

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2016/15

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – plain language re-drafting – substitution of public holidays (AM2016/15)

SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION)

17th May 2018

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| Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) ABN 46 243 168 565 | Contact Person: Stuart Maxwell, Senior National Industrial Officer | Address for Service: Level 9, 215-217 Clarence Street Sydney NSW 2000 | T: F: E: | (02) 8524 5800 (02) 8524 5801 hearings@fed.cfmeu.asn.au smaxwell@cfmeu.org |
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Introduction

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) as required by s.156 of the *Fair Work Act 2009* (the FW Act). On the 15th March 2018 the President, Justice Ross, issued a Statement ([2018] FWC 1501) in relation to the substitution of public holidays and alleged inconsistencies with the NES. In the Statement, Justice Ross determined that a “*broader review of all awards containing a term which provides for the substitution of public holidays by either majority agreement, or unilaterally by an employer, is required*” and referred a number of awards listed in Attachments A and B to the Statement and the Sporting Organisations Award 2010 to the Plain Language Full Bench for review.¹
2. On 27th April 2018, Vice President Hatcher issued directions in regard to the matters referred to the Plain Language Full Bench by the President. The directions invited interested parties to make submissions on the following issues:
 - The accuracy of the list of substitution clauses referred to the Plain Language Full Bench referred to in paragraph [10] of [2018] FWC 1501; and
 - Whether an award term which permits public holidays substitution by agreement between an employer and a majority of employees excludes the NES or any provision of the NES, within the meaning of s.55(1).
3. The directions further required such submissions to be filed by 4.00 pm on 17th May 2018. This submission is made in accordance with those directions.
4. It should be noted that this submission is made on behalf of both the Construction and General and Mining and Energy Divisions of the CFMMEU.

Accuracy of the List of Substitution Clauses Referred to the Plain Language Full Bench

5. The CFMMEU has considered the list of awards, contained in Attachment A to the Statement of the President, and agrees that the following awards that it has an interest in contain clauses that allow for public holidays to be substituted by majority agreement (although there are minor differences in the precise wording in the awards):
 - *Black Coal Mining Industry Award 2010*
 - *Building and Construction General On-site Award 2010*
 - *Concrete Products Award 2010*

¹ [2018] FWC 1501 at paragraph [10]

- *Joinery and Building Trades Award 2010*
 - *Mobile Crane Hiring Award 2010*
6. However, in a number of the Awards listed in Attachment A the substitution is not limited to majority agreement as they also permit individual employee agreement. These awards are:
- *Electrical Power Industry Award 2010*
 - *Manufacturing and Associated Industries and Occupations Award 2010*
 - *Mining Industry Award 2010*
 - *Waste Management Award 2010*

Do Terms Referring to Agreement with a Majority of Employees Exclude the NES or Any Provision of the NES?

7. In regard to the second matter identified in the directions issued by Vice President Hatcher, the CFMMEU submits that an award term which permits public holidays substitution by agreement between an employer and a majority of employees does not exclude the NES or any provision of the NES, within the meaning of s.55(1) of the FW Act.
8. Section 55(4)(a) of the FW Act permits awards to include terms that are ancillary or incidental to the operation of an entitlement of an employee under 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.
9. Sections 55(6) and (7) of the FW Act are also important considerations in this matter. They provide as follows:

Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the award or agreement entitlement) that is the same as an entitlement (the NES entitlement) of the employee under the National Employment Standards:

- (a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

10. The terms in the awards that allow for substitution by agreement between the employer and a majority of employees (whether it be in an enterprise or section of an enterprise) do not reduce the employees entitlement to the number of public holidays determined in accordance with s.115(1) of the FW Act.
11. Nor do such terms remove the employers ability to make a reasonable request for an employee to work on a public holiday (s.114(2)) or the employees ability to refuse such request if it is unreasonable or if the employees refusal is reasonable (s.114(3)).
12. The substitution provision does not remove the employee's entitlement for payment of the ordinary hours on the day or part day for which they are absent if it is a public holiday (s.116).
13. The substitution provision is nothing more than a facilitative provision that allows for agreement to be reached in a practical way in a workplace as to which day is to be treated as the public holiday. Its main effect is to determine whether or not penalty rates are to be paid for work on a particular day. It does not remove an employee's entitlement or the benefits under the NES taken as a whole.
14. Whilst the wording in the awards is not exactly the same as the wording in s.115(3) of the FW Act, the discretionary power of this provision allows the Commission to include in

awards terms that operate in a practical way, as determined by the industry parties, taking into account the way in which work is typically organised. The NES does not prescribe the specific term to be included in awards.

15. The preliminary and jurisdictional issues decision of the Full Bench in AM2015/1 and AM2015/2 provides support for the argument that, even if s.115(3) is considered a provision of the NES, the ancillary nature of the terms in the awards does not mean that the terms contravene s.55(1),

“we consider that it is reasonably arguable that the effect of s.55(7) is that a modern award term which, under s.55(4), is supplementary to a NES provision and does not result in any detriment to an employee when compared to the NES as a whole, does not contravene s.55(1) even if it excludes some other provision of the NES.”²

Conclusion

16. The award terms that permit public holidays substitution by agreement between an employer and a majority of employees do not exclude the NES or any provision of the NES, within the meaning of s.55(1) of the FW Act.

² [2015] FWCFB 5585 at paragraph [24]