

Fair Work Act 2009

s.156 - Four Yearly Review of Modern Awards

AM 2014/47 - Annual Leave

Submission on behalf of the Group of Eight Universities

1. We act on behalf of the Group of Eight Universities comprising the University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland). These universities together employ approximately half of the staff in the university sector.
2. These submissions address the issue of the incorporation of the model term in relation to excess annual leave (**EAL Model Term**) into the Higher Education-General Staff- Award 2010 (MA00007) (**General Staff Award**) and Higher Education - Academic Staff- Award 2010 (MA00008) (**Academic Award**) as raised in the decision of the Full Bench on 11 June 2015 [2015] FWCFB 3406 and on 15 September 2015 [2015] FWCFB 5771 (**AL Full Bench**).

Education Awards Full Bench Should Consider Appropriate Adoption/Tailoring of Model Clause

3. The Higher Education awards currently contain clauses concerning management of annual leave, that would deal with excess annual leave (clause 30.1 of the General Award and clause 23), which in summary enables the direction on at least 2 months' notice by the employer to take annual leave, where 30 days annual had accrued and the direction is reasonable.
4. If the Full Bench intends to include the EAL Model Term in the higher education awards, it should be tailored to take into account and properly have regard to some specific features of the higher education industry.
5. The Higher Education Awards and other awards have been allocated to a dedicated Full Bench in AM 2015/6 in the award stream.
6. In that stream, the relevant union has made a number of claims concerning academic employment, including a claim for a detailed extended provision concerning academic hours of work, a claim for conversion of sessional academic work and other claims which will necessitate the calling of a variety of evidence concerning the nature of higher education industry, the nature of academic employment and various operational and other requirements unique to the higher education sector. There are also claims regarding general staff.
7. The Education Full Bench will also be considering the issues concerning schools, where leave is taken during breaks between terms (school holidays), that have some similar considerations to semester based teaching at Universities.
8. These are not matters that the AL Full Bench considered or dealt with in hearing the matter and formulating the model EAL clause.

9. In those circumstances, without diminishing the role of the AL Full Bench in this proceeding, which has determined a model EAL clause, it would be more appropriate for the Full Bench that has been convened to hear and determine the claims in the education stream to consider, with the benefit of that evidence and full submissions, and taking into account the decision of this AL Full Bench, whether the model EAL clause should be adopted and any appropriate tailoring of that clause for the higher education Awards.

Tailoring to avoid adverse student and course impact

10. If the model clause is to be adopted, at a minimum some modest tailoring should occur, to protect the integrity of course offerings and adverse student impact.
11. There are certain aspects of the higher education industry and employment within it, which should be considered and taken into account in any clause dealing with management of excess annual leave. These include the structure of the teaching year with blocks of teaching and assessment periods necessitating the presence of particular staff and the nature of academic employment and discipline specific expertise.
12. Universities predominantly run on a semester based system with approximately 13 week teaching periods followed by a period of examination and assessment. Further, there are processes for the allocation to academic staff for delivery of teaching/ assessment, which take into account discipline-specific academic knowledge and, in some cases, unique knowledge of particular staff. In turn this informs the curriculum offered and course and subject offerings required to be published and available to students and prospective students, well before the relevant semester.
13. In clause 1.2(c) of the EAL Model Clause, in certain circumstances an employee can give written notice of 8 weeks of their taking of EAL of up to 4 weeks and the Universities would be bound by an obligation to grant the employee paid leave in accordance with that notice.
14. While, the Universities acknowledge that there are some limits and pre-conditions in relation to this right under 1.2(c), the clause provides the clear capacity for an employee to mandate the taking of annual leave part way through a teaching period or semester, including during a subject/course or in critical assessment period for which they have delivered the subject. This has the very real potential to compromise the delivery of a course or subject. This could include potential cancellation of subjects and delay in delivery of student results, to the detriment of the students and their progression and to the detriment of the university (including reputational damage), should it be adopted.
15. The likelihood of 1.2(c) being called into play is increased by the history of academic leave management and nature of academic employment, whereby academic work and hours and attendance at the University (outside allocated lectures and tutorials) are largely self-directed, academic staff did not traditionally have leave recorded and rarely submitted leave forms, irrespective of whether they were attending campus or not (for example during non-teaching

periods). Consequently, many academic staff in particular, have significant periods of accrued leave and there may well be circumstances where the University cannot reasonably or sensibly direct under clause 1.2(b) the taking of all of the EAL, consequently resulting in the capacity for the employee to give a direction concerning the taking of further EAL with which the University would then be compelled to comply irrespective of whether it had very good or reasonable grounds for refusal.

16. Further, some features of academic employment, particularly at research intensive universities, may limit the ability of the University to direct the employee to take excess annual leave in a particular 12 month period. For example, an employee undertaking a dedicated externally funded research project may be required to deliver the research outcomes within a particular timeframe and potentially may also require constant attendance to their research in order to do so or maintain the integrity of the research. In those circumstances the University would be limited in its practical ability to direct the staff member to take all their excess annual leave.
17. Having regard to the above matters, if the clause is to be adopted, the model clause should be tailored in the Higher Education Awards by qualifying the capacity of an employee to give binding notice under 1.2(c) in respect of the taking of annual leave to "*periods falling outside the teaching and examination period in respect of which the staff member has already been allocated work*" or similar formulation.
18. This would still provide the employee significant opportunity to direct the taking of leave and balance the interests of the staff, the University and the students.
19. The above approach would be consistent with the modern awards objective and consistent with the NES. The NES envisages the tailoring of provisions concerning the manner and taking of annual leave through awards and enterprise agreements (i.e. industry specific industrial instruments) and the approach would be consistent with providing a "*relevant*" safety net of terms and conditions (s.134(1)) and promote flexible modern work practices and efficient and productive performance of work (s.134(1)(d)).

Clayton Utz
Solicitors for the Group of Eight
26 October 2015