IN THE FAIR WORK COMMISSION

AM2016/15

4 yearly review of modern awards

Plain Language Redrafting – Standard Clauses

SUBMISSIONS OF THE ACTU

1. These submissions are made in response to the Statement and Directions [2017] FWCFB 5367 and pursuant to leave granted on 13 November to file no later than 20 November 2017. We are grateful to the Commission for accommodating our request for additional time.

2. These submissions deal with "Issue 1" identified in the decision [2017] FWCFB 5258 of 18 October 2017 ("the Decision").

3. The Decision expresses some concluded views some and provisional views of the Commission. The concluded views are, relevantly, that subject to sections 134 and 138 of the Act:

    a. Clause E(1)(c) *may* be a term permitted in a modern award.

    b. The only pathway through which clause E(1)(c) *may* be permitted is where:

        i. A modern award contains a term specifying the notice of termination to be given by an employee; and

        ii. The requirements of section 142 are satisfied.

    c. The requirements in (b) above are necessary but not sufficient for clause E(1)(c) to be included, because it may be impermissible under section 151.

4. The Statement and Directions invite specific comment on matters that relate to the provisional views expressed by the Commission in the Decision. Those matters are addressed below.

Scope of clause E.1 (a)

5. We concur that an award term that relies upon section 118, or is regarded as incidental to such a term, must be confined to persons to whom section 118 applies. Even if a merit claim

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had been advanced from some broader application (which has not occurred), paragraphs [67]-[76] of the Decision and section 55(4) of the Act prevent such an claim from being granted.

6. Accordingly, clause E.1 (not just paragraph (a) thereof) ought to be expressed as subject to an appropriate proviso. The form of that proviso can be resolved at a later stage, however for discussion purposes we suggest a new subclause be inserted to address this issue that simply reads:

   (a) "This clause applies to employees to whom Subdivision A of Division 11 of Part 2-2 of the Act applies"

   Note: Section 123 of the Act excludes some employees from all or part of Division 11 of Part 2-2 of the Act."

7. We also support a further revision of the scope of the clause in paragraph 14 below.

Deleting the word "written" from clause E.1(a)

8. We would not oppose the removal of the requirement for notice to be given by an employee in writing. Whilst written notice likely would be given in many circumstances, it is also likely and common for any written notice to be preceded by verbal notice in advance of this. There is an unfairness associated with an employee being found to have contravened the law and exposed to a penalty (and, potentially, disqualified from holding office in a union[1]) by virtue of non-compliance in form rather than in substance with this requirement.

9. Such a change would not, in our view, have much if any impact on the assessment of whether a deduction under clause E(1)(c) was "unreasonable in the circumstances".

Clause E(1)(c) deductions only to be applied to wages

10. For the reasons expressed in paragraphs 41-43 of our Submission of 4 September, we concur that clause E(1)(c), should it remain, cannot permissibly authorise deductions from NES entitlements. In addition, it ought not reach beyond the entitlements due to an employee under the award and extend to over-award entitlements.

11. Therefore, if clause E(1)(c) is to remain, we are of the view that it should be limited not only to deductions from "wages due to the employee", but rather "wages due to the employee under this award".

[1] See Item 9 of the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017*

Employees under 18 years of age

12. We remain of the view expressed in paragraph 38 of our submissions of 4 September and concur with the view expressed at paragraph [232] of the decision that clause E(1)(c) would have no effect in relation to employees under 18 years of age.

13. From a purely technical perspective, it might seem desirable to supplement or confine the clause in some way to make those limitations explicit (i.e. to make it "simple and easy to understand"), if clause E(1)(c) is to remain. But, if clause E(1)(c) is in all other respects found to be permissible and found to be necessary pursuant to section 134 and section 138, a more pragmatic question will ultimately arise: would it be both fair and relevant to include a term that allowed such deductions only with the agreement of parents and guardians? The prospect of any parent, given the power to refuse or agree to their son or daughter having their wages docked, is almost certainty nil. Even ignoring the fairness considerations, such a term would be clearly irrelevant. Employees under 18 should be wholly exempt from clause E(1)(c).

14. A related issue is whether clause E(1) ought to apply to persons under the age of 18 at all. It is a common conception that the minimum wage jobs that many young people find themselves in[2] are a ladder of opportunity to bigger and brighter things[3]. The labour mobility considerations that informed the corresponding provisions of the TCR case (referred to at paragraph [19] of the Decision) are particularly forceful if that conception remains the accepted wisdom, from both a fairness and a relevance perspective. Youth unemployment is traditionally higher than unemployment generally, and it might be inferred that the entry level positions offered to workers under the age of 18 are part of a labour market in which barriers to entry are lower are vacancies are more easily filled. The disincentive associated with requiring an employee to give notice and deeming a failure to do so an unlawful act, sits uncomfortably with that broader context.

Is clause E(1)(c) incidental to clause E(1)(a)?

