

IN THE FAIR WORK COMMISSION

Matter No: AM2016/15

s.156 4 yearly review of modern awards

Plain language re-drafting – annual leave loading and shutdown provisions

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia Submissions in respect of the Shutdown Provisions

Introduction

1. On 28 February 2019 the Full Bench of the Fair Work Commission issued a Statement¹ inviting parties to file submissions on a range of issues before the Plain Language Full Bench.
2. On 29 March 2019, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) made a submission in response to paragraph [84] of the February 2019 Statement, in respect of the proposed re-drafting of the annual leave shutdown provisions in both the *Electrical Power Industry Award 2010* (**Power Award**) and the Electrical, Electronic and Communications Contracting Award 2010 (**Electrical Award**). Specifically, the CEPU raised concerns that the Model Annual Leave Shutdown Clause provided in the February 2019 Statement (**Model 2019 Clause**), would leave those covered by the Electrical Award worse off because the Model 2019 Clause provided:
 - a. a shorter period of 28 days written notice by the employer;
 - b. a broad spectrum when the shutdown can occur (i.e. not specific to Christmas- New Year Period);
 - c. no provision for identifying that unpaid leave taken during shut down does not break service of an employee; and
 - d. no definition of a shutdown to cap the duration of shutdown period.
3. On 25 August 2022, the Full Bench issued a Decision² expressing its provisional views and conclusions regarding the model annual leave shut down clause (**Model 2022 Clause**). At paragraph [161] of the Decision, the Full Bench invited interested parties to make submissions in response to the provisional views and conclusions at paragraphs [149] – [160] of the Decision

¹ [2019] FWCFB 1255 (**February 2019 Statement**).

² [\[2022\] FWCFB 161 \(the Decision\)](#).

and the terms of yet to be published draft determinations, within 21 days of the publication of the draft determinations.

4. On 19 September 2022, the draft determinations were published on the Commission website.
5. The CEPU makes this submission in accordance with the invitation in paragraph [161] of the Decision, in response to the draft determination issued for the Electrical, Electronic and Communications Contracting Award 2020 (**Electrical Award 2020**).
6. The CEPU has also had the opportunity to read the submissions of the Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) ('CFMMEU C&G'). The CEPU supports and relies on the submission filed by the CFMMEU C&G on 10 October 2022.

Shutdown Provisions

7. Whilst the CEPU acknowledges that the redrafting of the Model 2019 Clause addresses several of the concerns raised by the CEPU in its submissions of 29 March 2021, there remains two primary concerns as outlined above in paragraphs [2.c] and [2.d] unaddressed by the Model 2022 Clause which, when compared to the shutdown provision in the *Electrical Award 2020*, would leave those covered by this Award worse off.
8. Firstly, Clause 21.5(c) of the Electrical Award 2020, provides that “*unpaid leave taken does not break service of an employee and is not expected periods as per the NES.*” This term has been removed in the Model 2022 Clause.
9. The CEPU acknowledges the statements made by the Full Bench at paragraphs [149] and [150] having regard to the right to elect (by an employee) or require (by employer) to take unpaid leave during the shutdown. However, clause 21.5(c) does not in itself:
 - a. give an employee a right to elect to take leave without pay in lieu of accessing accrued annual leave entitlements during a shut down, as was provided by the Model 2019 clause;
 - b. infer that an employee has a general entitlement to take leave without pay under the NES or any award; or
 - c. provide the employer with a right to require/direct an employee to take leave without pay.

10. Rather, clause 21.5(c) provides clarity and certainty that unpaid leave taken during a temporary Christmas shutdown will not break service. Such unpaid leave may be taken by agreement between an employer and employer, even where an unfettered right to take or require unpaid leave does not exist.
11. Further, employers and employees who would otherwise be covered by the Electrical Award may negotiate and agree upon a clause in an enterprise agreement that provides either a right to elect (for employees) or require (for employers) unpaid leave during a temporary shutdown. In those circumstances, clause 21.5(c) would be relevant to the Commission’s assessment of the proposed enterprise agreement shutdown clause by way of the Better Off Overall Test.
12. Accordingly, the CEPU submits that the Model 2022 Clause should be amended to ensure that unpaid leave taken during a shutdown does not break service. If the Model 2022 Clause is not amended in this way, then employees who take unpaid leave during a Christmas shut down by agreement or who bargain a shutdown clause in an enterprise agreement will be worse off.
13. Secondly, Clause 21.5(e) of the Electrical Award 2020, provides:

