**Ashurst Australia**
31 July 2013

Employment Alert

# Calculation of annual leave pay out on termination – first Court ruling

*Ryan v Whitehaven Coal Mining Pty Ltd* NSW Local Court (26 July 2013)

## WHAT YOU NEED TO KNOW

- There has long been controversy over the correct interpretation of the National Employment Standards provision (section 90(2)) of the *Fair Work Act 2009* requiring the employer to pay the employee on termination of employment *"the amount that would have been payable to the employee had the employee taken that period of leave"*.
- The Fair Work Ombudsman and employer associations have adopted different interpretations of what is required.
- A recent NSW Local Court decision supports the Fair Work Ombudsman's view that if an employee is entitled to annual leave and annual leave loading during employment, the employee must be paid out both entitlements on termination of employment.
- Legislative clarification of the position is required but cannot occur until Parliament reconvenes. The Government has not stated its position on the issue. The Opposition proposes to amend section 90(2) so that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.

## WHAT YOU NEED TO DO

- An employer should check whether the annual leave pay it must provide to its employees where taken during employment includes any amount additional to the National Employment Standards requirement of the base rate of pay for ordinary hours of work.
- Obligations to pay more than the National Employment Standards requirement may arise from an applicable award, enterprise agreement or contract of employment. An example is annual leave loading.
- In the absence of legislative clarification or superior court rulings, an employer needing to pay an employee more than the base rate of pay for annual leave taken during the employment should carefully consider the position when determining the annual leave payment on termination.
- Employers taking a conservative approach will adopt the position taken by the Fair Work Ombudsman and include amounts such as annual leave loading which would have been payable had the leave been taken during employment.
- Breach of the annual leave provisions of the National Employment Standards is a civil remedy with a maximum penalty of $51,000 for a corporation.

## First Court ruling on section 90(2)

On 26 July the NSW Local Court handed down the first judicial decision regarding section 90(2) of the Fair Work Act. The Court ruled that the section requires employers to pay out accrued annual leave to an employee upon termination of employment at the same rate that the employee would have received had he or she taken the leave during the employment.

Before this decision no Court had decided the correct interpretation of section 90(2).

## What does section 90 say?

Section 90 is part of the National Employment Standards and consists of two subclauses.

Section 90(1) provides that if an employee takes a period of paid annual leave, the employer *"must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period".*

Section 90(2) then states that if employment comes to an end then for any period of untaken paid annual leave, *"the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave."*

## Long standing debate over section 90(2)

There has been debate about the correct interpretation of section 90(2).

The Fair Work Ombudsman's interpretation is based upon a December 2010 opinion of counsel (Jeffrey Phillips SC). This opinion is to the effect that:

*"if an employee is entitled to annual leave and annual leave loading, then they must be paid out for both entitlements if their employment is terminated. This applies even if a clause in a modern award, agreement or contract expressly states that either entitlement is not payable.*

*"This entitlement is based on the annual leave on termination provision in s.90 (2) of the Fair Work Act 2009 which provides that a terminated employee with a period of untaken annual leave must be paid what they would have been paid if they had taken that period of leave. This section is part of the National Employment Standards so it cannot be excluded by any term in a modern award, agreement or other instrument that may provide for a lesser benefit."*

Employer groups and others have disagreed with this interpretation arguing that section 90(2), when read in its context, requires annual leave to be paid out at the base rate of pay only. In other words, it requires such payment as section 90(1) would have required had the leave been taken – payment at the base rate of pay.

The interpretation of section 90(2) has also attracted the attention of the Fair Work Commission. Commissioner Hampton in *Re Goodstart Early Learning Enterprise Agreement* [2012] FWA 2408 questioned whether annual leave pay outs included annual leave loading. Commissioner McKenna stated in *Inghams Enterprises Pty Limited* [2012] FWA 8668 that there were different interpretations of section 90 and that the provision would benefit from "legislative clarification".

## Change previously recommended

The Fair Work Act Review Panel recommended in August 2012 that section 90(2) be amended to make clear annual leave loading was not payable on termination unless this was otherwise a term of an award or enterprise agreement.

However, despite recent amendments being made to the Act, this recommendation was not picked up by the Federal Government. The interpretation of section 90(2) has remained in question.

