



DECISION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—plain language re-drafting—standard clauses

(AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

MELBOURNE, 24 DECEMBER 2019

4 yearly review of modern awards – plain language re-drafting – standard clauses – Mannequins and Models Award 2010.

[1] This statement deals with the standard clauses to be inserted into the *Mannequins and Models Award 2010* (the Mannequins Award).

[2] In a decision issued on 11 December 2018¹ (the December 2018 decision), we finalised the standard redundancy term and expressed the *provisional* view that the term should be inserted into 100 modern awards. The remaining 22 awards were categorised as follows:

- Category 1: Awards with an industry-specific redundancy scheme.
- Category 2: Awards with an industry-specific redundancy element that supplements the NES (such as providing an entitlement to redundancy pay for employees of small businesses).
- Category 3: Awards with other variations from the standard redundancy provisions.

[3] The Mannequins Award was included in category 2 because it supplements the National Employment Standards (the NES) by providing an entitlement to redundancy pay for employees of small businesses and at [29] of the December 2018 decision we stated that the provisions of the award required further consideration.

[4] The current redundancy provision in the Mannequins Award is set out in full below:

‘12. Redundancy

12.1 Redundancy pay is provided for in the NES.

¹ [\[2018\] FWCFB 7447](#) at paras [11]-[12].

12.2 Severance pay—employees of a small employer

In addition to the provisions set out in the NES, an employee of a small employer as defined in clause 3.1 whose employment is terminated by reason of redundancy is entitled to the following amount of severance pay in respect of a period of continuous service:

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and over	8 weeks' pay

12.3 Transfer to lower paid duties

Where an employee is transferred to lower paid duties by reason of redundancy, the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the ordinary time rate of pay for the number of weeks of notice still owing.

12.4 Employee leaving during notice period

An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee is entitled to receive the benefits and payments they would have received under this clause had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.

12.5 Job search entitlement

- (a) An employee given notice of termination in circumstances of redundancy must be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.
- (b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee must, at the request of the employer, produce proof of attendance at an interview or they will not be entitled to payment for the time absent. For this purpose a statutory declaration is sufficient.
- (c) This entitlement applies instead of clause 11.3.'

[5] A small employer is defined in clause 3.1 of the Mannequins Award as follows:

'small employer means an employer who employs fewer than 15 employees'.

[6] We considered that clause 12.2 of the current award required further consideration because of the words 'in addition to the provisions set out in the NES'.

[7] Section 119 of the *Fair Work Act 2009* (Cth) (the Act) provides for the entitlement to redundancy pay and the amount to be paid. Section 121 of the Act provides for exclusions from the obligation to pay redundancy pay. Section 121 sits within the NES and section 121(1) relevantly states (emphasis added):

‘121 Exclusions from obligation to pay redundancy pay

- (1) Section 119 does not apply to the termination of an employee’s employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):
- (a) the employee’s period of continuous service with the employer is less than 12 months; or
 - (b) the employer is a small business employer.’

[8] In a decision issued on 25 September 2009,² the Australian Industrial Relations Commission (AIRC) published an exposure draft of the Mannequins award. The AIRC noted that the exposure draft was drawn largely from the existing federal award.³ The Shop, Distributive and Allied Employees Association (SDA) were the only party to make submissions about this award during award modernisation and they did not make any reference to the redundancy provisions.⁴

[9] In the December 2018 decision we expressed *provisional* views in relation to small business employer redundancy pay entitlements in the *Timber Industry Award 2010* (the Timber Award) and in the *Manufacturing and Associated Industries and Occupations Award 2010* (the Manufacturing Award). We proposed that clause 15 of the Timber Award should be replaced by the plain language standard redundancy clause together with the following new redundancy pay provision:

‘15.4 Redundancy pay for employee of small business employer

- (a) Clause 15.4 applies to an employee of a small business employer except for an employee who:
 - (i) only performs work within clause 4.2(f)—Pulp and paper sector of this award; or
 - (ii) is excluded from redundancy pay under the NES by section 121(1)(a), section 123(1) or section 123(4)(a) of the Act.
- (b) In paragraph (a) an employee is **an employee of a small business employer** if, immediately before the time the employee’s employment is terminated, or at the time when the employee is given notice of termination as described in section 117(1) of the Act (whichever happens first), the employer is a small business employer as defined by section 23 of the Act.

