

IN THE AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION

Conciliation and Arbitration Act 1904

In the matter of a notification of an industrial dispute between

The Clothing and Allied Trades Union of Australia

and

Australian Confederation of Apparel Manufacturers - N.S.W.  
(Division of the Chamber of Manufacturers of New South Wales) and others

in relation to adoption leave and other matters

(C No. 4374 of 1985)

And in the matter of an application by the Shop, Distributive and Allied  
Employees Association to vary the

Retail and Wholesale Shop Employees (Australian Capital Territory)  
Award 1983(1)

in relation to adoption leave

(C No. 4342 of 1984)

And in the matter of references made pursuant to section 34 of the Act

MR JUSTICE COLDHAM  
MR JUSTICE ALLEY  
MR COMMISSIONER MAHER

MELBOURNE, 16 AUGUST 1985

DECISION

On 13 November 1984 The Clothing and Allied Trades Union of Australia served a log of claims on employer organisations located in New South Wales, Victoria and Queensland and upon individual employers in all States except Tasmania. The organisations and employers are concerned with or engaged in the clothing and allied industries.

A finding of dispute was duly made, followed by a union application for that part of the log which related to a claim for adoption leave to be referred pursuant to section 34 of the Act.

Meanwhile, on 26 November 1984 an application was filed by the Shop Distributive and Allied Employees Association to vary the Retail and Wholesale Shop Employees (A.C.T.) Award 1983 by incorporating within that award provisions for adoption leave. Upon the initial hearing of the matter the union sought a reference pursuant to section 34.

By decision made on 9 January in respect of each matter the Acting President directed that the two matters be referred to a Full Bench, later to become the bench as presently constituted.

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(1)Print F3127 [R017CR]

2 DECISION - RETAIL AND WHOLESALE SHOP EMPLOYEES (AUSTRALIAN CAPITAL TERRITORY) AWARD 1983

The Australian Council of Trade Unions (ACTU) through its representative, Mr Boulton, put forward a claim, common to both matters, which was in the nature of a test case having general application to Federal awards.

Employers were represented by the Confederation of Australian Industry.

The Minister of State for Employment and Industrial Relations intervened in the proceedings. Leave to intervene was granted to the States of Victoria, Queensland, South Australia and Western Australia and to the Australian Adoption Council Incorporated.

The claim formulated by the ACTU applies only to female employees and follows closely the prescription which was propounded by the Full Bench in the test case relating to maternity leave which handed down its decision on 9 March 1979(2).

We set out the terms of the claim for adoption leave:

"1. Eligibility for Adoption Leave

A female employee shall, upon production to her employer of a statement from an adoption agency or other appropriate body stating the presumed date of the placement of a child with her for adoption purposes, be entitled to adoption leave provided that she has had not less than 12 months' continuous service with that employer immediately preceding the date upon which she proceeds upon such leave.

For the purposes of this clause:

- (a) An employee shall include a part-time employee but shall not include an employee engaged upon casual or seasonal work.
- (b) Adoption leave shall mean unpaid adoption leave.
- (c) 'Child' refers to a person under the age of 16 years who has not previously lived permanently with the employee concerned.

2. Period of Leave and Commencement of Leave

- (a) Subject to subclause (3) and (6) hereof, the period of adoption leave shall be for an unbroken period of up to 52 weeks.
- (b) An employee shall, as soon as she is aware, give notice in writing to her employer stating the presumed date of placement of a child for adoption purposes.
- (c) An employee shall give notice in writing to her employer of the date upon which she proposes to commence adoption leave, stating the period of leave to be taken.

3. Variation of Period of Adoption Leave

- (a) Provided the addition does not extend the adoption leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened.

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(2) Print D9576; (1979) 218 CAR 120

- (b) The period of leave may, with the consent of the employer, be shortened by the employee giving not less than fourteen days notice in writing stating the period by which the leave is to be shortened.

4. Cancellation of Adoption Leave

- (a) Adoption leave, applied for but not commenced, shall be cancelled should the placement of a child not proceed.
- (b) Where the placement of a child with an employee then on adoption leave does not proceed or continue, it shall be the right of the employee to resume work at a time nominated by the employer which shall not exceed four weeks from the date of notice in writing by the employee to the employer that she desires to resume work.

