IN THE FAIR WORK COMMISSION

AM2016/15

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

Submissions of the National Road Transport Association (NatRoad)

Introduction

1. These submissions are filed on behalf of the National Road Transport Association (**NatRoad**) in response to the Decision of the Full Bench dated 18 October 2017[1] (the **Decision**) and the related Statement and Directions, also dated 18 October 2017(the **Statement**).[2]

2. In these proceedings, NatRoad lodged a submission on 1 September 2017 (the **First Submission**)[3] and submissions in reply on 11 September 2017 (the **Reply Submission**).[4]

3. The Decision contains a number of provisional views expressed by the Full Bench.

4. Submissions in response to those provisional views are now sought.

5. In particular, the Full Bench is seeking submissions on two questions:

    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).*[5]

6. The Full Bench has directed that submissions should specifically address a number of issues.[6]

7. This submission sets out some preliminary matters and then addresses each of the specific issues as directed by the Full Bench.

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[1] [2017] FWCFB 5258 https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb5258.htm.
[2] [2017] FWCFB 5367 https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb5367.htm .
[3] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201516-sub-natroad-010917.pdf Note that whilst reference is made to the Submission throughout the Decision, in error the Submission is not shown as one of the submissions lodged in the proceedings per paragraph 9 of the Decision.
[4] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-natroad-110917.pdf .
[5] Above note 2 Attachment A Directions paragraph 1.
[6] Id at paragraph 2.

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8. The preliminary matters are set out both as a comment on the characterisation of prior NatRoad submissions and also to reinforce NatRoad's view, and the Full Bench's provisional view, that Clause E.1(c) is ***incidental to a permitted term***, namely Clause E.1(a).

Preliminary Issues

9. In the Decision, part of the prior NatRoad submissions were characterised as "plainly wrong."[7] However, the matters raised by NatRoad in its First Submission relate more to industrial reality and practicalities than to the strict legal position.

10. We agree that the clause to which we referred, Clause 11.2 of the *Road Transport (Long Distance Operations) Award 2010* (the **Long Distance Award**), does not provide immunity from prosecution or an indemnity to an employee in respect of any penalty that may be imposed for breaching the (employee's) principal obligation to provide the appropriate level of notice on termination.[8] In that regard, the de jure position was conflated with industry's experience with this provision operating as a practical mechanism for dealing with the failure by an employee to give the requisite notice. That view is reflected in the example set out in paragraph 69 of the First Submission.

11. The NatRoad position is encapsulated in the Full Bench's observation in paragraph 167 of the Decision that "a term such as Clause E.1(c) is likely to enhance compliance with an award term which specifies the period of notice an employee must give to terminate his or her employment." As is evident from the First Submission and the Reply Submission, and as articulated in this submission, NatRoad considers the answer to the first question at paragraph 4 above is that the clause is both incidental and essential.

12. In the case noted by the Full Bench at paragraph 160 of the Decision, *Jetgo Australia Holdings P/L v Goodsall (No 2)*[9] (***Jetgo***), the judge said:

> *The penalty also needs to illustrate to employees that complying with the FW Act is a "two way street" and that breaches of the FW Act that damage employers will also be met with condign penalties.*[10]

13. We agree that the conceptual underpinning of the relevant provisions is that compliance with the *Fair Work Act 2009* (Cth) (the **FW Act**) should be a "two-way street." Further, the relevant provisions should be considered in light of the overall 'fair go all around'' thrust of the FW Act.

14. *Jetgo* also illustrates the practicality of a clause like E.1(c) in that clause 12.7 of the *Air Pilots Award 2010* (the relevant Award in *Jetgo*), which deals with an employee providing notice of termination, does not contain a term equivalent to E.1(c) or a provision that emulates the relevant provision of the Long-Distance Award.

