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AM2015/1 Family & Domestic Violence Clause

Submissions in Response to
Statement [2017] FWCFB 4047
1 September 2017



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and Industry

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1. On 3 August 2017, the Full Bench of the Fair Work Commission issued a Statement [2017] FWCFB 4047 (**Statement**) in these proceedings *AM2015/1 - 4 yearly review of modern awards – Family & Domestic Violence Leave Clause* (**Proceedings**).
2. Attachment C of the Statement outlines directions (**Directions**) which concern the further proceedings in respect of the preliminary views expressed by the majority (Deputy President Gooley and Commissioner Spencer) ([2017] FWCFB 3494 at [6]) that:
 - (i) All employees should have access to unpaid family and domestic violence leave.
 - (ii) Employees should be able to access their National Employment Standards (**NES**) entitlement to personal/carer's leave for the purpose of taking family and domestic violence leave.
3. These submissions address Directions 1 and 3 of the Directions which requires:
 1. *All interested parties [to] file comprehensive written submissions and any further witness statements or documentary evidence on which the party seeks to rely by 4.00 pm on Friday 1 September 2017.*
 - ...
 3. *All submissions filed should address the issues set out in Attachment B to the 2 August 2017 Statement. Submissions are not limited to the issues identified in Attachment B.*
4. The issues identified in Attachment B of the Statement, and accordingly the issues addressed in these submissions, are as follows:

Part A: Unpaid Domestic Violence Leave

1. Should there be an entitlement to access unpaid domestic violence leave in Modern Awards?
2. If there is to be an entitlement to unpaid domestic violence leave in Modern Awards, then:
 - 2.1 What is the extent of the entitlement to unpaid domestic violence leave (i.e. quantum)?
 - 2.2 The circumstances in which the leave entitlement arises, including:
 - (a) the definition of 'family and domestic violence' for the purposes of the clause;
 - (b) the circumstances in which leave may be accessed (eg attending an appointment related to the violence); and
 - (c) who may access the entitlement.
 - 2.3 Accrual issues, in particular whether the leave entitlement is available in full at the start of the year or accrues.
 - 2.4 How would an employee access the entitlement (notice and evidentiary requirements)?

- 2.5 The availability of leave for part-time and casual employees.
- 2.6 The confidentiality of information provided by employees concerning their experience of family and domestic violence.
- 2.7 Whether taking unpaid family and domestic violence leave counts towards continuity of service.
- 2.8 Relationship/interaction with other forms of leave.

Part B: Extension of the NES entitlement to personal/carers leave to domestic violence leave

- 1. Does the Full Bench have jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave?
- 2. If so, should the NES entitlement to personal/carers leave be extended to incorporate domestic violence leave?
- 3. If the NES entitlement to personal/carers leave is to be extended to incorporate domestic violence leave, then:
 - 3.1 The circumstances in which the NES entitlement to personal/carers leave can be accessed for the purposes of domestic violence leave? This issue requires a consideration of definitional issues regarding domestic violence for the purposes of the clause, the purposes for which the leave could be accessed and who can access the entitlement.
 - 3.2 Should there be a cap on the amount of personal/carer's leave that can be taken for family and domestic violence leave purposes?
 - 3.3 Accrual issues, in particular whether the leave entitlement is available in full at the start of the year or accrues.
 - 3.4 How would an employee access the entitlement (notice and evidentiary requirements)?
 - 3.5 The availability of leave for part-time and casual employees.
 - 3.6 The confidentiality of information provided by employees concerning their experience of family and domestic violence.
 - 3.7 Whether taking unpaid family and domestic violence leave counts towards continuity of service.
 - 3.8 Relationship/interaction with other forms of leave.
- 5. These submissions are made in response to the questions posed above by the Full Bench.

A. Unpaid domestic violence leave

A1. SHOULD THERE BE AN ENTITLEMENT TO ACCESS UNPAID DOMESTIC VIOLENCE LEAVE IN MODERN AWARDS?

