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Sent: Thursday, 13 April 2017 12:55 PM
To: AMOD
Cc: Andrew Thomas; trent.sebbens@ashurst.com; adrian.morris@ashurst.com
Subject: AM2014/47 Annual Leave Black Coal Mining Close Down

Dear AMOD

Please find attached a revised version of the AMWU's submissions dated 11 April, with a new paragraph 43. The previous version contained an error in the last sentence of paragraph 43.

Regards

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IN THE FAIR WORK COMMISSION

Matter No.: AM2014/47 Annual Leave

Re Application by: Coal Mining Industry Employer Group regarding Shut Down



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

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following Submissions to the Fair Work Commission about the provisional views set out by the Full Bench at [34] – [38] of the decision in *4 yearly review of modern awards – Annual Leave* [2017] FWCFB 959.
2. The provisional view expressed by the Full Bench raises the following issues:
 - a. The notice period of direction may result in some employees not having sufficient leave to cover the period of the shutdown.
 - b. This results in a proposed ability for an employer to require an employee to take unpaid leave whether or not they had requested such unpaid leave, which is tantamount to a stand down.
 - c. There is no power to make an award that allows employers to stand down employees in Awards.
3. The AMWU's submissions will address the following:
 - a. The current uses for shutdowns;
 - b. The relevant power to direct the taking of annual leave;
 - c. The difference between an employer power to direct an employee to take unpaid leave and an employer power to stand down an employee without pay;
 - d. The way that Stand Down is dealt with by the *Fair Work Act 2009*;
 - e. The reasonableness of directing paid leave for the purposes of a shut down;
 - f. If the Commission decides to include a Shutdown clause:
 - i. The reasonableness of the notice period; and
 - ii. Allowing for paid leave in advance.

- iii. Stand down under s.524 should allow for approval of both paid leave or unpaid leave and not provide for a power to direct paid leave.

Current Uses for Shutdowns (Close Downs) in the Industry

4. The AMWU understands that the current uses for Shutdowns has changed in the industry along with changes in utilisation of capital and mine operating hours.
5. When the mines used to operate three eight hours shifts with optional overtime for weekends, there was a tendency to conduct significant shutdowns across the entire mine twice a year.
6. As mines have moved to operating 24 hours and 12 hours shifts have been implemented over seven days, the shut downs have also changed in nature, being confined to smaller specific areas.
7. The general practice is for the maintenance planning for these shutdowns of specific areas is to be planned at least 12 months in advance.
8. Employees who are in the specific work areas which are impacted by the shutdown are provided with an opportunity to take Annual Leave during that period if they wish. Many of the employees who do not choose to take Annual Leave are deployed to other areas which are not shutdown.
9. These shutdowns for planned maintenance which the employer is in control of are distinct from Stand Downs which are only allowed under the Act in specific circumstances or through clauses in enterprise agreements or contracts of employment.¹ Stand downs which are in response to natural disaster or breakdowns outside of the employer's control are of an entirely different nature and should considered differently by the FWC.
10. If this understanding of the current manner in which the industry operates and conducts shut downs is disputed, the employers should provide evidence about

¹ Part 3-5 *Fair Work Act 2009*

the specific types of shutdowns which they say should result in the requirement to direct the taking of annual leave.

The Relevant Power for Directing the Taking of Paid Annual Leave

11. The Annual Leave Decisions have relevantly canvassed the section which gives power to the Fair Work Commission (FWC) to include clauses in Modern Awards about when an employer may direct the taking of *paid leave*.² In particular, the Full Bench relies upon s.93(3), coupled with paragraph 381 of the explanatory memorandum which provides an example of an employer's decision to shut down a workplace over the Christmas / New Year period.
12. There may be a power to deal with unpaid leave under s.139. However, there is a question about whether there is power to provide a clause which provides for an employer to direct the taking of unpaid leave. It would not be consistent with the legislation for the Commission to make a distinction between an employer directing an employee to take unpaid leave and a stand down. This distinction between unpaid leave and stand down is important. It appears that the legislature purposely considered whether Awards should allow for employers to stand down employees when it removed stand down from the list of allowable matters in Awards.

