



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER HAMPTON

AM2014/47

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/47)**

Common Issue - Annual Leave (Black Coal Mining Industry Award 2010)

Sydney

10.02 AM, FRIDAY, 25 NOVEMBER 2016

Continued from 1/07/2016

PN87

THE COMMISSIONER: All right, gentlemen, this is a conference, so in that context I'm more than comfortable for you to remain seated. We are, however, retaining a transcript of proceedings, partly because as I think all the parties here are veterans of the modern award process, will understand that we generally use the transcript as a means of keeping broader interests involved of matters. So for that purpose, I will take the appearances in a moment, but I advise that I'm more than happy to go off the record at any stage if the parties think that would be more appropriate.

PN88

So with that caveat, I'll take the appearances.

PN89

MR T SEBBENS: If the Commission pleases, my name is Sebbens, initial T, solicitor. I appear for the Coal Mining Industry Employer group.

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THE COMMISSIONER: Thank you Mr Sebbens.

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MR A RIVETT: If the Commission pleases, my name is Rivett, initial A. I appear for APESMA.

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THE COMMISSIONER: Mr Rivett.

PN93

MR A THOMAS: If the Commission pleases, I appear for the CFMEU. My name is Thomas, initial A and sitting behind me here is Mr South, initial G.

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THE COMMISSIONER: Very well, thank you, Mr Thomas.

PN95

MR M NGUYEN: May it please the Commission, my name is Nguyen, initial M. I appear for the Australian Manufacturing Workers Union. I also appear with my colleague who is here, Mr Arginella, initial H.

PN96

THE COMMISSIONER: Very well, thank you, Mr Nguyen, and I should note for the record the cooperation of the AMWU to sub you in, so to speak, to allow the conference to proceed today.

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All right, gentlemen, I've read the material that's been provided to the Full Bench and the President on behalf of the Full Bench has asked me to convene the conference. I've read the employer's position, I think advanced by your firm Mr Sebbens.

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MR SEBBENS: Yes.

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THE COMMISSIONER: I've also read what I understand to be the common union position. You'll tell me if I'm wrong, but I've understood that to be represented or led by the CFMEU submissions of 25 October. So in that context, as I understand it, there are some drafting issues with the draft determination associated with how hours and weeks are expressed, but there's no controversy about those matters. The issue that's led us to convene the conference today is associated with the shut down clause.

PN100

Mr Sebbens, as I understand the employer's position, it is that the loss of 25.4(c) in the award as it originally stood, which involved the power to direct employees to take leave, has changed the context in which the shut down clause is to operate.

PN101

MR SEBBENS: Yes.

PN102

THE COMMISSIONER: In that context, as well as proposing an amendment to clarify the relationship between the shut down clause and the other annual leave clauses, you've also proposed the insertion of a clause permitting employers to direct leave during a shut down period. So is that an accurate reflection?

PN103

MR SEBBENS: Yes it is, thank you.

PN104

THE COMMISSIONER: And from the union's perspective Mr Thomas and colleagues, my understanding is that the position is that those changes go beyond the Full Bench decision and it's seen as an attempt to reintroduce the former 25.4(c).

PN105

MR THOMAS: Yes.

PN106

THE COMMISSIONER: That the current shut down provision didn't provide for an employer to direct annual leave.

PN107

MR THOMAS: Yes, and in effect we are saying that what the draft order from the Coal Group is seeking is also inconsistent with the NES as the Full Bench described it quite clearly and quite frankly at paragraph 76 of the decision whereby it stated that an award term, whereby an employee can be directed to take all or part of their accrued paid leave on the provision of 28 days' notice in writing without other considerations or requirements is not reasonable within the meaning of section 93(3).

PN108

We say the effect of the draft order from the Coal Group does precisely that. It allows the employer to direct an employee to take leave, albeit under the heading of close down. We think that is something that the Full Bench has said would be inconsistent with the NES. That fundamentally is why it removed 25.4(c). So to the extent that you're trying to copy that into 25.10, you commit the same sin, so to speak. That's our position.

PN109

THE COMMISSIONER: So Mr Rivett and Mr Nguyen, I take it that the position as announced by the CFMEU is consistent with your views on the matter?

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MR NGUYEN: Yes, we're supporting the CFMEU's submission.

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MR RIVETT: Yes Commissioner, we support the CFMEU's position.

PN112

THE COMMISSIONER: All right. Mr Sebbens, first of all, is there anything you want to say further about your position, and secondly and this is probably a more general question, how do the parties propose we advance matters this morning?

