

# Summary of Decision

2 September 2013



## Transitional Review—Annual Leave

[2013] FWCFB 6266

AM2012/8 and others

1. This decision deals with applications to vary annual leave provisions in various modern awards.
2. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Provisions Act) provides that the Fair Work Commission must conduct a review of all modern awards as soon as practicable after 1 January 2012 (the Transitional Review).
3. The Transitional Review is quite separate from, and narrower in scope than, the four yearly reviews of modern awards provided for in s.156 of the *Fair Work Act 2009* (Cth) (the Act). The scope of the Transitional Review was dealt with in the June 2012 Transitional Review decision [2012] FWAFB 5600. In the Transitional Review Annual Leave decision, the Commission adopted the June 2012 Full Bench decision and applied it to the applications before it.
4. Many of the applications made as part of this Transitional Review involve matters that were expressly dealt with by the AIRC in the award modernisation process. In these circumstances the need to advance probative evidence in support of an application to vary a modern award is particularly important. The Transitional Review does not involve a fresh assessment of modern awards unencumbered by previous Tribunal decisions. As the June 2012 Full Bench stated, in the context of the Transitional Review:

“...the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome.”
5. It is also important to recognise that we are dealing with a system in transition. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Transitional Review. Such changes are more appropriately dealt with in the four yearly review, after the transition process has completed given that the Transitional Review is narrower in scope than the four yearly reviews provided in s.156 of the Act.
6. The Full Bench had before it applications from employer organisations, employers and unions.

7. The Applications sought variations to the modern awards in respect of the:

- a. Cashing out of annual leave,
- b. Requirement to take annual leave,
- c. Additional one twelfth payment,
- d. Leave loading provision,
- e. Leave loading calculation,
- f. Leave loading on advanced leave,
- g. Leave loading on termination,
- h. Payment for a period of annual leave,
- i. Definition of a shift worker, and
- j. Other claims

8. In approaching all of these matters the Commission gave particular consideration to whether the modern awards before it achieved the modern awards objective. Further, the Commission also considered whether the awards were operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

9. The Commission determined the following modern awards should be varied in respect of the following issues:

- *Legal Services Award 2010*: To provide that an employer may require an employee to take annual leave if the employer gives the employee at least four weeks' notice, and provided the requirement is part of a full or partial close down of operations and is reasonable or the employee has more than eight weeks' accrued annual leave.
- *Building and Construction General On-Site Award 2010*: To clarify the rates, loadings and allowance on which annual leave loading is calculated.
- *Cleaning Services Award 2010* and *Road Transport and Distribution Award 2010*: To provide for the annual leave loading in those modern awards to be payable in respect of all untaken annual leave paid out on termination of employment.

10. The Commission also noted that the variations sought in respect of the additional one twelfth payment associated with annual leave for a close down had not been made in respect of all the modern awards with such a clause. As a result the Full Bench has decided to relist all the modern awards with such an additional one twelfth payment clause to give all those with an interest in those modern awards the opportunity to put submissions to the Full Bench on the matter as part of the Transitional Review. A notice of listing and directions in respect of the matter have been published on the Commission's website:  
<http://www.fwc.gov.au/index.cfm?pagename=awardsmodernlisting>.

11. The Full Bench also emphasised that the four yearly review of modern awards is to commence in 2014, that the four yearly review will be broader in scope than the Transitional Review and that at least some of the variations sought, but declined, in respect of annual leave in the Transitional Review may be more appropriate for consideration in that future review.

12. In a dissenting decision, Vice President Watson said that the constricted approach adopted by the majority is not consistent with the legislative mandate to conduct a review of the provisions.

- *This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.*

- ENDS -

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