There is no difference between an employer direction to an employee to take Unpaid Leave and an employer power to Stand Down an employee without pay

13. There is no difference between an employer directing an employee to take unpaid leave and an employer seeking to stand down an employee without pay. Providing an employer with a right to direct an employee to take unpaid leave amounts to the employer having an unfettered power to avoid obligations to provide full time or part time work and make payments to permanent employees on this basis. Employees have a reasonable expectation of work and regular payments that should be subject to an unfettered employer discretion to shutdown a workplace. This would make the employment very similar to casual employment in terms of the employer's ability to call an employee in for work or

² 4 yearly review of modern awards – Annual Leave [2015] FWCFB 3406 at [336] to [356]

suspend them without regard for any expectations that they may have for ongoing work.

14. The concept of leave is that it is requested by and taken by an employee and that the leave is for the employee's benefit. When it comes to unpaid leave, whether or not the employee has requested to take the leave is an important characteristic to consider. Conversely, an employer stand down of an employee without pay does not involve any role on the part of the employee, except to either accept or challenge the validity of the stand down. Irregular Casual employees for example are not able to challenge the validity of an employer direction not to come to work for a period. While a permanent employee would be entitled to ask the question why they are being stood down.
15. If an employer doesn't want to pay an employee, they must meet the very specific requirements of the Stand Down provisions, or Protected Industrial Action provisions in the Act.
16. There is no functional distinction between unpaid leave or stand down initiated by the employer. However, there is a distinction between unpaid leave requested and taken by an employee and unpaid leave which is directed and initiated by an employer. This distinction is reinforced in the treatment of unpaid leave, as compared to Stand Down when it comes to accrual of Service in s.22 of the Act. An employee's unpaid leave does not count as service. However, a stand down period does count as service.
17. This recognises that unpaid leave at the request of an employee is for the employee's benefit and they should not be allowed to accrue service related entitlements where they have requested unpaid leave with the intention of returning to work. Whereas Stand Down is for the employer's benefit to assist in unforeseeable or uncontrollable circumstances. This benefit to the employer and detriment to the employee is recognised by s.22 which attempts to ameliorate this detriment to the employee which is also outside of their control by preventing the accrual of service related entitlements from being paused during the period of a stand down.

18. In summary, unpaid leave should be requested by the employee, otherwise it amounts to a stand down by the employer or industrial action by the employer which is not allowed under the Act.
19. A Modern Award which provides for a de facto stand down clause in the form of a clause allowing for employers to direct unpaid leave to be taken would be inconsistent with the legislative framework which deals with Stand Down. It cannot be justified as necessary for a fair and relevant minimum safety net in the circumstances of the Black Coal Mining Industry.

Stand Down is dealt with specifically in the *Fair Work Act 2009*

20. Stand Down is dealt with specifically in the Fair Work Act 2009 at s.524. This provision provides the important legislative cover for an employer to avoid payments to an employee at subsection 524(3):

“524(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.”
21. It is also important to note that the Stand Down sections in the Act, explicitly states that an employer cannot stand down an employee under the Act, if there is a Stand Down provision in an enterprise agreement or contract of employment. The legislation does not concede any space for Modern Awards to contain Stand Down clauses. This omission to allow for Modern Awards to contain stand down clauses which override s.524 is consistent with the changes to allowable matters in awards.
22. This decision to remove Stand Down from the list of Allowable Matters is reinforced by the history of the allowable matters.
23. The *Workplace Relations Act 1996*, at 5 September 2005 contained as an allowable matter in s.89A(2)(o) stand-down provisions.
24. The *Workplace Relations Act 1996*, at 5 December 2006 contained as an allowable matter in s.513(1)(l) stand-down provisions.

