

IN THE FAIR WORK COMMISSION

Matter No.: AM2016/15 Plain Language Standard Clauses



Submission of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

27 July 2018

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) seeks leave to file the following submission to the Fair Work Commission in this matter AM2016/15 Plain Language Standard Clauses.
2. The Full Bench Statement 19 July 2018¹ sought submissions from parties by 4pm on Friday 27 July 2018 in relation to "issue 2" which related to the AiGroup's assertions about an employer's ability to deduct monies. The Statement also canvassed "issue 1" which related to an employees entitlement to benefits and payments they would have received, where they leave during the period the employer gave notice of the redundancy.
3. The 19 July 2018 Statement did not ask for parties to file submissions in respect of issue 1. However, a conference is being convened by the Commission on 2 August to discuss issue 1 and 2.
4. On issue 1, the AMWU respectfully requests an opportunity to file this submission which is filed at the same time as the deadline for issue 2 and which should give parties sufficient time to review its contents prior to the conference.
5. This submission will present the relevant history of the clauses in various Awards.
6. The history points to accrued service for the redundancy entitlement being calculated on the same basis as the annual leave entitlement.

Relevant History

7. It is relevant that the full "Severance" clause in the pre-modern federal Awards included a specific sub-clause which referenced the calculation of service for Annual leave payments in the context of severance (redundancy) payments.
8. In the *Metal, Engineering and Associated Industries Award 1998 AP789529CRV*² (Metals 98) within clause 4.4 Redundancy, underneath the severance pay tables (which are now in the NES), there was a sub-clause 4.4.2(d), which provided as follows:

"4.4.2(d) Continuity of service shall be calculated in the manner prescribed by 7.1.5. Provided that service prior to 8 June 2004 shall not be taken into account in calculating an entitlement to severance pay for an employee of a small employer pursuant to 4.4.2(b).

9. Sub-clause 7.1.5 is a sub-clause within clause 7.1 Annual Leave.
10. Sub-clause 7.1.5 provides as follows:

"7.1.5 How to Calculate the Leave Entitlement

¹ [\[2018\] FWCFB 4181](#)

² Metal, Engineering and Associated Industries Award 1998 [AP789529CRV](#)

7.1.5(a) Except for the following, any absences from work are not to be taken into account and will not count as time worked in calculating the leave entitlement:

- in a 12 month period the employee is entitled to have off up to 152 ordinary working hours because of sickness or accident and this will be counted as time worked (i.e. worker's compensation leave, paid sick leave, paid carers leave).
- long service leave, annual leave, public holidays, paid bereavement leave, paid training leave and jury service taken by an employee will count as time worked.
- any interruption or termination of the employment by the employer which has been made with the intention of avoiding obligations under this clause.

7.1.5(b) Absences from work which do not count as time worked in calculating the leave entitlement but do not break continuity of service for the purposes of this award include:

- any absence with reasonable cause, proof of which shall be upon the employee.
- any leave without pay taken with the agreement of the employer.
- parental leave.

7.1.5(c) Where a business is transmitted from one employer to another, as set out in 4.4.2 of this award, the period of continuous service that the employee had with the transmittor or any prior transmittor shall be deemed to be service with the transmittee and taken into account when calculating annual leave. However an employee shall not be entitled to leave or payment in lieu for any period in respect of which leave has been taken or paid for."

11. The structure of the clauses make it clear that continuity of service and the way that service is calculated is the same for both Redundancy and Annual Leave.
12. This is the context of the original clause whose meaning is now being disputed. The original clause which is now H.2 in the Commission's proposed clause, was clause 4.4.7 of the Metals 98 Award. Clause 4.4.7 provided as follows:

"4.4.7 Employee leaving during notice period

An employee given notice of termination in circumstances of redundancy may terminate his/her employment during the period of notice set out in 4.3.1(a). In this circumstance the employee will be entitled to receive the benefits and payments they would have received under this clause had

they remained with the employer until the expiry of the notice, but will not be entitled to payment in lieu of notice.”

13. There is no indication that the calculation of service would be different for the calculation of annual leave as compared to redundancy.
14. In importing the clause over into the Modern Awards, there does not appear to be any intention that there would be a different operation of the clause, arising out of the new structure of the terms.
15. Changing the Annual Leave payment as contended by the AiGroup does not appear to be considered by the Award Modernisation Full Bench. In the Statement³ accompanying the exposure drafts where this clause is imported across, the Award Modernisation Full Bench made the following remark:

“Redundancy

[23] We have also drafted a model provision dealing with redundancy. The draft clause contains provisions dealing with transfer to lower paid duties, employees leaving during a notice period and a job search leave entitlement. In addition the draft clause includes severance pay, at reduced levels, for employees of small employers. That provision is designed to operate prospectively and would therefore not apply to periods of service prior to 1 January 2010.”

16. In the decision which made the priority Awards and retained this provision for “employee leaving during a notice period”, the Full Bench did not deal with any change in the interpretation of the clause or the effect of it.⁴
17. Equivalent terms about continuity of service referring to the Annual Leave clause existed in the following pre-modern Awards:
 - a. AP782505CR - Graphics Arts - General - Award 2000⁵
 - b. AP800937CRV - Timber and Allied Industries Award 1999⁶
 - c. AP781106CRV - Food Preservers’ Award 2000⁷
 - d. AP790767 - New South Wales Sugar Industry (AWU) Award 1999⁸

³ [\[2008\] AIRCFB 717](#)

⁴ [\[2008\] AIRCFB 1000](#) paragraphs [53] to [62] cover other matters but not this specific issue

⁵ [AP782505CR - Graphics Arts - General - Award 2000](#) at clause 4.2.5(d)(iv)

⁶ [AP800937CRV - Timber and Allied Industries Award 1999](#) at clause 20.3.4

⁷ [AP781106CRV - Food Preservers’ Award 2000](#) at clause 14.3.4

⁸ [AP790767 - New South Wales Sugar Industry \(AWU\) Award 1999](#) This is the only federal pre-reform Award in the industry. Clauses 14.5.3(d) and 14.1.6 refer to the Annual Leave provisions in the NSW legislation *Annual Holidays Act 1944* (NSW).

Conclusion

18. The way that the clause H.2 equivalent operated when it was in the Metals 98 Award and the above listed awards, was to provide for service to be calculated in the same manner as Annual Leave.
19. When it was put into the modern award, with the references to the NES providing for redundancy and service now provided for by the Act, there was no indication that there would be a change to how the clause operated in relation to annual leave or any indication from the Award Modernisation Full Bench that this was the intention.
20. The proposal in the submission of the AiGroup should not be applied to the Manufacturing and Associated Industries and Occupations Award 2010, the Food, Beverage and Tobacco Manufacturing Award 2010, the Graphic Arts, Printing and Publishing Award 2010, or the Sugar Industry Award 2010 or any other award where similar history exists.

End

27 July 2018