

IN THE FAIR WORK COMMISSION

2014 Award Review

(AM2016/15)

Community and Public Sector Union (CPSU) (PSU Group)

Submissions in plain language re-drafting and substitution of public holidays by agreement

Introduction

1. On 15 March 2018 President Ross as part of the plain language re-drafting common issue issued a Statement and Directions.
2. Those Directions of 27 April 2018 called for submissions from interested parties regarding:
 - The accuracy of the list of substitution clauses referred to the Plain Language Full Bench in the 15 March 2018 Statement; and
 - Whether an award term which permits public holidays substitution by agreement between the employer and a majority of employees excludes the NES or any provision of the NES, within the meaning of s55(1).

Accuracy of the list of substitution clauses in the 15 March 2015 Statement

3. The CPSU confirms the following modern industry awards listed in the 15 March 2018 Statement in which the CPSU has an interest contain clauses that in various ways provide for substitution of public holidays by agreement with the majority of employees:

Airport Employees Award

Broadcasting Recorded Entertainment and Cinemas Award clause 26.2

Business Equipment Award

Contract Call Centres Award

Labour Market Assistance Award

Telecommunications Services Award

Whether such an award term excludes the NES

4. Relevantly, s115(3) provides:

A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

5. The CPSU's first submissions is that s115(3) allows a discretion for awards to include such a term and therefore a different term that provides for groups of employees to agree to substitution is not in conflict with it. Such a term would be permitted by s55(4) as either

ancillary or supplemental to leave and penalty provisions under s139 of the Act. A provision allowing for agreement of a group of employees does not bring that clause into conflict with the NES either under s115 or under the range of factors in determining reasonableness in s114 of the Act dealing with requests to work on public holidays.

6. If the Commission does not accept this submission, and is of the view that an award term which provides for public holiday substitution by agreement between the employer and a majority of employees would be a term in conflict with s115(3) of the Act, the CPSU provides the following alternative argument. That an award provision for majoritarian agreement when used in conjunction with provision for individual agreement substitution does not conflict with s115(3). For example, the *Telecommunication Services Award* provides:

26.2 Substitution of public holidays

An employer and a majority of affected employees or an individual employee may reach agreement in writing to substitute a day or part-day for a day or part-day that would otherwise be a public holiday under terms of the NES

The *Contract Call Centres Award* provides:

30.3 Substitution of certain public holidays by agreement at the enterprise

(a) By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday instead of any of the prescribed days.

(b) An employer and an individual employee may agree to the employee taking another day as the public holiday instead of the day which is being observed as the public holiday in the enterprise or relevant section of the enterprise. Such agreement must be recorded in the time and wages records.

7. The CPSU says the *Broadcasting Recorded Entertainment and Cinemas Award*, *Contract Call Centres Award*, *Miscellaneous Award* and the *Telecommunications Services Award* in different ways contain provisions for both collective agreement to substitution and individual agreement to substitution of a public holiday. The *Labour Market Assistance Award* only provides for individual substitution of public holidays for National Aboriginal Day of Celebration.
8. For the *Airport Employees Award*, individual substitution occurs after the group have collectively decided substitution arrangements. The CPSU says such arrangements do not conflict with s115(3) which does not prevent preconditions or limitations being included in an award around how that individual flexibility may occur, such as through democratic participation. In this fashion such terms could be seen as ancillary or supplementary to the NES under s55(4) of the Act.

9. The CPSU says it is an important feature of the award landscape that substitution can occur by collective design and decision making, especially in rostered or shift environments. A collective process allows for workers to discuss issues with co-workers at their workplace and form their view about the issue as a group. Such a process has utility occurring before an employee reaches agreement or disagreement individually with their employer.

Conclusion

10. The CPSU says that terms providing for majoritarian agreement for substitution are not prevented by s115(3) which deals with a FWC discretion to include individual substitution terms. In the alternative, the CPSU says awards can and should continue to provide for collective agreement to substitution arrangements as part of a facilitative clause or in conjunction with individual agreement. Clauses providing for both forms of substitution would not conflict with s115(3).

CPSU Sydney

17 May 2018