Fair Work Commission
Section 156 – Fair Work Act 2009
4 Yearly Review of Modern Awards

(AM2016/8) – Payment of Wages

Full Bench Decision [2016] FWCFB 8463 (1 December 2016)

Submissions in Reply
Textile Clothing and Footwear Union of Australia
(3 February 2017)

Submitted by:

Textile Clothing and Footwear Union of Australia
(National Office)
500 Swanston Street
Carlton South VIC 3000

Contact:
Vivienne Wiles
(National Industrial Officer)
(t) 03 9639 2955 (m) 0419 334 102
(f) 03 9639 2944
(e) vwiles@tcfvic.org.au

2014 AWARD REVIEW
(AM2016/8)
PAYMENT OF WAGES

Full Bench decision [2016] FWCFB 8463 (1 December 2016)
Submissions in Reply of the
Textile, Clothing and Footwear Union of Australia
(3 February 2017)

---

1. BACKGROUND

1.1 The Textile, Clothing and Footwear Union of Australia ('TCFUA') files these Reply Submissions in accordance with Directions contained in the Full Bench Decision [2016] FWCFB 8463 (1 December 2016)[1] ('December 2016 decision).

1.2 The Full Bench in its *December 2016 decision* sought submissions in Reply to be filed by 2 February 2017 regarding:

- The Full Bench's proposed provisional 'Payment of wages and other amounts' model term at paragraphs [34] and [44] and [48], including its treatment of accrual of payments, directed to the concepts in, and wording of the provisional term; and
- The Full Bench's provisional view that there would be benefit in either replacing the existing provision for payment in all modern awards with the model term (once finalised), or alternatively with a version of the model term appropriate adapted to the existing award payment arrangements; and
- The Full Bench's provisional 'payment on termination of employment' model term at paragraph [7]. The Full Bench further stated that, 'Once the model term has been settled a Statement will be issued setting out the process for considering which modern awards are to be varied to insert the model term. Interested parties will be given an opportunity to comment on whether the particular modern awards should be varied to insert the model term.[2]

1.3 The TCFUA filed submissions on 23 December 2016[3] regarding the above. It continues to rely on those submissions, together with its other previous written submissions (14 October 2016[4]) and its oral submissions made at the Full Bench hearing held on 21 October 2016.[5]

1.4 In this matter, the TCFUA has a primary interest in the Textile, Clothing, Footwear and Associated Industries Award 2010 ('*TCF Award'*) and the Dry Cleaning and Laundry Industries Award 2010 ('*Dry Cleaning Award'*).

---

[1] 4 Yearly Review of Modern Awards; (AM2016/8) Payment of Wages, [2016] FWCFB 8463 (1 December 2016)
[2] [2016] FWCFB 8463 at para [198]
[3] (AM2016/8) Payment of Wages – TCFUA Submission (23 December 2016)
[4] (AM2016/8) Payment of Wages – TCFUA Submission (14 October 2016)
[5] (AM2016/8) Payment of Wages – TCFUA oral submissions; Transcript (21 October 2016) at PN414 – PN444

1.5 The TCFUA reiterates its opposition to any proposed changes to the payment of wages/payment on termination provisions of the *TCF Award* and *Dry Cleaning Award* which would constitute a diminution of current rights and entitlements for employees covered by those awards. The TCFUA submits that the process of the development of model terms with respect to 'Payment of Wages' and "Payment on termination of employment' should provide parties with a further opportunity to raise award/industry specific issues and to allow appropriate adaptions to existing award arrangements, where fair and reasonable.

