

# Circumstances Allowing Stand Down of Employees Without Pay

## Briefing Paper for CCQ Members

### Prepared by Employer Services

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1. The extensive flooding throughout Queensland has resulted in many questions arising regarding an Employer's obligations with respect to payment of wages when employees cannot be employed because of (i) a Centre being affected by flooding; or (ii) employees being directed not to attend work; or (iii) employees cannot attend work because of road closures; or (iv) employees are directly affected by flooding to their own residences and seek time off.
2. This briefing paper seeks to cover the general circumstances mentioned in (i) to (iv) above and the provisions found in the Fair Work Act 2009.
3. This paper by its very nature is general and if in doubt seek advice based on your centre's specific circumstances.
4. The Fair Work Act 2009 permits the Employer to stand down without pay an employee who cannot be usefully employed but it is not an unfettered decision of the Employer and is subject to review by the Union or the Workplace Ombudsman's Office. Ultimately the challenge could reach the Federal Magistrate's Court.
5. It is critical to any decision (and defence) that it can be established that the employee(s) could not be usefully employed.
6. Section 524 of the Fair Work Act 2009 provides as follows:-

#### *“524 Employer may stand down employees in certain circumstances*

*(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*

*(a) industrial action (other than industrial action organised or engaged in by the employer);*

*(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*

- (c) *a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*
- (2) *However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:*
- (a) *an enterprise agreement, or a contract of employment, applies to the employer and the employee; and*
- (b) *the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.*
- Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.*
- Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).*
- (3) *If 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.”*

7. Section 524(1)(c) is the applicable circumstance to the flooding.
8. Section 524(2) is very specific and unlikely to have much application to Centres, but if such Enterprise Agreements or Contracts exist then their specific terms must be carefully examined. Those terms override the general ‘stand down’ prescription.
9. Please note an employee is not to be stood down under Section 525 of the Act when they are accessing authorized leave either paid or unpaid.
10. Furthermore, the provisions of Carer’s Leave under the National Employment Standards (NES) allow employees to take paid Carer’s Leave to provide care and support to a member of their immediate family or household because of an unexpected emergency, which would include a natural disaster such as the current flooding.
11. Paragraph 10 only applies to those employees (permanents) who accrue paid leave entitlements, not casuals. Unpaid leave can be accessed.

12. The Fair Work Act and the NES do not contain specific natural disaster leave entitlements but Carer's Leave could be accessed as explained above in paragraph 10.
13. The Modern Awards applicable to Centres, namely the *Children's Services Award 2010* and/or the *Educational Services (Teachers) Award 2010* do not deal with stand downs.
14. Standing down employees is not an unfettered decision of an employer and, based on available precedents, an employer would, if challenged, need to show to a court that the reason for the 'stand down' is something "for which the employer is not responsible or over which the employer had no control".
15. Furthermore, also based on available precedents, the ability to stand down without pay is limited to "isolated, unpredictable, temporary incidents".
16. Employers must bear these principles in mind in standing down employees.
17. Therefore, apart from the "usefully employed test" is the "something for which the employer is not responsible, or over which the employer has no control" test.
18. Employees who cannot attend work (as distinct from being stood down) have no right to payment unless they claim Carer's Leave (see NES) or claim paid annual leave which is common in these circumstances.
19. Alternatively, Employers may decide to grant paid time off to employees as a special circumstance without deduction from accrued leave.

## 20. Centrelink Assistance

Employees who have lost pay can contact Centrelink to see if they are entitled to government assistance. The phone number is **180 22 66**.

There could be support for small business persons also found at the above number. Also the Queensland Government is offering financial support to small businesses (less than 20 employees) of up to \$25000.00 see

<http://www.business.qld.gov.au/risk-management/flood-assistance.html>

Alternatively, employers and employees can visit:

[http://www.centrelink.gov.au/internet/internet.nsf/emergency/qld\\_flooding\\_dec10.htm](http://www.centrelink.gov.au/internet/internet.nsf/emergency/qld_flooding_dec10.htm)

## **21. Contact Employer Services**

Should any member have a query regarding the obligations surrounding “stand down” please call Employer Services on (07) 3220 3500.