



# DECISION

*Fair Work Act 2009*  
s.217—Enterprise agreement

**Diocese of Sale Catholic Education Limited**  
(AG2021/9160)

## **VICTORIAN CATHOLIC EDUCATION MULTI-ENTERPRISE AGREEMENT 2018**

Educational services

COMMISSIONER PLATT

ADELAIDE, 4 MARCH 2022

*Application for variation of the Victorian Catholic Education Multi-Enterprise Agreement 2018*

### **Background**

[1] On 20 December 2021, an application was made by the Diocese of Sale Catholic Education Limited (the Applicant) for the variation of the *Victorian Catholic Education Multi-Enterprise Agreement 2018* (the Agreement) which was approved by the Fair Work Commission pursuant to s.185 of the *Fair Work Act 2009* (the Act) on 20 February 2019.

[2] The Applicant originally made the Application in a different form to the one currently before me, however the Applicant subsequently varied the Application after an initial conference with the parties was conducted on 10 January 2022.

[3] The Application seeks to amend Appendix 3 of the Agreement, which deals with Long Service Leave (LSL). Specifically, the Applicant proposed to make the following amendments to Clause 3 of Appendix 3:

- Changing the title of Clause 3 from ‘Calculation of leave entitlements’ to ‘Payment during long service leave’; and
- Deleting subclause 3.2 in its entirety.

[4] The effect of the proposed amendment, as confirmed by the Applicant on 16 February 2022 is as follows:

- LSL will be paid at the Ordinary Rate of Pay (as defined in the Agreement) of the employee at the time of the taking of leave or on termination.

- If an employee would be worse off by using the above method of calculation of their pay, compared to the *Long Service Leave Act 2018* (VIC) (LSL Act), the employer(s) will ensure that the employee will receive the greater benefit calculated accordance with the LSL Act.

[5] On 14 February 2022, I conducted a further conference with the parties in an attempt to better understand the application and their interpretation of the Agreement.

[6] The Applicant, as well as the two employee organisations covered by the Agreement, the Australian Nursing and Midwifery Federation (ANMF) and the Independent Education Union of Australia (IEUA), provided submissions in support of the proposed amendments.

[7] As the application affected multiple parties, including a large number of employees, on 16 February 2022, I issued a statement that was to be served on all persons covered by the Agreement. The statement outlined the amendments that were proposed by the Applicant, as well as the effect of those amendments. All persons affected were given an invitation to provide their views or voice any objection in relation to the Application.

[8] My Chambers received one email from an employee covered by the Agreement. The employee expressed that the current LSL provisions contained in Appendix 3 of the Agreement have caused confusion with the employees and employers around the calculation of LSL and how it is paid in respect of employees who have worked part-time, and employees who have worked a combination of part-time and full-time. This is consistent with the information provided with the Application that indicates that the current provisions concerning LSL have caused confusion for both employers and employees.

## Legislation

[9] Section 217 of the Act provides as follows:

### **“217 Variation of an enterprise agreement to remove an ambiguity or uncertainty**

- (1) The FWC may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following:
  - (a) one or more of the employers covered by the agreement;
  - (b) an employee covered by the agreement;
  - (c) an employee organisation covered by the agreement.
- (2) If the FWC varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement.”

## Consideration

[10] There is no dispute and I find that the Applicant has standing to bring the application as an employer covered by the Agreement as per s.217(1)(a) of the Act.

[11] The existence of ambiguity or uncertainty is a jurisdictional fact that I must determine in order for me to exercise my discretion to approve any variation under s.217 of the Act.

[12] A review of the Agreement shows that the current title of clause 3 of Appendix 3 is misleading.

[13] I accept that the text of clause 3 has been subject to differing interpretations and that employees and employers alike have had difficulty in understanding the entitlements that stem from the clause.

[14] I am satisfied that there exists suitable ambiguity and/or uncertainty such to enliven my powers under s.217 of the Act.

[15] After receiving feedback from the Unions covered by the Agreement and providing the opportunity for all employees covered by the Agreement to express their views, I am satisfied that no employee will be disadvantaged by the proposed amendment and that the proposed amendment removes the ambiguity and/or uncertainty that has been associated with this clause. As such, I am satisfied that it is appropriate for me to exercise my discretion to vary the Agreement as proposed by the Applicant.

[16] Clause 3 of Appendix 3 of the Agreement will now read as follows:

**“3. Payment during long service leave**

3.1 Long service leave is paid at the Ordinary Rate of Pay at the time of the taking of the leave or on termination.

3.2 If the calculation in clause 3.1 results in an Employee's leave entitlement being lower than that provided under the Act, the entitlement to long service leave for that Employee will be calculated as provided for under the Act.”

[17] This variation will operate from the date of this Decision.



COMMISSIONER

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