(Fair Work Act 2009)

91 Transfer of employment situations that affect entitlement to payment for period of untaken paid annual leave

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

(1) Subsection 22(5) does not apply (for the purpose of this Division) to a transfer of employment between non-associated entities in relation to an employee, if the second employer decides not to recognise the employee's service with the first employer (for the purpose of this Division).

Employee is not entitled to payment for untaken annual leave if service with first employer counts as service with second employer

(2) If subsection 22(5) applies (for the purpose of this Division) to a transfer of employment in relation to an employee, the employee is not entitled to be paid an amount under subsection 90(2) for a period of untaken paid annual leave.

Note: Subsection 22(5) provides that, generally, if there is a transfer of employment, service with the first employer counts as service with the second employer.

(Fair Work Act 2009)

22 Meanings of *service* and *continuous service*

General meaning

(1) A period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an ***excluded period***) that does not count as service because of subsection (2).

(2) The following periods do not count as service:

(a) any period of unauthorised absence;

(b) any period of unpaid leave or unpaid authorised absence, other than:

(i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or

(ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or

(iii) a period of leave or absence of a kind prescribed by the regulations;

(c) any other period of a kind prescribed by the regulations.

(3) An excluded period does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service.

(3A) Regulations made for the purposes of paragraph (2)(c) may prescribe different kinds of periods for the purposes of different provisions of this Act (other than provisions to which subsection (4) applies). If they do so, subsection (3) applies accordingly.

Meaning for Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2

(4) For the purposes of Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2:

(a) a period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include:

(i) any period of unauthorised absence; or

(ii) any other period of a kind prescribed by the regulations; and

(b) a period referred to in subparagraph (a)(i) or (ii) does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service; and

(c) subsections (1), (2) and (3) do not apply.

Note: Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2 deal, respectively, with requests for flexible working arrangements, parental leave and related entitlements, and notice of termination or payment in lieu of notice.

(4A) Regulations made for the purposes of subparagraph (4)(a)(ii) may prescribe different kinds of periods for the purposes of different provisions to which subsection (4) applies. If they do so, paragraph (4)(b) applies accordingly.

When service with one employer counts as service with another employer

(5) If there is a transfer of employment (see subsection (7)) in relation to a national system employee:

(a) any period of service of the employee with the first employer counts as service of the employee with the second employer; and

(b) the period between the termination of the employment with the first employer and the start of the employment with the second employer does not break the employee's continuous service with the second employer (taking account of the effect of paragraph (a)), but does not count towards the length of the employee's continuous service with the second employer.

Note: This subsection does not apply to a transfer of employment between non-associated entities, for the purpose of Division 6 of Part 2-2 (which deals with annual leave) or Subdivision B of Division 11 of Part 2-2 (which deals with redundancy pay), if the second employer decides not to recognise the employee's service with the first employer for the purpose of that Division or Subdivision (see subsections 91(1) and 122(1)).

(6) If the national system employee has already had the benefit of an entitlement the amount of which was calculated by reference to a period of service with the first employer, subsection (5) does not result in that period of service with the first employer being counted again when calculating the employee's entitlements of that kind as an employee of the second employer.

Note: For example:

(a) the accrued paid annual leave to which the employee is entitled as an employee of the second employer does not include any period of paid annual leave that the employee has already taken as an employee of the first employer; and

(b) if an employee receives notice of termination or payment in lieu of notice in relation to a period of service with the first employer, that period of service is not counted again in calculating the amount of

notice of termination, or payment in lieu, to which the employee is entitled as an employee of the second employer.

*Meaning of **transfer of employment** etc.*

(7) There is a ***transfer of employment*** of a national system employee from one national system employer (the ***first employer***) to another national system employer (the ***second employer***) if:

(a) the following conditions are satisfied:

(i) the employee becomes employed by the second employer not more than 3 months after the termination of the employee's employment with the first employer;

(ii) the first employer and the second employer are associated entities when the employee becomes employed by the second employer; or

(b) the following conditions are satisfied:

(i) the employee is a transferring employee in relation to a transfer of business from the first employer to the second employer;

(ii) the first employer and the second employer are not associated entities when the employee becomes employed by the second employer.

Note: Paragraph (a) applies whether or not there is a transfer of business from the first employer to the second employer.

(8) A transfer of employment:

(a) is a ***transfer of employment between associated entities*** if paragraph (7)(a) applies; and

(b) is a ***transfer of employment between non-associated entities*** if paragraph (7)(b) applies.