25. The present s.139 of the Fair Work Act 2009, does not allow for any stand down or stand-down provisions in Modern Awards.
26. While there is a provision for the FWC to provide for circumstances where an employer may direct paid leave in s.93(3), this is very specifically confined to “paid leave.” There is significance in there existing this very specific section to allow for a Modern Award to include clauses that allow an employer to direct paid leave.
27. Comparing the two types of clauses; a power to direct employees to take paid annual leave, is much less punitive in nature to a power for an employer to stand down an employee. Given the punitive nature of stand downs, there should be a specific provision to allow for these types of provisions to exist. That specific provision exists in the form of s.524 which limits the extent to which an employer can stand down an employee without pay.
28. This contrasts with the alternative position, which would be that s.139(1)(h) provides a power for stand down under “leave.” In order for this interpretation of the legislation to be correct, it would require the FWC to determine that an employer power to direct unpaid leave, is different to a power to stand down without pay.
29. For these reasons, the AMWU submits that there is no power for the FWC to include a clause which allows an employer to direct the taking of unpaid leave which is essentially the same thing as a power to stand down without pay.
30. If the FWC is of a mind to find that there is some distinction between an employer directing an employee to take unpaid leave, and an ability to stand down an employee without pay, the AMWU submits that there is a serious question to be answered about whether an employer should have a power to stand down an employee for reasons other than those provided for by the legislature and whether this can be part of a fair and relevant safety net.

Reasonableness of the direction to take annual leave

31. Giving businesses the power to direct employees to take annual leave in the Black Coal Mining Industry is not reasonable in the current circumstances. The general uses for shutdowns in the modern 24 hour 7 day operations of a Black Coal mine are isolated to very specific parts of the operation. The reasons which may have existed previously of shutting down an entire plant to allow for the taking of annual leave no longer exist. Outside of these planned shutdowns are Stand downs because of natural disaster or events outside of the employer's control which fall under the "Stand Down" provisions of the Act.
32. Where an entire Coal Mine was shut down because a majority of employees wanted to take leave at one time and business was keen to allow for employees to take that leave, there would be limited opportunities for redeployment or work. Where the entire mine is shutdown, there is clearly circumstance where a shut down may be more desirable for all parties in order to allow for employees to take annual leave.
33. However, in the current circumstances, the more efficient planning of maintenance in very specific areas has allowed for more intensive extraction from the mines and use of associated capital. Where only part of a mine or work area is shut down, there are more opportunities for employees to be redeployed. The significant lead times for planned maintenance also mean that there are more opportunities for arrangements for annual leave to be reached on a voluntary basis. The current way in which the industry operates effectively removes a rationale that the shut down is for the purpose of allowing employees to take annual leave.
34. The Annual Leave clause should prioritise and facilitate the voluntary reaching of agreement between the employer and the employee. Providing employers with a blanket power to direct leave because of a "shut down" will discourage the careful planning, voluntary agreement for annual leave and considered redeployment which should accompany a planned shut down which is efficient and productive.

Other matters if the FWC decides to include a shutdown clause

Reasonableness of the notice period

35. While the AMWU does not support an ability to direct the taking of paid annual leave by the employer for unspecified “shutdowns,” if the FWC is minded to create a right to direct the taking of annual leave in this unspecific circumstance of “shutdown” the period of notice should match the significance of the period.
36. Given the uses of shutdowns in the Black Coal Mining Industry, it is not unreasonable for the employer’s required notice period to match the length of paid leave being directed to be taken. Planned maintenance requires a long lead time. This lengthy period of planning would suggest that a lengthier period of notice which matches the accrual of leave for the period of the shut down should not be a great difficulty for Black Coal Mining businesses.
37. If a shutdown is to occur for one week, then the notice period should at least be a period of notice which matches the length of time which it would take to accrue that one week’s leave, which would be approximately 10.4 weeks (35hrs/3.3654hrs leave accrued per week) or 8.7 weeks for 7 day roster employees. A three week shutdown would require 31.2 weeks or 6 months notice for a 7 day roster employee.
38. The lengthier notice periods for longer shut downs takes into account the needs of the employee to conduct planning for their leave, in terms of partner leave, arrangements for children and holiday related planning (flights, accommodation etc). It also takes into account that a very significant number of employees do not take leave because they are saving up their leave for a holiday, can’t get time off that suits or are too busy at work. These factors weigh in favour of a lengthier notice period.
39. The statistics relied upon previously by the Full Bench indicated that 42.1% of non-professional employees did not take leave because they were saving leave for

a future holiday. Also relevant is that for non-professional employees 14.5% say they could not get time off that suited and 25.4% said they were too busy at work.³

