

IN THE FAIR WORK COMMISSION

MATTER NO: AM2014/1 and Ors – FWO Correspondence re Inconsistencies between the National Employment Standards (NES) and Modern Awards

SUBMISSIONS OF THE AUSTRALIAN MANUFACTURING WORKERS' UNION (AMWU) - VEHICLE DIVISION

1. These submissions are filed in response to statement issued by the FWCFB dated¹ 13 August 2014 relating to the inconsistencies identified by the Fair Work Ombudsman ('FWO') between the National Employment Standards (NES) and Modern Awards entitlements.
2. The FWO identified two issues of inconsistency or ambiguity in their correspondence dated 4 April 2014 between the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* [MA000089] ('Vehicle Award') and particular NES provisions.
3. The two inconsistencies which have been identified in relation to the Vehicle Award are:
 - 3.1 Annual Leave (Part 2-2 Division 6, Schedule 2 – Accrual) - Inconsistency between section 87(2) of the Act dealing with the accrual of annual leave for seven day shiftworkers, and clause 29.5(b) of the Award;
 - 3.2 Annual Leave (Part 2-2 Division 6, Schedule 2 – On termination) - Inconsistency between section 90(2) of the Act dealing with the payment of accrued, untaken annual leave and clause 29.8 of the Award.

Issue 1: Accrual of Annual Leave

Fair Work Act 2009 (Cth) ('the Act')

4. Part 2-2 Division 6 sets out the annual leave entitlement for employees under the Act.
5. Section 87 of the Act sets out the annual leave entitlement and provides that employees are entitled to 5 weeks paid leave if "*a modern award applies to the employee and defines or describes an employee as a shiftworker for the purposes of the National Employment Standards.*"²
6. Section 87(2) discusses how annual leave accrues for the purposes of the Act. This section provides that:

¹ [2014] FWCFB 5527 at [28]

² Section 87(1)(b)(i) of the Fair Work Act 2009 (Cth).

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

Vehicle Award

7. Clause 29 of the Vehicle Award deals with the entitlement to annual leave. Clause 29.5 deals with the entitlement to annual leave for seven day shiftworkers. Clause 29.5(a) defines a 'shiftworker' for the purposes of the Act:
 - (a) For the purpose of the additional week of annual leave provided for in s.87(1)(b) of the Act, a shiftworker is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays.
8. Clause 29.5(b) deals with the accrual of annual leave for shiftworkers. This provides:
 - (b) Where an employee with 12 months' continuous service is engaged for part of the 12 month period as a seven day shiftworker, the employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.

Inconsistency Issue

9. One of the inconsistencies which FWO have identified is that it is not clear from clause 29.5 of the Vehicle Award whether an employee must have completed 12 months continuous service before they are entitled to access the shiftworker leave entitlement.
10. The AMWU agrees that, to the extent that clause 29.5(b) of the Award requires as a condition precedent 12 months continuous service, it is inconsistent with s87(1)(b) and s87(2) of the FW Act.
11. For this reason we proposed varying the clause to remove the words "*with 12 months' continuous service*" from the current 29.5(b). This would remove the inconsistency identified by the FWO.
12. However, the AMWU submits that – aside from this variation – the clause should remain unvaried (subject to particular clarifications) because it contains a more beneficial entitlement than s87(1)(b).
13. If, under clause 29.5(b) of the Vehicle Award a seven day shiftworker works for a consecutive period of 12 months, they are entitled to an additional 6 days of annual leave (one half day for each month they are continuously engaged as a seven day shiftworker). This entitlement exceeds the entitlement contained in s87(1)(b)(i) of the FW Act.
14. If, under clause 29.5(b) of the Vehicle Award a seven day shiftworker works for a period less than 12 continuous months, then the clause allows for a pro-rata accrual of additional annual leave. For example, if a seven day shiftworker was engaged for 3 months, they would be entitled to an additional 1.5 days of leave. Under the NES,

they would be entitled to an additional ¼ of a week which, based on a 38-hour week, equates to 1.25 days of leave.

15. The AMWU submit that clause 29.5(b) is designed to cover employees falling within the second scenario; that is where a shiftworker works a period of less than 12 continuous months, or engaged for part of a 12 month period as a shiftworker.
16. The mere fact that the Vehicle Award provides for a better entitlement than the NES does not render the provision inconsistent with the Vehicle Award.
17. The FWO also notes that, under the NES, annual leave accrues progressively throughout the year on the basis of the ordinary hours of work performed by the employee. To the extent that it is arguable that under this clause the additional leave does not accrue progressively during the relevant periods, we further propose to vary clause 29.5(b) as follows:

Where an employee ~~with 12 months' continuous service~~ is engaged for ~~only~~ part of ~~a~~ the 12 month period as a seven day shiftworker, the employee must have their annual leave increased by half a day for each month ~~based on the ordinary hours worked over the relevant period in which the employee~~ is continuously engaged as a seven day shiftworker.³

Issue 2: Annual Leave Loading on Termination

18. The FWO has identified Awards where the provision for or express exclusion of payment of annual leave loading upon termination is ambiguous or offends the NES.
19. The Vehicle Award is one of the Awards being considered as part to the annual leave common matters⁴. The AMWU understands that this issue identified by the FWO has already been progressed before a Full Bench of the Fair Work Commission and, as such, it is not necessary to make further submissions on that matter.

29 September 2014

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) - Vehicle Division

³ See attached draft determination.

⁴ AM2014/47.

DRAFT DETERMINATION

Fair Work Act 2009
Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Vehicle Manufacturing, Repair, Services and Retail Award 2010
(ODN AM2008/62) MA000089

Vehicle industry

MELBOURNE, XX YYY 2014

Review of modern awards to be conducted.

- [1] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* be varied as follows:

Clause 29.5 Seven day shiftworkers

- [2] Remove the paragraph 29.5(b).
- [3] Substitute with the following:

Where an employee is engaged for only part of a 12 month period as a seven day shiftworker, the employee must have their annual leave increased by half a day for each month based on the ordinary hours worked over the relevant period in which the employee is continuously engaged as a seven day shiftworker.

- [4] The determination shall operate on and from XX YYY 2014

Commission Member