AM 2014/198

FOUR YEARLY REVIEW OF MODERN AWARDS

AUSTRALIAN SKI AREAS ASSOCIATION SUBMISSIONS ON THE DRAFT DETERMINATION REGARDING SEASONAL EMPLOYMENT IN THE ALPINE RESORTS AWARD 2010

1 Introduction

1.1 These submissions on the Draft Determination regarding seasonal employment in clause 11.5 of the *Alpine Resorts Award 2010* ("**Award**") ("**Draft Determination**") are made by the Australian Ski Areas Association ("**Association**").

1.2 The Association has reviewed the Draft Determination and notes that it is its submission that the current clause 11.5 of the Award (7.5 in the exposure draft of the *Alpine Resorts Award 2014*) is not inconsistent with section 87(1) of the *Fair Work Act 2009* (Cth) ("**FW Act**"), concerning the entitlement to annual leave, but, rather, is ancillary or incidental to the operation of the NES annual leave entitlement and is therefore permitted by section 55(4) of the FW Act.

1.3 The Association makes its submissions on the following bases:

(a) the instant case is distinguishable from *Canavan Building Pty Ltd* [2014] FWCFB 3202 ("***Canavan***") in that it relates to pre-payment of an inevitable payout of annual leave pro rata on termination of employment at the end of a 10 to 16 week season and in no way discourages or prevents the taking of actual "paid annual leave";

(b) the unique nature of the snowsports industry and its industrial regulation;

(c) the unique nature of seasonal employment in the snowsports industry;

(d) that the Full Bench in Canavan, in its analysis of the entitlement to annual leave, considered the historical context of annual leave. It then follows as relevant that the *Annual Holidays Act 1944* (NSW) ("**Annual Holidays Act**") contains a provision that allows for superior arrangements. The *Ski Industry (State) Award* (a Preserved Collective State Agreement ("**PCSA**")) ("**NSW Ski Industry Award**"), one of the pre-modernisation industrial instruments that forms the basis of the Award, has historically permitted the payment of a loaded pay rate in place of the entitlement to paid annual leave; and,

(e) that the arrangement in clause 11.5 of the Award, in respect to annual leave, in the circumstances, is a superior arrangement to that in Division 3 of Part 2-1 of the FW Act, in that it causes numerous relative benefits for employees.

1.4 The Association sets out its submissions below.

2 Relevant provisions of the Award

2.1 The Award provides for the pre-payment of annual leave for seasonal employees, by way of an 8.33% loading on the applicable hourly rate, instead of annual leave. This is provided for in clause 11.5 of the Award, as follows:

> The hourly rate of seasonal employees will include an 8.33% loading of the applicable hourly rate instead of annual leave.

2.2 The loading paid to seasonal employees in clause 11.5 of the Award does not replace any other benefit that full-time or part-time employees are otherwise entitled to receive under the Award or the National Employment Standards within FW Act ("**NES**").

2.3 A seasonal employee is defined in clause 3.1 of the Award as an "employee engaged to perform work for the duration of a specified season".

2.4 The Association notes that seasonal employees are in the vast majority of cases engaged for the ski season, which runs for approximately 10 to 16 weeks, from early June to early October, depending on the snow conditions. There are small numbers of instances of staff being engaged for the summer season, however, similarly, these engagements are for discrete periods of a fixed term nature.

3 Relevant provisions of the FW Act

3.1 Division 3 of Part 2-1 of the FW Act governs the interaction between the NES, modern awards and enterprise agreements. Relevantly, section 55 of the FW Act provides that:

> (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.
>
> ….....
>
> *Ancillary and supplementary terms may be included*
>
> (4) A modern award or enterprise agreement may also include the following kinds of terms:
>
> (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
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> (b) terms that supplement the National Employment Standards;
>
> but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

> Note 1: 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; or
>
> (b) that specify when payment under section 90 for paid annual leave must be made.
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> Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:
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> (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
>
> (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).
>
> Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

NES provisions of the FW Act concerning annual leave

3.2 The statutory entitlement to annual leave is set out in Division 6 of Part 2-2 of the FW Act. Section 87(1) of the FW Act identifies the entitlement to annual leave:

> (1) For each year of service with his or her employer, an employee is entitled to:
>
> (a) 4 weeks of paid annual leave; or
>
> …

3.3 Section 87(2) of the FW Act identifies the way in which annual leave accrues:

> (2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.
>
> Note: If an employee's employment ends during what would otherwise have been a year of service, the employee accrues paid annual leave up to when the employment ends.

