Fair Work Commission

Section 156 – Four Yearly Review of Modern Awards

Alleged Inconsistences with the NES

Outline of Submissions

Mobile Crane Hiring Award 2010

1. Clause 26.2(c)(i) of the Mobile Crane Hiring Award 2010 (the Modern MCH Award) provides;

    i. An employer may allow an employee to take annual leave prior to the employee's entitlement otherwise arising. In such circumstances the ***qualifying period*** *of further annual leave will not commence until the expiration of 12 months in respect of which the leave so allowed was taken.(emphasis added)*

2. The NES relevantly provides:

    87 Entitlement to annual leave

    …….

    87 (2) Accrual of leave

    An employee's entitlement to paid annual leave accrues progressively during the year of service according to the employee's ordinary hours of work, and accumulates from year to year.

    88 Taking Paid Annual Leave

    1) *[Leave period may be agreed between employee and employers] Paid annual leave may be taken for a period agreed between an employee and his or her employer.*
    2) *[Employer must not unreasonably refuse paid annual leave] The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.*

3. The entitlement to annual leave provided for by the NES differs markedly from that provided by predecessor legislation. Section 232(2) of the former *Workplace Relations Act* 1996 provided that an employee was entitled to accrue an amount of

paid annual leave for each completed 4 week period of continuous service with an employer of 1/13th of the nominal hours worked during the four week period. In other words, under the previous Act, the entitlement arose at the completion of each four week block of continuous service rather than accruing progressively during each year of employment. As the Full Bench of the Fair Work Commission has noted '*The critical feature of s.87(2) is that, unlike the annual leave regimes found in many pre-modern awards and State legislation, there is no minimum qualifying period of service before an employee accrues a period of annual leave accessible by the employee.*'[1]

4. As well as a standard entitlement of 4 weeks leave after fifty two weeks continuous service (i.e. 13 completed 'blocks' of 4 weeks service), previous award provisions reflected this statutory concept of a qualifying period which was reached after each completed four week block. Thus the predecessor award to the Modern MCH Award stated that an entitlement of 28 consecutive days (inclusive of weekends, but exclusive of public holidays) was to be given and taken as annual leave after 12 months continuous service (clause 25.1.1). Proportionate leave on termination was dependent upon the completion of each period of 38 ordinary hours worked (Clause 25.9).

5. The predecessor award also contained a clause in almost identical terms to the current clause 26.2(c)(i) (see clause 25.5.1). It reflected a point in time where safety net provisions did not mandate that annual leave was to accumulate progressively and be accessible accordingly, as is now the case under the NES. That outmoded concept has carried over into Clause 26.2(c)(i) of the Modern MCH Award.

6. Although the quantum of annual leave guaranteed by the *Fair Work Act* 2009 remains unchanged at 4 weeks for each year of service, the entitlement set out in the NES is now unencumbered by any requirement for an employee to complete 'blocks' of 4 week of continuous service in order to accumulate an entitlement to leave. Nor does it contain any restriction on the taking of leave in advance of the kind set out in Clause 26.2(c)(i). There is no 'qualifying period' for either the accrual of the entitlement to leave or the capacity to take annual leave once accrued.

7. The second sentence of clause 26.2(c)(i) of the Modern MCH Award purports to impose a minimum 'qualifying period' for any annual leave which is taken after an earlier period of annual leave which has been taken in advance. Taking annual leave before the expiration of this qualifying period, something plainly permitted (by agreement of the parties) under the NES, would be a contravention of the award provision. There is a direct collision between this award provision and the right of an employee under section 88(i) to seek agreement from their employer to take accrued annual leave at any mutually convenient time - and to take that leave. This restriction

[1] [2014] FWCFB 9412 at [87]

or limitation is directly contrary to a central tenet of the NES, namely that terms of modern awards or enterprise agreements can only operate *'to the extent that the effect of those terms* ***is not detrimental to an employee in any respect****, when compared to the NES'* (section 55(4)) (emphasis added).

8. The restriction might also arguably operate to limit an employee's access to proportionate leave on termination and therefore conflict with section 90(2).

9. The second sentence of Clause 26.2(c)(i) should be removed from the Modern MCH Award.

Building and Construction General On-site Award 2010

10. Clause 17.7 of the Building and Construction General On-Site Award 2010 (The Modern Construction Award) provides:

> ***(a)*** *Where a business is, before or after the date of this award, transferred from an employer (in this subclause called* ***the old employer****) to another employer (in this subclause called* ***the new employer****) and an employee who at the time of such transfer was an employee of the old employer in that business becomes an employee of the new employer:*
>
> > ***(i)*** *the continuity of the employment of the employee will be deemed not to have been broken by reason of such transfer; and*
> >
> > ***(ii)*** *the period of employment which the employee has had with the old employer or any prior old employer will be deemed to be service of the employee with the new employer.*
>
> ***(b)*** *In this subclause,* ***business*** *includes trade, process, business or occupation and includes part of any such business and* ***transfer*** *includes transfer, conveyance, assignment or succession whether by agreement or by operation of law.* ***Transferred*** *has a corresponding meaning.*

11. There is no inconsistency between Clause 17.7 of the Modern Construction Award and s. 91(i) of the *Fair Work Act*. Section 91(i), in combination with subsection 22(5), merely prescribes what the minimum entitlements are in circumstances where there is a transfer of employment between non-associated entities and the second employer determines not to recognise the employee's service with the first employer. That is to say, under the NES a transferring employee has no *right* to have their service with a non-associated entity of the first employer recognised for the purposes of annual leave. However, where service is so recognised, there is no obligation on the first employer to pay out untaken annual leave (s. 91(2) and see Explanatory Memorandum at paragraph 376). Conversely, where service is not recognised, the first employer will be required to pay out untaken annual leave (Explanatory Memorandum paragraph 375).

12. The scheme and purpose of these provisions is to set out statutory minimum entitlements to annual leave for transferring employees. Whilst this statutory scheme recognises that there is no obligation on 'non-associated' new employers to recognise service for annual leave purposes, there is nothing in the NES which provides that modern award provisions cannot impose such an obligation. In fact, the NES makes it clear that award and agreement provisions can supplement the statutory minima set out in the NES '*to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the NES*' (s55(4)). Clause 17.7 is clearly such a clause and is permissible on this basis.

13. The argument that clause 17.7 of the Modern Construction Award is 'inconsistent with the NES' is fundamentally misconceived and should be rejected.

CFMEU (Construction and General Division)

23 January, 2015.