



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Annual leave

(AM2014/47)

BLACK COAL MINING INDUSTRY AWARD 2010

[MA000001]

Coal industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER HAMPTON

MELBOURNE, XX NOVEMBER 2017

4 yearly review of modern awards - annual leave common issue.

A. Further to the Full Bench decision issued by the Fair Work Commission on 22 September 2016¹, the above award is varied as follows:

1. By deleting clause 25.4 and inserting the following:

25.4 Excessive leave accruals: general provision

Note: Clauses 25.4 to 25.6 contain provisions, additional to the National Employment Standards, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Fair Work Act.

- (a) An employee has an **excessive leave accrual** if the employee has accrued more than **350 hours (10 weeks)** paid annual leave (or **420 hours (12 weeks)** paid annual leave for a shiftworker, as defined by clause 25.2(b)).
- (b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual.
- (c) Clause 25.5 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.

¹ [2016] FWCFB 6836; see also [2015] FWCFB 3406, [2015] FWCFB 5771, [2016] FWCFB 3177 and [2016] FWCFB 3953.

- (d) Clause 25.6 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

2. By renumbering clauses 25.5 to 25.12 as 25.7 to 25.14.

3. By inserting new clause 25.5 as follows:

25.5 Excessive leave accruals: direction by employer that leave be taken

- (a) If an employer has genuinely tried to reach agreement with an employee under clause 25.4(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave.
- (b) However, a direction by the employer under paragraph (a):
 - (i) is of no effect if it would result at any time in the employee's remaining accrued entitlement to paid annual leave being less than **210 hours (6 weeks)** when any other paid annual leave arrangements (whether made under clause 25.4, 25.5 or 25.6 or otherwise agreed by the employer and employee) are taken into account; and
 - (ii) must not require the employee to take any period of paid annual leave of less than **35 hours (one week)**; and
 - (iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and
 - (iv) must not be inconsistent with any leave arrangement agreed by the employer and employee.
- (c) The employee must take paid annual leave in accordance with a direction under paragraph (a) that is in effect.
- (d) An employee to whom a direction has been given under paragraph (a) may request to take a period of paid annual leave as if the direction had not been given.

Note 1: Paid annual leave arising from a request mentioned in paragraph (d) may result in the direction ceasing to have effect. See clause 25.5(b)(i).

Note 2: Under section 88(2) of the Fair Work Act, the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

4. By inserting new clause 25.6 as follows:

25.6 Excessive leave accruals: request by employee for leave

- (a) Clause 25.6 comes into operation from **XX November 2018**.

- (b) If an employee has genuinely tried to reach agreement with an employer under clause 25.4(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (c) However, an employee may only give a notice to the employer under paragraph (b) if:
 - (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
 - (ii) the employee has not been given a direction under clause 25.5(a) that, when any other paid annual leave arrangements (whether made under clause 25.4, 25.5 or 25.6 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (d) A notice given by an employee under paragraph (b) must not:
 - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than **210 hour (6 weeks)** when any other paid annual leave arrangements (whether made under clause 25.4, 25.5 or 25.6 or otherwise agreed by the employer and employee) are taken into account; or
 - (ii) provide for the employee to take any period of paid annual leave of less than **35 hours (one week)**; or
 - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
 - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.
- (e) An employee is not entitled to request by a notice under paragraph (b) more than **175 hours (5 weeks)** paid annual leave (or **210 hours (6 weeks)** paid annual leave for a shiftworker, as defined by clause 25.2(b)) in any period of 12 months.
- (f) The employer must grant paid annual leave requested by a notice under paragraph (b).

5. By deleting renumbered clause 25.12(a) and inserting the following:

- (a) **Despite the terms of clauses 25.4 to 25.6**, clause 25.12 applies if an employer intends to shutdown all or part of its operation for a particular period (**temporary shutdown period**) and wishes to require affected employees to take leave during that period.

6. By updating cross-references accordingly.
7. By deleting clause 25.6 and inserting the following:

25.6 Excessive leave accruals: request by employee for leave

- (a) If an employee has genuinely tried to reach agreement with an employer under clause 25.4(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (b) However, an employee may only give a notice to the employer under paragraph (a) if:
 - (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
 - (ii) the employee has not been given a direction under clause 25.5(a) that, when any other paid annual leave arrangements (whether made under clause 25.4, 25.5 or 25.6 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (c) A notice given by an employee under paragraph (a) must not:
 - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than **210 hours (6 weeks)** when any other paid annual leave arrangements (whether made under clause 25.4, 25.5 or 25.6 or otherwise agreed by the employer and employee) are taken into account; or
 - (ii) provide for the employee to take any period of paid annual leave of less than **35 hours (one week)**; or
 - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
 - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.
- (d) An employee is not entitled to request by a notice under paragraph (a) more than **175 hours (5 weeks)** paid annual leave (or **210 hours (6 weeks)** paid annual leave for a shiftworker, as defined by clause 25.2(b)) in any period of 12 months.

(e) The employer must grant paid annual leave requested by a notice under paragraph (a).

B. Items 1 to 6 of this determination come into operation from **XX November 2017**. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after **XX November 2017**.

C. Item 7 of this determination comes into operation from **XX November 2018**. In accordance with s.165(3) of the *Fair Work Act 2009* this item does not take effect until the start of the first full pay period that starts on or after **XX November 2018**.

PRESIDENT