3.4 Section 88 of the FW Act sets out the circumstances in which annual leave can be taken:

> (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
>
> (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

3.5 Section 90 of the FW Act sets out the method of payment of annual leave:

> (1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.
>
> (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

4 Canavan Building Pty Ltd

4.1 The decision of the Full Bench of the Commission on 23 December 2014, which considered, *inter alia*, alleged inconsistencies with the NES, found, at [84], that clause 11.5 of the Award is inconsistent with section 87(1) of the FW Act, relying on *Canavan* as authority on the issue.

4.2 *Canavan* concerned an application for approval of the *Canavan Building Pty Ltd Enterprise Agreement 2013* ("**Agreement**"). In *Canavan*, the Full Bench considered whether a clause within the Agreement that provided for annual leave to be paid for as loading within an employee's hourly rate of pay was in breach of the NES provisions of the FW Act regarding annual leave.

4.3 After extensive consideration of whether such a clause in the Agreement provided for the pre-payment of annual leave or whether the pre-payment amounted to the cashing out of annual leave, which would then require the cashing out provisions in sections 92 and 93 of the FW Act to be complied with, the Full Bench, after it found that there was a requisite temporal connection between the taking of annual leave and the payment of such leave,[1] held, at [56], that:

> … the scheme of "pre-payment" of annual leave in the Agreement constitutes cashing out of annual leave in a manner inconsistent with s.93, with the result that the prohibition in s.92 is excluded. Once it is understood that "*paid annual leave*" means annual leave accompanied by pay when it is taken, then the prohibition in s.92 must be understood as prohibiting the making of a payment which would lead to the employee forgoing his or her entitlement to later take annual leave *with pay* (unless such cashing out is authorised by s.93 or s.94).

5 Distinguishment from *Canavan*

5.1 With respect to the Full Bench, it is the Association's submission that the instant case is distinguishable from *Canavan* and, accordingly, that *Canavan* should not be authority on this issue.

5.2 In this regard, the Association notes that:

(a) seasonal employees are defined in the Award as an "employee engaged to perform work for the duration of a specified season";

[1] *Canavan* [41]-[52].

(b) the snowsports industry is highly seasonal in nature – with the vast majority of employees being engaged only during the ski (winter) season;

(c) the vast majority of seasonal employees in the snowsports industry are employed only during the ski season;

(d) the ski season typically runs from early June to early October, depending on the snow conditions;

(e) the ski season is a relatively short, busy and intense trading period and is generally not conducive for seasonal employees to take annual leave;

(f) approximately less that two percent of seasonal employees are employed during the summer season;

(g) the limited number of seasonal employees employed during the summer season are also employed for a fixed period of approximately 10 to 16 weeks;

(h) seasonal employees employed during the summer season are employed to carry out work on fixed projects, where they would otherwise be employed on a casual basis, foregoing entitlements that they receive as seasonal employees;

(i) seasonal employees' employment terminates at the end of each season for which they are employed;

(j) the seasonal employees do not achieve sufficient service to generate a right to take paid annual leave during the season;

(k) the annual leave loading in the rate of pay is therefore an early payment of an inevitable requirement to pay out annual leave pro rata under section 90(2) of the FW Act;

(l) the annual leave loading in the rate of pay is not in this context a cashing out of a right to take actual paid annual leave nor does it provide any disincentive to the taking of paid annual leave;

(m) approximately over 95 percent of the revenue generated by the employers operating alpine resorts, who are the employers covered by the Award, is generated during the ski season; and

(n) seasonal employees do not receive an entitlement to take annual leave without pay, as was the case within the Agreement in *Canavan*.