2. AI GROUP SUBMISSION

2.1 The TCFUA opposes various aspects of the AI Group submission (23 December 2016).[6]

Provisional 'Payment of wages and other amounts' model term

Setting of a regular pay day and the requirement to notify employees of it in writing

2.2 Clause X.1(c) of the provisional model term provides:

> *(c) The employer must notify each employee in writing of their pay day and their pay period.*

2.3 In summary, the AI Group contend that:

- it should not be necessary for every award to provide for the setting of a particular pay day, or that such notification must be in writing;
- clause X.1(a) does not necessitate the setting of a specific 'pay' day and that this is appropriate;
- however, clause X.1(c) assumes there will be a set pay day; and
- contest that the obligation in clause X.1(c) on an employer to provide written notice of their pay day and period is necessary and adds to the administrative burden on employers generally.[7]

2.4 The TCFUA oppose the contentions of the AI Group. The entitlement to wages for work performed is in many respects one of the most fundamental benefits provided by the award safety net. The enhancement of clarity as to what is both the employee's pay period and their actual pay day ensures that employees have certainty as to when they will receive their pay and any other money due to them arising from leave entitlements etc. In our view this is a fair and reasonable expectation of employees. This is consistent with the consideration in s134(1)(a), *the relative living standards and the needs to the low paid*, and 13491)(h), *the need to ensure a simple, easy to understand, stable modern award system*.

2.5 It is worth emphasising that award dependent workers are by definition low paid in the great majority of industries and occupations covered by modern awards. This is particularly the case in the TCF and dry-cleaning and laundry industries. Secondly, in the TCFUA's experience, workers in these industries, are generally paid in arrears for work already undertaken and for leave already accrued; that is, the employer has already obtained the benefit from the employee's labour. Thirdly, a significant percentage of award dependent workers generally are part-time or casual highlighting that a great

[6] (AM2016/8) Payment of Wages – AI Group submission (23 December 2016)
[7] Ibid; at paras [22] – [33]

many of them receive a very low quantum of take-home pay each period. Fourthly, disputes about the late payment of wages occur regularly in the award system, however, absent consent of the parties to the dispute, the FWC has no jurisdiction to arbitrate such disputes. In such circumstances, the onus is on the employee to initiate legal proceedings in a relevant court. In practice and reality, the overwhelming risk of, and consequences of late payment of wages is disproportionately borne by the employee.

2.6 In this context, a requirement on an employer to provide written notice to an employee of their pay day and pay period, cannot be reasonably said to be onerous or burdensome. The inclusion of the written notice obligation in the provisional term, we submit, will greatly assist in the provision of clarity and certainty regarding the timing of payment of wages and other amounts owing in relation to a particular pay period. This is also important given the removal of late payment of wages provisions in a number of awards. We also consider that the written notice obligation may operate to reduce disputation regarding payment of wages under modern awards and aid compliance, such that award dependent employees are better able to calculate whether they have been paid correctly for a particular pay period.

2.7 The AI Group contend in support of its position that 'in many circumstances employees are engaged with little formality' and that it 'is not uncommon for employers to engage employees without reducing the terms to writing, but to instead merely rely on the award and legislation to govern such matters'.[8] In our submission, this factor demonstrates that contrary to the AI Group's submission, in these proceedings there is a greater necessity for the award system to address the absence of formality in the commencement of many employment relationships.

2.8 It is further argued by the AI Group that 'the necessity to provide written notice of the relevant pay period is further undermined by the practical reality that such matters will become evident to the employee once they have been paid.' This contention assumes that in a specific case, employees are paid on the same or similar date each week, that the actual pay period is readily apparent and/or that employees receive detailed and accurate pay slips as required by the *Fair Work Act 2009* ('FW Act'). In the TCFUA's experience, for many workers in the TCF and dry cleaning and laundry industries, this is not the case.

2.9 In the TCFUA's submission (23 December 2016)[9], we raised a technical issue regarding when the written notice obligation would be triggered. For example:

- Would it be triggered on the commencement of employment?
- Would it be triggered at the point of any change to the pay day and/or pay period?
- Would the employer be also required to keep a record of the written notice as an employee record?[10]

2.10 These are matters which require further consideration.

[8] AI Group submission (23 December 2016); op cit, at [29]
[9] TCFUA submission (23 December 2016); op cit.
[10] Ibid; at [3.10]

Should provision be made for pay days falling on a public holiday?

