

IN THE FAIR WORK COMMISSION

2014 Award Review

(AM2016/15)

Community and Public Sector Union (CPSU) (PSU Group)

Submissions re: plain language drafting and notice of termination by an employee

**Introduction**

1. On 21 August 2017 the Full Bench of the Fair Work Commission in the plain language drafting common issue, issued a Statement calling for submissions on notice of termination by an employee. The CPSU files these submissions pursuant to that statement.

**Notice of termination by an employee**

2. The 4 yearly review of modern awards has considered a term common to modern awards which deals with notice provided to an employer by an employee who is giving notice of termination. The proposed common term is as follows:

**E.1 Notice of termination by an employee**

*(a) An employee must give the employer written notice of termination in accordance with Table X—Period of notice of at least the period specified in column 2 according to the period of continuous service of the employee specified in column 1.*

**Table X—Period of notice**

<b>Column 1</b> <b>Employee's period of continuous service with the employer at at the end of the day the notice is given</b>	<b>Column 2</b> <b>Period of notice</b>
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

*NOTE: The notice of termination required to be given by an employee is the same as that required of an employer except that the employee does not have to give additional notice based on the age of the employee.*

*(b) In paragraph (a) **continuous service** has the same meaning as in section 117 of the Act.*

*(c) 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 ~~National Employment Standards NES~~), an amount not exceeding the amount that the employee would have been paid in respect of the period of notice not given.*

3. The question posed by the Full Bench in its 21 August 2017 statement is whether sub-clause (c) above can validly be included in a modern award, and if the clause can be included in a modern award whether such a clause has merit and is necessary to achieve the modern awards objective.
4. In response to these questions the CPSU says a clause which allows an employer to deduct money due to an employee on termination, if the employee fails to provide the period of notice, is not a term that can be included in a modern award. It is a term that conflicts with other NES entitlements contained in the *Fair Work Act 2009* (the Act).
5. Section 136 of the Act defines terms that can be included in modern awards as follows:

***Terms that may or must be included***

*(1) A modern award must only include terms that are permitted or required by:*

- (a) Subdivision B (which deals with terms that may be included in modern awards); or*
- (b) Subdivision C (which deals with terms that must be included in modern awards); or*
- (c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or*
- (d) Part 2-2 (which deals with the National Employment Standards).*

*Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.*

*Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.*

***Terms that must not be included***

*(2) A modern award must not include terms that contravene:*

- (a) Subdivision D (which deals with terms that must not be included in modern awards); or*
- (b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).*

*Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).*

Section 136 allows a modern award to include terms that deal with the National Employment Standards (NES) in part 2-2. The NES includes provisions which deal with notice of termination. Section 118 provides:

***Modern awards and enterprise agreements may provide for notice of termination by employees***

*A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.*

6. Section 118 of the Act allows an award to deal with the period of notice an employee must provide an employer in order to terminate the employment relationship. However, sub-clause (c) above deals with what happens if the employee fails to provide notice and enables the employer to impose a financial penalty upon the employee if they don't provide adequate notice. Sub-clause (c) does not deal with the period of notice and thereby is not a matter related to s118 of the Act.
7. The CPSU further submits sub-clause (c) of the proposed common term is not ancillary to notice of termination. Section 142 of the Act allows terms to be included in a modern award if they are ancillary. It provides:

**Incidental terms**

*(1) A modern award may include terms that are:*

*(a) incidental to a term that is permitted or required to be in the modern award; and*

*(b) essential for the purpose of making a particular term operate in a practical way.*

8. Further, the terms of an award must not contravene or exclude the National Employment Standard: Section 55. That section 55 provides:

***Interaction between the National Employment Standards and a modern award or enterprise agreement***

***National Employment Standards must not be excluded***

*(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.*

***Terms expressly permitted by Part 2-2 or regulations may be included***

*(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:*

*(a) by a provision of Part 2-2 (which deals with the National Employment Standards); or*

*(b) by regulations made for the purposes of section 127.*

*Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.*

*(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).*

*Note: See also the note to section 63 (which deals with the effect of averaging arrangements).*

**Ancillary and supplementary terms may be included**

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

**Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards**

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

**Effect of terms that give an employee the same entitlement as under the National Employment Standards**

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the award or agreement entitlement) that

is the same as an entitlement (the NES entitlement ) of the employee under the National Employment Standards:

a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

*Note:* For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

**Terms permitted by subsection (4) or (5) do not contravene subsection (1)**

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

*Note:* A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

9. The CPSU says the effect of s55 is to prevent a modern award containing a term that contravenes the National Employment Standards. Sub-clause (c) cannot be in a modern award because it allows an employer to withhold money, such as annual leave, or an amount owing from the performance of work, from the employee because they did not provide notice. Sub-clause (c) above prima facie conflicts with the NES entitlement to be paid annual leave upon termination of employment. That provision s90 says:

**Payment for annual leave**

...

(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

10. On the basis that sub-clause (c) of the proposed common terms permits annual leave not to be paid to an employee on termination, the CPSU says it conflicts with the NES entitlement to annual leave and cannot be included in a modern award.
11. A term of an award must also not include a term that is in conflict with s326. Section 151 provides as follows:

**Terms about payments and deductions for benefit of employer etc.**

A modern award must not include a term that has no effect because of subsection 326(1) (which deals with unreasonable payments and deductions for the benefit of an employer) or subsection 326(3) (which deals with unreasonable requirements to spend an amount)."

12. Section 326 provides:

**Unreasonable payments and deductions for benefit of employer**

(1) 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 either of the following apply:

(c) the deduction or payment is:

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

(ii) unreasonable in the circumstances;

(d) if the employee is under 18--the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

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

13. The CPSU says the withholding of payment by the employer of accrued annual leave or wages because they have not provided the required notice of termination to an employee is a payment caught by s326 of the Act, is unreasonable in the circumstances and by virtue of s151, cannot be included in a modern award.

**Conclusion:**

14. The CPSU says that sub-clause (c) of the proposed common terms is not a term that can be included in a modern award under s136 and s55. If the CPSU is wrong in this conclusion, and it is a matter that can be included, we say such a clause is not one that should be included because of the unreasonable penalty it imposes upon an employee and is not necessary to meet the modern awards objective.