



Fair Work Commission  
Section 156 – Fair Work Act 2009  
4 Yearly Review of Modern Awards

Annual Leave – Common Issues  
(AM2014/47)

**Submission of the  
Textile, Clothing and Footwear Union of Australia  
In Response to  
Revised Draft Determinations  
(published 26 May 2016)**

3 June 2016

Submitted by:

Textile Clothing and Footwear Union of Australia  
(National Office)  
500 Swanston Street  
Carlton VIC 3053

(t) 03 9639 2955

Contact:  
Vivienne Wiles  
TCFUA National Industrial Officer  
(e) [vwiles@tcfvic.org.au](mailto:vwiles@tcfvic.org.au)

**2014 AWARD REVIEW  
(AM2014/47)  
ANNUAL LEAVE – COMMON ISSUES**

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**INTRODUCTION**

1. The Textile, Clothing and Footwear Union of Australia (TCFUA) provides this submission in response to the Revised Draft Determinations (Annual Leave) published by the Fair Work Commission (FWC) on 26 May 2016 arising from the FWC’s further Decision handed down on 23 May 2016 (*May 2016 Decision*)<sup>1</sup>.
2. In its *May 2016 Decision*, the FWC determined that the Annual Leave Model Terms (finalised in its *September 2015 Decision*<sup>2</sup>) would be subjected to plain language redrafting in respect to the following:
  - Annual Leave in Advance
  - Cashing out of Annual Leave
  - Excessive Annual Leave
3. In reviewing the model annual leave terms to ensure that that they are expressed in plain language, the FWC indicated in the *May 2016 Decision* that:

*‘The plain language model terms have been restructured to make the clauses more straightforward for employers and employees to understand and use. The language is simpler and clearer and uses commonly understood words rather than jargon or archaic words. Importantly, the substantive legal effect of the model terms has not been changed.*<sup>3</sup> [our emphasis]
4. The TCFUA has a primary interest in the *Textile, Clothing, Footwear and Associated Industries Award 2010* (TCF Award) and the *Dry Cleaning and Laundry Industry Award 2010* (DC&LI Award).
5. The FWC has determined to insert into the TCF Award, the model terms for Annual Leave in Advance and Cashing out of Annual Leave.<sup>4</sup>
6. The FWC has determined to insert into the DC&LI Award, the model terms for Annual Leave in Advance, Cashing out of Annual Leave and Excessive Annual Leave.<sup>5</sup>

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<sup>1</sup> 4 Yearly Review of Modern Awards – Annual Leave (AM2014/47), [2016] FWCFB 3177 (23 May 2016)

<sup>2</sup> 4 Yearly Review of Modern Awards – Annual Leave (AM2014/47), [2016] FWCFB 5771 (15 September 2015)

<sup>3</sup> [2016] FWCFB 3177, at para [59]

<sup>4</sup> [2016] FWCFB 3177, Attachment 6 (List of Awards). In relation to the Excessive Annual Leave model term, the FWC has determined that the TCF Award will be relisted for further consideration later in 2016 (see paras [93] – [95], 307

<sup>5</sup> [2016] FWCFB 3177, Attachment 6 (List of Awards).

7. In the *May 2016 Decision*, the FWC directed that in relation to the model terms for Annual Leave in Advance and Cashing out of Annual Leave, the opportunity to comment on the Draft Determinations only relates to the plain language revisions to model term/s and template agreement/s.<sup>6</sup>

#### **ANNUAL LEAVE IN ADVANCE MODEL TERM: PLAIN LANGUAGE REDRAFT**

8. The FWC's Plain Language redraft of the model Annual Leave in Advance<sup>7</sup> provides as follows:

##### ***Attachment 4 – Plain Language re-drafts of the annual leave model terms***

##### ***1.1 Annual Leave in advance***

- (a)** *An employer and employee may agree in writing to the employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.*
- (b)** *An agreement must:*
- (i) state the amount of leave to be taken in advance and when it is to be taken; and*
  - (ii) be signed by the employer and employee.*
- (c)** *The employer must keep a copy of any agreement under clause 1.1 as an employee record.*
- (d)** *If, on the termination of the employee's employment, the employee has not accrued an entitlement to a period of paid annual leave already taken in accordance with an agreement under clause 1.1, the employer may deduct from any money due to the employee in respect of that annual leave taken. [our emphasis]*

9. The previous formulation of the model term as finalised in the *September 2015 Decision* (prior to the plain language redraft) provided as follows:

*'X.X(b)*

*Clause X.X(b) applies if an employee takes a period of paid annual leave in advance pursuant to an agreement made in accordance with clause X.X(a). If the employee's employment is terminated before they have accrued all of the entitlement to paid annual leave which they have taken then the employer may deduct an amount equal to the difference between the employee's accrued annual leave entitlement and the leave taken in advance, from any monies due to the employee on termination.'*

