

Notice of termination by an employee

Fair Work Commission

Matter No: AM2016/15

## Submissions – Notice of termination by an employee

Master Electricians Australia (MEA) is a modern trade association representing electrical contractors. A driving force in the electrical industry and a major factor in the continued success and security of electrical contractors, MEA is recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate.

MEA currently has a membership base of approximately 3000 electrical contractors Australia-wide, the vast majority of which are small businesses with fewer than 20 employees.

***Issue 1: whether Clause E.1(c), either wholly or insofar as it deals with NES entitlements, is a type of provision which may validly be included in a modern award under the relevant provisions of the FW Act, including but not confined to ss.55, 118, 139 and 142.***

MEA submits that clause E.1(c) is a type of provision that may be included in a modern award. As has been advanced the term is common to many modern awards.

### **[1] The scope of Clause E.1(a), having regard to the terms of s.123 (see [226]).**

MEA submits that the scope of the provision is not too broadly expressed as employees excluded from notice periods under s.123 will continue to remain so; no greater requirement has been set by this wording.

### **[2] The provisional view that the word 'written' be deleted from Clause E.1(a).**

MEA would prefer that the word 'written' be kept in the award as a written letter of resignation encourages the same level of compliance for an employer when terminating an employee. While not a bullet proof solution, as MEA can foresee disputes that only written resignations have legal effect, employers experience regular disputes regarding notice periods; such as when notice was given, when it was expected to end, was notice of termination given at all. Encouraging compliance with a written notice will deter these types of claims.

MEA submits that the loss is proportionate, and the deduction permitted be limited to the notice not given. A deduction of 4 weeks permitted by the term (for an employee with more than 5 years' service) is proportionate to the loss of the employer as they have limited time to recruit for the position and have lost the ability to pass the knowledge on. An example clause would read; If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.

MEA submits that numerous members have had to defend claims that the employee did not resign because the employee did not submit a *written* resignation letter. If the term *written* is removed from the clause it will be increasingly difficult for members to defend their position.

MEA submits that the inclusion of '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)' is reasonable to deter employers withholding additional amounts despite earlier resignation periods being accepted.

**[3] 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' (see [223] – [226]).**

MEA agrees that the term 'wages due to the employee' appropriately captures the extent of the application of the clause. Particularly where 'wages due to the employee' as notice is considered in the context of the provision of section 117 (2) (b).

MEA is in agreement that the fair work information sheet is one method that the employer can demonstrate that they have outlined the employee's responsibility to give notice; however, there are others including reference to the award on the provision of notice by the employee.

Employers that already have this term in their award are regularly advised that if they wish to enforce the provision that need to:

1. Remind the employee of the requirement to give notice;
2. Be clear that they require to work the notice period (and thereby are not agreeing to a shorter notice period)
3. If they fail to do so they will deduct wages in accordance with the specified award provision.

**[4] 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).**

MEA submits that a minor should not be exempt from this clause if they have been made aware of their obligations to give notice and the consequences of failing to do so.

**[5] The provisional view that Clause E.1(c) is incidental to a permitted term, namely Clause E.1(a) (see [152]).**

The clause also complies with section 142 as it is permitted to be in modern award. Similar clauses exist in the Clerks Private Sector Award (13.2) and the Electrical, Electronic and Communications Contracting Award 2010 (14.2).

**[6] 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)?**

MEA submits that the proposed award clause E.1 (c) complies with section 139 (1) of the Act and may be included in a modern award. Section 139 (1) (c). The employer's ability to deduct wages due to an employee where the employee fails to give the required period of notice falls must be provided for in the award in order to give the employer the right to enforce such a condition. The alternative is the Fair Work Act's provisions at 324 'Permitted Deductions' would not give the employer any ability to establish such a condition.