*, and was not an opportunity to relitigate matters that have been determined.

[11] Submissions were received from:

- (i) The Australian Chamber of Commerce and Industry ([ACCI](#))
- (ii) The Australian Council of Trade Unions ([ACTU](#))
- (iii) The Australian Industry Group ([Ai Group](#))
- (iv) National Road Transport Association ([NatRoad](#))
- (v) The Pharmacy Guild of Australia ([the Pharmacy Guild](#))

⁵ [\[2018\] FWCFB 1691](#) at [253].

⁶ [\[2018\] FWCFB 1691](#) at [266].

⁷ [\[2018\] FWCFB 1691](#) at [303].

⁸ [\[2018\] FWCFB 1691](#) at [307] – [309].

⁹ [\[2018\] FWCFB 2440](#) at [10] – [11].

[12] ACCI, Ai Group and NatRoad submit that the model term attached to the 3 May Statement accurately reflects the *March 2018 Decision*.

[13] The Pharmacy Guild submit that the model term does not reflect the intent of the *March 2018 Decision* and makes the follow suggestions for amendment of the model term:

(i) Amend X.3(b) to make it clear that the entitlement to 5 days unpaid leave is fully accrued at the employee's employment start date and the entitlement is fully accrued on the employee's 12 month anniversary date for the duration of employment thereafter.

(ii) Amend clause X.4(b) to replace the words "needs to do something" with "is required to".

[14] The ACTU submits that the model terms accurately reflects the *March 2018 Decision* and the discussion between the parties during the conferences held in October 2017 subject to two comments:

(i) Clause X.1 provides that the clause applies to all full-time, part-time and casual employees. The ACTU submit that this could lead to uncertainty about the application of the clause to fixed-term employees, apprentices and others. The ACTU suggest that the clause be amended to read: "This clause applies to all employees, including casuals".

(ii) A new clause X.3(b)(iii) should be inserted to confirm that the leave is available in full to part-time and casual employees, i.e that the leave is not pro-rated. The ACTU submit that in the absence of such clarification, there may be some uncertainty about the way in which this provision interacts with other award provisions which pro-rata entitlements for part-time employees.

[15] This matter was the subject of a mention on 21 June 2018. A [transcript](#) of the mention is available on the Commission's website. The ACTU, ACCI, Ai Group and NatRoad were represented at the mention.

[16] At the mention, there was no opposition to the ACTU's proposed changes to the draft model term. However, ACCI sought a short opportunity to reflect on a possible implication arising from the ACTU's proposal.

[17] The Pharmacy Guild did not appear at the mention. The changes proposed in their submission of 13 June 2018 were opposed by the ACTU and were not the subject of comment by any other employer organisations.

[18] A [Report](#) of the outcome of the mention was issued on 22 June 2018, confirming the matters discussed at the mention and directing the parties as follows:

1. ACCI is to file any additional comment it wishes to make by no later than **4pm Monday, 25 June 2018**.

2. All parties are invited to file any final comments on the proposed model term, having regard to the discussion at the conference and any material filed by ACCI pursuant to direction 1, by no later than **4pm Thursday, 28 June 2018**.
3. All submissions are to be sent to amod@fwc.gov.au.
4. Liberty to apply.

[19] ACCI filed a submission on 25 June 2018 in compliance with the above directions, which relevantly states:

‘At the proceedings on 21 June 2018, we raised by way of observation a small issue in the drafting.

That observation succinctly expressed is as follows:

1. Clause X.3 (a) commences with the expression “Each year...”
2. Clause X.3 (b) (i) expresses the entitlement as being “...available in full at the start of each 12 month period...”

An employer (or employee) reading this without the benefit of advice may be confused by the juxtaposition of these two propositions.

The reference to a “year” is likely to invoke the notion of a calendar year for most employers.

The words “Each year” appearing in clause X.3 (a) appear unnecessary given clause X.3 (b) (i).’

[20] No other submissions were received.

[21] It is convenient to deal first with ACCI’s proposed changes. We agree that the words ‘Each year’ in clause X.3(a) may lead to confusion, given the terms of clause X.3(b)(i). We will delete these words and merge subclauses X.3(a) and (b).

[22] We now turn to the amendments proposed by the Pharmacy Guild. We note that the Pharmacy Guild did not attend the mention on 21 June 2018; nor did it avail itself of the opportunity to make further submissions in support of its position. We also note that no other party in the proceedings expressed any support for the amendments proposed by the Pharmacy Guild.

