



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Payment of wages (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE
COMMISSIONER HUNT

MELBOURNE, 18 AUGUST 2020

4 yearly review of modern awards – common issue – payment of wages – payments on termination of employment model term – outstanding issues in the Graphic Arts, Printing and Publishing Award 2010, Food, Beverage and Tobacco Manufacturing Award 2010, and Manufacturing and Associated Industries and Occupations Award 2020.

1. Background

[1] The ‘payment of wages’ terms in modern awards are being dealt with as a common issue in the 4 yearly review of modern awards.

[2] In a decision issued in December 2016,¹ we confirmed our *provisional* view that each modern award should provide for the payment of wages and other amounts owing to an employee on termination of employment and that such a term should prescribe the timeframe within which such termination payments are to be made.²

[3] In a decision issued on 17 July 2018³ we finalised the payment of wages on termination of employment model term. The model term provides as follows:

X (a) The employer must pay an employee no later than 7 days after the day on which the employee’s employment terminates:

(i) The employee’s wages under this award for any complete or incomplete pay period up to the end of the day of termination: and

(ii) All other amounts that are due to the employee under the award and the NES.

¹ [2016] FWCFB 8463

² Ibid at [86]

³ [2018] FWCFB 3566

(b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or Act.

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the required minimum period of notice or "has paid" to the employee payment instead of giving them notice.

Note 2: Paragraph (b) allows the Commission to make an order delaying the requirement to make a payment under clause X. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

Note 3: State and Territory long service leave laws or long service leave entitlements under s.113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.⁴

[4] The model term was subsequently inserted (in some cases with minor modifications) in the 86 modern awards which were silent in respect of the time period within which termination payments are to be made.⁵

[5] The remaining 36 modern awards contained terms which provided for the payment of wages and other amounts on the termination of employment. There is considerable variation in the manner in which these modern awards deal with termination payments. For example, the time period within which termination payments are to be made varies from the day of termination to 3 days after termination; 10 of the 36 modern awards provide for termination payments to be sent by post or registered post; 6 provide for termination payments to be 'forwarded' to the former employee, but do not specify the means by which such payments are to be made. The terms of these 36 modern awards also vary in the manner in which they refer to the amounts owing to an employee whose employment has been terminated, including making reference to 'all money due',⁶ 'monies',⁷ 'all wages and other monies'⁸ and 'all wages and holiday pay'.⁹

[6] In a decision issued on 20 May 2020¹⁰ (the May 2020 decision), 21 awards were listed as outstanding in AM2016/8—Payment of wages.¹¹ We were not persuaded to vary the *Supported Employment Services Award 2010* or the *Dry Cleaning and Laundry Industry Award 2020*.

⁴ Ibid at [119]

⁵ See [2018] FCFB 3566, [2018] FWCFB 4735

⁶ See the *Waste Management Award 2010* at clause 24.3

⁷ See the *Plumbing and Fire Sprinklers Award 2010* at clause 27.4

⁸ See the *Nurses Award 2010* at clause 18

⁹ See the *Horse and Greyhound Training Award 2010* at clause 18.1

¹⁰ [\[2020\] FWCFB 1131](#)

¹¹ [\[2020\] FWCFB 1131](#)

[7] Ten of the awards were subsequently varied on 4 July 2020¹² and the *Vehicle Repair, Services and Retail Award 2020* was varied on 14 July.¹³

[8] In a number of awards already varied, we have adopted a “hybrid approach” whereby the model term was inserted with appropriate amendments to reflect the current terms of the award.

[9] This decision deals with outstanding issues in relation to the *Graphic Arts, Printing and Publishing Award 2010* (Graphic Arts Award), the *Food, Beverage and Tobacco Manufacturing Award 2010* (FBT Award); and the *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award).

Graphic Arts Award

[10] Ai Group and ABI made applications to insert the model term in the Graphic Arts Award. The AMWU opposed the ABI and Ai Group applications.

[11] The Graphic Arts Award provides that wages may be paid in cash, cheque or by electronic funds transfer, at the employer’s discretion. In relation to termination payments clause 28.5 provides as follows:

28.5 Payment on termination

On termination of employment, all monies due to an employee must be paid on the day of termination. When an employee is dismissed without notice all monies are to be forwarded to the employee by post or electronic funds transfer by the end of the next business day following the termination.

[12] In the May 2020 decision, we rejected the Ai Group and ABI applications but went on to express our *provisional* view that the current clause should be varied and that an appropriate balance between the competing considerations would be as follows:

1. The following amounts must be paid by the end of the next business day after the day on which the employee’s employment terminates:

- wages for any complete or incomplete pay period up to the end of the day of termination; and
- all other monies due to the employee under the award.

2. The following amounts must be paid no later than 7 days after the day on which the employee’s employment terminates:

- all amounts due to the employee under the NES.

¹² [Schedule of determinations](#)

¹³ [Determination – Vehicle Award](#)

[13] We directed the parties to confer on the form of a draft variation having regard to views expressed above.

