

WORKPLACE RELATIONS

16 June 2015

NAT 008/15

Annual Leave Decision – 4 Yearly Review of Awards

SUMMARY

In a major case contested over the past 15 months Ai Group has been successful in convincing a Full Bench of the Fair Work Commission (FWC) to give employers enhanced rights to direct employees to take excessive accrued annual leave, and to allow cashing-out of annual leave for award-covered employees by agreement with their employer. The decision provides important new rights for employers and important flexibilities for employers and employees.

Awards have not yet been varied to reflect the Full Bench's decision. Ai Group will distribute a member advice on individual modern awards when the specific terms of the variations have been settled by the FWC.

Annual Leave Common Issue Case – 4 Yearly Review of Awards

Ai Group is working hard to protect and promote Members' interests during the FWC's 4 Yearly Review of Awards. The Review commenced in early 2014 and will continue until at least the end of 2016. Ai Group is playing a leading role amongst employer groups. There are many risks for employers given the claims that the unions are pursuing, but there are also some opportunities to achieve more flexibility from the proposals which Ai Group has put forward.

As part of the Review, a series of major cases have been scheduled involving proposals to vary all or most awards. The FWC has called these proceedings "common issue" cases.

In the *Annual Leave Common Issue Case*, Ai Group sought to have model clauses included in most modern awards covering:

- The right of an employer to direct an employee to take annual leave where the employee's accrued leave is excessive;

- The cashing out of annual leave by agreement between an employee and the employer, provided that at least four weeks' of accrued leave is maintained;
- The granting of annual leave in advance by agreement between an employee and the employer, with the employer having the ability to deduct payment for any leave granted in advance from monies owed on termination;
- The right for an employer to pay annual leave as part of the employer's normal pay cycle, rather than in advance of the leave being taken; and
- The right of an employer to require employees to take annual leave during a close-down.

On 11 June 2015, a Full Bench of the FWC handed down its decision in the *Annual Leave Common Issue Case*. Key elements of the decision are summarised below.

At this stage no awards have been varied to reflect the Full Bench's decision. Ai Group will distribute a member advice on individual modern awards when the specific terms of the variations have been settled by the FWC.

Excessive leave

Employers will be given enhanced rights to direct employees to whom an award applies to take annual leave when an employee has an "excessive leave accrual" (defined as more than eight weeks' accrued annual leave for employees who are entitled to four weeks' of annual leave per year and 10 weeks' accrued leave for those shift workers who are entitled to five weeks' of annual leave per year).

The specific clause to be inserted into awards has not yet been settled, but the FWC has proposed that the clause will include the following aspects:

- Before an employer can direct an employee to take leave, the employer and employee will be required to genuinely try to agree upon the steps that will be taken to reduce or eliminate the employee's excessive leave; and
- A direction from the employer must not result in the employee's remaining accrued leave being less than six weeks and must not require the employee to take any period of leave less than one week. Also, at least eight weeks' notice must be given to the employee of the commencement of the leave.

At this stage it is not clear whether every award will be varied to reflect the FWC's decision given that many awards already have provisions about excessive leave accruals.

The FWC's decision relates only to employees to whom an award applied. Enterprise agreements under the *Fair Work Act* are able to contain provisions giving an employer the right to require an employee to take annual leave in particular circumstances if the requirement is "reasonable" (s.93(3) of the Act). Also, an employer may direct an award-free or

agreement-free employees to take annual leave in particular circumstances if the requirement is "reasonable" (s.94(5) of the Act).

Cashing out of annual leave

Employees to whom an award applies will be able to cash out accrued annual leave in excess of four weeks' accrued leave, by agreement with their employer and subject to various safeguards, including:

- Each cashing out of a particular amount of accrued annual leave must be by a separate agreement in writing between the employer and the employee; and
- An employee may not cash out more than two weeks' accrued annual leave in any 12 month period.

The FWC's decision relates only to employees to whom an award applies. Cashing out of annual leave for employees covered by an enterprise agreement under the *Fair Work Act* is available only if the agreement provides for such cashing-out and the safeguards in section 93 of the Act apply. Award-free and agreement-free employees are able to cash out annual leave in excess of four weeks' accrued leave, by agreement with their employer and subject to the conditions in section 94 of the *Fair Work Act*.

Granting annual leave in advance

Employers of employees to whom an award applies will have the right to grant annual leave in advance of the leave accruing, by agreement with an employee. If leave in advance is taken by an employee, the employer will be able to deduct payment for the leave in advance from money owed to the employee on termination.

At this stage it is not clear whether every award will be varied to reflect the FWC's decision or only the 48 awards which Ai Group and other employer groups applied to vary for this entitlement. The FWC has expressed a provisional view that all awards should be varied in similar terms.

Payment of annual leave as part of the normal pay cycle

Despite the fact that it is very common for employees to be paid for their annual leave in accordance with the normal pay cycle, a large number of awards still require that annual leave be paid in advance of the commencement of annual leave.

