Australian Meat Industry Council

4 Yearly Review of Modern Awards – Plain Language – Shutdown Provisions [2022] FWCFB 161

Meat Industry Award 2020

Date: Friday, 18 November 2022

Via Email: AMOD@fwc.gov.au

Filed By:
Stacey McKenna
General Manager – Workforce Services
Australian Meat Industry Council
smckenna@amic.org.au

AMIC Australian Meat Industry Council

Introduction

1. We refer to the decision of the Full Bench in *[2022] FWCFB 161* (the Decision) relating to the formulation of new Shutdown provisions in a range of modern awards, one of which is the Meat Industry Award MA000059 (the Award).
2. The Australian Meat Industry Council ("AMIC") is the peak employer body representing employers covered by the Award, and has a critical interest in the ongoing terms of the Award.
3. In the Decision at [149] the Full Bench commenced to outline its "provisional" conclusions in respect of the establishment of a model term to replace the existing shutdown clauses in 78 named modern awards. At [161] the Full Bench declared its intention to publish draft determinations in a manner consistent with the provisional views and conclusions stated in the Decision. A draft determination in relation to the Award has been published as foreshadowed.
4. The Full Bench invited interested parties to lodge any submissions in response to the provisional views and conclusions stated in the Decision at paragraphs [149]-[160], and concerning the terms of the draft determinations.
5. As an interested party in relation to the Award, AMIC makes the submissions set out below in relation to the provisional views and conclusions stated in the Decision, and the draft determination relating specifically to the Award.

Submission

6. AMIC concurs generally with those submissions which have been made by other interested parties which challenge the provisional conclusions to the effect that the Full Bench has no jurisdiction under the Fair Work Act ("the FW Act") to include certain critical features of existing award shutdown clauses, and is therefore bound to remove and not replace them.
7. In particular, reference is made to the five "basal propositions" set out in the Decision from [138]-[145]. These propositions are said to be derived from the matters discussed in the paragraphs immediately preceding [138] of the Decision. AMIC submits that the third and fourth of those propositions contain significant error, which error has caused the framing of the proposed draft determination to be affected by significant omission and unfairness.
8. The core submissions made by AMIC on behalf of its members in respect of those propositions are as follows:

Third Proposition [140]

9. It has been provisionally determined in the Decision at [140] that a shutdown clause cannot include a provision to the effect that an employer can stand down an employee without pay during a shutdown period which is for the purpose of facilitating annual leave, if the employee does not have sufficient accrued annual leave entitlements. Whilst it is correct to say that the provisions currently concerning shutdowns in modern awards are contained within the annual leave clauses of those awards, the jurisdiction of the FWC to retain certain award provisions presently contained in such clauses is not confined by that historical circumstance.
10. It is submitted that the Full Bench incorrectly characterised the nature and purpose of the provision which is said to be unable to be included. This is because there can be no doubt that the FWC has been granted the power under section 139(1) all (h) to include terms about leave and arrangements for taking leave in a modern award. In conferring such power, the FW Act draws no distinction between leave that is fully paid, partly paid, or unpaid, or granted or directed or authorised by the employer.
11. The existing shutdown clauses are primarily concerned with the arrangements for the taking of paid annual leave in circumstances of employers who are required to cease essentially all productive work at the processing facility to allow the processing workforce to take annual leave. This is an essential activity in the meat industry which is required in order to maintain the presence of a critical mass of skilled labour at all times when production is occurring, in the context of a sequential processing function involving teams of employees exercising diverse skills to process fresh food.
12. However, despite the primary purpose of the clause being as mentioned above, the clause also has an ancillary and related purpose of dealing with the leave arrangements of employees who have not, at the time of the necessary shutdown, qualified for paid annual leave as provided for in the general annual leave provisions of the award. It is incorrect to say, as appears to be asserted in [140], that the leave entitlements of such employees cannot be addressed or provided for in the shutdown clause, and any such provision in a shutdown clause must be removed as not being incidental to or necessary for the practical operation of a provision.
13. Respectfully, the error in reasoning is that the characterisation of the shutdown provision as being "about the taking of paid annual leave" is only partly correct. The clause is about more than that and is also concerned with addressing the question of what special leave arrangements should apply during the particular circumstances of a shutdown for the stated purpose, which is a circumstance that is different from the ordinary course of the granting and conferral of leave throughout a year in an establishment which is not subject to such a shutdown.
14. Although the predominant focus of the clauses is understandably on the substantial majority of the workforce who would be expected to have an entitlement to paid annual

leave, it is an error to suggest that the clause is confined only to the subject matter of paid annual leave.

