

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Supplementary Budget Estimates 2015 - 2016

Agency - Fair Work Commission

Department of Employment Question No. EMSQ15-000334

Senator McKenzie asked on 22 October 2015 on proof Hansard page 58

Question

FWC - Sick leave entitlements

CHAIR: You have taken that on notice. Thank you. Could you outline the Fair Work Commission sick leave entitlements generally for the committee, please.

Justice Ross: As I have said, for pre-AIRC members there is no statutory provision made. In accordance with convention, it has been a matter for the president to approve on application. As for Fair Work Commission members, that is regulated by the act and the Remuneration Tribunal. We can provide a more comprehensive response. The Remuneration Tribunal determination refers to the provisions that apply generally within an agency. We will track that through and advise you, but it is fair to say that there is more clarity provided in relation to those members appointed since the commencement of the Fair Work Act.

Answer

The *Fair Work Act 2009* (Cth) (FW Act) makes some provision for leave for Members appointed directly to the Fair Work Commission (Commission) under the FW Act, other than the President. Pursuant to FW Act s.639, all such Members:

- have recreation leave entitlements as determined by the Remuneration Tribunal (RT); and
- may be granted leave of absence other than recreation leave by the President, on the terms and conditions as to remuneration or otherwise as the President determines.

Pursuant to FW Act s.643(b), the Governor-General must terminate the appointment of such a Member if the Member is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months.

RT Determination 2012/11: Recreation Leave for Full-Time Holders of Relevant Offices (Determination 2012/11) provides Members (other than the President) who were appointed directly under the FW Act with an entitlement to four weeks' recreation leave for each completed 12 months' service. Pursuant to Determination 2012/11, leave accrued under the Determination is generally to be administered in accordance with the recreation leave policies and practices applying generally to staff within the agency.

Neither the FW Act nor Determination 2012/11 makes specific provision for personal/carers' leave.

In June 2013, the President promulgated the *Member leave policy - June 2013*. This policy indicates that Members appointed under the FW Act will receive recreation leave in accordance with RT determinations and may be granted other forms of leave, such as personal/carers' leave, on a case by case basis.

Under transitional legislation, former Presidential Members and Commissioners of the Australian Industrial Relations Commission (AIRC) were taken to be Members of the Commission upon its establishment, on the same terms and conditions as attached to their appointment under the *Workplace Relations Act 1996* (WR Act).

Similarly to Members appointed under the FW Act, the terms and conditions of former Commissioners of the AIRC include:

- recreation leave entitlements as determined by the RT (WR Act s.84(1)); and
- that the President may grant “leave of absence, other than recreation leave, on such terms and conditions as to Remuneration or otherwise as the President determines.” (WR Act s.84(2))

Under s.86(2)(b) of the WR Act, the Governor-General shall terminate the appointment of a former Commissioner of the AIRC if the Commissioner “is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months”.

The *Member leave policy - June 2013* generally treats former Commissioners as having the same leave entitlements as Members appointed under the FW Act.

In contrast to former Commissioners, the WR Act made no provision for any form of leave of absence for former Presidential Members of the AIRC. Former Presidential Members are entitled to long leave in accordance with the *Judges (Long Leave Payments) Act 1979* and associated long leave administrative arrangements.

There is no equivalent to FW Act s.643(b) or WR Act s.86(2)(b) for former Presidential Members of the AIRC. Former Presidential Members can only be removed from office by the Governor-General on an address praying for removal on the grounds of proved misbehaviour or incapacity by both Houses of Parliament (WR Act s.82).

As a practical matter Members obviously cannot be allocated work whilst they are medically unfit to perform their duties. In accordance with longstanding practice, the current President’s approach has been to deal with requests for sick leave from all Members on a case by case basis, on their merits.