Fair Work Commission

Section 156 – Fair Work Act 2009 (the Act)

4 Yearly Review of Modern Awards

(AM2014/1 and Ors)

Alleged Inconsistencies NES

Submission Category 5 NES matters

Australian Manufacturing Workers Union

(AMWU)

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Background

1. The AMWU makes this submission pursuant to the Fair Work Commission's (the Commission) Statement of 31 October, 2014[1] regarding alleged inconsistencies with the National Employment Standards (NES).

2. The AMWU has made previous submissions[2] regarding the NES matters. The particular issues addressed below relate to the "Category 5" matters identified in the Commission's 31 October Decision[3] and 23 December, 2014 decision.[4]

Airline Operations – Ground Staff Award 2010.

Annual leave in Advance- Clause 34.2

3. The FWO has identified that Clause 34.2 of the Airline Operations may be confusing and further that the Clause restricts the reaching of agreement between an employer and employee regarding the taking of annual leave.[5] The effect of the current clause creates ambiguity as it implies a qualifying period of 12 months before additional annual leave may be accessed in circumstances where leave has been taken prior to its accrual. Such ambiguity may interfere with the required implementation of s.87(2).

4. Taking the clause as currently expressed, a situation could arise where an employee, having accessed leave prior to its accrual, is prohibited by their employer from taking further leave, regardless of whether such leave has been accrued or not pursuant to s.87 *" until the expiration of the 12 month' service in respect of which annual leave was taken"*[6]

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[1] [2014] FWCFB 7727

[2] http://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultipleMA-sub-NES-AMWU-260914.pdf

[3] Ibid

[4] [2014]FWCFB 9412

[5] FWC 4 yearly Review of Modern awards- NES Issues; updated 31 October, 2014; p.2

[6] Clause 34.2 Airline Operations – Ground Staff Award

5. Clause 32.2 also inhibits the application of s.88 regarding the taking of annual leave by agreement between employers and employees by stipulating that 12 months must pass, negating any room for employers and employees to agree to the taking of annual leave as provided for by s.88(1).

6. The AMWU submits that the clause offends both ss.87 and 88 of the Act. The operational effect of the provision also offends ss.55 (1) and (4).

7. The AIG argue that Section 93 permits an award to include terms that deal with the taking of annual leave. The AIG also argue that the NES has effect subject to such terms and that Clause 34.2 is a term envisaged by s.93 and is therefore permissible. The only sub section of s.93 relevant to the clause in question is ss.93 (4). The inclusion of a term under s.93(4) must still be consistent with the requirements of s.51 (1) and (4).

8. The AIG do not address s.55(1) which prohibits a modern award from excluding the NES or any provision of the NES. The AMWU contends that "exclusion" is not limited to a specific exclusion but also covers provisions, such as Clause 34.2, whose effect is to exclude the operation of the NES or a provision thereof.

9. The AIG do not address s.55(4) which stipulates that an ancillary or supplementary term cannot be included in a modern award if it is detrimental to the NES.

10. Clause 34.2.is essentially a regime for allowing leaves to be taken in advance. The provision was constructed at a time when leave was restricted to a qualifying period of 12 months The AMWU[7] in our earlier submission proposed that Clause 34.2 and 34.3 of the Airline Operations Award be replaced by Clause 41.7 of the Manufacturing and Associated Industries and Occupations Award 2010. The Clause in the Award would then provide:

Clause 34.2 Paid leave in advance of accrued entitlement

[7] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultipleMA-sub-NES-AMWU-260914.pdf, paragraph 6

> By agreement between an employer and an employee a period of annual leave may be taken in advance of the entitlement accruing. Provided that if leave is taken in advance and the employment terminates before the entitlement has accrued the employer may make a corresponding deduction from any money due to the employee on termination.

11. The approach has much to recommend it and the reasons for opposition not substantive in light of the following benefits including :

- The intent of the clause's entitlement and responsibility is maintained;
- Ambiguity is removed;
- The integrity of the NES maintained; and
- The Act upheld.

Airport Employees Award 2010 - Clause 31.10; Manufacturing and Associated Industries and Occupations Award 2010 Clause 41.9; Food, Beverage and Tobacco Manufacturing Award Clause 34.10,Seafood Processing Clause 27.10, and Timber Industry Award Clause 33.9

12. The NFF[8] argue that award provisions in the Pastoral Award 2010, Horticulture Award 2010 and Wine Industry Award 2010 enabling service with a previous employer to be recognised on transfer of business to a new employee are inconsistent with s.91 of the Act and therefore should be deleted. The AIG[9] argue that the same issue arises in other awards, including Clause 31.10 of the Airport Employees' Award and the provision should be deleted where it occurs as it has no effect.

