

IN THE FAIR WORK COMMISSION

2014 Award Review

(AM2016/15)

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

Submissions in reply re: plain language drafting and notice of termination by an employee - 18 October 2017 Decision in [2017] FWCFB 5258

Introduction

1. On 18 October 2017 the Full Bench of the Fair Work Commission in the plain language drafting common issue, issued a decision in [2017] FWCFB 5258 (the Decision) and a Statement and Directions.
2. Those Directions called for submissions from interested parties key issues regarding the Full Bench's preliminary view in the Decision. Those two issues were:

1. 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 (see s.142(1)(a) and (b)).

2. 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 s.326(1) and (4). (see s.151)

3. The Commission directed that submissions should address a series of specific issues, listed below. These submissions are made in accordance with that Statement and Directions addressing the issues raised by parties in reply in response to the Commission.

(i) The scope of Clause E.1(a), having regard to the terms of s.123.

4. The CPSU supports the provisional view of the Commission regarding the scope of E.1(a) being restricted by the application of s123 of the Act. The CPSU disagrees with NatRoad in their submission of 13 November 2017 that no alteration to clause E.1(a) was required because the categories of employment set out in s123 of the Act would not be required to give notice because of their type of engagement. The CPSU says there are various situations involving ending those forms of engagement where notice provisions could apply. The CPSU also notes the submissions of ABI and the NSW Business Chamber of 14 November 2017 at [2.4] where they support the conclusion that the provision must be restricted by s123 of the Act. The CPSU supports the clause proposed by the ACTU in their submissions of 14 November 2017.

(ii) The provisional view that the word 'written' be deleted from Clause E.1(a).

5. The CPSU support's the ACTU position at [8-9] of their 14 November 2017 submissions regarding the omission of the word 'written' from E.1(a). This would be to avoid the

potential unfairness in having given oral notice but not written notice as the clause requires. The CPSU opposes the NatRoad submissions of 13 November at [29-30] where they say the removal of the expression 'written' would cause uncertainty over when the employee resigned. While the CPSU accepts resignation is writing is a good practice, it is sensible to allow an employee to comply with the notice requirements verbally. The CPSU opposes the submissions of the AiGroup of 14 November 2017 at [9-13] regarding the removal of 'writing' from clause E.1(a).

(iii) The provisional view that, in order to address some uncertainty about the 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.'

6. The CPSU supports this provisional view of the Commission that clause E.1(c) should not be phrased as to conflict with NES entitlements. On this point the CPSU notes support for this position in the NatRoad submission of 13 November 2017 at [33], the AMWU submission of 13 November 2017 at [12-13] and the ABI and NSW Business Chamber submission of 14 November 2017 at [4.3]. The AiGroup submission of 14 November 2017 at [14] says it understands the reasons why the Commission has reached this view. The CPSU also supports the ACTU submission of 14 November 2017 at [10-11] that clause E.1(c) should only deal with wages due under the award and not over-award entitlements.

(iv) The provisional view that deductions pursuant to Clause E.1(c) would have no effect in relation to employees under 18 years of age, because of s.326(4), and hence in its current form it is a term that must not be included in a modern award, because of s.151(c).

7. The CPSU supports the submissions of the ACTU of 14 November 2017 at [12-14] where they say employees under 18 y/o should be entirely excluded from the operation of the clause, rather than a deduction requiring parental consent. The CPSU opposes the AiGroup submissions of 14 November at [16] where they propose a clause limiting the operation to under 18 y/o workers and requiring parental consent. The CPSU notes the submissions of NatRoad of 13 November 2017 at [34] which appears to support the ACTU's position.

(v) The provisional view that Clause E.1(c) is incidental to a permitted term, namely Clause E.1(a).

8. The CPSU supports the submissions of the ACTU of 14 November 2017 and submissions in reply of 22 November 2017.

(vi) 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)?

9. The CPSU supports the submissions of the ACTU of 14 November 2017 and submissions in reply of 22 November 2017.

(vii) Having regard to the protective purpose of s.326, it is our 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)(c)(ii), in the following respects:

1. The deduction permitted by Clause E.1(c) may be disproportionate to the loss suffered by the employer as a consequence of the employee not providing the notice required under Clause E.1(a).