6. This question needs to be approached respectfully. It would be inappropriate to make any judgemental comments about the reasoning of either the majority or minority decision of the Full Bench in these proceedings.
7. The majority decision of the Full Bench has expressed a preliminary view that the answer to this question should be yes.
8. This view does not accord with the submissions of the Australian Chamber.
9. In closing submissions the Australian Chamber summarised the state of the evidence in the case (refer to PN2936 to PN2959 of the Transcript of 2 December 2016). The overwhelming majority of the case sought to show domestic violence as a social issue with very little focus on the need for the taking of leave in addition to that already provided in the NES. What evidence there was is difficult to describe as probative of the need for an entitlement to paid leave or unpaid leave.
10. Accordingly the Australian Chamber has not, respectfully changed its view as advanced in the case originally.
11. Notwithstanding this, the Australian Chamber does not consider it appropriate for the Full Bench to undertake a rehearing of matters on which parties have already been heard, and has approached this submission with the intention of assisting in the settling of orders.

A2. IF THERE IS TO BE AN ENTITLEMENT TO UNPAID DOMESTIC VIOLENCE LEAVE IN MODERN AWARDS, THEN:

12. The Full Bench is required to determine a rational and proper basis to answer the questions it poses assuming there is to be an entitlement to unpaid leave.
13. As already stated, there is very little available in the evidence to assist in resolving the questions posed.
14. Basing entitlements on bargaining outcomes is also unsound for two reasons.
15. Firstly, they occur in the context of a bargain in a particular enterprise and such benefits may have been material or simply thrown in to finalise a 'deal'.
16. Secondly, the Full Bench needs to be very wary of drawing bargained outcomes into the construction of what is a fair and relevant minimum safety net. It is inherent in their nature that these two elements of the Fair Work 'system' are distinct and serve a materially different role. The fact that a bargained entitlement exists does not constitute probative evidence in establishing that the inclusion of such an entitlement or its particular mechanical and operative terms in modern awards is necessary to achieve the modern awards objective.
17. Furthermore, the 'need to encourage collective bargaining' is a consideration that the Full Bench is required to take into account under the modern awards objective. This objective is not achieved by seeking to incorporate bargained entitlements into what is intended to operate as a minimum safety net.

Where then can the Full Bench seek guidance?

18. There was limited evidence to support the need for paid or unpaid leave (refer to PN2958 and PN2959 of the Transcript of 2 December 2016). Material was tendered regarding the amount of domestic violence leave taken in Telstra (being an average of 2.3 days per year by those using it) although this evidence has limitations (refer to paragraph 6.2 of the Expert Report of Ludo McFerran).
19. It is unclear whether this leave was a substitute for NES leave or separate.
20. Other areas where the Full Bench could seek guidance are the NES.
21. As section 134 of the Fair Work Act 2009 (Cth) (the “**Act**”) defines a safety net based on modern awards and the NES, the NES are a rational and proper basis to draw from in the context of the questions posed.
22. Awards do not usually provide for unpaid leave, but the NES includes various examples.
23. Section 102 of the Act provides for unpaid carer’s leave. The grant of leave is for two days’ leave per occasion subject to the section to provide care or support because of personal illness etc of another.
24. This leave has certain distinguishing features:
 - (a) it is event driven;
 - (b) the scope of the events is contained;
 - (c) the leave is not available if paid personal leave is available;
 - (d) the leave does not accrue; and
 - (e) the employee must give notice of the leave including evidence “...that would satisfy a reasonable person...” that the leave is taken for the purposes of the section of the Act.
25. Part 2-2, Division 8 of the Act provides for unpaid community service leave. There are two types of community service activity; jury service and voluntary emergency management activity.
26. Community service activity leave has certain distinguishing features:
 - (a) it is event driven;
 - (b) the scope of the events is contained;
 - (c) the entitlement arises out of a community based act of volunteerism;
 - (d) the extent of the absence is not quantified but needs to be “reasonable in all of the circumstances”;
 - (e) the leave does not accrue; and
 - (f) the employee must give notice of the leave including evidence “...that would satisfy a reasonable person...” that the leave is taken for the purposes of the section of the Act.
27. The period of leave associated with attending jury service is not subject to the “reasonable in all of the circumstances” test but proof of need is a disinterested external source, it operates at the direction of the State; attendance on jury service being taken to be an obligation falling on all adult citizens unless disqualified.