15. We also note that the judge in *Jetgo* did not make an order for costs against the employee, despite finding that the employee's conduct in breaching the Award was deliberate. Further the court-imposed penalty of $2,550.00, which was 25% of the available maximum, was paid to the Commonwealth rather than to the employer. This is a further red-light signal that, in

[7] Above note 1 at para 75.
[8] Phrases used by the Full Bench at ibid.
[9] [2015] FCCA 1911 http://classic.austlii.edu.au/au/cases/cth/FCCA/2015/1911.html .
[10] Id at para 10.

practice, pursuing a remedy for breach of the award provision may lead to a sub-optimal outcome for both employers and employees.

16. We note that the Full Bench in the Decision remarked that an order for compensation is available (rather than reliance on the compensatory nature of clause E.1(c)), when considering if E.1(c) is essential in ensuring that E.1(a) operates in a practical way, saying:

The court may, on application, order that the pecuniary penalty (or part of it) be paid to the employer (s.546(3)(c)).[11]

17. The *Jetgo* case, we submit, remains novel.

18. The context of the advice that NatRoad gives its industry members is guided largely by practical considerations. By way of example, the fact that an employer is unlikely to obtain costs against an employee if the employer initiates proceedings for an Award breach, the fact that monies sought by way of compensation for an Award breach may be payable to the Commonwealth rather than the employer (as in *Jetgo*) and the fact that making out a case for compensation is difficult as a matter of proof (together with the need to mitigate any loss and show how that mitigation has occurred) all act as a deterrent to litigation. In practice therefore, the presence of a clause such as E.1(c) (which allows employers to "claw back" the equivalent of the required notice period not given by the employee) typically results in the award breach not being pursued by employers.

19. We submit that the comments about the context of the practical application of the current "claw back" provision in the Transport Awards frames the NatRoad's submissions on the issues in contention.

20. As indicated in paragraph 70 of the First Submission, in the absence of a provision such as Clause E.1(c), it is more likely that employers would seek greater compensation from employees. That is, they may be motivated to seek compensation which reflects the actual loss flowing from the award breach (e.g. damage to a load where an employee abandons the heavy vehicle on the side of the road, loss on income due to contracts remaining unfulfilled, and loss of current and future contracts). In other words, the sort of proceedings taken in *Jetgo* are likely, we submit, to become more commonplace because the potential consequences and financial, business, and productivity loss to the road transport industry when employees leave without notice are dire and significantly greater than in most other industries. We hope that this aspect of the discussion also contextualises our prior submissions.

21. We now deal with the specific issues on which the Full Bench seeks further submissions.

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

22. The Full Bench noted in the Decision that:

Clause E.1(a) is a permitted term by virtue of s.136(1)(d) and s.118. Section 118 provides that a modern award 'may include terms specifying the period of notice an employee must give in order to terminate his or her employment'. Section 118 is in Division 11 of Pt 2-2. Section 123 limits the scope of that Division.[12]

[11] Above note 1 at para 158
[12] Above note 1 at para 226

23. The Full Bench indicates that based on specific exclusions to the application of Division 11 to certain employees set out in section 123: "It would seem to follow that the scope of any award term made pursuant to s.118 must be confined to persons falling within the scope of s.118."

24. The Explanatory Memorandum to the Fair Work Bill[13] shows that the exclusions from the Division are related to specific entitlements conferred by Division 11. For example, subsection 123(1):

> *(L)ists the categories of employees that are excluded from the entitlements to notice of termination of employment and redundancy pay set out in this Division*.[14]

25. The exclusion is framed so that a benefit otherwise conferred on employees is not so conferred where they fall within the categories of employee set out in section 123(1). It is not framed to limit the terms of section 118.