PN113

MR SEBBENS: We have had some discussions with the CFMEU. My understanding is not with the AMWU or APESMA, but we certainly understand the position which is put by the unions. Perhaps I might just respond briefly to what Mr Thomas just said about what the Full Bench has said at paragraph 76.

PN114

My understanding and reading of what paragraph 76 of the decision says is that effectively, without more, clause 25.4(c) that required the taking of leave upon 28 days' notice without any express provisions concerning what circumstances that right would be exercised in, in order to determine whether or not that clause would then have been reasonable, amounts to the clause being not reasonable and therefore, effectively inconsistent with section 93(3).

PN115

Now that doesn't necessarily mean that a provision in a shut down clause that is directed solely at the circumstance of a shut down in the whole or part of an operation, upon the giving of appropriate notice, would not be consistent with 93.3 and indeed, the Act provides in notes to the relevant provisions dealing with this point, that shut downs, including for the purposes of over the Christmas and Easter periods, would be examples of where requiring employees to take leave would be reasonable.

PN116

The Commission obviously will be aware of there being shut down clauses in other modern awards which require the taking of leave, a key example being the Coal Export Terminals Award 2010 which each of the unions here today would have members who would be covered by and certainly, the employers or some of them in the group I represent, operate those terminals. The clause within that

particular award does require the taking of leave during the period of a shut down expressly.

PN117

Now I should add to what we say in our written submission, that we don't concede necessarily, that it is not otherwise implicit within the existing clause 25.10 that if an employer give notice of a shut down, that that amounts to also the requirement upon employees to take annual leave, if they have it available, but that there are conditions upon that in the other subclauses or paragraphs which then provide for employees, potentially, if they don't have enough leave accrued to take it in advance.

PN118

So we don't concede that that might not be an appropriate construction and necessarily that might be implicit, but we say that in operation what has occurred is that in order to avoid any doubt about it, that employers did rely upon expressly the provision of 25.4(c) which has a coinciding period of - or had - a coinciding period of 28 days' notice with the 28 days' notice that might be given of a shut down to direct employees to take leave for the shut down, which they were contemporaneously giving notice of.

PN119

So, the removal of the clause, while we accept that's the decision that the Full Bench has reached, turning its mind to primarily the question of excessive leave, has had the practical effect of emasculating the operation of 25.10, subject to what I've said about a construction that might be available, but in practice, will emasculate it in that there will be disputation and potential doubt about whether or not an employer with the words as they stand, could require the taking of leave.

PN120

Now, we would say that would not meet the modern award's objective to have the variation that's now occurred, have that impact upon another clause. It would not make now the operation of that clause clear and simple to understand. We say therefore, that variations aren't necessary now to provide for what might, on one view, be implicit within the clause, explicit. Or on another view, might be the saving of the operation of part of 25.4(c) in the circumstances only of shut downs.

PN121

Now, as I've already mentioned, it really is beyond doubt that the requiring of employees to take annual leave for a period of shut down, amounts to a reasonable circumstance upon which an employer can require the taking of that leave.

PN122

THE COMMISSIONER: All right. Mr Thomas, you know, I'm not here to decide the matter today; I'm here to convene a conference. But it would seem to me that what Mr Sebbens about the operation of shut down clauses more generally, would have to be right. Bear in mind that the Commission itself has included and left in shut down provisions in annual leave clauses, allowing employers to direct annual leave.

PN123

In fact, I was unable to find a shut down clause that didn't have some prescription about the taking of annual leave in it. And as Mr Sebbens points out, and as noted by the Full Bench in a much earlier decision, shut down arrangements are one of the examples that are given in the Act itself. That doesn't conclusively mean that any shut down annual leave provision would be reasonable. But it would seem on face value that there would not appear to be a reason that there couldn't be a direction within a shut down clause, in an annual leave provision allowing an employer to direct annual leave on reasonable conditions.

PN124

MR THOMAS: I have a couple of responses to that. I'm not too sure where in the Act it says that shut downs are an example of where it is reasonable to compel an employee to take leave. I'm looking at 93(3) here and there's no note under 93(3) in my copy that says that a close down would constitute a requirement that is reasonable. So that's one incidence.

PN125

The second point I think it arises, Commissioner, out of the deliberations of the Commission, particularly with respect to the excess - - -

PN126

THE COMMISSIONER: I think there is a reference. I can't lay my hand on it immediately. Mr Sebbens, are you able to?

PN127

MR SEBBENS: I'm just looking right now, your Honour. It may not be that it's in 93, but it certainly is in one of the provisions that deals with the taking of the leave, and I'm just trying to locate it.

