IN THE FAIR WORK COMMISSION

Matter Number: AM2016/15 - *plain language re-drafting*

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION – MINING AND ENERGY DIVISION (CFMMEU) REGARDING PLAIN LANGUAGE RE-DRAFTING - ANNUAL LEAVE LOADING AND SHUTDOWN PROVISIONS

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Introduction

1. This submission is in response to the invitation to make submissions on matters raised in the Statement issued by the Full Bench of the Fair Work Commission on 28 February 2019 (**Statement**).[1] It addresses:
    a. the proposed redrafting of the annual leave loading clause in the *Black Coal Mining Industry Award 2010* (**BCMI Award**);
    b. the proposed model term regarding shutdown provisions in a number of modern awards, including the *Mining Industry Award 2010* (**Mining Award**) and the *Coal Export Terminals Award 2010* (**Terminals Award**); and
    c. the proposition that unpaid leave taken during a shutdown period should count as service.

2. These submissions supplement the submissions put to the Commission by the CFMMEU in October 2017 in respect of matter number *AM2014/47 - Common Issue – Annual Leave* (**Earlier Submissions**).

Annual leave loading clause – proposed re-drafting

3. The Statement invites submissions concerning the proposed redrafting of the annual leave loading clause in a number of awards, including the BCMI Award. This submission relates to the proposed redrafting of the annual leave loading clause as it relates to clause 25.9 of the BCMI Award.

4. Clause 25.9 of the BCMI Award provides:

> ***25.9 Payment for annual leave***
> *An employee taking annual leave must be paid either:*
>
> *(a) the employee's ordinary rate of pay plus a loading of 20% of that rate; or*
> *(b) the employee's rostered earnings for the period of annual leave, which includes all rostered overtime and rostered public holidays (paid at double time), but does not include shift allowances, other than for seven day roster employees;*
>
> *whichever is the greater.*

5. The proposed rewording suggested by the Ai Group has been based on the Clerks PLED which is drafted in markedly different terms. In that context, the

[1] [2019] FWCFB 1255.

proposed rewording seeks to remedy what the FWC has identified as wording which is likely to cause confusion in relation to the loading payable under some awards.[2] In our submission, the BCMI Award clause contains no such capacity for confusion. Given this, the proposed re-drafting has no work to do in the context of the BCMI Award, and we, therefore, submit that no change is needed.

Shutdown provisions – model term

6. The CFMMEU supports the variation of both the Mining Award and the Terminals Award to include the model term at Attachment D to the Statement (**Proposed Shutdown Model Clause**).

Continuity of service during a shutdown period

7. The CFMMEU's Earlier Submissions submitted, relevantly, that unpaid leave taken during a shutdown period should have that period of leave counted as service. This position was advanced in respect of the BCMI Award as was relevant to those submissions.

8. The CFMMEU maintains that position in respect of the BCMI Award. Further, the CFMMEU seeks to repeat that position in respect of the Mining Award and the Terminals Award.

9. The Earlier Submissions submitted that it was fair and reasonable that an employee taking leave without pay to accommodate a shutdown period, the direction of which is at the unilateral discretion of the employer, should not incur any other penalty. This submission was made on the basis that such leave was markedly distinct from a situation where an employee approaches their employer to take leave without pay. The CFMMEU continues to rely on this submission.

10. That an employee can be denied payment in circumstances where they are ready to serve is, of itself, acutely unfair. The legislation allows it in extremely specific circumstances,[3] and there is no common law right to require an

[2] [2019] FWCFB 1255, [64] - [65].
[3] FW Act, s 524.

employee to take unpaid leave in any circumstance.[4] That unpaid leave taken during a shutdown period, at the behest of an employer, would not count as service enhances the notion of unfairness that attaches to such a request. It is a position that should not be accepted when considering the modern awards objective.

Service and a willingness to serve

11. The CFMMEU states further that any period of unpaid leave taken at the direction of an employer should count as service because, in that circumstance, an employee's willingness to serve its employer is not disturbed by the absence of any work to perform.

