

IN THE FAIR WORK COMMISSION

Matter No.: AM2016/15 Plain language – Standard Clauses
Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)



Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following Submissions to the Fair Work Commission in response to directions in the Full Bench Statement 20 July 2017 *4 yearly review of modern awards – Plain language – Standard Clauses*.¹
2. The AMWU supports and adopts the Australian Council of Trade Union's submissions in this matter.
3. The AMWU makes some additional submissions on the meaning of term "ordinary time rate of pay" in the "Transfer to lower paid job on redundancy" clause;

The use of "ordinary time rate of pay" in the "Transfer to lower paid job on redundancy"

4. The AMWU continues to rely upon its 13 December 2015 submissions² in the AM2014/75 *Manufacturing and Associated Industries and Occupations Award 2010* matter referenced in the Full Bench Statement 20 July 2017³ at paragraph [121]. There are three issues which we submit the Commission should consider when determining the final entitlement of an employee transferring to a lower paid position.
5. The first issue is what the current words "ordinary time rate of pay" were intended to mean at the time that they were drafted by the *Termination, Change and Redundancy Supplementary Decision (TCR Supplementary Decision)*.⁴ The second issue is what the entitlement should be in the current legislative framework, where notice of termination is provide for by the National Employment Standard. The third issue, is whether such a term as currently phrased can be included in a Modern Award under the current legislative framework.

Termination, Change and Redundancy Decision and Supplementary Decision

6. It is relevant for the Commission to consider context of what the entitlement was seeking to achieve in determining the meaning of the use of the term "ordinary rate of pay" or "ordinary time rate of pay" in the "Transfer to lower paid job on redundancy" clause.
7. The original *Termination, Change and Redundancy Decision (TCR Decision)* gave the following intention for the entitlement:

"However, consistent with the remainder of our decision, we are prepared to provide that where an employee is transferred to lower paid duties because the employer no longer wishes the job the employee has been doing, done by anyone, then the

¹ [\[2017\] FWCFB 3745](#)

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201475-sub-amwu-131215.pdf> paragraphs 90 - 103

³ [\[2017\] FWCFB 3745](#) at

⁴ [F7262](#) Termination Change and Redundancy Case Supplementary Decision

employee should be entitled to the same period of notice of the change in employment as he would have been entitled to if his/her employment had been terminated. Alternatively, the employer shall pay to the employee maintenance of income payments calculated to bring the rate up to the rate applicable to his/her former classification in lieu thereof."⁵ (emphasis added)

8. Following the *TCR Decision*, the *TCR Supplementary Decision* developed the form of words which are the subject of these proceedings:

"An appropriate provision to give effect to our decision would be:

2. Where an employee is transferred to lower paid duties for reasons set out in clause 1 hereof the employee shall be entitled to the same period of notice of transfer as he/she would have been entitled to if his/her employment had been terminated, and the employer may at his/her option, make payment in lieu thereof of an amount equal to the difference between the former ordinary time rate of pay and the new lower ordinary time rates for the number of weeks of notice still owing."⁶

9. The purpose of the entitlement is to ensure that an employee receives what they would have received as notice of the termination, while providing flexibility for the employer to have the employee commence in the lower paid position earlier.⁷
10. The *Supplementary Decision* provided the following further reasons and explanation for the clause:

"Restricting the operation of the clause to transfers to lower paid duties is consistent with our intention expressed at page 39 of the decision and we are not prepared to extend any provision to cover any employee transferred to other duties. Indeed, the provision for payment would be meaningless for other transfers.

To provide that the employer has the option to make payment in lieu of notice is consistent with the position we adopted earlier in relation to termination of employment, as is the refusal to provide for employees and employers to opt out of any payment in lieu otherwise due."⁸

11. From the *TCR Decision* and the *TCR Supplementary Decision* it is apparent that the intention is for an employee not to be financially disadvantaged as a result of an employer deciding to make payment instead of providing notice or for an employer and an employee to agree to transfer an employee early instead of providing notice.
12. It is clear from the *TCR Decision* and the *TCR Supplementary Decision* that the AiGroup's contention that "Ordinary time rate of pay" is equivalent to the term "ordinary hourly rate of pay" must fail.
13. "Ordinary hourly rate of pay" is a new term that has been developed by the Commission in these proceedings and presently defined to only include the

⁵ Print [F6230](#) Termination, Change and Redundancy Case Decision 2 August 1984 at page 39

⁶ Print [F7262](#) Termination Change and Redundancy Case Supplementary Decision at page 18, paragraph h - j

⁷ Print [F7262](#) Termination Change and Redundancy Case Supplementary Decision at page 18, paragraph g - k

⁸ Print [F7262](#) Termination Change and Redundancy Case Supplementary Decision at page 18, paragraph g

minimum rate of pay plus any all purpose allowances or loadings, which would fail the original intention of the entitlement.

