

Fair Work Commission

Fair Work Act 2009

AG2021/9160

s.217 Application to remove ambiguity an ambiguity or uncertainty by variation of an enterprise agreement.

SUBMISSIONS OF THE IEUA

1. The Union has previously filed:
 - 1.1 a statutory declaration of the Union’s General Secretary Debra James, dated 14 December 2021; and
 - 1.2 an Outline of Submissions, filed on 28 January 2022. upon which the Union relies.
2. The Union endorses and supports the evidence and submissions of the applicant and further submits as follows.

Ambiguity and Uncertainty

3. Clause 3.1 of Appendix 3 of the VCMEA 2018 states, unequivocally, that *“Long Service Leave is paid at the Ordinary Rate of Pay at the time of taking of the leave or on termination”* (note the capitalisation of “Ordinary Rate of Pay”).
4. “Ordinary Rate of Pay” is a term defined in clause 5(n) of the Agreement as the *“current weekly rate for an employee as prescribed by this agreement plus (certain additional entitlements)”*.
5. Despite Clause 3.1, Clause 3.2 prescribes that payment is at *“the full-time Ordinary Rate of Pay as at the date of taking the leave multiplied by ... (another factor based on an averaging of of FTE over periods of service)”*.
6. It is not possible to pay both the “Ordinary Time Rate of Pay” and the “Ordinary Time Rate of Pay multiplied by (another figure)” unless that other figure is “one”. That figure is not “one” for any employee with any period of part-time service.
7. Accordingly the two clauses are irreconcilable as clause 3.2 entirely contradicts clause 3.1. Where the case law requires at least two arguable interpretations to find ambiguity¹, here the clause itself contains two directly contradictory clauses. In circumstances where there are irreconcilable clauses the Union submits that the Commission must find that Clause 3 of Appendix 3 contains both ambiguity and, uncertainty.
8. We adopt the submissions of the applicant in relation to the question of uncertainty (as distinct from ambiguity).

¹ Re: *Thiess John Holland Joint Venture* [2007] AIRCFB 619

The variation

9. Having found that it has jurisdiction because the agreement contains ambiguity or uncertainty the Commission is tasked with removing the offending ambiguity or uncertainty.
10. In circumstances where the ambiguity/uncertainty arises from two directly contradictory clauses, the proper course is to remove one of the offending clauses and make any necessary consequential amendments.
11. Section 217 does not operate as a slip rule if no ambiguity or uncertainty arises.² However, having established the existence of ambiguity or uncertainty, the Commission has jurisdiction to make such variations to terms as are necessary to remove the uncertainty or the ambiguity. *CFMEU v Linfox* is not authority for the proposition that the Commission may only amend the agreement consistent with some external finding of “mutual intention”, even if this is ascertainable.
12. In this case the parties are agreed about the variation that should be made.
13. The variation will not cause any employee to be worse off than under the agreement as currently being interpreted. Every employee will receive the same amount of paid Long Service Leave. That is, if the employee receives fewer hours of pay for a week, they will receive an equivalent increase in the number of weeks of leave to which they are entitled, and vice versa.

NES Safety Net

14. The Commission has raised questions as to whether the calculation of leave under the Appendix as varied will meet the standards prescribed by the *Long Service Leave Act 2018 (Vic)* (“the Act”).
15. As explained above, no employee will be worse off if the Commission varies the Agreement by deleting clause 3.2. Accordingly the variation will not have any impact on the relativity between the Agreement and the Act. The paid leave entitlement of each employee will be unaffected.
16. The examples set out in the statement of Mr Jordan are examples only. They do not deal with the question of clause 3.3.
17. Long Service Leave payments under this Agreement are made through a centralised “Long Service Leave Scheme”. The Scheme calculates the leave entitlements and payments for each employee taking leave or resigning. In each case, the Scheme ensures, in accordance with clause 3.3, that the leave entitlement is at least equal to the entitlement under the Act and, if the Act provides a greater entitlement, it provides that entitlement. This process will be unaffected by the variation.
18. The Commission has correctly identified that the Act affords an employee paid leave calculated on the greatest of three alternative calculations of hours:
 - 17.1 The average of the last 52 weeks; or
 - 17.2 The average of the last 260 weeks (5 years); or

² See Munro J in *Construction Forestry Mining and Energy Union v Linfox Transport (Aust) Pty Ltd*, Print Q2603, 30 June 1998

17.3 The average of the whole period of continuous service.³

19. Thus the entitlement under the Act is to a period of paid leave calculated in hours.
20. The Act provides 6.088 weeks' paid leave after 7 years' continuous service.⁴ The Agreement provides 9.1 weeks' paid leave after 7 years' continuous service. Accordingly, the vast majority of employees will receive more paid leave under the Agreement, even if one of the alternatives under the Act would provide a more beneficial calculation. For the very few that might derive a greater period of paid leave under the Act the scheme will, in accordance with clause 3.3, grant that period of paid leave.
21. This applies equally under both the Agreement as currently applied and the Agreement if varied as proposed.
22. Taking one example, an employee who works 6 years at 0.1FTE and one year full time would, under the currently applied interpretation of the Agreement and the varied Agreement, be entitled to 0.23 (ave FTE) x 9.1 weeks, or 2.08 weeks' (or 79.04 hours') paid leave. Under the Act, that employee would be entitled to 6.088 weeks' (231.3 hours') paid leave so, under clause 3.3 would be entitled to that amount of paid leave.
23. That is an exceptional example. It is highly unlikely that any such satiation would occur in practice but the employee would, in any event, receive his/her leave in accordance with the Act as provided by clause 3.3.
24. To be absolutely clear, the question as to whether the Agreement provides an entitlement equal to or greater than the Act does not arise from the proposed variation: the same issue applies to the same employees with the same effect whether the variation is approved or not. Clause 3.3 was put into the Appendix to cover any such circumstance and is actively applied by the LSL Scheme.

Denis Matson
Senior Industrial Officer
Independent Education Union of Australia
Victoria Tasmania

³ *Long Service Leave Act (Vic) 2018*, Section 16(2)

⁴ *Long Service Leave Act (Vic) 2018*, Section 6