15. To characterise the clause in this way would be to wrongly suggest that past Commissions who formulated the shutdown clauses were not intending to deal comprehensively with the leave arrangements and entitlements, both by inclusion and exclusion, of all employees affected by the shutdown. If the shutdown clause is correctly characterised as being one dealing with the manner in which leave entitlements found elsewhere in the Award are to be modified in the particular circumstances where the workplace is to be closed or specified purpose, it is entirely incidental to or necessary for the practical operation of such a provision to provide for those employees who have accrued sufficient pro rata leave so as to be able to take that leave, but to provide also for those employees who have not become entitled to physically take such paid leave or receive pro rata payment for that leave if it was to be taken at the time of the shutdown.
16. Clause 25.8 of the Award which is discussed in the Decision is plainly intending to deal with the overall question of leave entitlements and arrangements in a context where the vast majority of employees could be expected to have an entitlement for paid annual leave, but a smaller component of affected employees would not have that entitlement.
17. It is logical, sensible, fair and necessary for provision to be made in the Award for what is to occur in relation to that minority whilst their workplace is closed and their cohort is placed on paid leave. Such a provision is itself a provision in relation to leave, or arrangements for taking leave, and is incidental to and necessary for the practical operation of a provision which is designed to accommodate the working and leave entitlements of the entire production workforce, not simply that part of the workforce which has otherwise qualified for paid annual leave.
18. For this reason, it is respectfully submitted that the provisional conclusion in [140] is incorrect. It follows that a provisional conclusion that a clause about the standdown of employees without pay is prohibited in a shutdown clause, as contended in that paragraph, should not be adopted in this matter.

Fourth Proposition [141]-[144]

19. The Full Bench points [in 141] to the absence of any award entitlement to leave without pay (or an entitlement to request such leave) as justifying a conclusion that there is no power under the FW Act to include in an award a provision by which the employer may require an employee to take leave without pay during a shutdown period.
20. However, as is conceded in the Decision at [141], section 139 (1) (h) empowers the FWC to establish an award entitlement to leave without pay. If the shutdown provision relating to leave without pay for employees engaged in a plant which is closing temporarily for a specified reason is interpreted as being an existing award provision which creates an entitlement to leave without pay, then, respectfully, it is not clear why it is said that there is such an absence, and why it should be that a separate entitlement must be found elsewhere in the Award before the existing provision can be supported.
21. If the impugned provisions confer an entitlement to leave without pay, then they are supportable in their own right under section 139 (1) (h) as being an entitlement to leave. A further embellishment on that provision which entitles the employer to direct that such leave without pay be taken at the same time as the entire production cohort is also absent from the business, and whilst there is no work to be done, then such a provision would be incidental to, or necessary for the practical operation of, the primary provision conferring leave without pay in the particular circumstances. It would also arguably be a provision directly supported by section 139 (1) (h) as being a provision about arrangements for taking leave, or additionally, under section 139 (1) (c) as being an arrangement for when work is performed, including hours of work and variations to working hours.
22. AMIC also submits that the reasoning in [141] to the effect that a provision providing for an employer to direct the taking of leave without pay, is "not about leave at all" and is therefore not authorised by section 139 (1) (h), is, respectfully, entirely incorrect.
23. The concept of "leave" has an industrial history as long as the concept of employment itself. It is submitted that it notoriously refers to a period during which an employee is absent from the workplace, with the knowledge and consent of the employer or under the authority of the law, without terminating or otherwise harming the existence of their employment relationship. In modern times such leave periods are generally, but not always, paid in the same or similar matter to the employment which has been left, however there are numerous examples in modern awards and the FW Act and in contracts of employment of an employee being entitled or authorised to "leave" the workplace for a period and not perform any work, without being entitled to payment for the period.
24. It cannot be inferred that the unqualified use of the word "leave" in section 139 (1) (h), without reference to whether the leave is paid, partly paid or unpaid, is intended to exclude the concept of leave without pay. Nor is it accepted that there is any distinction to be found between an authority by the employer or a direction of the employer, which would place such leave outside the scope of section 139 (1)(h). Importantly, this submission is directed towards the question as to whether the subject matter of a direction to take unpaid leave is

capable of forming part of an award. The merit of doing so is a matter of fairness is a different question and would be assessed against the circumstances of each particular industry.

