Fair Work Commission: 4 Yearly Review of Modern Awards

FURTHER SUBMISSIONS ON PLAIN LANGUAGE STANDARD CLAUSES:
NOTICE OF TERMINATION BY EMPLOYEES

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

14 NOVEMBER 2017

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1. INTRODUCTION

1.1 These submissions are made in response to the Decision ([2017] FWCFB 5258) (**Decision**), Statement and Directions issued on 18 October 2017 ([2017] FWCFB 5367) (**Statement**) with respect to matter AM2016/15 - Plain language - standard clauses.

1.2 These further submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**). Our clients also rely upon their submissions filed with respect to this matter on 4 September 2017 (**Previous Submissions**) and extract the relevant passages of those submissions (for the convenience of the Bench) where relevant.

1.3 The Full Bench has sought submissions with respect to the proposed clause E.1(c) of the tranche of standard clauses. Clause E.1 deals generally with notice of termination by an employee. Clause E.1(c) is proposed to read as follows:

> "*If an employee fails to give the period of notice required under paragraph (a), the employer may deduct from any money due to the employee on termination (under this award or the NES), an amount not exceeding the amount that the employee would have been paid in respect of the period of notice not given.*"

1.4 The two overarching issues that the Commission has sought input in relation to relate to the matters raised at [1] of the Directions; specifically:

(a) whether clause E.1(c) is incidental to a term permitted to be in a modern award and essential for the purpose of making the permitted term operate in a practical way (with regard to ss 142(1)(a) and(b) of the *Fair Work Act 2009* (Cth) (**Act**)); and

(b) whether clause E.1(c) is a term which must not be included in a modern award as the term has no effect because of ss 326(1) and (4) (with regard to s 151).

1.5 In order to address these two issues, we outline immediately below a response to each of the separate and specific questions contained at [2] of the Directions..

2. WHAT IS THE SCOPE OF CLAUSE E.1(A) HAVING REGARD TO THE TERMS OF S 123?

2.1 The provisions governing termination of employment and redundancy pay are found within the National Employment Standards in Division 11 of Pt 2-2 of the Act.

2.2 Clause E.1 is a permitted matter generally by virtue of section 118 of the Act, which is found in Division 11. Section 118 provides that a modern award may include terms

specifying the period of notice an employee must give in order to terminate his or her employment.

2.3 Section 123 of the Act limits the scope of Division 11. Relevantly for the present purposes (notice of termination by an employee), Division 11 does not apply to:

(a) employees employed for a specified period of time, or for a specified task, or for the duration of a specified season (s 123(1)(a));

(b) a casual employee (s 123(1)(c));

(c) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or limited to the duration of the training arrangement (s 123(1)(d));

(d) daily hire employees working in the building and construction industry (s 123(3)(b));

(e) daily hire employees working in the meat industry in connection with the slaughter of livestock (s 123(3)(c)); or

(f) weekly hire employees working in connection with the meat industry whose termination is determined solely by seasonal factors (s 123(3)(d)).

2.4 Our clients acknowledge and agree with the Full Bench's conclusion at [227] that it follows that the scope of any term made pursuant to section 118 must be confined to people who fall within the scope of Division 11 generally, or in other words, not to employees who are excluded from the provisions of Division 11 because of section 123.

2.5 Therefore, using the basic term *'an employee'* without qualification with respect to the requirement to provide a prescribed period of notice of termination may extend the operation of the clause to employees who are not otherwise covered by Division 11 and therefore not entitled to either its benefits or subject to its requirements.

2.6 Our clients submit that this could be remedied by insertion of a new clause E.1(a) before the current clause, or alternatively, to a note in the following form:

> *This clause applies to all employees except those identified in sections 123(1) and 123(3) of the Fair Work Act 2009 (Cth).*

3. THE FULL BENCH'S PROVISIONAL VIEW THAT THE WORD 'WRITTEN' BE DELETED FROM CLAUSE E.1(A)

3.1 At [223] of the Decision, the Full Bench expressed the view that the requirement for an employee to provide notice in writing may permit a deduction in circumstances where the employee has provided the appropriate period of notice through oral notification to an employer, but has not followed this up with written notification. The Full Bench has expressed a concern that this may render the deduction 'unreasonable' for the purpose of what is now section 326(1)(b).

3.2 An employer is required to provide an employee with written notice of termination in accordance with section 117(1) of the Act. Accordingly, our clients do not concede that a reciprocal requirement to provide notice in writing is an unduly onerous obligation, such that failing to provide it would *prima facie* render any resulting deduction unreasonable.