5. Special Leave

The employer shall grant to an employee who is seeking to adopt a child such unpaid leave of absence as is required by the employee to attend compulsory interviews or examinations in relation to the proposed adoption. Where paid leave is available to the employee, the employee shall have the option of taking that leave or the leave provided under this subclause.

6. Adoption Leave and Other Leave Entitlements

Provided the aggregate of leave including adoption leave does not exceed 52 weeks:

- (a) An employee may, in lieu of or in conjunction with adoption leave, take any annual leave or long service leave or any part thereof to which she is then entitled.
- (b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during her absence on adoption leave.

7. Effect of Adoption Leave on Employment

Notwithstanding any award or other provision to the contrary, absence on adoption leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement.

8. Termination of Employment

- (a) An employee on adoption leave may terminate her employment at any time during the period of leave by notice given in accordance with this award.

- (b) An employer shall not terminate the employment of an employee on the ground of her application to adopt a child or of her absence on adoption leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

9. Return to Work After Adoption Leave

- (a) An employee shall confirm her intention of returning to her work by notice in writing to the employer given not less than four weeks prior to the expiration of her period of adoption leave.
- (b) An employee, upon the expiration of the notice required by paragraph (a) hereof, shall be entitled to the position which she held immediately before proceeding on adoption leave. Where such position no longer exists but there are other positions available for which the employee is qualified and the duties of which she is capable of performing, she shall be entitled to a position as nearly comparable in status and salary or wage to that of her former position.

10. Replacement Employees

- (a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on adoption leave.
- (b) Before an employer engages a replacement employee under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.
- (c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising her rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.
- (d) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.
- (e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where her employment continues beyond the twelve months qualifying period."

At the threshold of this decision, we must determine whether adoption leave is acceptable as an industrial concept; and if it is, to then advance to the question whether in the industrial world it is acceptable and appropriate as an award prescription.

By way of introduction we refer to the general outline of child adoptions which are open to adoptive parents.

In the broadest sense, adoptions are classed as relative, non-relative or "special needs".

A relative adoption occurs where a child is adopted by a parent, being an unmarried mother, step-parent, or other relative for example a sister,

brother, aunt, uncle or grandparent. Such adoptions form only a small part of the claim.



A non-relative adoption occurs where a child is adopted by a person who is not a parent or step-parent of the child nor other relative as previously defined. The non-relative adoption may involve a normal Australian born child, or a child born and adopted from another country (an inter-country adoption).

A "special needs" adoption involves an Australian born child suffering from some significant physical or mental impairment or some impairment both physical and mental.

We now turn to the question whether adoption leave is acceptable in concept in the industrial context. In doing so it is clear that the Maternity Leave decision of 1979 is a factor of significant importance. In that decision this Commission adopted the concept that continuity of employment in industry should not be incompatible with motherhood. The Commission expressed the view that:

"The claim if granted would recognise the special industrial interests of those female employees who elect to combine motherhood with continued participation in the work force. The preservation of job security in the event of maternity might well facilitate career opportunities and encourage career aspirations amongst women who have hitherto regarded termination of employment as an inevitable consequence of motherhood."

The Commission in that case clearly considered the claim as involving job preservation and as seeking recognition of the special interests of those who wish to combine motherhood with continued participation in the work force.

This wide conceptual expression would appear to have compelling implications for the present claim. For it seems to us that the circumstances which combine to link motherhood with job preservation and consequent continued participation in the work force do not significantly differ according to whether the mother is a natural mother or an adopting mother. There are of course differences in detail which must be considered if the claim is granted. Maternity leave follows an event which is predictable, which can be measured in time and which is inseparably associated with the particular female employee. The event which generates the claim for adoption leave is none of these things. To that extent the present claim involves industrial problems, later to be discussed, which do not relate to the natural process which culminates in the birth of a child to an employee seeking maternity leave.

In essence then, it appears that the pivotal concept of the Maternity Leave decision which enables participation in the work force effectively to be combined with the circumstances attendant upon motherhood should not be confined to natural motherhood. To do so would be to move toward the view that the circumstances affecting the adoptive mother do not involve her in the experience of motherhood. In concept we consider that adoption leave should therefore be accepted in the industrial context.

We must now consider whether adoption leave is acceptable and appropriate in practical terms as an award prescription. Involved here are questions of cost and the feasibility of such a prescription in terms of the balance of convenience as between the employee and her employer.

