



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, 21 MAY 2020

4 yearly review of modern awards – plain language re-drafting – standard clauses – Sugar Industry Award 2010.

[1] In a Statement¹ published on 4 March 2020 (March 2020 Statement) we addressed a submission filed by Ai Group on 14 February 2020 in relation to the redundancy clause to be inserted into the *Sugar Industry Award 2010* (the Sugar Award). At [10] – [11] of that Statement we said:

‘We do not agree with the proposition that the redrafting proposed at clause 16.5 disturbs other exclusions in s 123. However, we propose to deal with the concern raised by making an amendment to Note 2 at the start of the redundancy clause. Note 2 will be split into 2 separate notes as follows:

NOTE 2: Clause 16.4 supplements the NES by providing additional benefits to bulk terminal employees.

NOTE 3: Clause 16.5 supplements the NES by providing entitlements to certain employees in sugar mills excluded from redundancy pay under the NES by section 123(1)(a) of the Act **because they are employed for a specified period of time or for a specified task. The other exclusions in s 123(1) continue to apply.**

A revised draft determination will be published with this decision. Interested parties are invited to comment on the revised draft. Submissions should be filed by **4 pm on Friday 20 March 2020**. Submissions in reply should be filed by **4 pm on Friday 3 April 2020**. In the absence of any objection we will proceed to issue a final variation determination in the same terms as the draft determination.’

[2] The only [submission](#) received was filed by Ai Group on 27 March 2020. Ai Group refer to two variations made to the determination in response to Ai Group’s submissions of 14 February 2020. These are, respectively:

¹ [2020] FWCFB 1141.

- The replacement of the word ‘engaged’ with the word ‘retained’ in proposed cl. 16.5(c) of the Award:
- The inclusion of additional words in the notes which precede the redundancy clause confirming that other exclusions from the obligation to make redundancy payments in s. 123(1) of the *Fair Work Act 2009* (Cth) (FW Act) continue to apply.

[3] Ai Group goes on to identify two outstanding issues which it seeks to have resolved prior to the variation of the award.

[4] At paragraphs [8] to [10] of the March 2020 Statement, we acknowledged that Ai Group expressed the concern that the draft determination arguably disturbed other exclusions, including those for employees of ‘small business employers’ and for employees whose period of continuous service with an employer is less than 12 months. Although we did not agree that the redrafting of the entitlement disturbed these other exclusions, we decided to include the following words in a new NOTE 3 to precede the redundancy clauses in the Award:

NOTE 3: Clause 16.5 supplements the NES by providing entitlements to certain employees in sugar mills excluded from redundancy pay under the NES by section 123(1)(a) of the Act because they are employed for a specified period of time or for a specified task. The other exclusions in s 123(1) continue to apply.

[5] At [7] of its submission Ai Group says:

‘Ai Group retains the concern expressed in our original submissions. However, if a note is to address this issue, we propose that the note confirm that the other exclusions in ss 123(1), **121(1) and 123(4)(d)** continue to apply.’²

[6] We agree with the change proposed.

[7] The second issue raised by Ai Group concerns notice of termination for fixed term employees. Ai Group advances the following submission in respect of this issue:

‘Current cl. 16.6 only applies an exception to the limitation on redundancy in s. 123 of the FW Act. It does not impact limitations on the application of the requirement to provide notice of termination or payment in lieu of notice in s. 123. As such, proposed s. 16.5(d)(i) inappropriately claims to introduce an entitlement to ‘notice of termination’ to fixed-term employees.

Notice of termination’ is not a matter listed in s. 139(1). A term dealing with ‘notice of termination’ is not an incidental or machinery term within the current context for the purposes of s. 142 of the FW Act. The Commission’s capacity to include such a term in a modern award derives from Division 11 – Notice of Termination and Redundancy Pay. Pursuant to s. 123(1)(a) of the FW Act, Division 11 does not apply to employees employed for a specified period of time, for a specified task, or for the duration of a specified season. This includes ‘fixed term employees’.

² Ai Group submission 27 March 2020 at para [7].

A term which purports to extend a requirement to provide notice of termination or payment instead of notice in accordance with s. 117 of the FW Act to fixed term employees in a sugar mill would:

- exclude a provision of the National Employment Standards and have no effect due to the operation of s. 56 of the FW Act or;
- contravene s. 136 and have no effect due to the operation of s. 137 of the FW Act.

The purpose of an industry-specific redundancy scheme is not to outline entitlements afforded to employees in respect of notice of termination. As such, to the extent that proposed cl. 16.5(d)(i) impacts apprentices, Ai Group considers the clause to be superfluous.

Ai Group recommends that proposed cl. 16.5(d)(i) be deleted. It is noted that cl. 16.6 of the current Award contains no reference to notice of termination.³

[8] Clause 16.6 of the current award states:

16.6 Redundancy pay—apprentices and fixed term employees in sugar mills

The NES limitation on redundancy in s.123 of the Act for an employee employed for a specified period of time or for a specified task will not apply to employees of sugar mills where such employees are:

- (a) engaged on a series of consecutive contracts where the period of actual service covered by the series of contracts totals in excess of 12 months. For the purpose of this clause the continuity of an employee’s service with an employer is taken not to be broken by a period between fixed term contracts which is equal to or less than eight weeks; or
- (b) apprentices who are retained in employment for more than six months after the completion of their apprenticeship. (Emphasis added)

[9] The proposed clause 16.5 provides as follows:

‘16.5 Apprentices and fixed term employees in sugar mills

- (a) Clause 16.5(d) applies to a fixed-term employee in a sugar mill, where the employee is engaged on a series of consecutive contracts where the period of actual service covered by the series of contracts is more than 12 months.
- (b) For the purposes of clause 16.5(a), the continuity of an employee’s service with an employer will not be broken where there is a period of 8 weeks or less between fixed term contracts.
- (c) Clause 16.5(d) applies to an apprentice in a sugar mill who is engaged in employment for more than 6 months after the completion of their apprenticeship.

³ Ai Group submission 27 March 2020 at paras [8] – [12].

(d) Redundancy pay

(i) An apprentice or fixed-term employee in a sugar mill is entitled to notice of termination or payment instead of notice in accordance with section 117 of the Act.

(ii) An apprentice or fixed-term employee in a sugar mill is entitled to redundancy pay in accordance with section 119(2) of the Act.’ (Emphasis added)

[10] We agree with Ai Group that the current clause 16.6 only applies to ‘the limitation on redundancy’ in s.123 and says nothing about notice of termination. The intention of the plain language re-drafting process is not to alter the substantive effect of existing terms. Accordingly, we will delete proposed clause 16.5(d)(i). A final variation determination will be issued shortly.

PRESIDENT

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