12. At common law, an employee who is available to serve will receive the benefits of employment – this is not contingent on the performance of work.[5] The FW Act generally follows this principle in its definition of service, which carves out exceptions to service in circumstances where there is an unwillingness to serve. As set out at s 22 of the FW Act, service means:

> *General meaning*
>
> ***22(1)*** *A period of **service** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an **excluded period**) that does not count as service because of subsection (2).*
>
> ***22(2)*** *The following periods do not count as service:*
>
> *(a) any period of unauthorised absence;*
> *(b) any period of unpaid leave or unpaid authorised absence, other than:*
> *(i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or*
> *(ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or*
> *(iii) a period of leave or absence of a kind prescribed by the regulations;*
> *(c) any other period of a kind prescribed by the regulations.*

[4] For discussion see Creighton & Stewart, *Labour Law* (Federation Press, 6th ed, 2016) [15.56].
[5] See, for example, *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337, 342.

> ***22(3)*** *An excluded period does not break a national system employee's* ***continuous service*** *with his or her national system employer, but does not count towards the length of the employee's continuous service.*[6]

13. That is, the period of employment will count as service, less any excluded period. An excluded period will a period of unpaid leave which is taken exclusively at the initiative of an employee (or as otherwise prescribed by the regulations). Put another way, it involves an employee's voluntary withdrawal of service.

14. The kind of leave contemplated by clause 24.12 of the BCMI Award and the Proposed Shutdown Model Clause is of a different character. It is leave taken at the direction of the employer, in circumstances where there has been no withdrawal of service. It is closer in character to absences on unpaid leave that count as service for the purposes of the FW Act given there is the marked absence of any voluntary withdrawal of service.

15. There has been no interruption to the availability for service which s 22 of the FW Act has been designed to contemplate, nor an absence of service as it is contemplated by the common law. There is no basis to arbitrarily extract a period of unpaid leave from an employee's period of service and, in our submission, such an outcome would be unfair and unreasonable, and contrary to the modern awards objective.

Shutdown and the FW Act stand down provisions

16. The FW Act makes provision for a stand down of employees in certain circumstances, at s 524:

> ***524(1)*** *An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*
>
> *(a) industrial action (other than industrial action organised or engaged in by the employer);*

[6] Note that s 22(4) sets out a different rule for the calculation of an employee's service for the purposes of requests for flexible working arrangements, parental leave and related entitlements, and notice of termination under the FW Act.

(b) *a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
(c) *a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*

524(2) *However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:*

(a) *an enterprise agreement, or a contract of employment, applies to the employer and the employee; and*
(b) *the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.*

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

524(3) *If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.*

17. While not a stand down for the purposes of s 524, taking unpaid leave in accordance with the Proposed Shutdown Model Clause (or clause 24.12 of the BCMI Award) has the same character as leave taken by virtue of a shutdown, whether it be under s 524, an enterprise agreement or a contract of employment. This is because it is leave taken in circumstances where an employee cannot be usefully employed and it is leave which would not otherwise be taken, but for the employer's direction.

18. The FWC should be guided by the legislature's approach to unpaid leave in the context of a shutdown when determining this issue. The legislation clearly evinces an intention to differentiate between unpaid leave taken voluntarily by an employee, and unpaid leave taken at the direction of an employer. Unpaid leave in the context of a shutdown should be treated in the same way as the latter.

19. To an employee it matters not whether that direction to take leave is due to external circumstances or internal business reasons, and there is no basis to arbitrarily and unnecessarily distinguish between the two when contemplating which will count as service. An award clause creating the situation where leave

directed at the discretion of an employer would be more advantageous to that employer, at the expense of the record of service of an employee, when compared to leave being required due to external circumstances, would hardly meet the objective of providing a fair and relevant safety net. On the contrary, such a finding would be bordering on the absurd. In our submission, leave in both circumstances ought to be treated the same when contemplating an employee's service.

20. Given this, the question of whether such leave should count as service when it is in accordance with an award provision should, in our submission, be determined in the affirmative.

Construction, Forestry, Maritime, Mining and Energy Union
Mining and Energy Division
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