[14] On 4 August 2020 Ai Group filed a draft variation determination that it said would give effect to our *provisional* view. The draft variation determination is set out at Attachment A.

[15] A conference was held on 5 August 2020.¹⁴ Ai Group, the AMWU and ABI were represented. At the conference Ai Group and the AMWU confirmed they had reached a consent position and were in support of varying the Graphic Arts Award in the terms set out at Attachment A. ABI confirmed its agreement shortly after the conference.

Manufacturing Awards

[16] It is convenient to deal with the two Manufacturing Awards (the FBT Award and the Manufacturing Award) together, because the termination payment provisions are substantially the same. Clause 27.3 of the Manufacturing Award provides:

27.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee by post on the next working day. (Emphasis added)

[17] The relevant clause in the FBT Award (clause 28.3) is in the same terms as the Manufacturing Award, save that there is an absence of prescription as to the method by which payment may be forwarded to the working day following the termination date. Clause 28.3 provides:

28.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee on the next working day.

[18] Ai Group and ABI filed applications to insert the model term in the Manufacturing Awards. The AMWU (and other unions) opposed the ABI and Ai Group applications.

[19] In the May 2020 decision, we rejected the Ai Group and ABI applications but went on to express the *provisional* view that the current clauses should be varied and that an appropriate balance between the competing considerations would be as follows:

1. The following amounts must be paid by the end of the next business day after the day on which the employee's employment terminates:

- wages for any complete or incomplete pay period up to the end of the day of termination; and
- all other monies due to the employee under the award.

¹⁴ [Transcript](#), 5 August 2020

2. The following amounts must be paid no later than 7 days after the day on which the employee's employment terminates:

- all amounts due to the employee under the NES.

[20] We directed the parties to confer on the form of a draft variation having regard to views expressed above.

[21] On 4 August 2020 Ai Group filed draft variation determinations giving effect to our *provisional* view. Those draft variation determinations are set out at Attachments B and C.

[22] A conference was held on 5 August 2020 at which Ai Group, the AMWU and ABI were represented. At the conference the parties confirmed they had reached a consent position and supported the Manufacturing Awards being varied in the terms set out at Attachments B and C.

2. Consideration

[23] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations). The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.¹⁵ No particular primacy is attached to any of the s.134 considerations¹⁶ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[24] Section 138 of the Act emphasises the importance of the modern awards objective:

'138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[25] To comply with s.138, the terms included in modern awards must be 'necessary to achieve the modern awards objective.

[26] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.¹⁷

¹⁵ *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

¹⁶ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

¹⁷ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

[27] The modern awards objective is very broadly expressed.¹⁸ It is a composite expression which requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the matters in ss.134(1)(a)–(h).¹⁹ Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.²⁰

[28] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations.²¹ Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.²² In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[29] We now turn to the modern awards objective.

[30] Section 134(1)(a) requires us to take into account ‘the relative living standards and the needs of the low paid’.

[31] A threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid,’²³ within the meaning of s.134(1)(a).

[32] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. On the basis of the data from the CoE survey for August 2019, two-thirds of median weekly earnings for full-time employees is \$920.00. Data on median weekly full-time earnings are also available from the EEH survey for May 2018, and two-thirds of median earnings is equal to \$973.33.

[33] Using the two-thirds of median full-time wages as the benchmark, the award reliant employees covered by the Graphic Arts Award and the FBT Award are ‘low paid’ within the meaning of s.134(1)(a). In respect of the Manufacturing Award, approximately two thirds of the award reliant classifications are low paid.

[34] We accept that the variation of the awards in the manner proposed may result in low paid employees receiving some termination payments later than they would under the current award. This is a consideration that weighs against the variations proposed. However, the variations will ensure that such employees receive their NES entitlements in a timely manner.

¹⁸ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]

¹⁹ [\[2017\] FWCFB 1001](#) at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

²⁰ [\[2018\] FWCFB 3500](#) at [21]–[24]

²¹ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]–[106]

²² See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]–[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission’s task in the Review

²³ [\[2017\] FWCFB 1001](#) at [166]

[35] Section 134(1)(b) requires us to take into account ‘the need to encourage collective bargaining’. We accept that the variations proposed will not necessarily *encourage* collective bargaining. This is a consideration that weighs against the variations proposed.

[36] We accept that the variations proposed are consistent with the need to promote flexible modern work practices and is likely to have a positive impact on business. Further, we also accept that the variations proposed are consistent with the need to ensure a simple easy to understand modern award system (s.134(1)(d), (f) and (g)).

[37] The considerations in s 134(1)(c), (da), (e) and (h) are not relevant in the present context.

[38] It is our *provisional* view that the variations are necessary to achieve the modern awards objective.

3. Next steps

[39] We propose to provide interested parties with an opportunity to comment on our *provisional* view.

[40] Interested parties should file any response to the *provisional* view by **4pm on Wednesday, 26 August 2020**. Submissions should be sent to amod@fwc.gov.au.

[41] If no submissions are received opposing the *provisional* view, final variation determinations will be issued.