14. At a minimum, the TCR decision points to the “ordinary time rate of pay” meaning the rate of pay which the employee would have received, had they received the relevant period of notice, which means what they would have received had they continued to work in their old position until the end of the notice period.
15. This means the employee would have received, not only their minimum rate of pay and any all purpose allowances, but would also have received any shift penalties, overtime penalties for overtime worked, disability allowances, expense allowances, weekend penalties and other penalties.
16. Anything less would result in a financial detriment to the employee as a result of an employer transferring the employee earlier or making payment instead of providing notice. It cannot have been the intention of the expression “ordinary time rate of pay” to cause a financial detriment to the employee, which they would have not received any notice about.

Current notice of termination entitlement

17. The second issue which should be taken into account is the current entitlement to notice of termination. The present entitlement to notice as provide for by the Award is provided for by the National Employment Standards (NES).
18. The NES at section 117(2)(b) of the *Fair Work Act* (the Act) 2009 provides for notice of termination to be paid as follows:

“(2) The employer must not terminate the employee’s employment unless:

(a) the time between giving the notice and the day of the termination is at least the period (the minimum period of notice) worked out under subsection (3); or

(b) the employer has paid to the employee (or to another person on the employee’s behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee’s behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.” (emphasis added)

19. “Full rate of pay” is defined at section 18(1) of the Act as follows:

“18 Meaning of full rate of pay

General meaning

(1) The full rate of pay of a national system employee is the rate of pay payable to the employee, including all the following:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) any other separately identifiable amounts.”

20. Notice of termination as provided by the NES is expressed to include all “incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts” “for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.”
21. The NES entitlement aligns with the original intention of the *TCR Decision* and the *TCR Supplementary Decision* that the employer should be required to maintain an employee’s income up to the standard, which the employee would have received had they received appropriate notice and worked out that notice. In the context of transfer to lower paid duties, this intention of providing adequate notice does not change. This context supports the clarification of the meaning of “ordinary time rate of pay” by a simple alignment with the NES entitlement of “full rate of pay for the hours the employee would have worked had the employment continued to the end of the notice period.”

Award terms must not contain objectionable terms

22. The third issue arises as to whether the Award term satisfies the requirements of s.150 of the Act. Section 150 requires that Awards must not contain “objectionable terms.”
23. An employee should be entitled to notice of termination as provided for by the NES where their employment is to be terminated. Further if an employee’s employment is terminated at the initiative of the employer then they should be entitled to redundancy payment.
24. It is also relevant to note that where an employer demotes an employee and the employee does not accept the demotion, that would constitute a “constructive dismissal.”⁹
25. The concept of a transfer to lower paid duties seems to allow adverse action against an employee who would otherwise be entitled to payment of wages at the level for which they were employed. There is also the question of whether the employer is avoiding the NES entitlements of notice of termination and redundancy.

⁹ [Visscher v Teekay Shipping \(Australia\) Pty Ltd \(includes Corrigendum dated 15 September 2014\) \[2014\] FCAFC 5; Thomson v Orica Australia Pty Ltd \[2002\] FCA 939](#) at paragraphs 140 -148

26. An employee whose position the employer no longer requires to be performed by anyone would be seeking redundancy pay. In the usual circumstance, an employer who no longer requires a job to be done would terminate the employee's employment and they would be entitled to redundancy pay.
27. To allow an employer to engage in conduct in order to avoid the payment of wages at the level for which the employee is employed, or to avoid the NES termination of employment entitlements would be in conflict with s.150, which requires that an award must not contain an "objectionable term." An objectionable term is defined in the dictionary of the Act to include terms which permit breach of the General Protections.
28. A question also relevantly arises as to the basis for an award term to allow an employer to unilaterally vary an employee's contract of employment resulting in a demotion of the employee to lower paid duties against their will.
29. Taking into account s.140 in the General Protections and s.119 of the NES, the Award term should be clear that the transfer to lower paid duties must only occur where the employee agrees to be transferred. If the employee does not agree, then the term would be an objectionable term which allows an employer to injure an employee in their employment by transferring them to lower paid duties because they would otherwise be entitled to redundancy pay or to payment of wages for the position in which they were employed.