10. The TCFUA acknowledges that the FWC's intention underpinning the Plain English redrafting process is to reduce the complexity of modern awards consistent with 'the need to ensure a simple, easy to understand, sustainable and modern award system for Australia.'<sup>8</sup> However, in our respectful submission, the redraft of the model Annual Leave in Advance term has

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<sup>6</sup> [2016] FWCFB 3177, at paras [293], [300]

<sup>7</sup> [2016] FWCFB 3177, at Attachment 4 (p 81)

<sup>8</sup> *Ibid*, at para [57]

made sub-clause 1.1(d) less clear and more open to confusion and uncertainty. Whilst this is not the intention (and may not even be the legal effect), the redrafted 1.1(d) nevertheless can potentially be read as meaning that the employer has a right to deduct, on the termination of the employee, any money due to the employee that is equivalent to 'the amount already paid to the employee in respect of that annual leave taken.' That is, no distinction is made between the *accrued annual leave taken by an employee* and *annual leave advanced and not yet accrued*. Again, whilst the intention of the sub-clause is probably obvious, (i.e. that only the non-accrued portion of a period of annual leave can be reclaimed on termination) the actual words of 1.1(d) do not clearly implement that intention.

11. In the TCFUA's submission, without the necessary clarity there is a risk that everyday users of modern awards which contain the model term could be lead into confusion as to what the respective rights are of the employee and their employer under such an agreement. This is a particularly relevant consideration in industries which have significant numbers of award dependent workers from non-English speaking backgrounds and/or have limited English language literacy, such as the TCF and dry cleaning and laundry industries.
12. In a practical sense, if employers and/or employees misconstrue the meaning of subclause 1.1(d) this may lead to situations where greater amounts of money are deducted on an employee's termination of employment than is allowable under the clause, leading to allegations of underpayment and disputation.
13. We note that the AI Group in its submission (2 June 2016) make similar points regarding the potential for ambiguity and confusion in the plain language redraft of sub-clause 1.1(d) of the Annual Leave in Advance model term.<sup>9</sup> In an effort to remedy the potential confusion, the AI Group at paragraph [16] of its submission propose an alternative formulation as follows:

*'If the employee's employment is terminated before they have accrued all of the entitlement to paid annual leave which they have taken, then the employer may deduct an amount equal to the difference between the employee's accrued annual leave entitlement and the leave taken in advance, from any monies due to the employee on termination.'*<sup>10</sup>
14. The TCFUA supports the alternative formulation proposed by the AI Group. In our submission it provides a clearer and more precise description of the right of an employer to deduct an amount of termination of employee equal to the amount of taken, but not accrued annual leave, accessed by the employee.

#### **ANNUAL LEAVE IN ADVANCE TEMPLATE AGREEMENT: PLAIN LANGUAGE REDRAFT**

15. The *May 2016 Decision* also contained a redrafted Template Agreement for Annual Leave in Advance.<sup>11</sup> The TCFUA seeks to raise 2 issues of concern with the Template Agreement.
16. The first relates to the issue identified above in respect to the Plain Language redraft of 1.1(d), that is, the potential for confusion or ambiguity in the meaning of the term. The

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<sup>9</sup> 4 Yearly Review of Modern Awards, (AM2014/47) Annual Leave – Common Issues; AI Group Submission (2 June 2016) at paras [4] – [16]

<sup>10</sup> Ibid, at para [16]

<sup>11</sup> [2016] FWCFB 3177, at pp 84-85

Template Agreement, in effect, repeats the same wording (bolded in the Agreement) as follows:

***'I agree that:***

***If, on termination of the employee's employment, the employee has not accrued an entitlement to a period of paid annual leave already taken under this agreement, then the employer may deduct from any money due to the employee on termination an amount equal to the amount already paid to the employee in respect of that annual leave taken.'***

17. In this respect, we repeat our submission and believe that the Template Agreement should be similarly amended to remove the potential for ambiguity or confusion.
18. The second issue of concern relates to the fourth and fifth paragraphs of the Template Agreement which state:

*'The amount of leave to be taken in advance is: ----- hours/days.  
The leave will commence on: ----/----20----.'*

19. Whilst the intention is that the reference to 'leave' in paragraph 5 is to the commencement of the 'leave in advance' it could nevertheless be interpreted as annual leave in general, which may include both accrued leave and leave in advance. This is particularly so in circumstances where employees would commonly be familiar with completing leave forms in relation to annual leave which does not distinguish between accrued leave and leave in advance but simply states a period of leave from x date to x date.
20. In this context, the TCFUA propose that paragraph 5 of the Template Agreement be amended to read *'the leave in advance will commence on ----/----20----*.

Filed on behalf of:

Textile Clothing and Footwear Union of Australia  
(3 June 2016)