AUSTRALIAN BUSINESS
Lawyers & Advisors

Fair Work Commission: 4 Yearly Review of Modern Awards

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

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

28 NOVEMBER 2017

1. INTRODUCTION

1.1 These submissions in reply are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with 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 Our clients rely upon their submissions filed with respect to this matter on 4 September 2017 (**September Submission**) and 14 November 2017 (**November Submission**) in respect of the proposed clause E.1(c) of the tranche of standard clauses. Clause E.1 deals generally with notice of termination by an employee.

1.3 These submissions in reply address the submissions of other organisations (as indicated throughout this document), with respect to the specific questions raised 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 As indicated at [2.4] of our clients' November Submissions, we agree with the Full Bench's conclusion at [227] of the Decision 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.

2.2 Whilst our clients have proposed wording at [2.6] to remedy this issue, our clients also do not oppose the amendment to Clause E.1(a) proposed by the Australian Industry Group at [8] of its submission dated 14 November 2017 (**AiG Submission**), or the wording proposed by the Australian Council of Trade Unions at [6] in its submission dated 20 November 2017 (**ACTU Submission**).

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

3.1 At [3.2] of our clients' November Submission, we expressed the view that requiring employees to provide notice of termination in writing is not an unduly onerous obligation, such that failing to provide it renders any resultant deduction unreasonable.

3.2 Our clients agree with [10]-[11] of the AiG Submission in this regard but oppose the proposal at [12] that Clause E.1(c) should be amended to specify that a deduction may be made in circumstances where notice has <u>not</u> been provided "*either in writing or orally*".

3.3 This opposition is on the basis that this will bring clause E.1(c) into conflict with the requirement at Clause E.1(a) that notice be provided in writing, which is inconsistent with clause E.1(c)'s overarching goal of ensuring employees comply with clause E.1(a) .

3.4 Further, our clients do not agree with the proposition advanced at [8] of the submission of the AWMU dated 13 November 2017 (**AMWU Submission**) that the requirement to provide written notice places an "*unnecessary"* onus on the worker, in circumstances where:

(a) the same burden is placed on the employer;

(b) the requirement to provide written notice actually offers a safeguard to employees, by reducing the risk that there might be confusion or dispute about the timing and effect of resignations that have been made by employees.

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 Our clients have previously 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 However, our clients oppose the position advanced at [11] of the ACTU submission that employers be permitted to <u>only</u> make deductions from *"wages due to the employee under this award"*, as opposed to any over-award entitlements, for the following reasons:

(a) drawing this artificial distinction is practically burdensome for an employer who may have to undertake complex payroll calculations to work out an employee's entitlements under the relevant award, in circumstances where they are already dealing with the inconvenience caused by the employee failing to provide the requisite period of notice; and

(b) one of the reasons clause E.1(c) is required for clause E.1(a) to operate in a practical way is to offer a disincentive for non-compliance, the effect of which is lessened in circumstances where the amount of any deduction is not calculated in relation to the employee's actual income.

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 At [5.2] of our clients' November Submission, it was conceded that section 326(4) of the FW Act 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.

5.2 Our clients do not oppose the wording proposed at [16] of the AiG Submission.

5.3 Our clients oppose the view advanced at [14] of the ACTU Submission that there is a *"related issue"* being *"whether clause E(1) ought to apply to persons under the age of 18 at all"*. If this proposition is seriously advanced by the ACTU, it should be done in the appropriate manner and not in the context of a consideration of the technical operation of section 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 At paragraphs [2.18] - [2.19] of the September Submission and [6.1] - [6.6] of the November Submission, our clients asserted that:

(a) Clause E.1(a) is a permitted term by virtue of section 118; and

(b) Clause E.1(c) can be categorised as an 'incidental' to clause E.1(a) for the purpose of section 142 due to both its subject matter and location.

6.2 Our clients oppose the submission advanced at [19] of the ACTU submission that a matter cannot be 'incidental' for the purpose of section 142 unless it *"serve[s], support[s] or connect[s] to the same essential or substantial purpose as the permitted matter"*.

6.3 In our clients' submission, the ACTU has conflated the two requirements at section 142(1) for a term to be considered 'incidental' and therefore be a permitted term:

(a) firstly, that the term is in fact 'incidental' to another permitted or required term, merely in the sense that there is a 'sufficient relationship' between the two provisions (as articulated by the Full Bench at [152] of the Decision); and

(b) that the term is 'essential' for the purpose of making the term operate in a practical way.