5.3 Against this background, the Association submits that it would not be unreasonable for an employer operating an alpine resort to refuse to agree to a request by a seasonal employee to take paid annual leave during a season, which employers are permitted to do pursuant to section 88(2) of the FW Act.

5.4 It therefore follows that in circumstances where employers operating alpine resorts are able to refuse to agree to a request by a seasonal employee to take paid annual

leave during a season, which will occur, clause 11.5 of the Award does not constitute the cashing out of annual leave, but, rather, is the pre-payment of a payment that employees will inevitably receive upon the termination of their employment, pursuant to section 90(2) of the FW Act.

5.5 In this way, it is the Association's submission that the entitlement to annual leave provided for in clause 11.5 of the Award is ancillary or incidental to the operation of the NES annual leave entitlement and is therefore permitted by section 55(4) of the FW Act.

5.6 The Association further notes that one of the concerns of the Full Bench in *Canavan* was that "if pre-payment of annual leave was permissible under the Act, that would include the capacity to pre-pay for annual leave for any number of years in the future at the commencement of employment or at some other time, regardless of whether such leave was ever taken or not…. Such a consequence is so far removed from the ordinarily-understood concept of "*paid annual leave*" that it cannot have been intended by the legislature".[2] The Association submits that, given the compressed and limited nature of seasonal employment, such a concern is not applicable to the instant case.

5.7 The Full Bench in *Canavan* also referred to a foundational arbitral decision concerning annual leave, which, in consideration of annual leave, referred to an entitlement to "an adequate period of respite, without loss of income".[3] The Association submits that, given the compressed and limited nature of seasonal employment, such a consideration is not applicable in the instant case.

6 Industrial Background

6.1 The Association notes that the Full Bench in *Canavan*, in its analysis of the entitlement to annual leave, considered the historical context of annual leave – "the historical context is of significant assistance in understanding the provisions of Division 6 of Part 2-2."[4]

6.2 In this regard, the Association notes that the Annual Holidays Act allowed superior arrangements for annual holidays or annual leave in an award, agreement or contract of employment to apply to workers covered by those instruments in place of sections 3, 4 and 4A in the Annual Holidays Act, which governed annual leave entitlements. Relevantly, section 5 of the Annual Holidays Act provides:

> (1) The following provisions shall apply in every case where provision is made by an award, agreement or contract of employment for annual holidays or annual leave for any worker:
>
> (a) where the worker is entitled under such provision to any benefit that is more favourable to the worker than the benefits provided by section 3, section 4 or section 4A, as the case may be, that section shall not apply to the worker,

[2] *Canavan* [54].
[3] *Metal Trades Annual Leave Case* (1945) 55 CAR 595 at 597.
[4] *Canavan* [46].

> (b) where the worker is entitled under any such provision to any benefit that is not more favourable to the worker than the benefits provided by section 3, section 4 or section 4A, as the case may be, that section shall apply to the worker and no benefit shall be allowed to the worker under that provision in respect of any period of employment after the commencement of this Act in the case of a benefit not more favourable than that provided by section 3 or section 4 or, after the commencement of the *Annual Holidays (Amendment) Act 1967* , in the case of a benefit not more favourable than that provided by section 4A.

6.3 Against this background, the Association submits that a loading on the applicable hourly rate of seasonal employees in place of the entitlement to annual leave is beneficial to employees for the following reasons:

(a) the 8.33% loading that seasonal employees currently receive in place of paid annual leave is financially superior to a payment for annual leave that a seasonal employee would accrue progressively during their seasonal employment and then be paid as a lump sum upon termination of their employment, as a lump sum payment will be taxed at that employee's marginal tax rate, rather than as income across the employment term, which may fall below the tax free threshold;

(b) overtime is paid on the seasonally loaded rate;

(c) seasonal employees have more cash in hand throughout the season for which they are employed; and

(d) the 8.33% loading is more generous and financially beneficial to seasonal employees than the accrual of four weeks leave. Four weeks leave accrued across 52 weeks of the year is a percentage application of 7.69%, whereas the 8.33% loading is made on the assumption that four weeks is effectively an extra month of pay, hence a $1/12^{th}$ increase.

