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**) following the hearing of this matter on 15 December 2017.

2. At that hearing a Background Document[1] was circulated to the parties.

3. In addition, the advocate for Australian Business Industrial and the New South Wales Business Chamber (**ABI**) presented argument which was a reversal of its prior position in a critical regard.

4. This submission addresses an element of the Background Document that the President during the hearing[2] directed NatRoad to consider. In addition, it deals with the argument of ABI and one other matter raised during the hearing.

Background Document

5. 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] as well as a submission dated 13 November 2017 (**Third Submission**). The Third Submission was made in response to the Decision of the Full Bench dated 18 October 2017 (**the Decision**)[5] and the related Statement and Directions, also dated 18 October 2017 (**the Statement**).[6]

6. The Third Submission contained a response to the provisional view expressed by the Full Bench in the Decision that, based on specific exclusions to the application of Division 11 to certain employees set out in section 123 *Fair Work Act 2009* (Cth) (**FW Act**), that it would seem to follow that the scope of any award term made pursuant to s.118 must be confined to

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[1] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-background-paper-151217.pdf
[2] Transcript 15 December 2017 at PN205
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/151217-am201615.htm
[3] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201516-sub-natroad-010917.pdf
[4] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-natroad-110917.pdf .
[5] [2017] FWCFB 5258 https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb5258.htm.
[6] [2017] FWCFB 5367 https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb5367.htm

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persons falling within the scope of s.123. This view was endorsed by the ACTU, ABI and the AiGroup as mentioned at paragraph 12 of the Background Document, albeit expressed in that document as: "It would seem to follow that the scope of any award term made pursuant to section 118 must be confined to persons falling within the scope of s118."

7. However, NatRoad put forward in the Third Submission that there need not be a specific exclusion set out in the terms of proposed clause E.1(a). This submission was advanced on the basis that 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, we contend, their terms of engagement regulate the way their contract of employment will end and the notice provisions on both sides are reflective of the relevant method of engagement or circumstances listed in section 123.

8. At paragraph 17 of the Background Document the Full Bench asks that NatRoad confirms the position put in the Third Submission.

9. We have re-considered the position. We do not agree that there needs to be a specific reference to s123 in the terms of clause E.1(a). Other than the concessions by AiGroup and ABI there is only in contention the reply to the NatRoad submissions lodged by the ACTU in its reply submission dated 22 November 2017 (**ACTU Reply**).

10. In paragraph 6 of the ACTU Reply the following is said:

> *(I)t is to be noted that employees employed under arrangements to which paragraphs (b) and (d) of subsection 123(1) apply may conceivably terminate their employment earlier than the "automatic" termination provisions of their contract might specify. In such circumstances and absent the exclusion, clause (E)(1)(a) would still have some work to do notwithstanding the features of the contractual relationship. Accordingly, the exclusion should be given effect to.*

11. Section 123(1) sets out the following categories where the Division does not apply:

> (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
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> (b) an employee whose employment is terminated because of serious misconduct;
>
> (c) a casual employee;
>
> (d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;
>
> (e) an employee prescribed by the regulations as an employee to whom this Division does not apply.

12. We note that it is only s123(1) that excludes employees from the entire Division. The wording that has been proposed by ABI set out at paragraph 15 of the Background Document, which references s123(2), should not be adopted.

13. The ACTU assertion that the **employee** notice provisions in clause E.1(a) would be available in the instance where an employee's employment is terminated at the initiative of the employer

per paragraph (b) above, as argued by the ACTU, cannot be correct. In the relevant circumstances, the employee would not be required to give notice: the dismissal would be summary. In relation to an employee under a contract of training there would be no work for the notice requirements in E.1(a) to do because these are dealt with in contracts of training. These contracts are able to be cancelled at the request of either the employer or employee prior to the end date. However, if a mutual agreement to cancel the Training Contract cannot be reached, the relevant State or Territory Training Authority has its own procedures to resolve the issue.[7]

14. Having regard to these matters, NatRoad maintains its original position.

Issue Raised by Jetgo

15. Part of the argument that follows in relation to the section 142 argument is presaged on the two-way basis that should underpin the notion of fairness and award compliance. We reiterate the point made in the Third Submission that in *Jetgo Australia Holdings P/L v Goodsall (No 2)*[8] (***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.[9]

16. *Jetgo* was characterised by the President during the hearing on 15 December as "one case by a single circuit court judge." [10] The Federal Circuit Court is, however, like the Federal Court, a court of record.

17. Further the President indicated that the cases cited by the AMWU in its reply submission[11] better expressed the law as it relates to the "usual order" that is made when proceedings are taken for an award breach. The President said in response to the NatRoad advocate's position that the Jetgo case was not contradicted by the other authorities cited in these proceedings, that the decision cited by the AMWU[12] stood to the contrary of the Jetgo case thus: "Well it is to the contrary because it says - in those decisions it says that the usual order is that the penalty will be paid to the applicant."

