

Our ref: KZS\LGR\1000 041 081

10 February 2020

AM2018/14 AND AM2014/252 – AIR PILOTS AWARD 2010

SUBMISSIONS ON BEHALF OF QANTAS GROUP

1. We refer to the submissions made on behalf of the Qantas Group in relation to the *Air Pilots Award 2010* (**Award**) in matter number AM2018/14 dated 18 December 2019 (in relation to the training bond clause), and in matter number AM2014/252 dated 19 April 2018 (in relation to the annual leave clause).
2. These submissions are made on behalf of the Qantas Group in respect of the following issues:
 - (a) the AFAP's reply submissions dated 24 December 2019 and its proposed modification to the training bond clause put forward at the hearing on 12 November 2019 (**November Proposal**) to impose an additional cap on the amount of a training bond;
 - (b) the AFAP's submissions dated 6 February 2020 and its proposed amendments to clause 13.6(1)(h) of the November Proposal about when the amount of a training bond cannot be recovered; and
 - (c) the AFAP's submissions dated 6 January 2020 and its proposed amendments to the annual leave provisions in the exposure draft of the Award published on 14 October 2019.

Cap on training bond amount – clause 13.6(1)(d)

3. The parties, including the AFAP, put forward training bond proposals all of which included the following sub-clause 13.6(1)(d):

13.6(1) An employer and a pilot may, by agreement, enter into a training bond whereby the costs of training which have been or are to be borne by the employer may be recovered from the pilot if the pilot ceases to be employed by the employer within a period of time agreed between the pilot and the employer, subject to the following:

...

(d) The training bond amount cannot exceed fifty percent (50%) of the actual cost of the training.

4. The AFAP now proposes the following modification to this sub-clause, as follows:

13.6(1) An employer and a pilot may, by agreement, enter into a training bond whereby the costs of training which have been or are to be borne by the employer may be recovered from the pilot if the pilot ceases to be employed by the employer within a period of time agreed between the pilot and the employer, subject to the following:

...

(d) The training bond amount cannot exceed fifty percent (50%) of the actual cost of the training or an agreed value (which may vary by type), whichever is the lower.

5. The Qantas Group opposes the AFAP's proposed modification to clause 13.6(1)(d) which purports to represent a further cap on the amount of a training bond.¹
6. The earlier agreed drafting of clause 13.6(1)(d) already represents a significant cap on the amount of a training bond – namely, 50% of the actual cost of the training.
7. If parties wish to agree on a bespoke training bond amount that is less than 50% of the actual cost of the training, this is more appropriately achieved through enterprise bargaining.

When the training bond can and cannot be recovered – clause 13.6(1)(h)

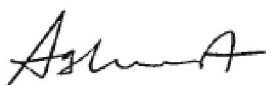
8. The training bond proposals put forward by the parties included the following sub-clause 13.6(1)(h):

(h) No amount can be recovered in the case of redundancy, loss of medical licence by the pilot, termination of employment by the employer (except in the case of serious misconduct) or where the Pilot fails the training course.
9. Interested stakeholders have been asked to consider the form of words at clause 13.6(1)(h). The Qantas Group proposes that sub-clause 13.6(1)(h) be amended as follows:

(h) No amount can be recovered in the case of redundancy, loss of medical licence by the pilot, termination of employment by the employer (except in the case of for the valid reason of serious misconduct) or where the Pilot fails the training course.
10. We oppose the wording put forward by the AFAP (as set out in their email dated 5 February 2020). In particular, the wording "or acceptance by the employer" is problematic. It is possible that an employer and employee may reach an agreement subsequent to termination of employment which deals, among other things, with the repayment of the training bond. The modern award should not deal with the recovery of the training bond in such circumstances.

Annual leave provisions in the Award

11. The Qantas Group agrees with the AFAP's submissions dated 6 January 2020 insofar as the "Annual leave" and "Excessive annual leave" clauses were intended to be included in one clause separated by sub-clauses, and not two separate clauses as currently set out in the October 2019 exposure draft of the Award.
12. In **Attachment A** to these submissions we have extracted clause 23 (Annual leave) and clause 24 (Excessive annual leave) of the exposure draft of the Award and re-positioned these clauses in mark-up to reflect our understanding of the agreed position between the parties, as set out in the Qantas Group submissions dated 19 April 2018, and the decision of the Full Bench [2018] FWCFB 4175 (see from paragraph [35]).



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¹ See paragraphs [31] and [32] of the AFAP's reply submissions dated 24 December 2019.