PN128

THE COMMISSIONER: It was something that was dealt with in one of the earlier decisions of the Full Bench dealing with the nature of annual leave and the interaction between modern awards and the National Employment Standards.

PN129

MR THOMAS: You may be right there, Commissioner. I'm not aware of where it was, but that was my second point, to say that at least to the extent that this decision addresses the Black Coal Award and the interaction between what was 25.4(c) and 25.10. The issue of whether a close down on its own would fulfil the requirement of being reasonable, is not addressed at all.

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THE COMMISSIONER: No, it wasn't.

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MR THOMAS: No.

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THE COMMISSIONER: But the decision wasn't addressed in the issue.

PN133

MR THOMAS: The matter was discussed in the proceedings on the 13th, and in that respect, His Honour the President made - it was called the interaction problem for want of a better description.

PN134

THE COMMISSIONER: Yes, I recall that.

PN135

MR THOMAS: And His Honour the President, suggested that there should be some clarifying words put at the commencement, which is what he did in the draft order.

PN136

THE COMMISSIONER: Yes, and that's what found its way into the decision.

PN137

MR THOMAS: Pardon?

PN138

THE COMMISSIONER: That's the concept that found its way into the decision.

PN139

MR THOMAS: That's correct, and we say that what the Full Bench has put in the draft determination is consistent with the decision that it made, and that it is not consistent with the view it expressed that without more directing people to take annual leave is not reasonable. I would submit, Commissioner, that simply giving it a label called close down, doesn't ipso facto make it reasonable.

PN140

You could give it any form of label, but it is still, in a practical sense, a situation where the employer directs a person on 28 days' notice or whatever, to take all or part of their leave. It gives them some other options, which is in essence between - a bit between a rock and a hard place. You either take annual leave or you take leave without pay or if possible, you can take leave in advance.

PN141

I don't know whether and I have not seen it addressed in earlier decisions; I would have thought had it been, we mightn't be here, that the draft clause as proposed by the Coal Mining Group - putting to one side whether they want to concede that it does or does not allow them to do it anyway, I would have thought the mere fact that they've put this clause in suggests that there at least aware of that position, means, Commissioner, that that particular part of the draft order, that is subclause 25.10 which I think becomes 25.12, is neither consistent with the decision nor consistent we say with the NES.

PN142

I recognise, I went and looked myself at other awards. I thought maybe I can find something to say that it is, and I agree with you, I've looked at other awards and they do permit the employer to direct employees to take leave during a close down. But what we say in relation to that is that we're not aware of where in

those other awards, unlike this one, that specific interaction problem, for want of a better term, has been addressed.

PN143

In that sense, following the juris prudence in the decision of 23 September, those awards to the extent they have such a provision would also be in breach of the NES, in particular 93.3 to the extent that they allow the employer to direct an employee on a certain period of notice to take all or part of their annual leave.

PN144

So it does, I acknowledge, have implications probably beyond just merely the Black Coal Award.

PN145

THE COMMISSIONER: Well, certainly it would. That would involve a review of each of the awards with a shut down provision.

PN146

MR THOMAS: Yes, well to be consistent, I can't adopt any other position. So I think it's incumbent upon me to at least inform the Commission that it may well have implications beyond the Black Coal Award.

PN147

THE COMMISSIONER: All right.

PN148

MR SEBBENS: I can assist the Commission by pointing out the provision is section 94(5). Now it's accepted that that provision concerns the cashing out and taking of paid annual leave for award, or agreement free employees. Subsection 5 says "An employer may require an award/agreement free employee to take a period of paid annual leave but only if the requirement is reasonable."

PN149

Those words I think we corresponded with what is in 93. The note then says "A requirement to take paid annual may be reasonable if, for example, the employee had accrued an excessive amount of paid annual leave or the employee's enterprise is being shut down for a period, for example, between Christmas and New Year". So it's clear that in the circumstance of the requiring of award and agreement free employees to be required to take leave, that the legislature considered that it was reasonable as per its examples to require the taking of leave if it is excessive, that is, the amount is excessive that's been accrued, or for the period of shut down.

PN150

Now, one will recall, of course, we're only in this place today because of the origin of these proceedings, is applications concerning the other example of excessive annual leave and the requirement to take leave in that circumstance. Now that's, we say, had an impact now upon the provision concerning shut downs, but it is an example clearly of at least in the legislature's mind for award and agreement free employees, it being reasonable to require employees to take such leave.