[2] The proportion of employees 17 years old and under, and the proportion of 18-20 year old employees, who are reliant on award wages is more than double the proportion who are not. See further ABS 6306 and Page 15 of the ACTU Submission to the 2016-17 Annual Wage Review.
[3] See for example [2017] FWCFB 3500 at [570]

15. We approach this issue on the basis that it is concerned only with the meaning of "incidental" under paragraph (a) of subsection 142(1).

16. In our submissions of 4 September, we said:

> "There is no settled industrial meaning of what is truly incidental, and the concept seems to encapsulate questions of degree. On the face of it, it does not appear that a power for an employer to withhold monies owing to an employee is any way incidental to an obligation upon the employee to give notice of their termination. The only relationship between the two obligations are that clause E.1(c) creates an incentive for the employee to comply with the preceding provisions of clause E.1. It does so by providing a financial penalty for non-compliance. It cannot be regarded as compensating the employer for the employee's non compliance, as it cannot be assumed that non-compliance with the obligation to give notice exposes the employer to any cost in all or any cases. In our submission, the relationship is too tenuous for clause E.1(c) to be considered truly incidental to the requirement to give notice.."

17. At the heart of the contrary provisional view expressed in the Decision is paragraph [152]:

> "Contrary to the ACTU's submission, we have reached a *provisional* view that Clause E.1(c) is incidental to clause E.1(a). It seems to us that there is a sufficient relationship between the two provisions – 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)" (emphasis in original)

18. We respectfully submit that the provisional view does not adhere to the definition of "incidental to" adopted at paragraph [134] of the Decision, and particularly the second limb thereof: liable to happen in conjunction with; *naturally* appertaining to (emphasis added).

19. What differentiates the approach taken in our submission of 4 September versus that adopted as a provisional view, is the conception of the required "relationship" between the permitted term and the term said to be incidental to it. Our approach focuses on a search for some *connection between the substance and essence* of what the permitted term is *about* and the *substance and essence* of what the term that is said to be incidental to it is *about*. This more closely follows the adopted definition at paragraph [134] (albeit admittedly entirely coincidently) than the provisional view. The provisional view takes a less restrictive view of the requisite relationship, potentially with the result that any clause that was expressed to be *contingent* upon compliance or non-compliance with the permitted clause would be regarded as incidental to it. Whilst we accept that paragraph (b) of subsection 142(1) serves as a check to prevent the more tenuous examples that might get through paragraph (a) from making it into an award if mere contingency was sufficient to satisfy it, the basic proposition that a matter cannot be "incidental" to a permitted matter if cannot be said to serve, support or *connect* to the same *essential or substantial purpose* as the permitted matter is, we submit, a sound one. Contingent and incidental are not the same thing.

20. This is not to say that anti-avoidance type provisions can never satisfy the requirement that they be incidental, but each issue needs to be considered on its merits cognisant of the fact that these are safety net instruments. In this case, the giving of notice is a benefit to the employer in the form of a convenience of uncertain and variable value. The deprivation of that convenience may or may not result in a cost – cost cannot be assumed to happen in conjunction with or naturally appertain to the failure to give notice. Furthermore, if any cost is incurred, it is highly unlikely to have any correlation whatsoever to an employee's length of service or the wages an employee has rightly earned for worked performed which the employer has received the benefit of. If an incentive is to have a role (beyond the incentive already provided by the enforcement framework of the Act itself), there is no warrant for the incentive to vary in accordance with an employee's years of service.

21. At least as presently expressed, we remain of the view that Clause E.(1)(c) is not "incidental".

Is clause E.(1)(c) essential for the purpose of making clause E.(1)(a) operate in a practical way? What is the purpose of clause E.(1)(c)?

22. Clause E(1)(c) is about what happens when notice is not given. It is not about how notice is given, or the way in which notice is given.

23. 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. It incentivises employee compliance by threatening employees with deprivation of a portion of the wages which they have earned through the performance of work. Clause E(1)(c) also compensates the employer for inconvenience associated with non-compliance, in a matter that is entirely arbitrary and disconnected from the extent of any inconvenience or cost (and even if neither occur). Where neither inconvenience or cost occurs, clause E(1)(c) provides the employer with a saving or in kind benefit at the value of the employee's earned wages and entitlements forgone.

24. An employee voluntarily changing jobs can be assumed to value their relationship with their incoming employer more than their relationship with their outgoing employer. They therefore may be keen to comply with a new employer's request or requirement to commence new employment before their notice period with their former employer expires. The incentive in clause E(1)(c) might be thought to even up the scale somewhat. Whether it actually does so is, at present, unknown. An employee who is penalised pursuant to clause

E(1)(c) might well have decided not to perform any work for the period the subject of the deduction had they been aware that they would not be paid for it. The question of whether work performed and unpaid in such circumstances is truly voluntary - and the question of whether an employee's decision to put the interests of their outgoing employer first when threatened with or "under the menace of" a penalty for not doing so is performing work voluntarily - are important ones that may bear further consideration when Issue 2 referred to in the Decision falls for consideration.

