

4 yearly review of modern awards — Family and Domestic Violence

AM2015/1

[2018] FWCFB 1691

Introduction

[1] One in four women in Australia have experienced family and domestic violence¹ (almost 2.2 million women). Domestic and intimate partner homicides represent the highest proportion of any category of homicides in Australia. At least one woman a week is killed by a partner or former partner.² Family and domestic violence is the leading contributor to death, disability and ill-health among Australian women aged between 15 and 44.

[2] Such violence not only affects those who suffer it, but the children who are exposed to it, extended families, friends and work colleagues. It is an issue that impacts on workplaces and which requires specific action.

[3] There is no single generally accepted definition of family and domestic violence, but at the core of family and domestic violence is the perpetrator's need to maintain control and dominance over the victim.

[4] In 2017, a Full Bench rejected an ACTU claim for *paid* family and domestic violence leave. The Majority Decision (Gooley DP and Spencer C) went on to express the following preliminary views:

‘We have formed the preliminary view that it is necessary to make provision for family and domestic violence leave but for reasons explained in this decision, have decided to dismiss the ACTU's application because we are not satisfied, at this time, that it is necessary to provide ten days paid family and domestic violence leave to all employees covered by modern awards. We have however, formed the preliminary view that all employees should have access to unpaid family and domestic violence leave and in addition we have formed the preliminary view that employees should be able to access personal/carer's leave for the purpose of taking family and domestic violence leave. We note that the parties have not had an opportunity to make submissions or call evidence on these matters and we intend to provide the parties with such an opportunity prior to finalising our decision.’³

[5] In this Decision, the Full Bench addressed those preliminary views.

[6] The Full Bench decided to provide five days' *unpaid* leave per annum to all employees (including casuals) experiencing family and domestic violence. Such leave will be available in the event that the employee needs to do something to deal with the impact of the family and

domestic violence and it is impractical for them to do it outside their ordinary hours of work. The Full Bench decided to defer its consideration of whether employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave.

The Findings

[7] In Chapter 3 of the Decision, the Full Bench adopted the following findings from the Majority Decision:

1. Family and domestic violence has a significant adverse impact on those who experience such violence.
2. While men can, and do, experience family and domestic violence, such violence is a gendered phenomenon that disproportionately affects women.
3. The effects of family and domestic violence are far reaching and extend beyond the individual directly affected; to their families and the general community.
4. Family and domestic violence has a real and tangible impact on employees and employers in the workplace.
5. Employees who experience family and domestic violence often face financial difficulties as a result, such as relocation costs or becoming a sole parent; and may suffer economic harm as a result of disruption to workplace participation.

[8] As noted above, the Full Bench accepted that family and domestic violence is a gendered phenomenon that disproportionately affects women, and that women are more likely than men to:

- be subjected to frequent, prolonged and extreme violence;
- be sexually assaulted;
- sustain injuries;
- fear for their lives; and
- experience other negative consequences, such as psychological harm.

[9] The Full Bench also adopted the conclusion in the Majority Decision that 'the circumstances faced by employees who experience family and domestic violence require a special response', and stated that family and domestic violence is a community issue and requires a community response.

Unpaid leave

[10] The Full Bench confirmed the preliminary view expressed in the Majority Decision that all employees should have access to unpaid family and domestic violence leave.

[11] The content of an unpaid family and domestic violence leave model term was discussed at conferences of interested parties held on 13, 18, 19 and 20 October 2017. The parties reached agreement on most elements of a model term. The major issue in contention was the amount of the leave entitlement.

[12] The Full Bench rejected the ACTU's primary submission that unpaid family and domestic violence leave should be available on an uncapped per occasion basis, instead finding that the model term should specify the maximum annual entitlement to unpaid leave.

[13] In the alternative, the ACTU sought an annual entitlement of 20 days' unpaid leave. The Employer parties advocated a cautious approach and generally submitted that unpaid leave should be limited to two to three days per annum.

[14] The Full Bench concluded that an entitlement of five days' unpaid leave per annum was appropriate:

'[235] Having regard to the evidence about the impact on employees of family and domestic violence; the indicative evidence of the utilisation of existing family and domestic violence leave entitlements, and the parties' submissions, we are of the view that five days' unpaid leave per annum represents a fair and relevant minimum safety net entitlement.'

[15] The Full Bench went on to address a number of matters relating to access to the entitlement to five days' unpaid leave, and decided that the unpaid leave entitlement:

- will apply to *all* employees (including casuals);
- will be available in *full* at the commencement of each 12 month period rather than accruing progressively during a year of service;
- will *not* accumulate from year to year; and
- will be available *in full* to part-time and casual employees (i.e. not pro-rated).

[16] The Full Bench then dealt with the remaining contested issue: the interaction between the new entitlement to unpaid family and domestic violence leave and other forms of leave.

[17] The Employer parties generally contended that unpaid family and domestic violence leave should not be available if the employee is able to access paid personal/carer's leave. The ACTU submitted that there should be no requirement that employees utilise any available paid leave entitlements before accessing unpaid family and domestic violence leave.