² [2009] AIRCFB 865

³ [Mannequins and Models Award 2000](#)

⁴ [SDA’s submission](#) 27 October 2009

- (c) Subject to paragraphs (f) and (g), an employee is entitled to be paid redundancy pay by the employer if the employee’s employment is terminated:
 - (i) at the employer’s initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
 - (ii) because of the insolvency or bankruptcy of the employer.
- (d) The amount of the redundancy pay in paragraph (c) equals the total amount payable to the employee for the redundancy pay period specified in column 2 of **Table 2—Redundancy pay period** according to the period of continuous service of the employee specified in column 1, worked out at the employee’s base rate of pay for his or her ordinary hours of work.

Table 2—Redundancy pay period

Column 1	Column 2
Employee’s period of continuous service with the employer on termination	Redundancy pay period
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years and over	8 weeks

- (e) In paragraph (d) **continuous service** has the same meaning as in section 119 of the Act.
- (f) The terms of section 120 of the [Act](#) apply as if section 120 referred to ‘paragraph (c)’ rather than ‘section 119’.

NOTE: Under section 120 of the [Act](#) the Fair Work Commission can determine that the amount of redundancy pay under the [NES](#) is to be reduced if the employer obtains other acceptable employment for the employee or cannot pay that amount. Paragraph (f) applies these arrangements also to redundancy pay under clause 15.4.

- (g) The terms of section 122 of the [Act](#) apply as if section 122 referred to ‘clause 15.4’ rather than ‘this Subdivision’ and to ‘paragraph (c)’ rather than ‘section 119’.

NOTE: Under section 122 of the [Act](#) transfer of employment situations can affect the obligation to pay redundancy pay under the [NES](#) and the Fair Work Commission can make orders affecting redundancy pay. Paragraph (g) applies these arrangements also to redundancy pay under clause 15.4.

[10] In the December 2018 decision we noted, as part of our *provisional* view:

[40] ... The proposed new redundancy pay provision has been drafted on the basis that clause 15.7(b) of the Timber Award limits the application of ‘small employer’ redundancy pay according to the types of work covered by the two predecessor awards, but not also according

to the geographic application of the two predecessor awards. Accordingly, the proposed new provision applies to ‘small business employers’ throughout Australia.

[41] If, contrary to our *provisional* view, clause 15.7(b) of the Timber Award does limit the application of ‘small employer’ redundancy pay also on a geographic basis, clause 15.7(b) would be a ‘State-based difference term’ that is now prohibited by s.154 of the FW Act. Were that the case, the potential options would be either to entirely remove the ‘small employer’ redundancy pay provision from the Timber Award or to omit the geographic limitations from the provision so that (like proposed new clause 15.4) it applies throughout Australia.’

[11] We expressed the *provisional* view at [46]-[48] that clause 23 of the Manufacturing Award should be replaced by the plain language standard redundancy clause together with the following new redundancy pay provision:

‘23.4 Redundancy pay for employee of furnishing small business employer

- (a) Clause 23.4 applies to an employee of a small business employer who performs any of the work within the Manufacturing and Associated Industries and Occupations which, immediately prior to 1 January 2010, was in clauses 6.1 to 6.6 of the *Furnishing Industry National Award 2003*, except for an employee who is excluded from redundancy pay under the NES by section 121(1)(a), section 123(1) or section 123(4)(a) of the Act.
- (b) In paragraph (a) an employee is **an employee of a small business employer** if, immediately before the time the employee’s employment is terminated, or at the time when the employee is given notice of termination as described in section 117(1) of the Act (whichever happens first), the employer is a small business employer as defined by section 23 of the Act.
- (c) Subject to paragraphs (f) and (g), an employee is entitled to be paid redundancy pay by the employer if the employee’s employment is terminated:
 - (i) at the employer’s initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
 - (ii) because of the insolvency or bankruptcy of the employer.
- (d) The amount of the redundancy pay in paragraph (c) equals the total amount payable to the employee for the redundancy pay period specified in column 2 of **Table 2—Redundancy pay period** according to the period of continuous service of the employee specified in column 1, worked out at the employee’s base rate of pay for his or her ordinary hours of work.