PN151

Now it necessarily follows if the entirety of the NES is read together, that those examples would seem to apply for award covered employees and the provision in 93 to insert in such clauses. I hear what my friend says about whether or not any other awards have had to deal with this specific issue. It may not be that there was a difference in, or the exact language that's adopted in this award, in those other awards and therefore the question may not have arisen.

PN152

There is some substantial history to this particular provision and annual leave and the taking of it in the Black Coal Mining industry, going back as far back as I could trace, to the 30's, prior to even the legislation for the provision of annual holidays by any of the states. It was actually a completely award derived provision. Back when the clause originally arose, on its face, the provision dealt with the operations of companies only being allowed for 46 weeks of the year and it would then announce to employees the balance of the weeks of the year in which it would not operate and employees would just simply be put off.

PN153

It may be the course of the origin of the provision in that way, that there is an absence of words concerning the directing of the taking of leave, firstly, because leave didn't exist at the time. Or, that it was simply assumed that once the entitlement came that when the shut down was announced that leave would be required to be taken.

PN154

Now we've said we don't concede the point whether or not a construction is available; it's implicit in the current wording, but it certainly would be in the interests of all employers and employees covered by this award for that to be put beyond doubt. And to the extent that they operated in a practical way by perhaps relying upon another provision in order to have that clarity amongst themselves about the directing of the taking of leave, that should now be made express.

PN155

THE COMMISSIONER: All right gentlemen, where do you want to go?

PN156

MR THOMAS: I just want to make one point with respect to the note. The note doesn't say it will be reasonable; it says it may be. That suggests that one would need to have a bit of a closer look at about what the shut down is. Commissioner, we've historically in coal mines and particularly in manufacturing industry in general, there would be a period of shut down, maybe on a yearly or two yearly basis where the employer would undertake major maintenance and renewal work or maybe some construction.

PN157

At that time, what you often had was that certainly many of the maintenance employees would probably work through a shut down. Some of the production employees would work during a shut down to provide work that is not required by a skilled trade, for example. That is generally the history of the. What is

happening here is that they're now saying that they wish to use a shut down for all sorts of things.

PN158

If we think we've got too bit a stock pile, well shutdown. If we want people to take annual leave, we'll just have a shut down, in total or partially. So, it may well be that at a particular time of the year or for a particular period, and on our reading of the note, to the extent that it has any legislative strength, for want of a better word, it leaves it open to a shut down may be reasonable.

PN159

For example, there are cases where employers will close between Christmas and the New Year. That quite often happens in offices. That's what it appears to be saying there. That's the example I think it's given. So it shuts for those three working days or four working days, whatever it is between Christmas and the New Year. That's a completely different scenario to what I suggest the coal employers have in mind when they're addressing this clause.

PN160

So, Commissioner, at this point, we maintain our position that the determination, as drafted by the Commission, is appropriate and it should go from being a draft to being signed, sealed and delivered.

PN161

THE COMMISSIONER: Mr Thomas, to what extent is there any potential to clarify the circumstances in which the shut down might operation, so as to ameliorate your concerns?

PN162

MR THOMAS: Well, I don't have any instructions to move beyond where I am, but the lawyers are free to put what they like, but I don't make any promises. I wouldn't want to mislead anybody that the outcome would be some form of compromise. You know, I don't have those sorts of instructions, Commissioner.

PN163

MR SEBBENS: Commissioner, I would need to seek instructions if that obviously were to be put as well, about whether or not there might be able to be some accommodation on that front. But I just make the point, that some of the points that Mr Thomas has just raised about the history of the operation of the clause, have been matters which have been disputed between the parties, resulting in proceedings before the Coal Industry Tribunal on a significant number of occasions, including the applications by the predecessor for his unions, to make express when the shut downs were to occur; whether it be Christmas and Easter and some other nominated period, or other occasions in which employers actually sought for there to be no shut downs at all, but the unions demanded there be shut downs because that was the opportunity for employees to take leave.

PN164

So there is some history that it may be entertaining for us all to trawl through, but we probably have other sources of entertainment.

PN165

THE COMMISSIONER: They weren't faced with section 93(3).

PN166

MR SEBBENS: Indeed, indeed, and as we're all finding out as the best efforts were made by the parties in preparing the modern award with the assistance of the Commission. Some of the finer details here with the provisions of the Modern Award's objective and other parts of the Act might not have been as thoroughly analysed as they could have been, but we're now in the position we are.