It is germane to the question of cost to consider the incidence of adoptions in Australia as they may affect industry in the context of the ACTU claim. Due, no doubt, to changes in social attitudes of recent years, the supply of children for adoption has significantly decreased. In the main, the single mother is now accepted by society to an extent that she is not socially handicapped by retaining custody of her child. Entitlements prescribed by State and Federal legislation have also been a factor. According to the Australian Bureau of Statistics (ABS), as against 240000 live births in Australia, in 1982-83 only 3072 persons were adopted. Of those 3072 adoptions, 1548 were relative adoptions and 1524 were non-relative adoptions. Slightly over 90% of the relative adoptions would not be included in the ACTU claim, having occurred where the adoption was sought by the spouse of the natural parent of the child. Compared with former years the decline indicated by the 1982-83 figures is dramatic. In 1971-72 there were 9798 adoptions representing a decline from that figure in 1983-84 of 68.6%. That the decline continues is illustrated by a further decrease noted in the official statistics provided by the Bureau on 3 May 1985 which show that for the year 1983-84 there were 2770 adoptions of which 1452 were relative adoptions and 1318 non-relative. Of the 1452 relative adoptions, 91.2% involved children adopted by parents who would be outside the ACTU claim. It follows that in 1983-84 only slightly more than 1318 adoptions could have been affected by the ACTU claim had it then been an award prescription. Of that number it may reasonably be inferred that some adoptive mothers would not have been employed and if so, would have been award free. Others would have announced their intention not to return to work. These statistics demonstrate that the number of general adoptions covered by an award prescription would be limited and that the resulting cost would be small.

It is also relevant to note that at the present time, with no general award provision for adoption leave, adoptive mothers who are in employment, do in fact cease that employment upon the placement of the child. This inference is supported by evidence called by the ACTU that a stated intention to remain in employment renders most unlikely the chances of adoption. It is therefore most probable, even in the absence of an award provision, that an employer will be required at short notice to incur the cost of seeking, and training, if necessary, someone as a replacement employee. We are aware that under the claim the obligation arises to re-employ the adoptive parent. However, having regard to the numbers which will be involved we are confident that any additional cost arising therefrom would be small.

Owing to the limited notice given to the adoptive mother of the placement of a child, an employer will only have a correspondingly limited notice of the impending adoption leave. As we have already noted, however, this inconvenience is calculated to occur in any event.

In all the circumstances and particularly in light of the incidence of adoptions and the consequent limited cost to industry occasioned thereby we are satisfied that for practical purposes, the concept which we have approved may safely be the subject of award prescription.

In declaring our general acceptance of a Federal award prescription we wish to make it clear that we have not been actuated by any consideration, as the ACTU suggested, that adoption leave is a "flow on" from the maternity leave provisions which were initiated by the 1979 decision. It is our consideration that the two prescriptions are so much the same genre as to be

indistinguishable parts of the same concept. "Flow on" and its implications are not apposite.

Nor do we recognise adoption leave as a step in what Ms Callander for CAI described as "a continuum" of social reforms posing under the guise of industrial claims. The ACTU Congress working Women's Policy 1983 refers to "the establishment of comprehensive maternity, parental and family leave" provisions. After a preamble to the ACTU Congress 1983 Working Women's Charter referring to the continuing quest for the recognition of industrial equality of the sexes, it is stated, amongst other like claims, that unions should actively pursue maternity, paternity, parental leave and family leave in awards, including leave for attending to dependants and next of kin in illness.

Our earlier observation relating to the common identity of adoption leave with maternity leave should have sufficed to clarify our position in the present case. We would share the anxiety of the CAI if, by granting the present claim it was thought that we were intending to foster expectations of social welfare reform, through the agency of this Commission. Speaking for ourselves as members of an industrial tribunal, claims must be seen to have an industrial texture, and must not be tested against a purely sociological background nor according to emotive standards which lack genuine industrial validity.

Having decided that adoption leave should have a place beside maternity leave as a Federal award prescription it is now necessary to consider the claim in detail, making amendments or modifications to it as we consider necessary.

(1) Eligibility for Adoption Leave

The claim requires the employee to produce documents from an adoption agency or other appropriate body with reference to the presumed date of placement of a child. However, the claim also includes a limited number of relative adoptions where the part played by agencies or government departments is minimal and where the documents referred to in the claim would be irrelevant. Provision should be made for these cases and we have modified the opening statement of part (1) to accommodate these circumstances.