6.4 The interconnectedness which is asserted by the ACTU to be required by section 142(1)(a) is therefore, in our client's submission, actually required to satisfy the second limb of the test at section 142(1)(b). The requirement that the term be 'incidental' is a

more straightforward proposition, and is satisfied in this case by the fact that clause E.1(c) deals with the same subject matter as E.1(a) and that clause E.1(c)'s operation is contingent on non-compliance with clause E.1(a).

6.5 The AWMU also expresses a misconstrued view of the meaning of 'incidental' and the operation of section 142 at [15]-[24] of the AWMU Submission. This misconception arises from the view that section E.1(c) somehow needs to be incidental to the power conferred by section 118 of the FW Act.

6.6 This is simply not the case.

6.7 Section 142 permits terms to be included in a modern award provided that they are incidental *to other award terms* (and meet the requirements in s142(1)(b)). There is no requirement that a term being included in an award under section 142 needs to be incidental to both:

(a) another award term (**the First Term**); and

(b) the section of the FW Act that empowers the Commission to include the First Term in the Award.

6.8 Such an approach introduces into section 142 pre-requisites that do not exist in the natural and ordinary language used in section 142 of the FW Act.

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 At [7.1] - [7.8] of the November Submission, our clients submitted that:

(a) 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); and

(b) It is therefore required to ensure clause E.1(c) operates in a practical way.

7.2 The ACTU appears to agrees with our clients' position by stating at [23] that *"the purpose of clause E(1)(c) is to make compliance with clause E(1)(a) more likely and thus reduce the risk of the employer being exposed to some inconvenience by an employee's departure at short notice".* The ACTU submissions go on to assert that clause E.1(c) seeks to compensate the employer for inconvenience associated with non-compliance in a

manner which is "*entirely arbitrary and disconnected*" to the inconvenience or loss caused by the employee. This appears to be a comment on the effect of the clause as opposed to its purpose. For the sake of completeness, our clients contend that:

(a) the purpose of clause E.1(c) is not to compensate employers in a manner which is "*entirely arbitrary and disconnected*" to the inconvenience or loss caused by the employee; and

(b) the effect of clause E.1(c) is not to compensate employers in a manner which is "*entirely arbitrary and disconnected*" to the inconvenience or loss caused by the employee.

7.3 Our clients do not agree with the position advanced at [28] - [29] of the AWMU Submission that the purpose of clause E.1(c) is to provide an avenue for businesses to extract a penalty from workers and to simultaneously compensate employers. This again appears to be a comment on the effect of the clause as opposed to its overarching purpose.

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 At [8.3] of the November Submission, our clients outlined the reasons why they do not believe that any and all deductions made in accordance with clause E.1(c) will be unreasonable.

8.2 Our clients do not agree with the proposition advanced at [28] of the ACTU Submission that a deduction will be unreasonable by virtue of the mere fact that the employee receives no benefit from the deduction. Whilst it is acknowledged that the current state of the law holds this to be a 'central consideration'[1] of the question of reasonableness, it is not the sole consideration. Indeed, this interpretation cannot be sustained following a consideration of both limbs of the test at section 326(1):

(a) that the deduction is directly or indirectly for the benefit of the employer or related party; and

(b) is unreasonable in the circumstances.

8.3 The ACTU submission relies solely on the first limb of this test; that the employee receives no benefit from the deduction. If it had been the intention of the legislature to

[1] *AEU v State of Victoria* [2015] FCA 1196 at [177].

restrict deductions in this way, the additional safeguard provided by section 326(1)(b) would have been unnecessary.

8.4 Specifically with respect to the issue of the proportionality of the deduction to the loss suffered by an employer as a result of an employee's failure to provide the requisite period of notice, our clients:

(a) maintain the view that, as a blanket proposition, a deduction permitted by clause E.1(c) is unlikely to be disproportionate to the loss suffered by the employer; and

(b) note that, if the Full Bench continues to hold concerns about proportionality, our clients do not agree with the proposition expressed by the ACTU at [29] and the AWMU at [39] that it is impossible to remedy these concerns through the imposition of a limit on the amount which may be deducted.

8.5 Indeed, there are two key considerations when it comes to considering reasonableness that appear to have been lost in the debate:

(a) there is a very simple way to avoid a deduction being made, which is to provide the required period of notice in writing; and

(b) there is no requirement that an employer must make a deduction, in circumstances where there has been no loss suffered, or that any deduction must be made to the fullest extent permitted.

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

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On behalf of Australian Business Industrial and the NSW Business Chamber Ltd