IN THE FAIR WORK COMMISSION

AM2016/15

4 Yearly Review of modern awards – Plain Language – standard clauses – notice of termination by employee

Reply Submissions of the National Road Transport Association (NatRoad)

Introduction

1. These reply submissions are filed on behalf of the National Road Transport Association (**NatRoad**) in response to the publication of a Statement dated 21 August 2017 (**Statement**) [1] by the Full Bench of the Fair Work Commission (the **Commission**) in relation to the proposed re-drafting of a standard modern award clause about notice of termination by an employee (**the Clause**). NatRoad lodged a submission dated 1 September 2017 (**the Submission**) in these proceedings on which we continue to rely. In accordance with the Statement, submissions in reply are required to be lodged by 11 September 2017.

2. In relation to the Submission, we referenced the fact that the substance of the clause in contention was similar to 2 transport award provisions that are commonly used in the industry and which have historically been part of the employment conditions for a considerable period. The right to make a deduction from amounts payable to an employee in circumstances where an employee fails to meet their award obligation to provide a minimum period of notice when terminating their employment is a longstanding element of the industry's workplace relations system. This is a practical and frequently used provision. Any change would be retrograde and this industrial context should be given prominence in the Full Bench's consideration.

3. NatRoad now responds to some elements of the ACTU's submission dated 4 September 2017, noting that the historical context to which we refer in the prior paragraph is ignored in that submission.

ACTU Submission: responses

4. The ACTU indicates at paragraph 14 that "The limited exemption in section 323(1)(a) to the requirement that employees be paid in full is satisfied where section 324 **authorises** the employee not to be paid in full." The plain words of s324 that we mentioned in paragraph 40 of the Submission are clear: Section 324(1)(c) states that deductions by employers from moneys otherwise payable to an employee are able to

[1] [2017] FWCFB 4355 https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb4355.htm.

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be made if authorised by a modern award. Hence if a modern award contains a provision which authorises the deduction there has been no breach of s323. Section 323 is not a barrier to the retention of the impugned clause.

5. The ACTU in paragraph 16 sets out the terms of s136. Section 136(1)(d) says that "A modern award must only include terms that are permitted or required by Part 2-2 (which deals with the National Employment Standards)." Section 118 is contained in Part 2-2 of the *Fair Work Act, 2009 (Cth)* (FW Act).

6. The argument that appears in paragraphs 23 and 24 of the ACTU submission says that no provision of Part 2-2 **requires** the inclusion of the clause in question. However, that clause is incidental and involves the practical application of the employee notice period permitted to be included in modern awards by s 118. This argument was set out in some detail in the submission dated 1 September 2017. The fact that the Clause is not included as a mandatory matter is not relevant because it is incidental to a matter authorized to be included in modern awards by s118.

7. In paragraph 27 the ACTU acknowledges that the Full Bench decision in the *Re Timber Industry Award 2010* case[2] (**Timber Case**) is relevant in the current context. We stand by the arguments NatRoad made in the Submission relating to the Timber Case. We do not agree with the ACTU when it says that the position adopted by the Full Bench in the Timber Case means that (per paragraph 28 of its submission) "it is not possible at this point to rule on whether clause E.1(c) is essential for the purpose of making the preceding provisions of clause E.1 operate in a practical way." On the contrary, there is clearly an indication by the Timber Case Full Bench that the current penalty for late payment provision was likely to have been based on the incidental power in s 142. The important finding of the Timber Case Full Bench is:

   We accept that the Award Modernisation Full Bench was satisfied as to the power to include such a provision, although it is not clear whether that power was based on s.139 or s.142 of the Act. Given our conclusion above in relation to s.139, ***we think the power was based on the incidental power in s.142 and that the Award Modernisation Full Bench was satisfied that the terms were necessary to achieve the modern awards objective in the particular circumstances of those awards.*** *It is necessary for us to consider whether a similar conclusion arises in relation to the case put by the CFMEU in relation to the Timber Award.*[3]

8. Just as with the late payment penalty, the "claw back" component of the Clause had been formulated and assessed as within power by the Award modernisation Full Bench and is based on the power in s142 FW Act. Relatedly, where the penalty for waiting time applies (the subject of the Full Bench proceedings in the *Timber Industry Award* matter) there remains an Award breach. Here, we argue in respect of the wording arising from the transport awards, there is no breach because the clause is, as contended in the Submission, self-executing. There is a mechanism within the Award which lifts that employee burden, a burden where the amount that is able to be "clawed back" from the employee equates with their monetary legal liability.

9. The ACTU in clause 31 refers to an earlier argument in its submission that says section 118 is not relevant in having a provision in a modern award which authorises a deduction. That is not the case if the power is incidental to the broad power given by

[2] [2015] FWCFB 2856

[3] Id at para 105 our emphasis

section 118. Hence the argument that s55(2)(a) does not permit the impugned clause to be included in awards is not correct. Section 55(2)(a) indicates that "a modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include by a provision of Part 2-2." As indicated the Submission and reiterated here, section 118 is within Part 2-2 of the FW Act. Therefore s55(2)(a) is entirely relevant.

10. The ACTU discusses the terms of s326 at paragraph 36 of its submission. If s326(1)(d) causes a problem (and we do not believe that it does) then the wording of the Clause could be changed. That provision does not create an impediment to its retention. In so far as s 326(1)(c) is concerned, we submit that the arguments of the ACTU in paragraphs 38 and 39 do not hold. Many decades of pre-modern and modern award history tell against the alleged "unreasonable" nature of the deduction.

11. The ACTU indicates in paragraph 44 a position about the enforcement provisions of the *Fair Work Act* being entirely appropriate. This is an argument that was rejected by both Full Benches in the *Timber Industry Award* matter. The waiting time penalty is entirely analogous. The practical mechanism encapsulated in the Clause is a fair means of dealing with what might otherwise constitute, in practice, a plethora of award breaches.

12. In conclusion, we submit that the Full Bench should not set aside a highly practical provision that has historically been part of the safety net employment conditions for a considerable period.

National Road Transport Association

11 September 2017