[18] The Full Bench decided not to adopt the proposal advanced by the Employer parties:

'[261] As a practical matter we think that award-reliant employees are likely to access any available paid leave entitlements before utilising any entitlement to unpaid family and domestic violence leave. But we are not persuaded that we should mandate such an approach ...

[267] To require employees to access any paid personal/carer's leave entitlement before accessing unpaid family and domestic violence leave will also introduce an unwarranted degree of complexity into the award term.

[268] We also accept that such a provision is likely to have, as the ACTU submits, a detrimental impact on women.’

[19] After determining all of the contested issues, the Full Bench was satisfied that the model term was a ‘permitted term’ within the meaning of s.136(1)(a) of the *Fair Work Act 2009* (Cth) (the Act):

‘[272] Insofar as the model term provides an entitlement to five days’ unpaid family and domestic violence leave, it is a term ‘about ... leave’, within the meaning of s.139(1)(h). The other elements of the model term, such as the definitions, notice and evidence requirements and confidentiality, are incidental to the unpaid leave entitlement and are essential for the purpose of making that term operate in a practical way. No party before us took a contrary view.’

[20] The Decision then discussed the modern awards objective and the considerations in ss.134(1)(a) to (h) of the Act. The Full Bench determined:

‘[189]...that the variation of modern awards to include the model term is necessary to ensure that such awards achieve the modern awards objective.’

[21] The Full Bench exempted from this general finding the *Australian Government Industry Award 2016*, the *Road Transport and Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010*, which are to be the subject of separate consideration.

Access to personal/carer’s leave

[22] The Majority Decision also expressed the preliminary view that ‘employees should be able to access paid personal/carer’s leave for the purpose of taking family and domestic violence leave’.

[23] All of the submissions before the Full Bench contended that the Commission does *not* have jurisdiction to provide for paid personal/carer’s leave under the National Employment Standards to be taken for reasons relating to family and domestic violence, in circumstances not covered by s.97 of the Act. Different reasons were advanced by the parties in support of that proposition.

[24] The Full Bench noted that the issues raised in the submissions were not without a degree of complexity and held:

‘[156] Given the unanimous position taken by the various parties we do not propose to act on the preliminary view expressed in the Majority Decision at this stage and it is not necessary to express any concluded views on the jurisdictional issue. However, we propose to revisit this issue in the review envisaged in Chapter 6.

[157] In concluding, we note that ACCI submits that ‘[a]ny change to the NES entitlement to expand conditions of access would require legislative change.’ That submission is, with respect, incorrect. Section 55(2)(b) of the Act permits a modern award or enterprise agreement to include any terms that the award or agreement is “expressly permitted to include ... by regulations made for the purposes of section 127” of the Act. Section 127 in turn provides:

“127 Regulations about what modern awards and enterprise agreements can do

The regulations may:

(a) permit modern awards or enterprise agreements or both to include terms that would or might otherwise be contrary to this Part or section 55 (which

deals with the interaction between the National Employment Standards and a modern award or enterprise agreement); or

(b) prohibit modern awards or enterprise agreements or both from including terms that would or might otherwise be permitted by a provision of this Part or section 55.”

[158] It follows that regulations could be made for the purposes of s.127 to expressly permit modern awards, and enterprise agreements, to include a term which extends paid personal/carer’s leave to incorporate family and domestic violence leave.’

Next Steps

[25] The drafting of the model term to give effect to the Decision will be finalised in the coming weeks. Interested parties will be given an opportunity to comment on the final form of the model term. Such comments are to be directed to whether the model term accurately reflects the outcome of the Decision; it is not an opportunity to re-litigate matters that have been determined.

[26] The three awards mentioned at [21] are to be the subject of later proceedings to determine whether it is necessary to vary the awards to insert the model term. A Mention is listed for **11:00am on Tuesday 1 May 2018** in Sydney.

[27] The Full Bench concluded as follows:

‘[307] This decision takes a cautious regulatory response to this issue. We have decided to provide five days’ unpaid leave to employees experiencing family and domestic violence, if the employee needs to do something to deal with the impact of that violence and it is impractical for them to do it outside their ordinary hours of work. We have decided to defer our consideration of whether employees should be able to access paid personal/carer’s leave for the purpose of taking family and domestic violence leave.

[308] The extent to which the new entitlement to unpaid leave will be utilised is unknown, as is the impact of the new entitlement on business.

[309] We propose to revisit this issue in June 2021, after the model term has been in operation for three years. At that time we will consider whether any changes are needed to the *unpaid* leave model term, and whether to allow access to personal/carer’s leave. At that time we will also revisit the question of whether provisions should be made for *paid* family and domestic violence leave.’

- ***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 -

¹ Exhibit B1, Expert Report of Dr. Peta Cox at [7.2]-[7.5].

² Cussen T & Bryant W, *Domestic/family homicide in Australia*, Research in Practice, No.38 May 2015, Australian Institute of Criminology. at [Australian Institute of Criminology](#).

³ [\[2017\] FWCFCB 3494](#) at [6].