26. However, the categories of employee listed in s123(1) would not be required to provide the notice provisions otherwise set out in the relevant award. This is because their terms of engagement regulate the way their contract of employment will end and the notice provisions on both sides are reflective of that method of engagement: e.g. in respect of a casual employee, per s123(1)(c), casual employees are usually characterised as being engaged and paid as such; the categories of employees mentioned in s123(1)(a) are engaged under arrangements which end at a specific time or at the end of the task or season. Similarly, no notice is required to be given by an employer when an employee is dismissed for serious misconduct: an excluded category per s123(1)(b). Therefore, we submit that it is not a matter of the scope of Division 11 that should limit or in practice limits the application of terms like clause E.1(a). It is the type of employment that those excluded employees undertake or the manner of their dismissal which is the criterion which excludes the need for the "normal" notice provisions to be given on either side.

27. We accordingly submit that no change to the terms of clause E.1 (a) is needed.

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

28. As currently drafted 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.' In the Full Bench's consideration of this issue it indicated that: "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."[15]

29. NatRoad advises members that where an employee resigns verbally, written confirmation from the employee should be sought and/or the employer should record the details of the conversation/exchange where the resignation was proffered and confirm the details in writing to the employee as soon as possible. Having certainty around whether an employee has in fact resigned is, in practice, paramount. The date of effect of the resignation, the consequent non-attendance at work (sometimes amounting to abandonment of employment), date of

[13] http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/bill_em/fwb2009124/memo_0.html
[14] Id at para 487
[15] Above note 1 at para 223

termination for unfair dismissal and other termination applications, and a range of other consequences flow where resignations are not made in writing. These considerations outweigh what we contend is the remote possibility that employers will act exploitatively as expressed in the last sentence of paragraph 28 above.

30. The removal of a requirement for the relevant notice to be in writing is opposed for highly practical reasons. The uncertainty that attends oral resignations leads to uncertainty and frequently fuels disputes and litigation. By way of example, the law recognises that in some circumstances, a so-called "heat of the moment" resignation may not result in termination of the employment contract if an employee acts quickly to retract the resignation by informing the employer that it was not intended. Further, in some circumstances, it is unreasonable for the employer to act on such a resignation.[16] Additionally, employees often regret resigning from their employment and subsequently seek to challenge it. These sorts of circumstances ground and reinforce NatRoad's advice to employers to "always get it in writing." We submit that the benefits of requiring a resignation in writing outweigh any detriments. We therefore contend that the proposed deletion should not be made.

(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.'

31. The Full Bench describes the relevant part of the NES that underpins this provisional view as follows:

> *Section 55(1) of the Act relevantly provides that a modern award 'must not exclude' the NES or any provision thereof. As discussed in Canavan Building Ltd, it is not necessary that an exclusion for the purpose of s.55(1) must be constituted by a provision in a modern award which ousts the operation of an NES provision in express terms. On the ordinary meaning of the language used in s.55(1), if the provisions of a modern award would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES.*[17]

32. The union parties contend that in its current form Clause E.1(c) excludes provisions of the NES in that it permits deductions from NES entitlements. As the Full Bench notes,[18] other employer groups appear to concede that the union position accurately reflects the law, especially as unamended Clause E.1(c) would permit deductions from accrued annual leave payable on termination and from long service leave entitlements.

33. We therefore agree with the provisional view expressed as a means of avoiding contravention of s55(1).

(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).

[16] *Mr Demes Wederay v Airline Cleaning Services Pty Ltd T/A Cabin Services Australia* [2017] FWC 4603 (6 September 2017) at para 72
[17] Above note 1 at para 179
[18] Above note 1 at para 183

34. The clause should be re-drafted to exclude its application to employees under 18 years.

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

(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)?

35. The arguments contained in the First Submission were advanced on the basis of the proposition captured in the provisional view at (v). Paragraphs 9-21 of this submission reinforce that argument.

