

No sick leave or compassionate leave during stand down

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Abstract:

In [Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Qantas Airways Limited \[2020\] FCA 656](#), Flick J decided that personal/carer's leave and compassionate leave cannot be taken or paid during lawful stand down periods under [ss 524 and 525 of the Fair Work Act \(Cth\) \(FW Act\)](#).

No sick leave or compassionate leave during stand down

Stand down under s 524 of the FW Act

[Section 524](#) of the FW Act says that “[i]f an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period”.

However, an employee is not taken to be “stood down” under [s 524](#) if the employee: (a) is taking paid or unpaid leave that is authorised by the employer; or (b) is otherwise authorised to be absent from his or her employment: [s 525](#). If the employee is not stood down then the employer is not excused paying the employee. For example, if an employee is authorised to take paid annual leave, he or she is not stood down for that period under [s 524](#) and the employer must pay the employee for annual leave pay.

The question for Flick J was whether personal/carer's leave ([Div 7, Subdivision A](#)) or compassionate leave ([Div 7, Subdivision C](#)) were entitlements covered by the [s 525](#) carveout. If so, Qantas would need to pay employees for sick or compassionate-related absences even though the employees had been stood down.

Personal/carer's and compassionate leave are forms of “income protection”

Flick J first dealt with the submission that personal/carer's and compassionate leave are “*paid or unpaid leave that is authorised by the employer*” under [s 525\(a\) of the FW Act](#).

His Honour concluded that personal/carer's and compassionate leave are different to paid annual leave. Following the approach in [Mondelez v Australia Pty Ltd v AMWU \[2019\] FCAFC 138](#), Flick J said these entitlements are a form of “income protection.” During a lawful stand down period “there is no available or required work from which to derive income in the first place” and no income to protect.

Therefore, personal/carer's leave or compassionate leave entitlements are not available to be taken or paid during stand down under [s 525\(a\) of the FW Act](#).

Personal/carer's and compassionate leave are not “authorised” absences

The submission relating to [s 525\(b\) of the FW Act](#) was then addressed by Flick J, that is whether an employee taking personal/carer's or compassionate leave was “*otherwise authorised to be absent from his or her employment*”

His Honour decided that [s 525\(b\)](#) does not apply to absences on personal/carer's or compassionate leave because that subsection is directed to circumstances under the FW Act which “authorise” or “entitle” an employee to be absent. Flick J provided examples of this: [s 108](#) – eligible community service activity, [s 111](#) – jury service and [s 114](#) – public holiday. Unlike those “authorised” absences, absences on personal/carer's and compassionate leave

are circumstances when the employee “takes” leave rather than being “entitled to be absent from his or her employment.”

Additionally, Flick J observed that during stand down the employee is in fact not working. This means there is no requirement for the employee to notify the employer of being unwell or not “fit for work” because there is no work for the employee to do. To allow a person to access these paid entitlements in these circumstances would be to permit them to effectively “cash out” their leave entitlements which is prohibited under [s 100 of the FW Act](#).

Therefore personal/carer’s leave or compassionate leave are not authorised absences that can be taken and paid during periods of stand down under [s 525\(b\)](#).

Rights under eEnterprise agreements

Flick J also rejected similar arguments under the two enterprise agreements on a similar basis. His Honour said he would only find a different outcome under an enterprise agreement where there was “clear language” and that was not the case here.

Actions

This case clarifies the position for employers who have stood down their employees under [s 524 of the FW Act](#) or under similar provisions in enterprise agreements.

Absent an employer electing to pay personal/carer’s leave or compassionate leave, an employer does not have to make those payments during periods of stand down.

See the case here: [*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Qantas Airways Limited \[2020\] FCA 656*](#)