2.11 In its December 2016 decision, the Full Bench stated:

> *[44] Section 36(2) of the Acts Interpretation Act 1901 (Cth) (AI Act) provides that where an Act requires a thing to be done on a Saturday, Sunday or public holiday, the thing may be done on the next day that is not a Saturday, Sunday or public holiday. Pursuant to s.46 (1)(a) of the AI Act, s.36 (2) applies to a modern award as if it were an Act. Interested parties are asked to consider whether it would be desirable for the model term to include provision to same effect as AI s.36(2), or alternatively, to include a note drawing attention to the statutory provision.*[11]

2.12 In summary, the AI Group in its submissions, contend:

- employers should not be required to process payments to employees on a public holiday;
- that an award term regulating the payment of wages and/or the extent to which they can be paid in arrears, should enable the payment to be made at a later point;
- that a better approach to the inclusion of a provision/Note (as suggested) would be for the award to specify what may occur when a pay day falls on a public holiday; and
- that the Commission should afford a level of flexibility in relation to the payment of wages provisions in order to accommodate public holidays.[12]

2.13 The TCFUA concurs with the AI Group that it is preferable for an award to provide clarity to users of the award as to what needs to happen in cases where a pay days falls on a public holiday.

2.14 However, the TCFUA opposes the submissions of the AI Group that award terms should allow for payment at a date after a public holiday. Our opposition to this concept is advanced on the basis of many of the same reasons that we outlined above regarding clause X.1(c). That is, the detrimental financial impact on employees covered by modern awards, many of whom are part-time or casual, and otherwise low paid.

2.15 The TCFUA submits that it is inherently unfair and prejudicial to low paid, award dependent employees for them to have to wait until after a public holiday or holidays to receive their wages and other monies due. For example, if an employee is ordinarily due to be paid on a Friday, in circumstances of the Easter holiday period they would have to wait until the Tuesday of the following week at the earliest for their wages etc. to be processed. Depending on when the wages were processed on the Tuesday, the employee may in fact not receive cleared funds until the following day, Wednesday. Such delay could be exacerbated if the provisional model term continued to provide for employees to be paid be cheque, a method of payment opposed by the TCFUA. Similar lengthy delays in payment could also occur in circumstances of the Christmas, Boxing Day public holidays.

[11] [2016] FWCFB 8463 at [44]

[12] AI Group submission (23 December 2016); op cit, at [34] – [37]

2.16 We note, that some pre-reform awards expressly addressed the issue of what should occur regarding the payment of wages in context of public holidays, such that wages would be paid prior to a public holiday, not after. For example, the pre-reform *Textile Industry Award 2000* [13]provided:

> *32.1.3 Wages are to be paid not later than Thursday of the particular week. In the Easter Holiday period wages will be paid on the Wednesday prior to Easter. Provided that shift workers finishing work on Friday mornings will be paid their wages before ceasing work.*
>
> *32.1.4 Not more than two days' pay will be kept in hand by an employer.*
>
> *32.1.5 Payment of wages is to be made on the day before a holiday if a holiday falls on the pay day. Provided that such payment may not include overtime, piecework and/or bonus earnings earned on the last day preceding a holiday. These payments may be made on a subsequent day.[14]*

2.17 We also make the observation that public holidays are prescribed by the NES, [15]including identifying the actual dates of national public holidays. Further, public holiday declared or prescribed by state and territory governments are made well in advance. As such, employers have sufficient time to plan for the payment of wages to employees to accommodate the falling of public holidays in any particular year.

2.18 Should the Full Bench ultimate determine that it is appropriate to include a substantive term (rather than a Note) dealing with public holidays and payment of wages etc., the TCFUA submits it should be informed by the principle of earlier payment rather than later payment, as discussed above.

