

Judicial guidance for payment of annual leave loading on termination

The genesis of annual leave loading can be traced back to the 1970's when metal workers won a claim for its inclusion in their award. It was sold on the logic that workers would not get their normal pay, which included shift and weekend penalties, while on annual leave.

An employee's entitlement to annual leave loading is now found in almost all modern awards and enterprise agreements and is colloquially celebrated as a holiday bonus. From an employee's perspective, it makes good sense, as going away on vacation typically costs more than being at the workplace for 8 hours a day, 5 days a week.

However, under the former Workplace Relations Act, loadings were not applicable when paying out an employee's accrued unused annual leave entitlement on termination. The National Employment Standards (under the Fair Work Act) were then introduced at the start of 2010 and the issue of paying leave loading on termination suddenly became unclear.

Section 90(2) of the Fair Work Act now states that, when the employment comes to an end, the employer must pay the employee (for accrued unused annual leave):

..the amount that would have been payable to the employee had the employee taken that period of leave'

This new provision suddenly created confusion for employers in relation to whether the goal posts had changed from the previous requirements under the Workplace Relations Act.

The industrial umpire, the Fair Work Ombudsman, took the view that leave loading **was** payable in addition to the employee's base rate for accrued annual leave. The opposing argument raised by employer groups was that section 90(1) stated annual leave was to be paid at the base rate of pay, which of course does not include loadings.

The issue has been a long standing grey area, with judicial commentary and submissions to the Fair Work Act review panel recommending legislative clarification.

In the first court or tribunal interpretation of section 90(2), the NSW Local Court (in the matter of Stephen Edward Ryan v Whitehaven Coal Mining Pty Ltd) recently determined a claim for unpaid leave loading by an employee. It was ultimately held by Magistrate Buscombe that the sub-section could only mean that an employee should be paid at the same rate applicable to periods of annual leave taken by him or her during the employment. Therefore, in this case, where leave loading was ordinarily payable during periods of annual leave under the award, payment of the loading on termination was inescapable.

While the Local Court finding does not provide any superior authority on the issue, it does offer some conservative guidance to employers when calculating an employee's final entitlements.

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