1(a) and (b)

These parts of the claim need not be amended and require no comment.

1(c)

The definition contained in this part of the claim affects the ambit of the award prescription as to the age of the child to be covered thereby and also raises consideration of the nature of the adoption which should be included within that prescription.

We are not satisfied that the right to adoption leave should be extended to include the adoption of children of school age. According to the evidence of Miss Symonds, an adviser in the protective services of the Victorian Department of Community Services, the majority of children involved in the normal non-relative adoptions are newly born infants and the range goes up usually to the school age child, which she identified as up to the age of four. This is confirmed by the ABS statistics 1982-83 which show that 92.8% of non-relative adoptions were in respect of children under the age of five

years. In the adoption leave provisions and procedures for public service employees in the State of Queensland, leave is granted only in respect of a child who has not attained its fifth birthday, while in the Public Service in South Australia and Western Australia leave is restricted to those adopting children below school age. In other States and in the Commonwealth there is no restriction in respect of the age of the child. Thus in three States the restriction of leave in the Public Service area in respect of children under five years of age accords with the normal incidence of non-relative adoptions.

Miss Symonds also gave evidence as to the importance of the bonding process which she described as the feeling of emotional attachment between the child and its parents, a feeling of integration within the family. In this connection she drew a distinction between the very young child who is greatly dependent on the parents and the older child who makes relationships more clearly with other people. The other witness, Mrs McDonald, who has had considerable experience in adoptions in New South Wales, stressed the need for full-time care for older pre-school children but confirmed that the older child is less dependent than the very young baby.

The evidence and material to which we have referred strongly suggest that the privilege of adoption leave should not extend to employees who adopt children older than four years of age. Beyond the age of four, a child would be expected to be at school, away from the home environment, for an extended period each day. Full-time home care no longer becomes possible nor does the evidence stress its importance beyond school age. We acknowledge that a child who has attained five years during one year may not be eligible for school entry until the following year. However, a prescription can only be made in general terms and provision cannot be made for every circumstance which might arise.

A restriction upon the age of the child will substantially disqualify the adoptive parent of a "special needs" child from the right to adoption leave because the majority of such children are between the age of five and sixteen years when they enter the home of the adoptive parent. The evidence relating to the adoption of those mentally or physically handicapped children was meagre. Miss Symonds referred to the reluctance of some people to jeopardise their work, and their return to employment, by adopting a handicapped child. However she did make the comment that in such cases it was less necessary for the parent to be away from work for any length of time simply because going to work gives the parent a balance between work and care for the child. Moreover the evidence suggested that in some cases institutional care for such children would be available during working hours.

We propose to change the definition of a child in the claim to mean a child under the age of five years. We are aware that the restriction to five years will exclude most of the relative adoptions which fall within the scope of the claim. However, we see no merit in granting adoption leave in respect of a child of school age.

The definition is also affected by reference to the scope of adoptions contemplated by the claim. In light of the fact that in 1983-84, 91.2% of relative adoptions involved a natural parent of the child, the exclusion with respect to children who have lived permanently with the employee effectively limits the claim to a small percentage of relative adoptions. However, we propose to modify the claim further to ensure that it does not extend to a natural mother who has not had permanent custody of the child nor to a step-mother. In the case of a step-mother the bonding process will be present and developing through the presence of the father. Moreover, responsibilities for a child or children are incidental to the marriage into which the step-mother has willingly entered.

With respect to the first paragraph of the claim, our proposed prescription will therefore be as follows:

"(1) Eligibility for Adoption Leave

A female employee shall upon production to her employer of

- (i) a statement from an adoption agency or other appropriate body of the presumed date of placement of the child with her for adoption purposes, or
- (ii) a statement from the appropriate government authority confirming that she is to have custody of the child pending application for an adoption order,

be entitled to adoption leave provided that she has had not less than twelve months continuous service with that employer immediately preceding the date upon which she proceeds upon such leave.