28. Jury service leave has certain distinguishing features:
- (a) it is event driven;
 - (b) the scope of the events is contained;
 - (c) the entitlement arises out of a primary obligation potentially falling on any adult in civil society (unless disqualified);
 - (d) the leave is paid leave for certain employees to a certain extent, but it does not become unpaid leave unless the employee is a casual or has exhausted the paid leave entitlement;
 - (e) the extent of the absence is not quantified;
 - (f) the leave does not accrue; and
 - (g) the employee must give notice of the leave including evidence “...that would satisfy a reasonable person...” that the leave is taken for the purposes of the section of the Act.
29. Section 70 of the Act sets the right to unpaid parental leave. The period of 12 months (or longer subject to agreement - refer section 76 of the Act) is a well accepted and uncontroversial period allowing an employee the opportunity to care for their child in its first year of infancy.
30. This leave has certain distinguishing features:
- (a) the period of leave is event based; and
 - (b) the leave does not accrue.
31. Section 80 and 82A of the Act provides for unpaid special maternity leave and unpaid no safe job leave which is protective in nature in case the woman concerned is not fit to work because of her pregnancy.
32. Section 85 of the Act provides for up to two days of unpaid pre-adoption leave to attend “interviews or examinations” which are part of the adoption process.
33. This leave has certain distinguishing features:
1. it is event driven;
 2. the scope of the events is contained;
 3. the leave is not available if some other form of leave is available and the employer directs that leave to be taken;
 4. the leave does not accrue; and
 5. the employer can require evidence “...that would satisfy a reasonable person that the leave is taken ...” for the purposes of the section of the Act.
34. Section 22 of the Act operates so that with limited exceptions periods of unpaid leave or unpaid authorised absence do not count as service but also that such periods do not break the continuity of employment.

35. Certain things follow from this guidance that the Full Bench should have regard to in answering its questions:
- (a) statutory unpaid leave is overwhelmingly limited in quantum;
 - (b) the purpose for taking the leave is clearly defined and is triggered by a specific event or cause;
 - (c) unpaid leave does not accumulate;
 - (d) well tested notification and evidence rules apply to the taking of unpaid leave;
 - (e) the NES contain explicit examples that unpaid leave should not be taken when a relevant form of paid leave is available.

2.1 What is the extent of the entitlement to unpaid domestic violence leave (i.e. quantum)?

36. As a matter of general guidance an employee should not get statutory unpaid leave if paid leave is available. In this case that would mean that if the circumstances of the taking of leave mean that the employee is eligible for paid personal/carer's leave then award-based unpaid leave should not be available.
37. Outside of this, what award-prescribed leave should be available? The nature of the leave is a little more specific than general personal/carers leave. It is more akin to compassionate leave (and pre-adoption leave) being occurrence based and not generally applicable; it does not have the features of general sickness nor any voluntary or community service character.
38. Based on this general guidance, and the Telstra experience, up to two to three (2 - 3) days per annum would sit comfortably with the NES and the very limited evidence in the case.

2.2 The circumstances in which leave may be accessed:

- (a) *the definition of 'family and domestic violence' for the purposes of the clause*
39. As demonstrated in the cross examination, this is a most vexed issue but one that might be addressed by considering the circumstances in which the leave may be accessed.
40. Absent this approach the definitions posed by the ACTU appear to be as 'long as a piece of string' and likely to include most 'heated divorces' or 'separations' that involve some form of emotional or economic pressure or distress.
41. It is important to avoid an unduly extended and impractically imprecise definition. We concede that we have not yet formed a definitive view on how this should be achieved. Arriving at this may require an iterative process.
42. Should the Full Bench conclude that, despite our concerns about imprecision and its consequences, a more generic sociological definition of 'family and domestic violence' is to be adopted (even in a contained form), we submit that it would need to be qualified effectively by the circumstances in which the leave can be accessed so as to be workable.