Paid Leave in Advance Should be Allowed

40. While the AMWU primary position is that the Modern Awards cannot or should not provide for an employer power to direct employees to take unpaid leave, if the Commission decides that there can and should be an employer power to direct unpaid leave, then the AMWU submits that the employer should first be required to approve any request for paid leave in advance.
41. If an employee doesn't have enough leave to cover the period of the shutdown, the employer should be required to allow the employee to take paid leave in advance if they wish. If the purpose is to allow employees to take annual leave, then employees who do not have the adequate leave should be allowed to take leave in advance, subject to the usual ability for the employer to deduct from any amounts on termination if the employee terminates their employment before they accrue sufficient leave to make up the leave in advance.
42. This is a fair requirement, because the direction to take paid leave is to the benefit of the employer in reducing annual leave balances across the workplace. There is also inconvenience for the employee who has not yet had sufficient time to accrue leave, in being directed to take leave at an inopportune time.

Paid leave or unpaid leave should be allowed during a period of Stand Down under s.524 of the Act

43. Putting aside the issue of whether there should be a general unspecified "shutdown" clause. If the business stands down employees under s.524 of the *Fair Work Act 2009*, in these circumstances, it would be appropriate to make clear that an employee should be allowed to take annual leave or unpaid leave. It would seem self evident that an employer would not be able to reasonably refuse a request for paid annual leave, where they were exercising the right to stand down employees without pay. However, if the employee wishes to retain their leave so

³ Paragraph [143] of Annual Leave Decision [2015] FWCFB 3406

that they can save up enough leave for a holiday, the employer should not be given the ability to direct the taking of paid leave.

44. It would not be reasonable for an employer to be given the power to direct an employee to take paid leave during a stand down under s.524, even if they had an excessive leave balance. The excessive leave balance should be dealt with under the excessive leave clause.
45. Simply because there was a circumstance which gave the employer the power to stand down employees without pay under s.524, does not create a circumstance where a power to direct paid leave is reasonable. It has to be considered in the context of how much paid leave the employee has, and the needs of the employee.
46. While it may seem that an employee is more likely to choose to be paid rather than be stood down during these circumstances outside of the employer's control, there may be circumstances where an employee may want to save their leave for a pre-planned and pre-approved period of annual leave which has already been agreed by the employer.

Conclusion

47. The AMWU opposes the inclusion of any clause which provides for an employer right to stand down employees without pay, because the Act does not allow for it and it cannot be considered necessary for a fair and relevant safety net.
48. The AMWU opposes the inclusion of any clause which provides for an employer to direct an employee to take annual leave during a shutdown of the workplace or part of the workplace for unspecified purposes, because it is not reasonable in the current circumstances of the industry.
49. If the FWC does consider it may be reasonable to include a power to direct an employee to take annual leave during planned maintenance shutdowns the AMWU submits that the period of notice should be equivalent to the length of time which it would take to accrue the period of leave to cover the shut down period.

50. If the FWC considers that it has the power to and it is necessary to include an employer power to direct an employee to take unpaid leave/be stood down without pay, the AMWU submits that the employee should have the option of requesting and being granted paid leave in advance. This would more fairly balance the needs of the employer and the employee.
51. If the FWC provides for a clause to deal with the leave applications during s.524 Stand Downs it should be clear that an employee has the option to choose to take paid leave which they are entitled to or be stood down without pay. They should not be forced to take annual leave in these circumstances unless they have excessive leave accruals which should be dealt with by the excessive leave clause.

End

11 April 2017