3.3 There are also a range of practical reasons why the word written should not be deleted from the provision; namely:

(a) there are a range of options available to employees in the contemporary context which mean that providing written notice is not inconvenient or unduly taxing (e.g. email);

(b) the requirement is an important safeguard to ensure there is no subsequent dispute about whether an employee actually orally evinced an intention to bring the employment relationship to an end; and

(c) the requirement assists an employer in ensuring compliance with Reg 3.40 of the *Fair Work Regulations 2009* (Cth), which relates to termination of employment.

4. THE FULL BENCH'S PROVISIONAL VIEW THAT, IN ORDER TO ADDRESS SOME UNCERTAINTY ABOUT ITS INTERACTION WITH THE NES, CLAUSE E.1(C) BE AMENDED TO CONFINE THE SCOPE OF THE CAPACITY TO MAKE A DEDUCTION TO 'WAGES DUE TO THE EMPLOYEE'

4.1 At [2.16] and [2.17] of the Previous Submissions, our clients conceded to the extent that the current clause E.1(c) permits an employer to deduct an amount from monies payable to an employee under the NES, there is a reasonable argument that the clause is excluding the operation of the NES in a manner inconsistent with subsection 55(1).

4.2 The term "*exclude*" is not specifically explained in subsection 55(1), but the Explanatory Memorandum to the Act identifies that the intention of subsection 55(1) is to ensure that the minimum safety net entitlements provided by the NES do not suffer any diminution:

> "*The intent of the NES is that it provides enforceable minimum entitlements for all eligible employees. This is reflected in subclause 55(1), which provides that a modern award or enterprise agreement may not exclude the NES, or any part of it.*
>
> *This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES.*"

4.3 In its current form, clause E.1(c) provides for a termination payment regime that could well conflict with NES obligations regarding payments on termination; in particular, s 90(2) of the Act, which addresses annual leave payment on termination.

4.4 Accordingly, our clients agree that the scope of the capacity to make a deduction be limited to 'wages due to the employee'.

5. THE FULL BENCH'S PROVISIONAL VIEW THAT DEDUCTIONS PURSUANT TO CLAUSE E.1(C) WOULD HAVE NO EFFECT IN RELATION TO EMPLOYEES UNDER 18 YEARS OF AGE

5.1 Section 326(4) relevantly provides that:

> *'A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:*
>
> (a) *permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or*
>
> (b) *requires, or has the effect of requiring, an employee to make a payment to an employer or another person;*
>
> *if the employee is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee.'*

5.2 As the Full Bench indicates at [232] of the Decision, s 326(4) operates such that clause E.1(c) would have no effect in relation to employees under 18 years of age and cannot be included in a modern award in its current form.

5.3 Our clients propose that a 'carve out' for employees under 18 years of age be inserted into the clause to ensure it is not prohibited by s 326(4).

6. THE FULL BENCH'S PROVISIONAL VIEW THAT CLAUSE E.1.(C) IS INCIDENTAL TO A PERMITTED TERM (CLAUSE E.1(A))

6.1 As submitted above at 2.2, clause E.1(a) is a permitted term in accordance with s 118 of the Act.

6.2 At paragraphs [2.18]-[2.19] of the Previous Submissions, our clients asserted as follows:

> *2.18 The final head of power by which the Commission may be empowered to include clause E.1(c) in modern awards is section 142, which deals with incidental and machinery terms. Section 142(1) provides that a modern award may include terms that are:*
>
> (a) *<u>Incidental</u> to a term that is permitted or required to be in the modern award; and*
>
> (b) *<u>Essential</u> for the purpose of making a particular term operate in a <u>practical</u> way.*
>
> *2.19 Our clients submit that clause E.1(c) can be categorised as an 'incidental term' for the purpose of section 142 and can be validly included in modern awards for the following reasons:*
>
> (c) *Clause E.1(a) is a permitted term by virtue of section 118; and*
>
> (d) *Clause E.1(c) is <u>incidental</u> to clause E.1(a), which is apparent from both its subject matter and location.*

6.3 Accordingly, our clients agree that clause E.1(c) can be categorised as an 'incidental term' to clause E.1(a) for the purpose of section 142 and can therefore validly be included in a modern award.

6.4 As observed by the Full Bench at [152], '*the right of an employer to make a deduction under Clause E.1(c) only arises in circumstances where the employee is obliged to give written notice of termination in accordance with Clause E.1(a)*'.

6.5 Clause E.1(c) has no work to do where notice of termination is not required to be provided in accordance with clause E.1(a).

6.6 Accordingly, our client submits that this connection (both in terms of subject matter and location as parts of the same clause) means that Clause E.1(c) can properly be characterised as being incidental to Clause E.1(a) for the purpose of section 142.

7. IS CLAUSE E.1(C) ESSENTIAL FOR THE PURPOSE OF MAKING A PERMITTED TERM (CLAUSE E.1(A)) OPERATE IN A PRACTICAL WAY? WHAT IS THE PURPOSE OF CLAUSE E.1(C)?