“Close-down means a period of not less than 2 consecutive weeks and not more than 4 consecutive weeks, inclusive of public holidays.”
14. The Full Bench at paragraph [155] of the Decision states that the model term:

‘..will not be adaptable to take into account the differing prescriptions identified in the Awards, since these amount in substance to the regulation of shutdowns. The requirements that the shutdown must be “temporary” and any direction to take annual leave must be reasonable will ensure that the model clause cannot be abused in respect of the frequency or length of the shutdowns.’ [emphasis added]
15. The CEPU respectfully submits that the word “temporary” is open to interpretation and therefore insufficient to ensure employees will not be worse off without the present limitations on the duration of shutdowns provided by clause 21.5(e) of the Electrical Award 2020. For example, a “temporary” shutdown period of 5 to 6 weeks may be permitted by the Model 2022 Clause although unlawful under the current Award provisions which specifically prohibit temporary shutdowns for durations longer than 4 weeks. Similarly, employers and employees who would otherwise be covered by the Electrical Award may negotiate and agree upon a clause in an enterprise agreement that provides specific temporal restrictions on a Christmas shutdown. In those circumstances, clause 21.5(e) would be relevant to the Commission’s

assessment of the proposed enterprise agreement shutdown clause by way of the Better Off Overall Test.

16. For the reasons outlined above, the CEPU opposes the insertion of the Model 2022 Clause into the Electrical Award 2022 in its current form. The CEPU submits that clauses 21.5(c) and 21.5(e) should be inserted into the Model 2022 Clause for the Electrical Award, as per the proposed draft determination at Appendix A.

END
10 OCTOBER 2022

Appendix A – Amended Draft Determinations

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—plain language re-drafting—shutdown provisions
(AM2016/15)

ELECTRICAL, ELECTRONIC AND COMMUNICATIONS CONTRACTING AWARD 2020 [MA000025]

Electrical contracting industry

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HUNT

SYDNEY, XX MONTH 2022

*4 yearly review of modern awards – plain language re-drafting – shutdown provisions – Electrical,
Electronic and Communications Contracting Award 2020 – variation to clause 21.5.*

A. Further to the decision issued by the Full Bench on XX MONTH 2022 [[2022] FWCFB XXX], the above award is varied as follows:

1. By deleting clause 21.5 and inserting the following:

21.5 Direction to take annual leave during shutdown

- (a) Clause 21.5 applies if an employer:
 - (i) intends to shut down all of its operation in conjunction with the Christmas/New Year period (**temporary shutdown period**); and
 - (ii) wishes to require affected employees to take paid annual leave during that period.
- (b) The employer must give the affected employees two months' written notice of a temporary shutdown period, or any shorter period agreed between them and the employer.
- (c) The employer must give written notice of a temporary shutdown period to any employee who is engaged after the notice is given under clause 21.5(b) and who will be affected by that period, as soon as reasonably practicable after the employee is engaged.
- (d) The employer may direct the employee to take a period of paid annual leave to which the employee has accrued an entitlement.
- (e) A direction by the employer under clause 21.5(d):

- (i) must be in writing; and
 - (ii) must be reasonable.
- (f) The employee must take paid annual leave in accordance with a direction under clause 21.5(d).
- (g) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 25.10.
- (h) In determining the amount of paid annual leave to which an employee has accrued an entitlement, any period of paid annual leave taken in advance by the employee, in accordance with an agreement under clause 25.10, to which an entitlement has not been accrued, is to be taken into account.
- (i) Unpaid leave taken does not break service of an employee and is not an excepted period as per the NES.*
- (j) **Temporary Shutdown Period** means a period of not less than 2 consecutive weeks and not more than 4 consecutive weeks, inclusive of public holidays.*
- (k) Clauses 21.6 to 21.8 do not apply to a period of annual leave that an employee is required to take during a temporary shutdown period in accordance with clause 21.5.

2. By updating the cross-references accordingly.

B. This determination comes into operation on XX MONTH 2022. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after XX MONTH 2022.