10. The CPSU agrees with the provisional view of the Commission that a deduction in these circumstances may be unreasonable. We rely upon the submissions of the ACTU of 14 November 2017 at [28-29] and submissions in reply of 22 November 2017 at [15-19]. As the ACTU states at [29], the employee does not derive any benefit for the deduction proposed under E.1(c) and such a clause is not an appropriate part of a 'fair and relevant safety net'. The CPSU says a system of fair minimum conditions should not include a term which allows wages earned through performance of work to be withheld by the employer to assist in compliance with the award.
11. The CPSU opposes the submissions of AiGroup of 13 November 2017 at [31] where they outline indicia of why such a deduction is not unreasonable. The extent of cost and disruption caused by lack of notice depends upon the circumstances. While it can be accepted that litigation by the employer regarding failure to give notice is costly and uncommon the CPSU does not believe such a clause is warranted (or reasonable) on the basis of 'fairness to employers' as AiGroup claims.
12. The CPSU opposes the submissions of NatRoad of 13 November 2017 at [42-49] where it is claimed such a clause is needed because it is a 'reciprocal' or 'two-way street' feature of the notice requirements. The CPSU says there is no equivalence between an employer's capacity to withhold money equal to the amount of notice failed to be given by the employee and the notice requirements imposed upon the employer. The employee is in not the same position of power as the employer regarding notice and termination. Clause E.1(c) does not somehow work as a 'two way street' reflecting fairness to the parties.

To the extent that the purpose of the provision is compensatory Clause E.1(c) does not contain a mechanism for ensuring that the extent of the deduction is proportionate to the loss. The deduction permitted by the term may be as much as four weeks' wages (for an employee with more than 5 years' service) in circumstances where the employer suffers no loss at all.

This concern may be addressed by a variation to Clause E.1(c) to limit the deduction that can be made – such as, no more than one week's wages.

13. The CPSU does not believe the proposal to limit the notice period to 1 week necessarily makes an unreasonable deduction reasonable. Such a minimum period of notice may make

the deduction less unreasonable but it does not easily cure the problems of disproportion identified by the Commission.

2. Clause E.1(c) permits an employer to make a deduction from monies due to an employee on termination in circumstances where the employee ‘fails to give a period of notice required under paragraph (a)’. Clause E.1(a) provides that ‘An employee must give the employer written notice of termination in accordance with Table X’ (emphasis added). Clause E.1(c) may permit a deduction in circumstances where an employee has given the employer the requisite notice orally but not in writing.

This concern may be addressed by removing the requirement in Clause E.1(a) for notice of termination to be in writing.

14. The CPSU refers to its submission at [4] above.

3. Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employer has consented (or acquiesced) to an employee providing less than the required period of notice. For instance, an employee with more than 5 years’ service resigns. Clause E.1(a) provides that the employee must give the employer 4 weeks’ notice of termination. The employee wants to leave in 2 weeks, to take up another job. The employer agrees and accepts the reduced notice period. Despite that agreement, Clause E.1(c) would permit the employer to deduct 2 weeks’ pay from the money due to the employee on termination.

This concern may be addressed by an appropriate qualification to Clause E.1(c), such as:

‘No deduction can be made pursuant to Clause E.1(c) in circumstances where the employer has agreed to a shorter period of notice than that required in Clause E.1(a).’

15. The CPSU supports the submissions of the ACTU of 14 November 2017 at [29] regarding this issue.

4. Clause E.1(c) would allow an employer to make a deduction from monies due to an employee in circumstances where the employee may be unaware of the requirement in Clause E.1(a) to provide notice of termination. In this regard, we note NatRoad’s submission that ‘Most employees would not be aware of the risk of being in breach of the Award by not giving the required period of notice.’

We note that employers must give each employee the Fair Work Information Statement (the Statement) before, or as soon as practicable after, the employee starts employment (s.125(1)). This requirement forms part of the NES (see Division 12 of Pt 2-2: ss.124-125). The Statement must be prepared and published by the Fair Work Ombudsman (s.124(1)).

The required content of the Statement is prescribed by the Act and Regulations (s.124(2) and Regulation 2.01) and must contain information, relevantly, about 'termination of employment' (s.124(2)(f)). The current version of the Statement was published on 1 July 2017. It does not contain any information about an employer's capacity under an award to deduct amounts from termination monies payable to an employee because the employee has failed to give the required notice on resignation. The section of the Statement dealing with 'Termination of employment' provides:

'Termination of employment can occur for a number of reasons, including redundancy, resignation and dismissal. When your employment relationship ends, you are entitled to receive any outstanding employment entitlements. This may include outstanding wages, payment in lieu of notice, payment for accrued annual leave and long service leave, and any applicable redundancy payments'.

To the extent that the purpose of Clause E.1(c) is to enhance compliance with Clause E.1(a) it seems axiomatic that employees must be made aware of the potential consequence of failing to provide the requisite notice. Absent such knowledge it is difficult to see how Clause E.1(c) can be said to encourage compliance with Clause E.1(a).

This concern may be addressed in the same manner as Issue 1. Alternatively, Clause E.1 may be varied to expressly provide that no deduction can be made pursuant to Clause E.1(c) unless the employer has informed the employee that a deduction may be made from monies due to the employee on termination in the event that the employee fails to give the period of notice required under Clause E.1(a).

16. The CPSU supports the submissions of the ACTU of 14 November 2017 at [29] regarding this issue.