The Full Bench has endorsed the clause proposed by Ai Group and decided that when employees are paid by electronic funds transfer (EFT), the employees may be paid in accordance with their usual pay cycle when on annual leave.

Annual close-down

The FWC has decided that it is not desirable to have a common annual close-down provision across all awards given that award provisions in this area vary considerably from one industry to another. A party may, however, seek the insertion of a new close-down provision or to vary an existing close-down provision when specific awards are considered during the 4 Yearly Review.

Payment of annual leave entitlements on termination

The FWC has decided to adjourn consideration of union claims for awards to be varied to require that an employer pay an employee on termination the amount that would have been payable had the employee taken the relevant period of annual leave (including annual leave loading).

The unions' claims in this area stem from uncertainty surrounding the interpretation of s.90(2) of the *Fair Work Act*. The Federal Government is seeking to amend s.90(2) to address the uncertainty through the *Fair Work Amendment Bill 2014* which is before Parliament. The interpretation of s.90(2) is also the subject of an appeal which is currently before the Full Court of the Federal Court of Australia.

Other cases during the 4 Yearly Review

The 4 Yearly Review of Awards involves individually reviewing each of the 122 modern awards, as well as providing the vehicle for a large number of common issue cases dealing with entitlements across the award system.

The 122 awards have been divided into four broad groups and further split into subgroups. At this stage no awards have been finalised given the large number of interpretation issues that have arisen due to the FWC's decision to re-draft each award.

Apart from the *Annual Leave Common Issue Case*, the common issue cases which have been scheduled by the FWC and the status of each matter are outlined below:

- ***Award Flexibility Common Issue Case***

This case relates to an Ai Group proposal to insert time-off-in-lieu of overtime and make-up time provisions in awards that currently do not include this type of flexibility. The hearings have concluded and the FWC Full Bench has reserved its decision.

- ***Accident Pay, District Allowances and Redundancy Pay Transitional Provisions Common Issue Case***

As discussed in Member Advice [NAT 002/15](#) and [NAT 006/15](#), this case involves a review of the accident pay, district allowances and certain redundancy provisions that were included in modern awards on a transitional basis until 31 December 2014. The case also includes union claims to insert national accident pay entitlements applicable to all employees covered by about 40 modern awards and the re-introduction of district allowances in a number of modern awards. The hearings regarding accident pay have concluded and the FWC Full Bench has reserved its decision on this topic. The district allowance hearings have been adjourned.

- ***Apprentice Common Issue Case***

This case involved the insertion of certain apprentice terms and conditions decided by the Full Bench in the FWC's *Apprentices, Trainees and Juniors Case* in 2012 into a large number of other awards. The case has concluded and relevant awards have been varied.

- ***Casual Employment Common Issue Case***

This case will be heard before a five-Member Full Bench of the FWC headed by Vice President Hatcher. The unions are pursuing numerous claims to restrict casual employment flexibility. Ai Group is seeking to increase flexibility and reduce red tape for employers. The matter was listed for Mention on 5 June 2015. Submissions and evidence will be filed in October before hearings in early 2016.

- ***Part-time Common Issue Case***

This case will be heard in conjunction with the *Casual Employment Common Issue Case*. Unions are pursuing claims to give part-time employees more entitlements. Ai Group is seeking to increase flexibility regarding part-time employment.

- ***Family and Domestic Violence Clause Common Issue Case***

The ACTU is seeking the inclusion in all awards of a clause which would provide, amongst other aspects, an entitlement to up to 10 days of paid leave per year to an employee who experiences family violence.

Ai Group has filed submissions opposing the ACTU's application on the basis that the FWC does not have the power to grant the claim. A hearing is scheduled in August 2015 to deal with the jurisdictional issues.

- ***Family Friendly Work Arrangements Common Issues Case***

The ACTU is seeking a right for new parents to return to work on a part-time basis, with only a very limited right for

employer refusal. This case also includes a claim for additional paid leave to attend pre-natal, pre-adoption or permanent care order appointments. Ai Group has filed submissions opposing the ACTU's application on the basis that the FWC does not have the power to grant the claim. A hearing is scheduled in August 2015 to deal with the jurisdictional issues.

- ***Public Holidays Common Issues Case***

This case involves a review of public holiday provisions in modern awards including various union claims for new entitlements. It is anticipated that these proceedings will commence in early 2016.

- ***Micro-business Schedule Common Issue Case***

This case relates to a proposal of a NSW employer group for a micro-business schedule to be inserted in all modern awards which would apply to businesses that employ fewer than five employees. The proceedings have not yet commenced.

In addition to the above common issue cases, there is a major ***Penalty Rates Case*** underway involving a review of penalty rates in the fast food, retail and hospitality industries. Ai Group Workplace Lawyers are representing fast food industry employers in this case.

Another major case involving a review of award terms which are allegedly inconsistent with the NES, is largely complete.

Do you require further advice?

For information or assistance, please contact the **Ai group's BIZassistInfoline** on 1300 78 38 44.



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