25. However, to the extent that it is appropriate to deal with questions of merit in this context, directed leave can be highly beneficial to an employee as an alternative to termination of their employment, casualisation of their employment or other impact on the security of their employment caused by reason of the periodic shutdown of their workplace.
26. The suggested parallel between the asserted practical outcome of a standdown, which may or may not be permissible under section 524 of the FW Act or an enterprise agreement or employment contract, is neither valid nor relevant. The clauses in contention in these proceedings impose strict limitations upon the circumstances upon which an employee might be directed to take unpaid leave, in a particular context where entire workforce is being stood aside and directed to take paid leave, and as a means of avoiding or minimising the possible termination or casualisation of the relevant employees.
27. The criteria under which a standdown might occur under section 524 are limited in a very different way, for a very different purpose, and in most circumstances would have no application to the circumstances prescribed in the shutdown clauses. It is, respectfully, not correct to suggest that the existing award entitlement that permits an employer to direct an employee to take leave without pay is merely an exercise of "re-labelling". The criteria that must be satisfied in the circumstances under which such an exercise might occur are substantially different in each case, and for the most part unlikely to be able to be utilised in replacement for each other. If the legislature has seen fit to confer an entitlement to make award provision for "leave", without reference to who may have authorised or directed such leave and without reference to whether such leave is paid or unpaid, it is not permissible to treat that wide conferral of power as being limited by the matters referred to in the concluding sentences of [141].
28. The fact that a practical outcome which is superficially similar in particular circumstances can be achieved under two different provisions of the FW Act is no reason why both provisions should not be able to be adopted and applied to their fullest permissible extent. The legislation does not erect any barrier of mutual exclusivity as between the provisions referred to in the Decision. Further, to hold that unpaid leave which may be directed by an employer is not "leave" for the purposes of the FW Act is, respectfully, to impermissibly import words and concepts into the legislation to deny the words used their clear and literal meaning.
29. For these reasons the conclusions provisionally reached in the Fourth proposition should not be adopted in the ultimate resolution of this matter.

The proposed Determination

30. AMIC has no substantive objection to the terms which are written in the proposed draft Determination, but rather has a significant objection to the removal of significant attributes of the existing award clause. That is, AMIC opposes the making of a determination which results in the removal from the terms of the existing clause 25.8 of any entitlement on the part of an employer to direct an employee to take unpaid leave that corresponds with the period of the shutdown, whilst other members of the production cohort are being required to utilise their paid annual (or other) leave.
31. It is submitted that if the Full Bench accepts the above submissions by AMIC, and other submissions to a similar effect by other interested parties, the question of the jurisdiction of the FWC to grant such a provision will be required to be reversed from the present provisional view. In such a case, the fairness and merit of maintaining such an entitlement will arise for consideration.
32. AMIC would request the right to be further heard in relation to the fairness aspect of maintaining such a provision, in an industry in which the shutdown of the meat processing facility has been a regular and necessary activity over very many decades.
33. It is not to the point that such a provision can be readily incorporated in an enterprise agreement, as many meat processing businesses operate under the Award, without any enterprise agreement. Those who do have the capacity to make an enterprise agreement which includes such a provision will be required to provide a significant additional component in the costings and comparisons for the purpose of the BOOT test, as it will now be necessary for the first time to allow for additional costs associated with paying wages for no work during the necessary shutdown, which cost did not previously exist.
34. Further, under the proposed Award determination, employees who have earned paid annual leave by virtue of their service throughout the year will be placed in an inferior position, so far as entitlement to income during the shutdown period is concerned, when compared to employees who have not accrued sufficient paid annual leave in that way, or have utilised their paid annual leave otherwise during the year.
35. The first group will be required to exhaust their paid leave entitlements whilst absent from the plant because it is closed. The second group will be entitled to receive full pay and not exhaust any part of their leave accruals, whilst also being absent from the plant because it is closed. The clear inequity of this position, which has not existed before, would militate against its implementation into the Award for the first time.

AUSTRALIAN MEAT INDUSTRY COUNCIL
ABN 65 990 653 488

Level 2, 460 Pacific Highway
ST LEONARDS
NSW, 2065