## Ryan v *Whitehaven Coal Mining Pty Ltd*

Mr Ryan claimed that following his resignation he had not been paid all of his annual leave entitlement. He claimed he was entitled to an annual leave loading of 20% or alternatively a project roster earning, whichever was the greater. This top up payment would have been due if the leave had in fact been taken during the employment.

The applicable enterprise agreement did not specifically deal with annual leave untaken at the end of employment. Mr Ryan's contract of employment stated that upon termination untaken accrued annual leave would be paid "at the ordinary rate".

Mr Ryan claimed his annual leave payout was inclusive of the claimed top up payment because of section 90(2).

Whitehaven Coal submitted that Mr Ryan's annual leave pay out was to be calculated at his ordinary rate exclusive of the top up payment. It also submitted that to read section 90(2) in the manner contended by Mr Ryan would lead to an absurd result because section 90(1) plainly only entitles an employee to annual leave at the base rate of pay during employment and so to provide for a greater entitlement on termination was an unlikely legislative intention.

The Australian Mines and Metals Association intervened in the proceedings to put submissions

about the correct interpretation of section 90(2). AMMA adopted and supported the submissions of Whitehaven Coal.

AMMA also submitted that of the Fair Work Commission's 122 modern awards, 29 stated explicitly or implicitly that annual leave loading was not paid on termination.

Magistrate Buscombe found in favour of Mr Ryan.

The Magistrate stated that section 90(2) provided a minimum standard for untaken paid leave, which was *"that an employee, whose employment comes to an end, is to be paid the amount that he or she would have been paid if they had taken the unpaid annual leave as at the date that the employment ends"*.

It was considered that section 90(2) was clear and used ordinary English words consistent with the legislative purpose and the statutory context in which they appeared. To accept Whitehaven Coal's and AMMA's submissions, he said, would be to ignore the words used by the legislature.

## Appeal?

It seems likely that this decision could be the subject of an appeal.

### MAKING THE CASE: Insights from Geoff Giudice

The Court noted that, pursuant to section 55(4), the NES minimum entitlement in relation to payment while on leave in s.90(1) had been supplemented by the terms of the enterprise agreement. The Court took the view that section 90(2) operates in relation to the more generous, supplementary, provision for pay while on leave with effect that pay out on termination should be at the rate that would have applied if the leave had been taken.

It is arguable that the decision does not distinguish between the minimum entitlements prescribed in the NES and the potential for supplementation of those entitlements in an enterprise agreement pursuant to section 55(4). The fact that the NES are minimum standards is made clear in sections 59 and 61. Section 55 is in a different part of the Act.

The higher entitlement in relation to payment while on annual leave flowed not from the terms of section 90(1) but from section 55 operating in relation to the relevant term in the enterprise agreement. In contrast, pay out of leave on termination was not supplemented by the enterprise agreement. The effect of the decision was to supplement the minimum entitlement for pay out of leave even though section 55(4) had not been engaged in relation to that minimum entitlement.

The decision in *Ryan v Whitehaven* will probably not be the last word, although it represents the law at this stage.

## Authors


**Marie-Claire Foley**
Partner
Perth
T: +61 8 9366 8734
E: marie-claire.foley@ashurst.com

**Jason Raftos**
Senior Associate
Perth
T: +61 8 9366 8176
E: jason.raftos@ashurst.com

**Geoffrey Giudice**
Consultant
Melbourne
T: +61 3 9679 3636
E: geoffrey.giudice@ashurst.com


## Employment contacts

| | | |
|---|---|---|
| Brisbane | Ian Humphreys, Vince Rogers, James Hall | T: +61 7 3259 7000 |
| Canberra | Paul Vane-Tempest | T: +61 2 6234 4000 |
| Melbourne | Steven Amendola, Richard Bunting | T: +61 3 9679 3000 |
| Perth | Marie-Claire Foley, Rob Lilburne, David Parker | T: +61 8 9366 8000 |
| Sydney | Lea Constantine, Jennie Mansfield, Helen McKenzie, Adrian Morris, Stephen Nettleton, Stephen Woodbury | T: +61 2 9258 6000 |