36. For the practical reasons we have advanced, we agree with the proposition of the Full Bench that the purpose of E.1(c) is encouragement of enforcement in that it is "a term provides an efficient and effective means whereby compliance with employee notice requirements may be encouraged."[19]

37. The Full Bench has indicated that:

> *The provision of such a mechanism may also avoid the need to enforce the notice provision through litigation. It may also be accepted that a term such as Clause E.1(c) has been a longstanding feature of federal awards. But, as mentioned earlier, that fact is far from determinative of the issues presently before us*.[20]

38. The Full Bench has expressed its doubts that these considerations may not be sufficient to "warrant a finding that a term such as Clause E.1(c) is essential for the purpose of making Clause E.1(a) operate in a practical way."[21] The practical matters we have alluded to earlier in this submission show the efficacy of the provision. We agree with the proposition that the mechanism in practice "avoids the need to enforce the notice provision through litigation", a highly practical outcome.

39. In the context of the comment just made, we commend the famous words of Abraham Lincoln to lawyers about the avoidance of litigation:

> *Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.*[22]

40. We submit that the mechanism in Clause E.1(c) shows that the *Fair Work Act's* provisions in the current context are, to use Judge Vasta's words quoted in paragraph 12 of this submission, to be a "two-way street." The fundamental notions of fairness that underpinned the derivation of the provision as mentioned in paragraph 17 of the First Submission, remain. E.1(a) requires employees to provide the same notice as employers (save for additional notice based on age). The operation of E.1(c) provides a practical means to hold employees to that obligation in that it enables monies otherwise equivalent to the amount of notice not given to be withheld. It reinforces the fairness of the obligations imposed, the reciprocal obligation that underpins the basis of the giving of notice on termination of employment.

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[19] Above note 1 at para 167
[20] Id at para 168
[21] Id at para 169
[22] Abraham Lincoln's notes for a Law Lecture http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm

(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)

41. Following the statement reproduced above as (vii) the Full Bench then sets out the bases on which the provisional view is founded. We next set out the Full Bench's concerns and then make a response:

    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).

    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.

42. The limitation of the "claw back" amount to one week's wages would be contrary to the foundational element of the provision: that it operates as a "two-way" street. That is the foundation on which the amount of the deduction is set. It proceeds on the basis that the longer an employee has been with the enterprise, then the greater the period of notice. This is fundamentally a reflection of the fact that experienced employees are generally more difficult to replace than those with lesser experience.

43. In addition, recruitment costs are generally more than 4 weeks wages for award-based employees. The concern of the Full Bench is that the extent of the deduction is proportionate to an employer's loss. In general, even if the loss only results in an employer incurring recruitment costs (rather than other factors such as disruption of work flows etc), they are likely to exceed the amount of wages withheld. One web site[23] estimates the average recruitment cost per hire (assuming 50 hires per year) at over $28,000. The limitation of the "claw back" to one week's wages as against these sorts of expenses is unreasonable.

44. The second concern is expressed thus and has been dealt with in paragraphs 28 et seq in this submission:

    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.

[23] https://recruitpack.com.au/formula-for-hiring-costs/

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

45. The next concern of the Full Bench is:

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).'

46. The employer in the example would be, we contend, unable to lawfully make the deduction as the employer would be estopped. Here, promissory estoppel would apply. This is the case because a promise, given by the employer during the performance of the employment contract, is to not hold the employee party to the terms of the original contract as expressed in the award. The employer would be acting unconscionably in not meeting its promise.

47. However, given that the likelihood of an employee relying on this remedy is remote, NatRoad would not object to the qualification proposed by the Full Bench.

48. The final concern of the Full Bench is expressed as follows:

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).

49. We disagree that the absence of knowledge of the provision by an employee creates unfairness or makes the deduction unreasonable. We refer to the issue as being one of fairness, the issue of the principal provision operating so that it represents a "two-way street."

50. We submit that the best outcome would be for the Fair Work Information Statement to be changed to alert employees to this issue. However, we also note that each modern award has a provision in its terms which requires that employers must ensure that copies of the relevant award and the NES are available to all employees either on a noticeboard or electronically.[24]

51. Ready access to the relevant information is mandated. This shows that the deduction is not made unreasonable solely on the basis that employees might in fact be unaware of the nature of the provision: ignorantia juris non excusat.

National Road Transport Association

13 November 2017

[24] See Clause 5 Long Distance Award.