7.1 We will turn firstly to the purpose of Clause E.1(a).

7.2 It is our clients' submission that clause E.1(a) is designed to prevent the significant disruption, inconvenience and cost to employers caused by employees not providing adequate notice of an intention to terminate the employment relationship.

7.3 Absent a specific award or contractual provision, there is no obligation on an employee to provide a period of notice which will enable an employer to avert or mitigate the disruption arising out of the cessation of the employee's employment.

7.4 In our clients' submission, the periods of notice required to be given where termination is at the initiative of the employer can reasonably be regarded as adequate periods of notice, such that they should apply also to employees.

7.5 Accordingly, the purpose of clause E.1(a) is to *prevent* an employee from failing to provide a sufficient period that would minimise disruption, inconvenient and cost to employers. That "*sufficient period of notice*" has been determined in the model clause to be the period equivalent to that notice required under section 117 of the Act.

7.6 Having established the purpose of clause E.1(a), it follows that the purpose of clause E.1(c) is to ensure that clause E.1(a) is substantially complied with as much as possible. It seeks to achieve this compliance by providing a deterrent to employees ceasing their employment in a manner inconsistent with clause E.1(a).

7.7 Clause E.1(c) is essential to ensure clause E.1(a) operates in a practical way for the following reasons:

(a) clause E.1(c) provides a clear and financially noticeable impact on employees that will act as an effective deterrent to ensure compliance with clause E.1(a), as accepted by the Full Bench at [167];

(b) absent clause E.1(c), an employer's only recourse in the event of a failure to provide the requisite period of notice is to pursue the employee by way of legal proceedings. In the Previous Submissions at [2.20], we referred to such

proceedings as a "*common law claim*". This phrase was intended to incorporate legal proceedings brought either in respect of a breach of section 45 of the Act (which requires compliance with modern award terms) or proceedings for breach of contractual obligations owed by an employee. The bringing of these types of proceedings against an employee is an unsatisfactory course of action for two primary reasons:

(i) it is an unduly onerous and costly process; and

(ii) it does not actually remedy the inconvenience caused by an employee not providing the requisite period of notice; and

(c) absent clause E.1(c),and having regard to the comments at paragraph 7.7(b) above, there is little reason why an employee may not simple abandon their employment at a time of their convenience once they have identified that they no longer wish to work for a particular employer.

7.8 Accordingly, our clients submit that the purpose of clause E.1(c) is entirely directed at ensuring clause E.1(a) operates in a practical way and is necessary to ensure this practical operation.

8. THE FULL BENCH'S PROVISIONAL VIEW THAT A DEDUCTION MADE PURSUANT TO CLAUSE E.1(C) MAY BE 'UNREASONABLE IN THE CIRCUMSTANCES' WITHIN THE MEANING OF S 326(1)

8.1 Section 326(1) relevantly provides that:

'A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is:

(a) *directly or indirectly for the benefit of the employer or a party related to the employer; and*

(b) *unreasonable in the circumstances.*

The regulations may prescribe circumstances in which a deduction referred to in subsection (1) is or is not reasonable.'

8.2 The expression 'unreasonable in the circumstances' in section 326 has been accepted to mean *'inequitable, unfair and unjustifiable'*.[1]

8.3 Our clients do not agree that any and all deductions made pursuant to section 326(1)(b) will be unreasonable. To this end, we respond directly to the factors set out at [223] of the Decision:

(a) Determining the loss suffered by an employer when an employee fails to provide the requisite period of notice will be a subjective consideration based on a range of factors, some of which are not quantifiable in monetary terms. To the extent that it is necessary to ensure that the clause does not fall foul of s 326, our clients do not oppose a limitation to the amount of any deduction if this is necessary to allay concerns about proportionality, but do not accept that this is necessary.

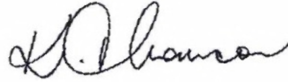
(b) We have addressed the requirement to provide notice in writing at 3.1-3.3 above.

(c) Our clients do not oppose the insertion of a prohibition on deductions in circumstances where an employer has agreed to accept less than the required period of notice.

(d) As a general proposition, we do not agree that an employee's ignorance of the requirement to provide a specified period of notice should excuse a failure to provide such notice. However, our clients acknowledge that it may be appropriate for an employee who has not provided the requisite period of notice to be informed of the employer's intention to withhold monies in accordance with clause E.1(c) and given the opportunity to move his or her last day of employment to a later date, if possible.

8.4 Should you have any questions about these submissions please contact Kate Thomson on 02 49891003.

[1] *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196 per Bromberg J noted with approval by the Full Bench at [165] of the Decision.



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