PRESIDENT

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ATTACHMENT A

MA000026 PRXXXXXX



DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—Payment of wages (AM2016/8)

GRAPHIC ARTS, PRINTING AND PUBLISHING AWARD 2010 [MA000026]

Graphic arts

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE
COMMISSIONER HUNT

MELBOURNE, XX DATE 2020

4 yearly review of modern awards – common issue – payment of wages – payments on termination – Graphic Arts, Printing and Publishing Award 2010.

A. Further to the Full Bench decision issued by the Fair Work Commission on XX DATE 2020 [[2020] FWCFB XXXX], the above award is varied as follows:

1. By deleting clause 28.5.
2. By renumbering clauses 28.6 as clauses 28.5.
3. By inserting a new clause 28.6 as follows:

28.6 Payment on termination of employment

- (a) The employer must pay an employee by the end of the next business day after the day on which the employee's employment terminates
 - (i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and
 - (ii) all other monies that are due to the employee under this award.

- (b) The employer must pay an employee all amounts due to the employee under the [NES](#) no later than 7 days after the day on which the employee's employment terminates.
- (c) The requirement to pay wages and other amounts under paragraphs (a) and (b) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

NOTE 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

NOTE 2: Paragraph (c) allows the Commission to make an order delaying the requirement to make a payment under paragraphs (a) or (b). For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

NOTE 3: State and Territory long service leave laws or long service leave entitlements under section 113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

4. By updating cross-references accordingly.

B. This determination comes into operation from XX DATE 2020. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after XX DATE 2020.

PRESIDENT

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ATTACHMENT B

MA000073 PRXXXXXX



DRAFT DETERMINATION

Fair Work

Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—Payment of wages (AM2016/8)

FOOD, BEVERAGE AND TOBACCO MANUFACTURING AWARD 2010 [MA000073]

Food, beverage and tobacco manufacturing industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE
COMMISSIONER HUNT

MELBOURNE, XX DATE 2020

4 yearly review of modern awards – common issue – payment of wages – payments on termination – Food, Beverage and Tobacco Manufacturing Award 2010.

A. Further to the Full Bench decision issued by the Fair Work Commission on XX Date 2020 [[2020] FWCFB XXXX], the above award is varied as follows:

1. By deleting clause 28.3.
2. By renumbering clauses 28.4 to 28.6 as clauses 28.3 to 28.5.
3. By inserting a new clause 28.6 as follows:

28.6 Payment on termination of employment

- (a) The employer must pay an employee by the end of the next business day after the day on which the employee's employment terminates:
 - (i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and
 - (ii) all other monies that are due to the employee under this award.

- (b) The employer must pay an employee all amounts due to the employee under the [NES](#) no later than 7 days after the day on which the employee's employment terminates.
- (c) The requirement to pay wages and other amounts under clause 28.6 (a) and (b) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

Note 2: Clause 28.6 (c) allows the Commission to make an order delaying the requirement to make a payment under clauses 28.6 (a) or (b). For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

Note 3: State and Territory long service leave laws or long service leave entitlements under section 113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

4. By updating the cross-references accordingly.

B. This determination comes into operation from XX DATE 2020. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after XX DATE 2020.

PRESIDENT

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ATTACHMENT C

MA000010 PRXXXXXX



DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—Payment of wages

(AM2016/8)

MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2020

[MA000010]

Manufacturing and associated industries

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE
COMMISSIONER HUNT

MELBOURNE, XX DATE 2020

4 yearly review of modern awards – common issue – payment of wages – payments on termination – Manufacturing and Associated Industries and Occupations Award 2020.

A. Further to the Full Bench decision issued by the Fair Work Commission on XX DATE 2020 [[2020] FWCFB XXXX], the above award is varied as follows:

1. By deleting clause 27.3.
2. By renumbering clauses 27.4 to 27.6 as clauses 27.3 to 27.5.
3. By inserting a new clause 27.6 as follows:

27.6 Payment on termination of employment

- (a) The employer must pay an employee by the end of the next business day after the day on which the employee's employment terminates:
 - (i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and
 - (ii) all other monies that are due to the employee under this award.

- (b) The employer must pay an employee all amounts due to the employee under the [NES](#) no later than 7 days after the day on which the employee's employment terminates.
- (c) The requirement to pay wages and other amounts under clause 27.6(a) and (b) is subject to further order of the Commission and the employer making deductions authorised by this award or the [Act](#).

NOTE 1: Section 117(2) of the [Act](#) provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

NOTE 2: Clause 27.6(c) allows the Commission to make an order delaying the requirement to make a payment under clauses 27.6(a) or (b). For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the [Act](#) for the Commission to reduce the amount of redundancy pay an employee is entitled to under the [NES](#).

NOTE 3: State and Territory long service leave laws or long service leave entitlements under section 113 of the [Act](#), may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

4. By updating the cross-references accordingly.

B. This determination comes into operation from XX DATE 2020. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after XX DATE 2020.

PRESIDENT

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