PN167

My suggestion of a way forward, Commissioner, would be perhaps that leave be given to the parties to perhaps put further the submissions perhaps on my part in support of the wording that we seek. We chose not to put on more detailed submissions than we did because of the note in the decision that the Tribunal preferred not to hear from the parties about some of the matters that had arisen in the earlier part of the proceedings, and only to deal with the draft determination. But perhaps the time has come that more needs to be said on our part about the words that we wish to have inserted, which we say is the operation of the clause made clear.

PN168

THE COMMISSIONER: So what time period would you have in mind?

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MR SEBBENS: Given the time of the year, subject to the Full Bench's view, we'd probably envisage that we would put something on in sort of mid-January if that was suitable.

PN170

THE COMMISSIONER: That might depend on when the Full Bench wants to draw a line over or under annual leave.

PN171

MR SEBBENS: Of course, I haven't said it, but we obviously would expect that the unions be given an opportunity to respond to whatever we put, etcetera.

PN172

THE COMMISSIONER: So Mr Thomas and colleagues?

PN173

MR THOMAS: Our primary position, your Honour, sorry, promoting you there, which mightn't be a bad thing - is that the decision has been made that the draft determination is consistent with that decision and the Full Bench should proceed to make the determination. Of course, in the event that the Full Bench feels that it needs to hear more, then of course we will participate in that. But given it's already made a decision, I don't think we would argue *functus officio* or whatever that Latin term is - its relevance to the Commission of course is debateable at best.

PN174

If that's what the Full Bench seeks, then of course we will participate, otherwise we would seek that the Full Bench make the order in its current form.

PN175

THE COMMISSIONER: I understand.

PN176

MR THOMAS: We don't have a difficulty, I might say with the proposal that the coal mining group were putting about expressing the leave entitlement in both hours and weeks; that's not an issue from our side.

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THE COMMISSIONER: Yes, I understand.

PN178

MR THOMAS: It does what the award current does, so it's - the annual leave provision in the current award expresses it in both hours and weeks.

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THE COMMISSIONER: Yes I understand.

PN180

MR THOMAS: To put it in that clause is consistent.

PN181

THE COMMISSIONER: All right, does anyone else want to say something?

PN182

MR NGUYEN: Commissioner, we would agree with the CFMEU, and I would just note that in the usual course of proceedings, that if there are unexpected effects or outcomes of a draft determination being made, then it would be up to those parties to bring their evidence and submissions to demonstrate that there has been an adjustment in the achievement of the modern award's objective requiring a further consideration.

PN183

Looking at this matter, the impact on potential shut downs seems to be a series of hypothetical propositions and if the employers are to be given time, then the time that they should be given, should be to pursue a variation outside of the four yearly review process or perhaps even if the Commission gives leave in this process to pursue a variation separate to the draft determination which have been put out for exposure.

PN184

THE COMMISSIONER: Mr Nguyen, I think the issue that arises from that is the issue arises from the Commission's decision to vary another part of the annual leave clause. So to the extent that there's uncertainty about the interaction, yes there is the question of the interaction clause, but to the extent to which that leaves some uncertainty about what the shut down clause means, I suspect the Full Bench won't be attracted to an idea of saying well that's for another day.

PN185

I think the issue is whether or not the Commission is satisfied that the provision as drafted is seen in context, is workable and appropriate. If there's any doubt about that, I suspect the Commission, the Full Bench will want to hear further from the parties, but that's a preliminary view; it's a matter for the Full Bench, but I understand what you've said.

PN186

Mr Rivett, did you want to say anything?

PN187

MR RIVETT: Commissioner, we would agree one hundred percent with the CFMEU's position.

PN188

THE COMMISSIONER: Okay, all right. Anything further Mr Sebbens?

PN189

MR SEBBENS: No, I perhaps just note what the AMWU has put. We can prefer, of course, for the proceedings not to go down that path. We don't think that's necessarily the point, but of course, we reserve our rights, depending upon the outcome here of course, to make an application to vary if we wish to do so.

PN190

THE COMMISSIONER: I understand. That's a right to oppose at any time, subject to the necessary agreement in the higher bench mark, it applies in that context. But yes, I understand what you say.

PN191

I think in hindsight, it was fortunate that I decided to retain a record of these proceedings because the transcript today will make my report to the Full Bench relatively easy. I will, by way of this transcript inform the President, my colleague, of the developments today and ultimately the Full Bench will either issue a decision or some directions, whatever is appropriate and I appreciate the constructive contribution of the parties to assist the Full Bench to make that decision.

PN192

Unless there's anything further, the tribunal will be adjourned.

ADJOURNED INDEFINITELY

[10.36 AM]