For the purposes of this clause:

- (a) An employee shall include a part-time employee but shall not include an employee engaged upon casual or seasonal work.
- (b) Adoption leave shall mean unpaid adoption leave.
- (c) 'Child' refers to a person under the age of 5 years who has not previously lived continuously with the employee concerned for a period of 6 months or who is not a child or step-child of the employee or of her spouse.
- (d) 'Relative adoption' occurs where a child, as defined, is adopted by a parent, a spouse of a parent or other relative being a grandparent, brother, sister, aunt or uncle (whether of the whole blood or half blood or by marriage)."

(2) Period of Leave and Commencement of Leave

2(a)

This part of paragraph 2 of the claim seeks adoption leave of up to 52 weeks.

It was submitted on behalf of CAI that something less than 52 weeks should be the prescribed leave in the event that we granted the claim.

It was contended first that a shorter period than 52 weeks was justified upon the ground that, unlike maternity leave, there was no justification for treating the adoptive mother as being in need of any respite from employment for medical reasons. In the maternity leave provision, six weeks following the birth is prescribed as the minimum period within which an employee may return to employment. However the submission does not take account of the fact that the medical factor which is part of the maternity leave provision and is not a consideration in the present claim, is material only in the initial post-natal

period. It must therefore be subsumed within the larger consideration of the appropriate period of leave. CAI submitted secondly that a shorter period would be less inconvenient to an employer because the adoptive parent would be



less likely to require retraining on her return to employment. This may be so in some cases but not in others. There is no evidence either way, nor could there be. The oral evidence and the material emanating from adoption agencies was all to the effect that 52 weeks was the desirable period of leave. In particular, Miss Symonds stated that the Victorian Department regarded a twelve-month period as desirable for development of the bonding process.

We therefore propose to prescribe 52 weeks as claimed but ceasing in any event when the child attains the age of five years.

2(b)

This part of the claim, which involves the length of notice to be given to an employer, engendered much discussion during the hearing. The difficulty with respect to notice arises from the shortness of time between the notice received by adoptive parents of the availability of a new born child in a non-relative adoption and the placement of that child.

In general terms, the non-relative adoption process, State by State, is much the same. In the case of Australian born children application for adoption is made to the relevant State department or to an approved agency. After a long wait the applicants are required to attend a series of assessing interviews. Approval for adoption follows upon these interviews. The period between approval and the placement of a child varies from approximately three months in Victoria to approximately three years in New South Wales. The period between notification of the availability of a new born child and its placement may be as short as 48 hours. However, the material provided at the hearing indicates that in all States and Territories except New South Wales a period of up to two weeks between notification and placement is negotiable. In the case of more mature children that period can be measured in weeks.

Inter-country adoption processes are conducted by the State department in conjunction with its overseas counterpart. The procedures of interview, approval and notification of availability are much the same as those relating to Australian children. However the parents are often required to collect the child in its country of origin.

It is apparent from this summary of the adoption process that a little more flexibility than is manifest in the claim may be provided with respect to the notification to the employer. We also consider that every effort should be made by the employee in conjunction with, and with the co-operation of, the State departments and agencies, to give an employer some ample notice of placement. We therefore propose to adopt the claim, but to add a 14 day period in the hope that such co-operation will be made. A saving clause in favour of the employee will be added as a precaution. These provisions will be incorporated in paragraphs (d) and (e) of our proposed prescription.

2(c)

We also propose to modify this part of the claim in light of the procedures relating to approval for adoption. We consider that the employer should be informed of the approval for adoption and be kept informed of progress to the time of notification that a child is available for adoption. Similarly an employer of a female who has commenced employment after the date

of approval should be so informed and kept informed. We also consider that the employee should be able to give notice of the period of leave to be taken at some time shortly after notice of approval. Paragraphs (b) and (c) of subclause 2 of our proposed prescription reflect these further considerations.

2(c) - contd

The second paragraph of the proposed prescription will therefore be as follows:

- "2(a) Subject to subclauses 3 and 6 hereof, the period of adoption leave shall be for an unbroken period of up to 52 weeks but ceasing in any event when the child attains the age of 5 years.
- (b) Upon receiving notice of approval for adoption purposes, an employee will notify her employer that she has been so approved and within 2 months of such approval she will further notify her employer of the period of adoption leave which she proposes to take upon the placement of a child. In the case of a relative adoption the employee shall notify as aforesaid upon deciding to take a child into her custody pending an application for an adoption order.
- (c) A female who commences employment with an employer after the date of her approval for adoption purposes shall notify the employer thereof upon commencing employment and of the period of adoption leave which she proposes to take upon placement of such child.
- (d) An employee shall as soon as she is aware of the presumed date of placement of a child for adoption purposes but not later than 14 days before such placement give notice in writing to her employer of such date and of her proposal to take adoption leave.
- (e) An employee shall not be in breach of this clause, as a consequence of failure to give the stipulated period of notice in accordance with paragraph (d) of this subclause if such failure is occasioned by the requirement of an adoption agency to accept earlier placement of a child."