10 February 2020

Attachment A

Air Pilots Award 2010 - Annual leave provision

23. Annual leave

23.1 Annual leave is provided for in the NES. Clause 23 provides occupational specific detail.

23.2 When payment will be made for annual leave

A pilot will be paid in full for the period of leave to be taken prior to commencing such leave unless mutually agreed between the pilot and the employer.

23.3 Electronic funds transfer (EFT) payment of annual leave

Despite anything else in clause 23, an employee paid by electronic funds transfer (EFT) may be paid in accordance with their usual pay cycle while on paid annual leave.

23.4 Entitlement to annual leave

An employee is entitled to annual leave such that the employee's total entitlement to annual leave pursuant to the NES and this award for each year of employment is a total of 42 days annual leave, inclusive of Saturdays, Sundays and public holidays on full salary for each completed year of service, with a right to take 2 rostered days free of duty immediately before or after or one day immediately before and one day immediately after such leave period.

NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

23.5 Annual leave loading

(a) Clause 23.5 does not apply to employees engaged in aerial application operations.

(b) In addition to the entitlement to payment under clause 23.4, a pilot when proceeding on annual leave will be paid in respect of the first 28 of 42 days annual leave (inclusive of Saturdays, Sundays and public holidays) falling due each year either:

(i) an annual leave loading equivalent to 17.5% of the salary inclusive of allowances and additions to salary prescribed by this award; or

(ii) the pilot's actual salary inclusive of allowances and additions to salary,

whichever amount is greater.

23.6 When annual leave can be taken

(a) A period of leave will commence on a Monday unless otherwise mutually agreed.

- (b) Normally, annual leave will be granted and will be taken within 12 months from the date on which it falls due or alternatively 15 months from the date of commencement of the preceding period of leave.
- (c) Annual leave will be allocated in no more than 2 periods unless otherwise mutually agreed between the employee and the employer.
- ~~(c)~~ Subject to clause ~~24.2~~23.7, annual leave must be taken at a time mutually agreed between the employee and employer. **When annual leave can be taken**
- ~~(d)~~ A period of leave will commence on a Monday unless otherwise mutually agreed.
- ~~(e)~~ Normally, annual leave will be granted and will be taken within 12 months from the date on which it falls due or alternatively 15 months from the date of commencement of the preceding period of leave.
- ~~(f)~~ Annual leave will be allocated in no more than 2 periods unless otherwise mutually agreed between the pilot and the employer.
- ~~(g)~~(d) Annual leave must be taken at a time fixed by the employer.

23.7 Excessive Annual Leave Accruals

Clause ~~24~~23.7 contains provisions additional to the NES about taking paid annual leave, to deal with excessive paid annual leave accruals.

23.7.1 Definitions

An employee has an excessive leave accrual if the employee has accrued more than 84 days of annual leave (including Saturdays, Sundays and public holidays).

23.7.2 Eliminating excessive leave accruals

(a) Dealing with excessive leave accruals by agreement

Before an employer can direct that leave be taken under clause ~~24.2(b)~~23.7.2(b) or an employee can give notice of leave to be granted under clause ~~24.2(e)~~23.7.2(c), the employer or employee must seek to confer and — must genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual.

(b) Employer may direct that leave be taken

(i) Clause ~~24.2(b)~~23.7.2(b) applies if an employee has an excessive leave accrual.

(ii) If agreement is not reached under clause ~~24.2(a)~~23.7.2(a), the employer may give a written direction to the employee to take a period or periods of paid annual leave. Such a direction must not:

(A) result in the employee's remaining accrued entitlement to paid annual leave at any time being less than 63 days (inclusive of Saturdays, Sundays and public holidays and also taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under clause ~~24.2(e)~~23.7.2(c);

(B) require the employee to take any period of leave of less than one week;

(C) require the employee to take any period of leave commencing less than 8 weeks after the day the direction is given to the employee;

(D) require the employee to take any period of leave commencing more than 12 months after the day the direction is given to the employee; or

(E) be inconsistent with any leave arrangement agreed between the employer and employee.

(iii) An employee to whom a direction has been given under clause ~~24.2(b)~~23.7.2(b) may make a request to take paid annual leave as if the direction had not been given.

NOTE: The NES state that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

(iv) If leave is agreed after a direction is issued and the direction would then result in the employee's remaining accrued entitlement to paid annual leave at any time being less than 63 days inclusive of Saturdays, Sundays and public holidays, the direction will be deemed to have been withdrawn.

(v) The employee must take paid annual leave in accordance with a direction complying with clause ~~24.2(b)~~23.7.2(b).