[23] We do not propose to make either of the changes sought by the Pharmacy Guild. The proposal to amend X.3(b) to make it clear that the entitlement is ‘fully accrued’ at the commencement of the employee’s employment is unnecessary. Clause X.3 is sufficiently clear and it reflects the *March 2018 Decision*.

[24] The Pharmacy Guild’s proposal to amend Clause X.4(b) to replace the words ‘needs to do something’ with ‘is required to’, would change the nature of the entitlement determined in the *March 2018 Decision*. The expression ‘is required to’ suggests that the action is to be taken in compliance with a direction of some sort, such as a summons to appear. The current expression ‘needs to do something’ is not so restrictive. We do not propose to make the change sought.

[25] We have decided to make the changes sought by ACTU. The proposed changes were not opposed by any party and they will improve the clarity of the model term and make it easier to understand.

[26] As we concluded in the *March 2018 Decision*, we are satisfied that it is necessary to vary all modern awards to include the model term to ensure that those modern awards achieve the modern awards objective. In particular, we said:

‘We have taken into account the considerations in ss.134(1)(a) to (h) and are satisfied that the variation of modern awards to include the model term is necessary to ensure that such awards achieve the modern awards objective. As we have mentioned, retaining employment is an important pathway out of violent relationships. Conversely, a lack of financial security has an adverse impact on the ability to recover from family and domestic violence. Absent an entitlement to unpaid family and domestic violence leave, employees will be reliant on the goodwill of their employer to obtain the leave necessary to deal with the various issues arising from family and domestic violence while remaining in employment.’¹⁰

[27] We adhere to the view expressed above.

[28] The final version of the model term is at Attachment A to this decision.

Next steps

[29] Draft variation determinations varying all modern awards to include the model term will be issued shortly.

[30] Interested parties will have 14 days to comment on the draft variation determinations. It is intended that the new entitlement to 5 days’ unpaid leave to deal with family and domestic violence leave will come into effect on 1 August 2018.

PRESIDENT

Appearances:

Sydney:

Mr B Ferguson on behalf of the Australian Industry Group

Mr N Ward on behalf of the Australian Chamber of Commerce and Industry

Melbourne:

Ms S Ismail on behalf of the Australian Council of Trade Unions

¹⁰ [\[2018\] FWCFB 1691](#) at para [303].

Canberra:

Mr D Johns on behalf of the National Road Transport Association

Hearing details:

Sydney.

2018.

21 June.

Final written submissions:

Australian Chamber of Commerce and Industry, 25 June 2018

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ATTACHMENT A

Leave to deal with Family and Domestic Violence: Model Term

X.1 This clause applies to all employees, including casuals.

X.2 Definitions

(a) In this clause:

family and domestic violence means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.

family member means:

- (i) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- (ii) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or
- (iii) a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

(b) A reference to a spouse or de facto partner in the definition of *family member* in clause X.2(a) includes a former spouse or de facto partner.

X.3 Entitlement to unpaid leave

An employee is entitled to 5 days' unpaid leave to deal with family and domestic violence, as follows:

- (a) the leave is available in full at the start of each 12 month period of the employee's employment; and
- (b) the leave does not accumulate from year to year; and
- (c) is available in full to part-time and casual employees.

Note: 1. A period of leave to deal with family and domestic violence may be less than a day by agreement between the employee and the employer.

2. The employer and employee may agree that the employee may take more than 5 days' unpaid leave to deal with family and domestic violence.

X.4 Taking unpaid leave

An employee may take unpaid leave to deal with family and domestic violence if the employee:

- (a) is experiencing family and domestic violence; and

(b) needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

Note: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

X.5 Service and continuity

The time an employee is on unpaid leave to deal with family and domestic violence does not count as service but does not break the employee's continuity of service.

X.6 Notice and evidence requirements

(a) Notice

An employee must give their employer notice of the taking of leave by the employee under clause X. The notice:

(i) must be given to the employer as soon as practicable (which may be a time after the leave has started); and

(ii) must advise the employer of the period, or expected period, of the leave.

(b) Evidence

An employee who has given their employer notice of the taking of leave under clause X must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in clause X.4.

Note: Depending on the circumstances such evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration.

X.7 Confidentiality

(a) Employers must take steps to ensure information concerning any notice an employee has given, or evidence an employee has provided under clause X.6 is treated confidentially, as far as it is reasonably practicable to do so.

(b) Nothing in clause X prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee.

Employers should consult with such employees regarding the handling of this information.

X.8 Compliance

An employee is not entitled to take leave under clause X unless the employee complies with clause X.