18. The cases cited by the AMWU all relate to applicants who are employees. As we mentioned in the Third Submission, the *Jetgo* case remains novel. The "usual order" pointed to by the AMWU has not been encountered, to the best of our knowledge, in the case of an employee being pursued for a breach of the award.

The ABI Argument

19. At the outset of NatRoad's response to the ABI argument, we note that we are in accord with the Full Bench's provisional view that clause E.1(c) is incidental to clause E.1(a) expressed at

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[7] See https://www.australianapprenticeships.gov.au/state-training-authorities
[8] [2015] FCCA 1911 http://classic.austlii.edu.au/au/cases/cth/FCCA/2015/1911.html .
[9] Id at para 10.
[10] Above note 2 at PN256
[11] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-amwu-271117.pdf
12 United Voice v MDBR 123 Proprietary Limited (No.2) [2015] FCA 76

paragraphs 134 et seq of the Decision. The ABI argument appears not to be concerned with arguing to the contrary.

20. The advocate for ABI at PN64 of the transcript indicates that ABI agrees with the Full Bench's reasoning at paragraphs 142-144 of the Decision.

21. At the nub of the ABI argument is a distinction between that which is necessary and that which is "absolutely necessary" as set out at PN70 of the transcript. That is a distinction without a palpable difference. The ABI argument is that the Full Bench should be "satisfied particularly well"[13] that "the test is satisfied."[14] The distinction that ABI is seeking to make is not one that arises from the use of the word essential if the word is construed to be consonant with the term "necessary" which is a position reached by the Full Bench and one which is readily able to be reached on the semantic basis set out at paragraph 142 of the Decision.

22. It is difficult to propose any meaningful distinction between an award term that might be considered necessary but not essential. The ABI submissions do not reveal the manner in which any such test could be applied. This is particularly the case given the phrase where the term "essential" appears. The phrase is that the requisite provision is "essential for the purpose of making a permitted term operate in a practical way."

23. In this context, 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 which "provides an efficient and effective means whereby compliance with employee notice requirements may be encouraged."[15] The proceedings should be more concerned with finding cogent reasons for not disturbing a longstanding provision of the substance of E.1(c) rather than imposing a generally higher standard to a provision that is a "gateway" to the merit arguments.

24. In the extract in the prior paragraph, the Full Bench is indicating the relevant nexus that NatRoad considers underpins the operation of clause E.1(c). The evidence and arguments to satisfy that matter should underpin the merit considerations rather than the prior test of power.

25. There has been no evidence formally called in this matter because of the unique basis on which the proceedings commenced. This is not a term that the Commission is, per the ABI advocate, putting "into a modern award the term which has a subject matter, or at its heart is about something which the legislature does not as a general principle agree should be included in modern awards."[16] There is no legislative intention evinced to have provisions with the substance of clause E.1(c) removed from awards. Section 142 should not be construed narrowly when the test of necessity is on all fours with the notion of the essential connection with the practical operation of Clause E.1(a).

26. ABI has provided in a submission dated 18 December 2017[17] alternative dictionary definitions to the Commission and the parties following a question from the President about that

[13] Above note 2 at PN100
[14] Ibid
[15] Above note 5 at para 167
[16] Above note 2 at PN100
[17] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-abinswbc-181217.pdf

matter.[18] We submit that whilst this exercise is interesting it does not assist to isolate further the ordinary meaning of the term essential defined as "absolutely necessary." Indeed, that definition is reinforced when the alternatives are examined.

27. As NatRoad has indicated in prior submissions, the approach taken in the proceedings which occurred in the *Timber Industry Award* matters appears relevant. The ACTU submission dated 4 September 2017 certainly canvasses this matter at length,[19] albeit we do not agree with the ACTU conclusion. These matters were dealt with in paragraphs 32-39 of the First Submission. To recap, a Full Bench was concerned with a challenge to the legal capacity of the Commission to have in modern awards a provision designated by the parties and the subsequent Full Bench that considered the merits of the matter a "penalty" provision. The merit argument was considered to be the place where any challenge should arise. That is the case here; that consideration should not be preceded by a different test than that which falls for consideration at the second tier of the arguments. As the President remarked at PN98 of transcript, "at the end of the day the award can only include terms which are necessary to achieve the modern award objective." Whether it is "absolutely necessary" falls to the same consideration.

28. There is nothing within the wording of section 142 or in any extrinsic material that indicates that there should be a threshold test which has a higher standard than the test of necessity. The ABI position should not be adopted by the Full Bench.

National Road Transport Association

19 December 2017

[18] Above note 2 at PN117

[19] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-actu-040917.pdf see in particular para 27