(c) Employee may require that leave be granted

(i) Clause ~~24.2(e)~~23.7.2(c) applies if an employee has had an excessive leave accrual for more than 6 months and the employer has not given a direction under clause ~~24.2(b)~~23.7.2(b) that will eliminate the employee's excessive leave accrual.

(ii) If agreement is not reached under clause ~~24.2(a)~~23.7.2(a), the employee may give a written notice to the employer that the employee wishes to take a period or periods of paid annual leave. Such a notice must not:

(A) result in the employee's remaining accrued entitlement to paid annual leave at any time being less than 63 days (inclusive of Saturdays, Sundays and public holidays and also taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under this subclause);

(B) provide for the employee to take any period of leave of less than one week;

(C) provide for the employee to take any period of leave commencing less than 8 weeks after the day the notice is given to the employer;

(D) provide for the employee to take any period of leave commencing more than 12 months after the day the notice is given to the employer; or

(E) be inconsistent with any leave arrangement agreed between the employer and employee.

(iii) The maximum amount of leave that an employee can give notice of under clause ~~24.2(e)~~23.7.2(c) is 42 days' leave in any 12 month period.

~~The employer must grant the employee paid annual leave in accordance with a notice complying with clause 23.7.2(c) 24.2(e).~~

(iv)

~~23.6~~23.8 Proportionate annual leave on termination of employment

- (a) Clause ~~23.7-8~~ does not apply to employees engaged in aerial application operations.
- (b) On termination of employment a pilot will be paid fully instead of annual leave:
 - (i) for all untaken annual leave entitlements that have fallen due in relation to any completed years of service, in accordance with clause 23.4, and the loading specified in clause 23.5 for each completed year of service;
 - (ii) for the balance of the employment period, or for the whole period where it has been less than one completed year, at the rate of 1/365th of the entitlement in clause 23.1 for each completed day of employment in respect of which annual leave has not been granted; and
 - (iii) the annual leave loading, as specified in clause 23.5, will be paid in the case of redundancy.

~~23.7~~23.9 Recall of pilot from annual leave

- (a) An employer will not be entitled to recall a pilot from annual leave except by mutual agreement between the employer and the pilot.
- (b) Where a pilot is so recalled the pilot will be granted 2 days' annual leave in place of each such day and the pilot may elect to add such additional entitlements to the balance of this interrupted annual leave period.
- (c) Clause ~~23.8~~9(b) does not apply to employees engaged in aerial application operations.

~~23.8~~23.10 Illness during a period of annual leave

- (a) Where a pilot would not be fit for work during annual leave because of a personal illness, or personal injury, affecting the pilot, the duration of such illness or injury may be counted as personal/carer's leave to the extent that the pilot has credited personal/carer's leave. Providing that:
 - (i) the pilot will advise the employer as soon as practicable after the commencement of the illness or injury; and
 - (i) produces proof of illness or injury to the employer within 7 days of return to duty.

- (b) Every consideration will be given to granting the equivalent substitute recreation leave in the manner requested by the pilot.

~~23.9~~23.11 Annual leave in advance

- (a) An employer and employee may agree in writing to the employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.
- (b) An agreement must:
 - (i) state the amount of leave to be taken in advance and the date on which leave is to commence; and
 - (ii) be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

NOTE: An example of the type of agreement required by clause 23.~~10~~11 is set out at Schedule G—Agreement to Take Annual Leave in Advance. There is no requirement to use the form of agreement set out at Schedule G—Agreement to Take Annual Leave in Advance.

- (c) The employer must keep a copy of any agreement under clause 23.~~11~~10 as an employee record.
- (d) If, on the termination of the employee's employment, the employee has not accrued an entitlement to all of a period of paid annual leave already taken in accordance with an agreement under clause 23.~~11~~10, the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued.

~~23.10~~23.12 Requirement to take leave notwithstanding terms of the NES

An employer may require an employee to take annual leave by giving at least 4 weeks' notice as part of a close down of its operations. Clause 23.~~11~~12 operates independently of clause 23.7, which deals with excessive annual leave.