Table 2—Redundancy pay period

Column 1	Column 2
Employee’s period of continuous service with the employer on termination	Redundancy pay period
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks

At least 3 years but less than 4 years	7 weeks
At least 4 years and over	8 weeks

- (e) In paragraph (d) **continuous service** has the same meaning as in section 119 of the Act.
- (f) The terms of section 120 of the Act apply as if section 120 referred to ‘paragraph (c)’ rather than ‘section 119’.

NOTE: Under section 120 of the Act the Fair Work Commission can determine that the amount of redundancy pay under the NES is to be reduced if the employer obtains other acceptable employment for the employee or cannot pay that amount. Paragraph (f) applies these arrangements also to redundancy pay under clause 23.4.

- (g) The terms of section 122 of the Act apply as if section 122 referred to ‘clause 23.4’ rather than ‘this Subdivision’ and to ‘paragraph (c)’ rather than ‘section 119’.

NOTE: Under section 122 of the Act transfer of employment situations can affect the obligation to pay redundancy pay under the NES and the Fair Work Commission can make orders affecting redundancy pay. Paragraph (g) applies these arrangements also to redundancy pay under clause 23.4.’

[12] In the December 2018 decision we noted, as part of our *provisional* view:

[46] ... As the description of the types of work to which the present redundancy pay provision applies (as per clause 23.2(b) above) is not as amenable to simplification as the corresponding provision in the Timber Award, the present description is reproduced in the new redundancy pay provision. We later invite submissions as to how the current description of the types of work to which the present redundancy pay provision applies may be simplified.

[47] Similarly to the new clause proposed for the Timber Award, the proposed new redundancy pay clause has been drafted on the basis that clause 23.2(b) of the Manufacturing Award limits the application of ‘small furnishing employer’ redundancy pay according to the types of work covered by the *Furnishing Industry National Award 2003*, but not also according to the geographic application of the predecessor pre-modern award. We note in that respect that clause 23.2(b) refers only to clauses 6.1 to 6.6 of the predecessor award and not also to the preamble to the coverage clause (see **Attachment B**).

[48] If, contrary to our *provisional* view, clause 23.2(b) of the Manufacturing Award does limit the application of ‘small furnishing employer’ redundancy pay also on a geographic basis, then (as with the corresponding provision of the Timber Award) the potential options would be either to entirely remove the ‘small furnishing employer’ redundancy pay provision from the award or to omit the geographic limitations.’

[13] In a decision issued on 9 October 2019 (the October 2019 decision)⁵ we confirmed our *provisional* view that the relevant clauses in the Manufacturing Award and the Timber Award limit the entitlement to redundancy pay by reference to the types of work covered by the predecessor awards and not on a geographic basis.⁶

⁵ [\[2019\] FWCFB 6858](#)

⁶ [\[2019\] FWCFB 6858](#) at paras [69] – [92]

[14] Our *provisional* view is that the Mannequins Award should be varied to include the plain language standard clauses A–E and the standard redundancy clause, amended to include small business employer redundancy provisions.

[15] The proposed redundancy clause in the Mannequins Award is set out below.

‘12. Redundancy

NOTE: Redundancy pay is provided for in the NES. See sections 119–123 of the Act. Clause 12 supplements the NES by providing redundancy pay for employees of a small employer.