### (3) Variation of Period of Adoption Leave

We have considered this part of the claim, noting its identity with the corresponding maternity leave provision. The modifications to the claim which we propose by the addition of subclauses 2(b) and (c) do not appear to require any consequential amendment to this particular subclause. We propose to prescribe accordingly.

### (4) Cancellation of Leave

It has already been noted that the period of notice of the placement of a child for adoption may be very short. This will mean that an employer might have to act very quickly in obtaining a replacement. If a replacement employee has been engaged and a change of circumstances leads to the cancellation of the adoption or its cessation for some other reason the employer and the replacement employee may well be inconvenienced. There appears to be little room for avoiding inconvenience if adoption leave has not commenced. However if leave has commenced and for some reason the need for leave does not continue for example by reason of the death of the child, or of failure to obtain custody in the case of an inter-country adoption, then the employer

must be notified forthwith and be given a right to nominate a time, not exceeding four weeks from the notification, for the employee's recommencement of work.

We will provide as follows under this part of the claim:

"4(a) Adoption leave, applied for but not commenced, shall be cancelled should the placement of the child not proceed;

(b) where adoption does not continue the employee shall notify the employer forthwith and the employer shall nominate a time not exceeding 4 weeks from receipt of notification for the employee's resumption of employment."

(5) Special Leave

After application for an adoption has been made the suitability of the applicants as adoptive parents is assessed in a series of interviews. There may be up to six interviews, each lasting some two hours. Some of these interviews are conducted outside working hours but in the main they are not. The evidence is clear that the interviews are compulsory in the sense that if they are not attended approval for adoption will be refused.

We consider that a claim for leave of absence from employment to attend these interviews is justified. We also see justification extending to both a male and female employee. However, we consider the absence from employment be unpaid unless the employer, in the event that paid leave is available, opts to pay the employee some of that entitlement. The claim allows that option to be exercised by the employee. In our view it is the convenience of the employer which should be considered.

This type of claim was rejected in the Maternity Leave case. But interviews are an essential part of the adoption process and provision for them must therefore be made.

The ACTU stated that it would not oppose special leave being limited to two days in respect of any application for adoption.

We propose as follows:

"5. The employer shall grant to any male or female employee who is seeking to adopt a child, such unpaid leave not exceeding 2 days, as is required by the employee to attend any compulsory interviews or examinations as are necessary as part of the adoption procedure. Where paid leave is available to the employee the employer shall have the option of paying the employee out of such available leave."

(6) Adoption Leave & Other Entitlements

We propose to grant this part of the claim without modification.

(7) Effect of Adoption Leave on Employment

This also should be granted as claimed.

(8) Termination of Employment

We are prepared to grant this part of the claim without comment.

(9) Return to Work After Adoption Leave

This part of the claim requires no modification.

(10) Replacement Employee

This too will be incorporated in our order without amendment.

CONCLUSION

Appended to this decision is the draft which we propose. It will be settled by the Registrar with recourse to a member of this Bench. The orders will be directed to the awards referred to in the application. The order made on the application of The Clothing and Allied Trades Union of Australia will be binding upon those employers and organisations served with the log of claims.

The orders will operate from the date of their execution and will remain in force for a period of twelve months thereafter.

APPENDIX

DRAFT ORDER - ADOPTION LEAVE

(1) Eligibility for Adoption Leave

A female employee shall upon production to her employer of

- (i) a statement from an adoption agency or other appropriate body of the presumed date of placement of the child with her for adoption purposes, or
- (ii) a statement from the appropriate government authority confirming that she is to have custody of the child pending application for an adoption order,

be entitled to adoption leave provided that she has had not less than 12 months continuous service with that employer immediately preceding the date upon which she proceeds upon such leave.

For the purposes of this clause:

(a) An employee shall include a part-time employee but shall not include an employee engaged upon casual or seasonal work.

(b) Adoption leave shall mean unpaid adoption leave.