- (b) the circumstances in which leave may be accessed (eg. attending an appointment related to the violence)
43. While again limited in terms of probative evidence to support an answer, some meaningful guidance can be drawn from the evidence of Dr Peta Cox, Exhibit B-2.
44. A reasonable list of urgent circumstances arising from experiencing an incident of domestic violence (not otherwise comprehended by the NES) arise from Dr Cox's report. They include:
- (a) attendance with police to report on an incident of domestic violence (including any required ongoing attendance with police);
 - (b) attendance at Court;
 - (c) attendance with a lawyer;
 - (d) attendance with a Government service providing support to persons experiencing domestic violence; and
 - (e) attendance to locate refuge or shelter or temporary accommodation.
45. Accordingly the circumstances triggering the leave could reasonably be contained to these situations.
46. A question arises as to whether or not the employee can practically deal with these matters outside work time and we think that when this is available it should be done. However when it is impracticable or necessary to use work time then the leave would be available.
- (c) Who may access the entitlement
47. The general guidance from the Act is that all employees including casual employees are given access to statutory unpaid leave.
- 2.3 Accrual issues, in particular whether the leave entitlement is available in full at the start of the year or accrues**
48. The general guidance from the Act is that unpaid leave does not accrue.
49. A consideration of the character of this leave has it sitting between contained occurrence based leave like compassionate leave and a more general usage leave like personal leave.
50. Consistent with the role of awards in providing the safety net, the requisite caution required when introducing a new entitlement and the limited evidence, a capped per year non-accruing approach commends itself as being best aligned.
51. These conclusions reached in paragraph 39 to 50 accords well with section 134(1)(g).
- 2.4 How would the employee access the entitlement (notice and evidentiary requirements)?**
52. The general guidance from the Act supports the adoption of the consistently applied test in the Act; evidence "...that would satisfy a reasonable person..." that the leave is taken for the purpose articulated.
53. This provides broad scope for an employer to manage this issue sensitively and to also make reasonable enquiries if concerned about validity.

2.5 The availability of leave for part-time and casual employees

54. This seems uncontroversial. Again the guidance from the Act supports the view that casual and part time employees be entitled to access forms of unpaid leave. There seems little present in this case to conclude differently.

2.6 The confidentiality of information provided by employees concerning their experience of family and domestic violence

55. There seems little warrant to add additional privacy obligations to any grant of unpaid leave and to do so would amount to unnecessary complexity and prescription.

56. Employees accessing personal leave and other forms of leave for reasons that could be described as sensitive have not required this for such leave to be accessed and administered in a fair and orderly manner.

57. For many employees being diagnosed with a health condition, undergoing a medical procedure or experiencing difficult personal circumstances that impact their ability to attend for work could invoke many of the anxieties that could accompany notifying an employer about domestic violence. There is no evidence to suggest that additional prescription in modern awards to direct employers about the way in which they are required to deal with requests for domestic violence, or indeed other forms of leave, is necessary.

58. While this was not the subject of evidence in the case, and while we have not done an exhaustive review, we understand that in some jurisdictions, there are mandatory reporting requirements on persons who become aware of instances of domestic violence. These types of matters make the question of confidentiality more problematic than may have otherwise thought the case.

2.7 Whether taking unpaid family and domestic violence leave counts towards continuity of service

59. Again, the general guidance from the Act in section 22 should answer this question.

60. The leave should not count as service but the leave should also not break the continuity of service.

2.8 Relationship/interaction with other forms of leave

61. The general guidance from the Act supports the view that an employee should not take unpaid leave when another form of paid leave is available; in this case personal/carer's leave which could be triggered in many circumstances involving domestic violence.

62. Our answers above about access have however dealt with this in a manner that is simple for an employer and employee to understand and are consistent with the very limited evidence in this case.

B. Extension of the NES entitlement to personal/carer's leave to domestic violence leave

B1. Does the Full Bench have jurisdiction to extend the NES entitlement to personal/carers leave to incorporate domestic violence leave?