12.1 Transfer to lower paid duties on redundancy

- (a) Clause 12.1 applies if, because of redundancy, an employee is transferred to new duties to which a lower ordinary rate of pay applies.
- (b) The employer may:
 - (i) give the employee notice of the transfer of at least the same length as the employee would be entitled to under section 117 of the Act as if it were a notice of termination given by the employer; or
 - (ii) transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer, provided that the employer pays the employee as set out in clause 12.1(c).
- (c) If the employer acts as mentioned in clause 12.1(b)(ii), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of all-purpose allowances and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of all-purpose allowances and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.

12.2 Employee leaving during redundancy notice period

- (a) An employee given notice of termination in circumstances of redundancy may terminate their employment during the minimum period of notice prescribed by section 117(3) of the Act.
- (b) The employee is entitled to receive the benefits and payments they would have received under clause 12 or under sections 119–123 of the Act had they remained in employment until the expiry of the notice.
- (c) However, the employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to be employed.

12.3 Job search entitlement

- (a) Where an employer has given notice of termination to an employee in circumstances of redundancy, the employee must be allowed time off without loss of pay of up to one day each week of the minimum period of notice prescribed by section 117(3) of the Act for the purpose of seeking other employment.
- (b) If an employee is allowed time off without loss of pay of more than one day under clause 12.3(a), the employee must, at the request of the employer, produce proof of attendance at an interview.
- (c) A statutory declaration is sufficient for the purpose of clause 12.3(b).
- (d) An employee who fails to produce proof when required under clause 12.3(b) is not entitled to be paid for the time off.
- (e) This entitlement applies instead of clauses 11.2 and 11.3.

12.4 Severance pay—employees of a small business employer

- (a) Clause 12.4 applies to an employee of a small business employer, except for an employee who is excluded from redundancy pay under the [NES](#) by sections 121(1)(a), 123(1), 123(4)(a) or 123(4)(d) of the [Act](#).
- (b) In paragraph (a) an employee is an employee of a small business employer if, immediately before the time the employee’s employment is terminated, or at the time when the employee is given notice of termination as described in section 117(1) of the Act (whichever happens first), the employer is a small business employer as defined by section 23 of the Act.
- (c) Subject to paragraphs (f) and (g), an employee is entitled to be paid redundancy pay by the employer if the employee’s employment is terminated:
 - (i) at the employer’s initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
 - (ii) because of the insolvency or bankruptcy of the employer.
- (d) An employee of a small business employer whose employment is terminated by reason of redundancy is entitled to the following amount of redundancy pay in respect of a period of continuous service:

Table 2—Redundancy pay period

Column 1	Column 2
Employee’s period of continuous service with the employer	

on termination	Redundancy pay period
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years and over	8 weeks

(e) In paragraph (d) **continuous service** has the same meaning as in section 119 of the [Act](#).

(f) The terms of section 120 of the [Act](#) apply as if section 120 referred to ‘paragraph (c) above’ rather than ‘section 119’.

NOTE: Under section 120 of the [Act](#) the Fair Work Commission can determine that the amount of redundancy pay under the [NES](#) is to be reduced if the employer obtains other acceptable employment for the employee or cannot pay that amount. Paragraph (f) applies these arrangements also to redundancy pay under clause 17.4.

(g) The terms of section 122 of the [Act](#) apply as if section 122 referred to ‘clause 12.4’ rather than ‘this Subdivision’ and to ‘paragraph (c) above’ rather than ‘section 119’.

NOTE: Under section 122 of the [Act](#) transfer of employment situations can affect the obligation to pay redundancy pay under the [NES](#) and the Fair Work Commission can make orders affecting redundancy pay. Paragraph (g) applies these arrangements also to redundancy pay under clause 17.4.

[16] Clause 3.1 of the Mannequins Award will be amended to delete the definition of ‘small employer.’

[17] A draft award variation determination will be published with this Decision. Any party opposing our *provisional* view must file a submission setting out their position by no later than **4pm on Thursday 23 January 2020**. If there is no opposition to our *provisional* view we will issue a variation determination in the same terms as the draft determination.

[18] Submissions are to be sent to amod@fwc.gov.au.

PRESIDENT

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