Proposed restrictions on use of monthly pay systems

2.19 In summary, the Ai Group contend in relation to clauses X.1(b)(iii) and (e) (capacity to have a monthly pay period) that:

- the provisional model clause only provides for limited use of monthly pay periods;
- any model term should be cast in the most flexible terms that are appropriate;
- if a specific award context dictates a greater level of protection being afforded to employees this should be achieved through tailoring the provisions to address such matters;
- an additional facilitative provision should be introduced which enables a monthly pay period where agreed by majority of employees covered by the award or a particular classification;
- an employer and employee should be able to agree on a monthly pay arrangement as part of an offer and acceptance of employment.[16]

2.20 As outlined in its previous written submissions (23 December 2016) the TCFUA strongly opposes the inclusion into a model term, as a common standard, the capacity

[13] [AP799036CRV] *Textile Industry Award 2000*
[14] Ibid; clause 32.1.2 – 32.1.4
[15] FW Act 2009; Division 10, Part 2-2
[16] AI Group submission (23 December 2016); op cit, at [43] – [48]

for monthly pay periods. We submit that, in particular, there is no cogent reason for the introduction of monthly pay periods in the TCF and dry cleaning industries, and it cannot be said to necessary (as required by s.138) for such a term to be included in the *TCF Award* or *Dry Cleaning Award*.

2.21 Whilst we maintain our primary position as outlined above, we further reject the AI Group's contention that an additional majority facilitative provision be introduced into the model term regarding the capacity for a monthly pay period.

2.22 With respect to the AI Group's contract of employment point, we submit that the award safety net exists, together with the NES, as an absolute floor of minimum terms and conditions in a particular industry or occupation. It is well established that contractual terms (express or implied) in an employment contract may provide more beneficial terms to an employee, but otherwise not derogate from the award/NES safety net. We also note that AI Group evokes the issue of contract terms when it seeks additional flexibility for employers, but rejects a similar argument with respect to over-award payments and benefits applying as rights under a contract of employment.

Provisional 'Payment of termination of Employment' model term

2.23 In relation to the Provisional 'Payment of termination of employment' model term, the AI Group makes a number of submissions with respect to section 120 considerations.[17]

2.24 More generally, the TCFUA notes the previous submissions made by the CFMEU (C&G)[18] and the ACTU[19] regarding the operation of s.119 and s120 FW Act regarding the NES entitlement to redundancy pay with respect to any proposed term contemplated by the Commission regarding delay in payment of redundancy pay. The jurisdiction of the Commission to make an order delaying the requirement to make payment until after the Commission makes a decision on an s120 application is clearly a relevant matter.

2.25 More specifically, we strongly oppose the AI Group's proposal (see paragraphs [62] – [66]) whereby there would be no requirement for the Commission to make an order relieving an employer of the obligations in clause X.1(a) (i.e. payment within 7 days). That is, AI Group propose that the relief from the proposed new obligation should be '*automatic, if a s.120 application is made'*, [20]and that *'the award obligation should be taken never to have applied in circumstances where such an application is made more than seven days after the date of termination.'*[21]

2.26 The TCFUA is generally concerned that the inclusion of Note 2 in the provisional model term may act to encourage or incentivise non-genuine, s.120 applications by employers in order to delay the required payment of redundancy pay to terminated employees. An application under s.120 may not be heard and determined by the

[17] AI Group submission (23 December 2016); op cit, at [58] – [66]
[18] (AM2016/8) Payment of Wages – CFMEU (C&G) submission (23 December 2016) at [7]
[19] (AM2016/8) Payment of Wages – ACTU submission (23 December 2016) at [15]
[20] AI Group submission (23 December 2016); op cit, at [62]
[21] Ibid; at [65]

Commission for many months, leaving the affected employee no access to the redundancy entitlement for a significant period of time. In circumstances where the Commission found against an applicant employer in an s.120 application, an employer retains the obligation to pay the redundancy pay under s119 but has effectively subverted the beneficial obligation regarding timely payment. There are few negative scenarios for an employer in such a scenario. The AI Group's proposal would exacerbate this risk even further and should be rejected on that basis.

Filed by the:
Textile, Clothing and Footwear Union of Australia

(3 February 2017)