IN THE FAIR WORK COMMISSION

Matter No.: AM2015/1 and AM2015/2

Family Friendly Work Arrangements

ACTU SUBMISSIONS ON THE ALLEGED NES INCONSISTENCIES DECISION

NES Decision

1. This further submission is filed in accordance with the direction of VP Hatcher for the ACTU to provide a note in relation to the *4 yearly review of modern awards – Alleged NES Inconsistencies Decision* [2015] FWCFB 3023 (*NES Decision*).

2. As part of these proceedings, the ACTU seek a modern award term that provides an entitlement for employees to return to work on a part-time basis, or on reduced hours, after a period of parental leave (Parental Leave Claim).

3. The AI Group submit that the Parental Leave Claim is not permitted because it excludes the "right" of an employer to refuse an employee's request for flexible working arrangements "on reasonable business grounds" pursuant to s65(5) and is therefore contrary to s55(1).

4. The AI Group rely on the *NES Decision* to support this submission. The *NES Decision* dealt with, inter alia, an award term that stated:

   "Transfer of business
   Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an employee is not entitled to leave or payment instead for any period in respect of which leave has been taken or paid for."

5. The effect of the award term was to transfer an employee's annual leave balance from the old employer to the new employer, rather than permitting the annual leave to be paid out by the old employer on transfer.

6. A question in the *NES Decision* was whether such an award term was inconsistent with s91(1) which provides:

   "91 Transfer of employment situations that affect entitlement to payment for period of untaken paid annual leave

   Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

   (1) Subsection 22(5) does not apply (for the purpose of this Division) to a transfer of employment between non-associated entities in relation to an employee, if the second employer decides not to recognise the employee's service with the first employer (for the purpose of this Division)."

7. The Full Bench found at [37] that:

   "We consider that the modern award provisions in question generally are clearly inconsistent with section 91(1)…A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by section 55(4)".

Parental Leave Claim

8. The Parental Leave Claim can be distinguished, from the *NES Decision* because:

   (a) s65 is enlivened by the *employee's* choice to make a request for flexible working arrangements whereas s91(1) is enlivened by the employer's choice not to recognise the employee's prior service;

   (b) there would be no need for an employee to make a request under s65 to cater for circumstances to which the entitlements in the Parental Leave Claim applied: in this event, the conditions under which an employer could refuse such a *request* would not arise;

   (c) further, as submitted at PN309-312 of the transcript, s65(5) is not properly characterised as an employer right: it is a limitation which is placed on when an employer may refuse the employee's request for a flexible working arrangement, should that request be made;

   (d) the Parental Leave Claim supplements, or builds on other entitlements contained within the NES as set out in our submissions in reply: by way of example, s.84 of the Act allows an employee to return to their "pre parental leave position" upon their return to work. This is called the "return to work guarantee". The Parental Leave Claim builds on this entitlement by enabling

the employee to return to their position on a part-time or reduced hours basis. It thus, builds on this NES entitlement.

Conclusion

9. In summary, we submit that the correct approach is, first, to determine whether the Parental Leave Claim is "ancillary or incidental" or alternatively, whether it "supplements" the NES and, second, whether the effect of the Parental Leave Claim is detrimental to employees pursuant to s55(4).

10. If the answer to the first is yes, and the second is no, then the term in permitted by virtue of s55(4)[3] and s55(7). On this basis, there is no need to determine whether the term "excludes" a term of the NES pursuant to s55(1).

11. We submit that the Parental Leave Claim is permitted under s55(4) because it is:

    (a) a term that is ancillary or incidental to the operation of an employee's entitlement to parental leave as provided in ss76 and 84; or

    (b) a term that supplements the NES, specifically the parental leave and related entitlements contained in the NES; and

    (c) not detrimental to an employee in any respect.

12. In these circumstances, s55(7) applies which states that *"to the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1)."*

13. In the alternative, we submit that the Parental Leave Claim does not exclude any provision of s65 because it is only enlivened by the employee's choice and, in this event, s65(5) merely places a limitation on when an employer may refuse an employee's request rather than constituting a *right* of an employer to refuse a request for flexible working arrangements.

[3] We submit that it is possible to supplement an entitlement in a manner which removes some of the 'strictures' that might otherwise operate under the NES, as confirmed in *The Maritime Union of Australia v FBIS International Protective Services (Aust) Pty Ltd* [2014] FWCFB 6737 at [27] and [32]. We refer to this decision at paragraph 12(a) of our Reply Submissions dated 15 June 2015.