25. Accepting for present purposes that the purpose of clause E(1)(c) is both compensatory and an incentive and even assuming the incentives referred to above and at paragraphs [167]-[168] of the Decision are effective ones, the question remains whether those matters are sufficient to render clause E(1)(c) "essential for the purpose of making [clause E(1)(a)] operate in a practical way". The adjective "practical" operates on the "way" in which it must be essential for clause E(1)(a) to operate. It does not contemplate non-observance of clause E(1)(a) – something that is not operating cannot be said to be operating in a "way", regardless of the adjective used. The incentive purposes of clause E(1)(c) therefore do not give that clause the character of making clause E(1)(a) operate in a practical way, let alone being essential order that it do so. Something that provides an incentive to make a clause operate at all, might be considered to effect the purpose of that clause, but that is not the same as making the clause operate in a "practical way", or in any "way" for that matter. As far as the compensatory purpose is concerned, it also suffers from the vice of being directed to what happens when clause E(1)(a) is not observed, rather that the manner or way in which it is observed.

26. We do not quarrel with the position advanced by the employer interests that suing for breach of an award in a Court is an arduous process with numerous barriers and disincentives associated with it, but complaints about those practicalities are not concerned with the way in which clause E(1)(a) operates. Rather, they are concerned with how the clause may be enforced.

A deduction made pursuant to clause E(1)(c) may be unreasonable in the circumstances

27. The decision in *AEU v. State of Victoria*[4], referred to in the Decision, relevantly states:

[4] [2015] FCA 1196

> *"First*, consideration must commence from the premise that the ultimate purpose of the scheme is to protect employees from practices that have the effect of denying them the benefit of the remuneration they have earned and are thus entitled to fully enjoy. As Lord Herschell LC said in *Hewlett* (at 389), the object of the Truck Act was to strike at practices that were "calculated to result in the person employed obtaining something less than the agreed remuneration for services". A central consideration in assessing whether a deduction is unreasonable in the circumstances will be the extent to which the employee has gained the benefit of the deduction made from, or out of, his or her remuneration."[5] (emphasis in underline added)

28. In *all circumstances* in which clause E(1)(c) authorises a deduction, the employee derives absolutely no benefit. This should be regarded as conclusive of the issue. Interestingly enough, whilst no Regulations have been made pursuant to section 326(2) which prescribe circumstances in which a deduction is *not* reasonable must be regarded as unreasonable in the circumstances, regulation 2.12 of the *Fair Work Regulations 2009* prescribes two circumstances in which a deduction is reasonable. Both involve circumstances where an employee derives a benefit from the deduction – either in the form of goods or services[6], or in the form of personal use of the employer's property[7].

29. As to the issues enumerated under paragraph (vii) of the Statement and Directions:

    1) For reasons stated above and at paragraph 39 of our submissions of 4 September, we concur that deduction authorised by clause E(1)(c) may be (and probably is in many cases) entirely disproportionate to the loss (if any) suffered by an employer where clause E(1)(a) is not complied with. This, in our view, would be sufficient to render such a deduction unreasonable in the circumstances independently of the matters raised at paragraphs 27-28 above. In any event, we are not convinced that limiting the deduction to one weeks wages would be sufficient to enable the term to be ultimately be included in a modern award, if for no other reason than that it is difficult to conceive of a "fair and relevant safety net" that authorises the deprivation of wages earned through work performed. Similarly, it is to be recalled that the sole pathway for inclusion of clause E(1)(c) is through it being regarded as incidental to a provision in a modern award which itself is only there because it is permitted by the National Employment Standards. The National Employment Standards are undeniably on conventional principles and explicitly[8] beneficial provisions for employees. Utilising the interplay between the National Employment Standards and the permitted content of awards to establish a mechanism for employees to be deprived of wages for work

[5] at [177]
[6] Regulation 2.12(1)
[7] Regulation 2.12(2)
[8] See section 61(1), 55(1), 55(4).

performed is wholly repugnant to ensuring "that modern awards, together with the National Employment Standards, provide a fair and relevant safety net", which is the ultimate test that Commission must subject clause E(1)(c) to pursuant to section 134 of the Act. An outer limit of one weeks wages given effect to as payment by the employee to their employer prior to their termination date or, at the option of the employee, via a deduction of wages, might overcome that were it not for the considerations referred to at paragraphs 27-28 above and the fact that there is no verifiable way of ensuring any compensation is in fact warranted.

2) Removal of the requirement for Notice of Termination to be in writing will not make an unreasonable deduction a reasonable one.

3) Agreement to a shorter period of notice does not result in any deduction at all, thus the issue of unreasonable in the circumstances would not arise. There is merit in including such a provision, irrespective of the present controversy and it is clearly authorised by section 118 as the "period of notice" referred to in that section would effectively be "x weeks or an agreed lesser period".

4) If clause E(1)(c) is to remain, then it is entirely appropriate that employees are advised at the commencement of their employment of that potentiality. However, providing that information is not sufficient to render the deduction a reasonable one, for reasons already given above.

Australian Council of Trade Unions