What would constitute a fair entitlement to notice of termination where an employee agrees to be transferred to lower paid duties or a lower paid job?

30. Employees may agree to be demoted in circumstances where they believe that their employment prospects outside of the business are low or non-existent. Where an employee agrees to be demoted, the employee does also retain a benefit of continuous service in the form of their accrued entitlements of personal leave, long service leave and the potential of any NES termination of employment entitlement crystallising in the future. However, the employee does experience an injury to their employment in the form of lower pay which should be recognised and adjustment time provided for by the Award.
31. It is unfair for an Award term to provide for an ability for an employer to forcibly demote an employee. This unfairness would be compounded if the AiGroup's suggestion, that they should only be paid their minimum rate plus all purpose allowances, is adopted by the Commission.
32. The stated intention of the original clause as outlined in the TCR Decision and TCR Supplementary Decision is to maintain the income of the employee so that they are afforded adequate notice of the change. The notice of the change has self evident benefits for an employee who may need to make changes to their personal circumstances as a result of the impending reduction in wages.
33. Any attempt to encapsulate the concept from the TCR Decision in the Award, which is the current task, should ensure that the clause does not provide for an

ability to unilaterally demote an employee without their agreement. It should also provide for the level of notice which the NES currently provides.

34. Maintaining a consistent standard for the payment and conceptualisation of notice of termination across the NES and Awards, will result in an easier to understand and use Modern Award. The standard of the “full rate of pay” should be adopted in the plain language redraft of this clause or reference to the NES standard should be adopted.
35. It is relevant to note that where an employer obtains acceptable alternative employment for the employee, the employer can seek an order reducing the NES redundancy entitlement. Various decision of the Commission have looked at what constitutes “acceptable alternative employment.”¹⁰ Even where an employee has been found acceptable alternative employment, where employee’s wages have been reduced or have been red-circled with limited prospects for wage increases this was found to result in the redundancy entitlement only being reduced by a proportion and not reduced to zero.
36. The requirements for an employer obtaining acceptable alternative employment provide a further guide as to what should be considered fair where an employee is transferred to lower paid duties with an employer. It would seem unfair for an employee to be transferred to lower paid duties and not receive the notice of termination, where if the position was with another employer, they would be entitled to the full NES notice of termination entitlement (in addition to partial redundancy).
37. If we put aside the partial redundancy, which can be roughly said to be retained through the continuous service, the notice of termination should be provided to the employee in order to retain fairness as between an employee who accepts lower paid duties with the employer and an employee who accepts lower paid duties obtained by the employer at another employer’s business.

Proposed Clause

38. The AMWU proposes the following clause:

G. Transfer to lower paid job on redundancy

G.1 Clause G applies if the employer:

- (a) no longer requires the duties being performed by an employee in a role (the first role) to be performed by anyone; and
- (b) the employee agrees to be transferred to a new role (the second role) at a lower ordinary rate of pay.

G.2 The employer may:

¹⁰ [NUW v Tontine \[2007\] AIRCFB 1016](#) at paragraph 24

- (a) give the employee notice of the transfer of the same length as the employee would be entitled to under section 117 of the Act as if it were a notice of termination given by the employer; or
- (b) transfer the employee without giving notice of transfer or before the expiry of a notice of transfer.

G.3 If the employer acts as mentioned in paragraph G.2(b), the employee is entitled to a payment of an amount equal to the difference between the full rate of pay for the hours the employee would have worked in the first role and the full rate of pay of the employee in the second role for the period for which notice was not given.

39. In conclusion, the rate of pay as provided for through the words “ordinary time rate of pay” should be understood to give effect to the intention of the entitlement, which is to provide the employee with a period of notice of the change in their rate of pay. The context of the NES entitlement supports the entitlement being expressed to be consistent with what the NES provides. The clause should also be redrafted to be clear that the employer cannot unilaterally demote an employee.

End

11 August 2017