[8] NFF Submission of 25 September, 2014

[9] AIG, Submission in reply, 15 October, 2014

13. The AIG do concede[10] that the wording in the Airport Operations Award is different. That concession is an understatement as the entitlement in Clause 31.10 of the Airline Award is different to that in the Horticulture and other Awards. No party has addressed the entitlement at Clause 31.10 of the Airline Operations Award. Submissions going to other Awards should be ignored in the context of the Airline Award

14. The AWU's submission[11] made in respect of the provision in the "Horticulture. Pastoral, Wine and other awards "[12] rejects the position that the clause in the Horticultural Award, expressed in the same terms as Clause 41.9 of the Manufacturing Award, Clause 27.10 of the Seafood Processing Award and Clause 34.10 of the Food Manufacturing Award is inconsistent with the NES. and argues that the retention of the clause providing for the recognition of service on transfer of business is not inconsistent with the NES, including for the reason amongst others , that Awards may supplement the NES to the extent the supplementation is not detrimental to an employee. (s.51 (4)).

15. The AMWU supports and adopts the AWU's submission.

16. The Airport Employees Award contains provisions elsewhere in the annual leave clause which advantageously supplement the NES, for example *Clause 31.2 Additional Periods of Leave*. Clause 31.10 is no different in concept to the supplementation provided for in Clause 31.2. The same argument applies to the advantageous supplementary entitlements of the Annual Leave provisions of the Manufacturing Award

17. In addition we note s.55(2) of the Act enables Awards to contain terms that are provided for in Part 2-2 which may otherwise be contrary to the NES. The Explanatory Memorandum to the Fair Work Bill establishes the work of s.55(2) as follows:

[10] Ibid, Paragraph 4.3

[11] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultiMA-sub-NES-AWU-241014.pdf

[12] Ibid

> "210. Some provisions of the NES expressly authorise a modern award or enterprise agreement to deal with certain issues in a way that would, or might, otherwise be contrary to the NES - and which may therefore be prohibited by subclause 55(1). For example: clauses 93 and 101 allow for the cashing out of paid annual leave and paid personal/carer's leave; and subclause 107(5) allows a modern award or enterprise agreement to specify the kind of evidence that must be provided to access paid personal/carer's leave.
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> 211. Subclause 55(2) ensures that such terms are able to be included in a modern award or enterprise agreement."[13]

18. Clearly the Manufacturing, Airport Employee, Food, Seafood Processing, Timber and other Awards could have contained the express exclusion provided for at s.91 however, to the contrary, the parties and the FWC when making the Award and, through the 2012 Review, enabled the provisions complained of to supplement pursuant to s.55(4), rather than detract, from the NES.

19. The AIG submit that the *"NES have effect subject to terms included in a modern award"*[14]. On that argument the subject supplementary Award provisions cannot be said to be inconsistent with s.91 of the NES.

20. The clauses complained of in the Airport Employees, Manufacturing, Food, Seafood Processing, Timber and other Awards are consistent with the schema of the Act, in particular s.22(5) and do not offend the NES. The provisions should be retained.

Building and Construction General On-site Award 2010 Clause 17.7

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[13] Fair Work Bill 2008 Explanatory Memorandum
http://www.austlii.edu.au/au/legis/cth/bill_em/fwb2008124/memo_0.html

[14] Aig Submission 26 September, 2014 Paragraph 2.2, dot point 2
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/Timber-sub-NES-AiG-260914.pdf

21. This clause has been raised by the CEPU in its submissions as similar to the clause which has been raised by the National Farmers Federation and the AiGroup as being inconsistent with s.91.

22. This particular clause in the Building and Construction General On-site Award 2010 is slightly different in that it provides for service to be recognised generally and is not part of the award's annual leave clause. Clause 17.7 is part of the Industry Specific Redundancy Scheme clause and is regulated by s.123(4)(b) and s.141 of the Fair Work Act 2009 which deals with industry specific redundancy schemes in modern awards.

23. A similar clause can be found in the pre-reform National Metal and Engineering On-site Construction Industry Award 2002 at clause 15.4.

24. The clause is not inconsistent with the NES as the NES specifically provides at s.123(4)(b) that Subdivision B Redundancy Pay does not apply where an industry specific redundancy scheme in a modern award applies to an employee.

Cashing out of personal leave – Timber Industry Award 2010 Clause 34.4

25. The AMWU supports the position put forward by the CFMEU in their further reply submissions of 21 November 2014. To summarise, we agree that this matter may be inconsistent with the NES and do not specifically oppose the amended clause put forward by the AiG. We agree that the matter can appropriately be dealt with during the award stage, and we reserve our right to make further submissions on the matter.

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