63. This question has been the subject of submissions previously in the case.

64. Leave arising from Part 2-2, Division 7 of the Act may well be available in circumstances that have at their root domestic violence; for example, the need to attend a doctor to deal with an injury arising from a domestic assault.

65. The National Employment Standards are a set of minimum standards that apply to all "national system employees". This is made clear by section 61 of the Act:

"The National Employment Standards are minimum standards applying to employment of employees

(1) This part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5)."

66. Section 55 of the Act provides that a term of a modern award or enterprise agreement must not exclude any provision of the NES. This reinforces the standing of the NES as a basic minimum standard of entitlements that is to apply to all national system employees. Equally, the Explanatory Memorandum to the Act (**Explanatory Memorandum**) describes the NES as "*Legislated Minimum Employment Standards*".

67. Although the NES is the minimum standard, subsection 55(4) allows modern awards and enterprise agreements to include terms that are ancillary to, or supplement, the NES. That is, modern awards and enterprise agreements can include terms:

(a) explaining how NES entitlements are to be paid (see Note 1 under subsection 55(4)); or

(b) that increases the value or quantum of NES entitlements (see Note 2 under subsection 55(4)).

68. The words of section 55(4) need focus. Section 55(4) states:

"(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

*(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" [emphasis added]*

If there is a situation under an award provision where the employee is in any respect worse off than the strict NES entitlement contemplates, it would fall foul of this hurdle.

69. Perhaps contrary to the notation in the section, these words should be read to provide an absolute protection to the NES not just as a whole or in concept but in relation to every individual element.

70. The words support the view that elements of the NES cannot be offset by an increased benefit in one area outweighing a detriment in another.

71. By creating a provision in a modern award that allows access to take NES personal/carer's leave in circumstances not contemplated by the NES itself would superficially be seen as advantageous to an employee.
72. The difficulty with this arises when the employee seeks to take paid personal/carer's leave for the actual purpose of that leave as contemplated by the NES and when so doing finds that their available paid leave is less than contemplated by the NES (because it was used for a non NES purpose and deducted).
73. At this point the award provision has operated to create a detriment for the employee with respect to his or her paid entitlement (a detriment in any respect) and section 55(4) is offended.
74. Any change to the NES entitlement to expand conditions of access would require legislative change.
75. Given our answer to the question above we have not answered questions B2 or B3.

Proposed Clause

76. Based on these submissions we have set out in Annexure A our proposed draft clause to give effect to the majority decision.



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Annexure A

1.1 Entitlement

An employee who experiences an act or acts of domestic violence committed by a member of the employee's immediate family and who is a member of the employee's household shall be entitled to take up to three days leave without pay in a calendar year to attend:

- (a) with police to report on an incident of domestic violence (including any required ongoing attendance with police);
- (b) court associated with the act or acts;
- (c) with a lawyer to seek advice or representation in relation to or arising from the act or acts;
- (e) a Government support service providing support to persons experiencing domestic violence; or
- (f) locate refuge or shelter or temporary accommodation in relation to or arising from the act or acts,

provided it is impracticable to attend outside work time.

1.2 Leave not to be taken if personal leave is available

Despite anything else in this clause, an employee is not entitled to take leave under this clause if the employee was otherwise entitled to take personal/carers leave.

1.3 Notice

- (a) An employee must give their employer notice of the taking of leave under this clause by the employee.
- (b) The notice must:
 - (i) be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (ii) advise the employer of the period, or expected period of the leave.

1.4 Evidence

- (a) An employee who has given their employer notice of the taking of leave under this clause must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in this clause and it was impracticable to attend outside work time.
- (b) To avoid any doubt, a statutory declaration is sufficient for the purposes of clause 1.4(a).

1.5 Additional Leave by agreement

An employer and an employee may agree to allow the employee to take unpaid leave in addition to the leave set out in clause 1.1 above.

1.5 **Definitions**

In this clause the following words have the following meaning:

Domestic Violence means [insert].

Immediate Family means a spouse, de facto partner, child, parent or sibling of the employee.

Australian Chamber Members

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