(c) "Child" refers to a person under the age of 5 years who has not previously lived continuously with the employee concerned for a period of 6 months or who is not a child or step-child of the employee or of her spouse.

(d) "Relative adoption" occurs where a child, as defined, is adopted by a parent, a spouse of a parent or other relative being a grandparent, brother, sister, aunt or uncle (whether of the whole blood or half blood or by marriage).

(2) Period of Leave and Commencement of Leave

(a) Subject to subclauses 3 and 6 hereof, the period of adoption leave shall be for an unbroken period of up to 52 weeks but ceasing in any event when the child attains the age of 5 years.



(b) Upon receiving notice of approval for adoption purposes, an employee will notify her employer that she has been so approved and within 2 months of such approval she will further notify her employer of the period of adoption leave which she proposes to take upon the placement of a child. In the case of a relative adoption the employee shall notify as aforesaid upon deciding to take a child into her custody pending an application for an adoption order.

(c) A female who commences employment with an employer after the date of her approval for adoption purposes shall notify the employer thereof upon commencing employment and of the period of adoption leave which she proposes to take upon placement of such child.

(d) An employee shall as soon as she is aware of the presumed date of placement of a child for adoption purposes but not later than 14 days before such placement give notice in writing to her employer of such date and of her proposal to take adoption leave.

(e) An employee shall not be in breach of this clause, as a consequence of failure to give the stipulated period of notice in accordance with paragraph (d) of this subclause if such failure is occasioned by the requirement of an adoption agency to accept earlier placement of a child.

(3) Variation of Period of Adoption Leave

(a) Provided the addition does not extend the adoption leave beyond 52 weeks, the period may be lengthened once only, save with the agreement of the employer, by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be lengthened.

(b) The period of leave may, with the consent of the employer, be shortened by the employee giving not less than 14 days notice in writing stating the period by which the leave is to be shortened.

(4) Cancellation of Adoption Leave

(a) Adoption leave, applied for but not commenced, shall be cancelled should the placement of the child not proceed;

(b) where adoption does not continue the employee shall notify the employer forthwith and the employer shall nominate a time not exceeding 4 weeks from

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IN THE AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION

Conciliation and Arbitration Act 1904

In the matter of applications by The Municipal Officers' Association of Australia and The Association of Professional Engineers, Australia to vary the

Local Government Officers' (City of Canning) Award, 1979(1)

ployee out of

such available leave.

(6) Adoption Leave and Other Entitlements

Provided the aggregate of leave including adoption leave does not exceed 52 weeks:

(a) An employee may, in lieu of or in conjunction with adoption leave, take any annual leave or long service leave or any part thereof to which she is then entitled.

(b) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave), shall not be available to an employee during her absence on adoption leave.

(7) Effect of Adoption Leave on Employment

Notwithstanding any award or other provision to the contrary, absence on adoption leave shall not break the continuity of service of an employee but shall not be taken into account in calculating the period of service for any purpose of any relevant award or agreement.

(8) Termination of Employment

(a) An employee on adoption leave may terminate her employment at any time during the period of leave by notice given in accordance with this award.

(b) An employer shall not terminate the employment of an employee on the ground of her application to adopt a child or of her absence on adoption leave, but otherwise the rights of an employer in relation to termination of employment are not hereby affected.

(9) Return to Work After Adoption Leave

(a) An employee shall confirm her intention of returning to her work by notice in writing to the employer given not less than 4 weeks prior to the expiration of her period of adoption leave.

(b) An employee, upon the expiration of the notice required by paragraph (a) hereof, shall be entitled to the position which she held immediately before proceeding on adoption leave. Where such position no longer exists but there are other positions available for which the employee is qualified and the duties of which she is capable of performing, she shall be entitled to a position as nearly comparable in status and salary or wage to that of her former position.

(10) Replacement of Employees

(a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on adoption leave.

(b) Before an employer engages a replacement employee under this subclause, the employer shall inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

(c) Before an employer engages a person to replace an employee

temporarily promoted or transferred in order to replace an employee exercising her rights under this clause, the employer shall inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.

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(d) Provided that nothing in this subclause shall be construed as requiring an employer to engage a replacement employee.

(e) A replacement employee shall not be entitled to any of the rights conferred by this clause except where her employment continues beyond the 12-months qualifying period.