6.4 For employers operating alpine resorts, the de-loading of annual leave from seasonal employment rates will create issues for returning seasonal employees, who in some resorts can make up to 60% of total seasonal staff. Returning staff will be hesitant to accept a lower hourly rate of pay upon their return to seasonal employment and in some cases have already been issued contracts under the Award, with loaded rates for the upcoming 2015 ski season.

6.5 Relevantly, the NSW Ski Industry Award, which is one of the pre-modernisation industrial instruments that forms the basis of the Award, [5] permits the payment of a loaded pay rate in place of the entitlement to paid annual leave.

6.6 In this regard, the Association notes that in the decision of his Honour Justice Watson in the Industrial Commission of New South Wales on 31 July 1989, in respect to Matter Nos 100 of 1987 and 609 of 1988, in which reasons were given for the making of the NSW Ski Industry Award, his Honour observed that:

[5] See paragraphs 3.3 to 3.21 of the Association's written submissions to the Australian Industrial Relations Commission on 6 March 2009 and paragraphs 2.4 to 2.21 of the Association's written submissions to the Australian Industrial Relations Commission on 8 April 2009.

> The composite rate for daily hire is 1/5th of the weekly rate without any added loading except for the added annual leave component.

6.7 Daily hire in the NSW Ski Industry Award is equivalent to seasonal employment in the Award.

6.8 The Association further notes that a seven member panel of the Commission considered the Award during the award modernisation process in 2010 and during that process no inconsistency was found between clause 11.5 of the Award and section 87(1) of the FW Act.

7 Inconsistency between clause 11.5 and section 90(1)

7.1 A further issue raised by the Full Bench in *Canavan* was that the payment of annual leave on a progressive basis, in advance, rather than when annual leave is taken, may result in an inconsistency with the payment obligation in section 90(1) of the FW Act, if an employee is paid an earlier and lower rate of pay than the rate of pay applicable at the time leave is taken.[6]

7.2 The Full Bench of the Commission, however, concluded that this impediment to approval could be overcome by an undertaking in appropriate terms.[7]

7.3 The Association accepts there being potential for an inconsistency between the current clause 11.5 of the Award and section 90(2) of the FW Act in this regard, if a seasonal employee is paid an earlier and lower rate of pay for annual leave prior to any Award indexation, which normally occurs in July, than the rate of pay applicable at the termination of the seasonal employees' employment, and the pre indexation component of annual leave is not outweighed by post indexation loading payments, including overtime. To avoid this potential outcome, the Association would be prepared to accept a variation to the Award, for a top up payment at the end of seasonal employment designed to ensure that no employee is worse off than they would be under section 90(2) of the FW Act.

7.4 Should the Commission wish to include such a clause in the Award, the Association proposes the following:

> *Should a seasonal employee's payment for annual leave, under clause 11.5 of the Award, result in a seasonal employee being worse off than they would be under section 90(2) of the Act, that seasonal employee will receive a top up payment at the end of the seasonal employment in the amount of any shortfall.*

7.5 In considering this decision the Commission is asked to consider paragraph 6.3(d) of these submissions and the more favourable conditions being applied to staff throughout the contract term in comparison to if such employees were on de-loaded rates and were accumulating annual leave.

7.6 The Association notes, however, that such an occurrence is unlikely to affect the few seasonal employees who are employed during the summer season, since the

[6] *Canavan* [38].
[7] *Canavan* [40].

summer season does not intersect the Award indexation that normally occurs in July.

8 Further matters

8.1 The Association reserves its right to make further submissions in this matter.

Harmers Workplace Lawyers

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