



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Annual leave

(AM2014/47)

EDUCATIONAL SERVICES (TEACHERS) AWARD 2010

[MA000077]

Educational services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER HAMPTON

MELBOURNE, XX OCTOBER 2015

4 yearly review of modern awards - annual leave common issue.

A. Further to the Full Bench decisions issued by the Fair Work Commission on 11 June 2015¹ and 15 September 2015², the above award is varied as follows:

1. By inserting clause 21.4 as follows:

21.4 Annual leave in advance

- (a) An employer and employee may agree to the employee taking a period of paid annual leave in advance of the employee accruing an entitlement to such leave provided that the agreement meets the following requirements:
 - (i) it is in writing and signed by the employee and employer;
 - (ii) it states the amount of leave to be taken in advance and the date on which the leave is to commence; and
 - (iii) it is retained as an employee record.
- (b) Clause 21.4(b) applies if an employee takes a period of paid annual leave in advance pursuant to an agreement made in accordance with clause 21.4(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.

2. By inserting clause 21.5 as follows:

21.5 Cashing out of annual leave

- (a) Paid annual leave must not be cashed out except in accordance with this clause.
- (b) An employer and an employee may agree to the employee cashing out a particular amount of the employee's accrued paid annual leave provided that the following requirements are met:
 - (i) each cashing out of a particular amount of accrued paid annual leave must be by a separate agreement between the employer and the employee which must:
 - be in writing and retained as an employee record;
 - state the amount of accrued leave to be cashed out and the payment to be made to the employee;
 - state the date on which the payment is to be made, and
 - be signed by the employer and employee and, if the employee is under 18 years of age, the employees' parent or guardian;
 - (ii) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave at the time that it is cashed out;
 - (iii) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than four weeks; and
 - (iv) employees may not cash out more than two weeks' accrued annual leave in any 12 month period.

Note 1: Under s.344 of the *Fair Work Act 2009*, an employer must not exert undue influence or undue pressure on an employee to make an agreement to cash out paid annual leave under this award clause.

Note 2: Under s.345 of the *Fair Work Act 2009*, a person must not knowingly or recklessly make a false or misleading representation about an employee's workplace rights under this award clause.

3. By inserting clause 21.6 as follows:

21.6 Excessive annual leave accruals

Note: A dispute in relation to the operation of clause 21.6—Excessive annual leave accruals may be dealt with in accordance with clause 9—Dispute resolution.

This clause contains provisions additional to the NES about taking paid annual leave, to deal with excessive paid annual leave accruals.

(a) Definition

An employee has an **excessive leave accrual** if the employee has accrued more than eight weeks' paid annual leave.

(b) Eliminating excessive leave accruals

(i) Dealing with excessive leave accruals by agreement

Before an employer can direct that leave be taken under clause 21.6(b)(ii) or an employee can give notice of leave to be granted under clause 21.6(b)(iii), the employer or employee must seek to confer and must genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual.

(ii) Employer may direct that leave be taken

(A) Clause 21.6(b)(ii) applies if an employee has an excessive leave accrual.

(B) If agreement is not reached under clause 21.6(b)(i), the employer may give a written direction to the employee to take a period or periods of paid annual leave. Such a direction must not:

- result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under clause 21.6(b)(iii);
- require the employee to take any period of leave of less than one week;
- require the employee to take any period of leave commencing less than eight weeks after the day the direction is given to the employee;
- require the employee to take any period of leave commencing more than 12 months after the day the direction is given to the employee; or
- be inconsistent with any leave arrangement agreed between the employer and employee.

(C) An employee to whom a direction has been given under clause 21.6(b)(ii) may make a request to take paid annual leave as if the direction had not been given.

Note: The NES state that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

- (D) If leave is agreed after a direction is issued and the direction would then result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks, the direction will be deemed to have been withdrawn.
- (E) The employee must take paid annual leave in accordance with a direction complying with clause 21.6(b)(ii).

(iii) Employee may require that leave be granted

- (A) Clause 21.6(b)(iii) applies if an employee has had an excessive leave accrual for more than six months and the employer has not given a direction under clause 21.6(b)(ii) that will eliminate the employee's excessive leave accrual.
- (B) If agreement is not reached under clause 21.6(b)(i), the employee may give a written notice to the employer that the employee wishes to take a period or periods of paid annual leave. Such a notice must not:
 - result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under this clause);
 - provide for the employee to take any period of leave of less than one week;
 - provide for the employee to take any period of leave commencing less than eight weeks after the day the notice is given to the employer;
 - provide for the employee to take any period of leave commencing more than 12 months after the day the notice is given to the employer; or
 - be inconsistent with any leave arrangement agreed between the employer and employee.
- (C) The maximum amount of leave that an employee can give notice of under this clause is: four weeks' leave in any 12 month period.
- (D) The employer must grant the employee paid annual leave in accordance with a notice complying with clause 21.6(b)(iii).

4. By updating cross-references accordingly.

B. This determination comes into operation from xx October 2015. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after xx October 2015.

PRESIDENT

¹ [\[2015\] FWCFB 3406](#)

² [\[2015\] FWCFB 5771](#)