~~23.24~~ Excessive Annual Leave Accruals

~~Clause 24 contains provisions additional to the NES about taking paid annual leave, to deal with excessive paid annual leave accruals.~~

~~23.1~~ Definitions

~~An employee has an excessive leave accrual if the employee has accrued more than 84 days of annual leave (including Saturdays, Sundays and public holidays).~~

~~23.2~~ Eliminating excessive leave accruals

~~23.2~~ Dealing with excessive leave accruals by agreement

~~Before an employer can direct that leave be taken under clause 24.2(b) or an employee can give notice of leave to be granted under clause 24.2(c), the employer or employee must seek to confer and must genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual.~~

~~23.2 Employer may direct that leave be taken~~

~~23.2 Clause 24.2(b) applies if an employee has an excessive leave accrual:~~

~~23.2 If agreement is not reached under clause 24.2(a), the employer may give a written direction to the employee to take a period or periods of paid annual leave. Such a direction must not:~~

~~23.2 result in the employee's remaining accrued entitlement to paid annual leave at any time being less than 63 days (inclusive of Saturdays, Sundays and public holidays and also taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under clause 24.2(c);~~

~~23.2 require the employee to take any period of leave of less than one week;~~

~~23.2 require the employee to take any period of leave commencing less than 8 weeks after the day the direction is given to the employee;~~

~~23.2 require the employee to take any period of leave commencing more than 12 months after the day the direction is given to the employee; or~~

~~23.2 be inconsistent with any leave arrangement agreed between the employer and employee.~~

~~23.2 An employee to whom a direction has been given under clause 24.2(b) may make a request to take paid annual leave as if the direction had not been given:~~

~~NOTE: The NES state that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave;~~

~~23.2 If leave is agreed after a direction is issued and the direction would then result in the employee's remaining accrued entitlement to paid annual leave at any time being less than 63 days inclusive of Saturdays, Sundays and public holidays, the direction will be deemed to have been withdrawn.~~

~~23.2 The employee must take paid annual leave in accordance with a direction complying with clause 24.2(b).~~

~~23.2 Employee may require that leave be granted~~

~~23.2 Clause 24.2(c) applies if an employee has had an excessive leave accrual for more than 6 months and the employer has not given a direction under clause 24.2(b) that will eliminate the employee's excessive leave accrual.~~

~~23.2 If agreement is not reached under clause 24.2(a), the employee may give a written notice to the employer that the employee wishes to take a period or periods of paid annual leave. Such a notice must not:~~

~~23.2 result in the employee's remaining accrued entitlement to paid annual leave at any time being less than 63 days (inclusive of Saturdays, Sundays and public holidays and also taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under this subclause);~~

~~23.2 provide for the employee to take any period of leave of less than one week;~~

~~23.2 provide for the employee to take any period of leave commencing less than 8 weeks after the day the notice is given to the employer;~~

~~23.2 provide for the employee to take any period of leave commencing more than 12 months after the day the notice is given to the employer; or~~

~~23.2 be inconsistent with any leave arrangement agreed between the employer and employee;~~

~~23.2 The maximum amount of leave that an employee can give notice of under clause 24.2(c) is 42 days' leave in any 12 month period;~~

~~23.2 The employer must grant the employee paid annual leave in accordance with a notice complying with clause 24.2(c);~~

~~24.3~~24.1 ~~When annual leave can be taken~~

~~(a) A period of leave will commence on a Monday unless otherwise mutually agreed.~~

~~(b)(a) Normally, annual leave will be granted and will be taken within 12 months from the date on which it falls due or alternatively 15 months from the date of commencement of the preceding period of leave.~~

~~(c)(a) Annual leave will be allocated in no more than 2 periods unless otherwise mutually agreed between the employee and the employer.~~

~~(d) Subject to clause 24.2, annual leave must be taken at a time mutually agreed between the employee and employer.~~

~~23.4~~23.13 **Cashing out of annual leave**

~~(d)(a)~~ Paid annual leave must not be cashed out except in accordance with an agreement under clause ~~24.4~~23.13.

~~(d)(b)~~ Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause ~~24.4~~23.13.

~~(d)(c)~~ An employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee.

~~(d)~~ An agreement under clause ~~24.4~~23.13 must state:

~~(iv)(i)~~ _____ the amount of leave to be cashed out and the payment to be made to the employee for it; and

~~(iv)(ii)~~ _____ the date on which the payment is to be made.

~~(d)(e)~~ An agreement under clause ~~24.4~~23.13 must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

~~(d)(f)~~ The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

~~(d)(g)~~ An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

~~(d)~~(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

~~(i)~~(i) The employer must keep a copy of any agreement under clause 24.423.13 as an employee record.

NOTE 1: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 24.423.13.

NOTE 2: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 24.423.13.

NOTE 3: An example of the type of agreement required by clause 24.423.13 is set out at Schedule H—Agreement to Cash Out Annual Leave. There is no requirement to use the form of agreement set out at Schedule H—Agreement to Cash Out Annual Leave.