AUSTRALIAN BUSINESS
Lawyers & Advisors

MODERN AWARDS REVIEW 2014

PAYMENT OF WAGES (AM2016/8)

SUBMISSIONS IN REPLY

ABI & NSWBC

A. AWARD PROVISIONS REGARDING TIMEFRAME FOR MAKING TERMINATION PAYMENTS

1. INTRODUCTION

1.1 Various union parties have made submissions in response to the ABI/NSWBC submissions regarding timeframes for the payment of wages on termination. Some of the key arguments are addressed below:

2. EMPLOYEES MAY HAVE TO WAIT FOR UP TO A MONTH FOR THEIR FINAL PAY

2.1 The AMWU Submissions, United Voice Submissions and CFMEU Mining and Energy Division Submissions both assert that it would be unreasonable to pay employees by way of their usual pay cycle, as this could keep employees waiting either 14 days or up to a month for their termination payments.

2.2 The AMWU submits that it is "*unacceptable*" to have an employee being forced to wait for money rightly owed to them and criticises the notion of employers "*withholding entitlements for a month*".

2.3 However, employees who are paid monthly would be well accustomed to receiving their pay in regular monthly periods. There is in fact no additional "*wait*" that the employee is subjected to - they will be paid as per usual.

3. EMPLOYEES WILL HAVE TO WAIT TO FIND OUT WHAT THEIR TERMINATION PAY WILL BE

3.1 The AMWU and CFMEU Mining and Energy Division also contend that employees need to be able to plan ahead and knowing their termination entitlements is critical to budget planning.

3.2 However, the fact that the termination payment is proceeded during the ordinary pay cycle should not prevent an employee from either:

(a) requesting an estimate of their termination entitlements from the employer; or

(b) calculating their own termination entitlements.

3.3 This is particularly the case given that employees have a right under the *Fair Work Regulations 2009* to request information at any time relating to their annual leave accruals, rates of pay, overtime hours and past pay slips.[1]

4. NO EVIDENCE ADDUCED OF PROBLEMS WITH EXISTING DRAFTING

4.1 The AMWU, CFMEU Mining and Energy Division, United Voice and CFMEU Construction and General Division variously contend that insufficient evidence has been adduced by the employer parties supporting the applications to warrant the variations sought.

4.2 However, the nature of the arguments advanced by ABI/NSWBC and Ai Group are arguments which are self-evident and available from any logical reflection of the conditions prevailing in the modern workplace.

4.3 This submission applies to all 5 merit arguments advanced in support of the changes by ABI, namely, that:

(a) It can be logistically impossible to process termination payments in cases of summary termination, where the employer does not have the ability to provide advance notice of the termination to a payroll department or outsourced payroll provided.

[1] See *Fair Work Regulations 2009*, Part 3-6, Division 3

(b) It can take some time to obtain relevant timesheet and overtime records in order to process termination payments.

(c) Employers need to ensure funds are available in transaction accounts that process the termination payment.

(d) Processing termination payments outside of the usual pay cycle requires a dedicated manual transaction that imposes a time and administrative cost on employers.

(e) Employers can be charged additional financial costs when paying 'out of cycle' EFT transactions.

5. QUESTIONS ARISING FROM 14 OCTOBER 2016 STATEMENT

Question 1: Parties are invited to comment on the terms of the provisional default term

5.1 ABI and NSWBC support the provisional default term.

Question 2: Parties are invited to comment on the provisionally expressed view that the default term be inserted into all modern awards

5.2 ABI and NSWBC support the inclusion of the provisional default term into all modern awards.

Question 3–If any party would seek to retain a current award provision, the Full Bench requests that the party provide an explanation as to the purpose of the provision and how this particular provision meets the modern awards objective.

5.3 N/A

Question 4–Parties are asked to consider how s.117(2)(b) might interact with the proposed default term and whether the clause should include reference to s.117(2)(b).

5.4 As section 117(2)(b) of the FW Act only applies to payments in lieu of notice, it regulates the payment of a far narrower range of entitlements to those regulated by the modern award provisions regarding termination payments.

5.5 The classes of termination payments that are subject to the modern award clauses regarding termination pay include:

(a) payments for accrued leave;

(b) wages for hours actually worked; and

(c) notice payments where notice is not worked out.

5.6 In order to address this question, ABI intends to discuss the question with other employer parties between now and 21 October 2016. We intend to further address this question orally on 21 October 2016.

C. AWARD PROVISIONS IMPOSING PENALTIES FOR LATE PAYMENT OF WAGES

6. EXISTING AWARD PROVISIONS

6.1 The 10 Awards subject to the NSWBC and ABI claim with respect to the late payment of wages all require that an additional payment must be made to employees in circumstances where the employees have not been paid their wages as required by the relevant awards.

6.2 The drafting of the awards subject to the NSWBC and ABI claim makes it clear that the penalties apply both to employees paid by cash/cheque as well as employees who are paid by EFT.

6.3 In the case of an employee paid by EFT, on their face, the award provisions appear to entitle employees to an additional payment, even though the employees will not be physically kept waiting at the workplace for payment (as the payment will be made by way of EFT). We describe these types of clauses for the purposes of these submissions as **"EFT Late Payment Penalties".**

7. THE COMMISSION'S POWER TO INCLUDE THE EFT LATE PAYMENT PENALTIES IN AWARDS

7.1 The ABI/NSWBC submissions filed in these proceedings on 20 September 2016 advanced the contention that the EFT Late Payment Penalties are not a term permitted to be included in a modern award pursuant to section 139 of the FW Act.

7.2 At the directions hearing held in these proceedings on 17 October 2016, the United Voice contended that the EFT Late Payment Penalties (at least the Penalties in those awards which United Voice has an interest in) constitute "*penalty rates*", within the meaning of section 139(e) of the FW Act.

7.3 For the reasons that follow, this position is refuted by NSWBC and ABI.

8. DICTIONARY DEFINITION OF A "*PENALTY*" AND "*PENALTY RATE*"

8.1 The Macquarie dictionary defines a "*penalty rate*" as follows:

> "*... a rate of pay determined by an award, higher than the usual rate, in compensation for working outside the normal spread of hours.*"[2]

8.2 The Macquarie dictionary defines the term "*penalty*" differently, noting that a penalty is:

> "*a punishment imposed or incurred for a violation of law or rule...*"[3]

8.3 The dictionary approach to defining these terms leads to two conclusions:

(a) firstly, that the notion of a "*penalty*" is different to the term "*penalty rate*"; and

(b) secondly, that a "*penalty rate*" attaches to conditions associated with the work performed. That is, to be a penalty rate, the rate must be applied to particular work.

9. CASELAW REGARDING PENALTY RATES

9.1 In the seminal cases that gave rise to penalty rates[4], industrial Courts outlined that penalty rates arose to compensate employees for the lost opportunity to spend time with family and friends or on religious activities due to work being rostered at unsociable hours.

9.2 By way of example, the *Weekend Penalty Rates Case* (1947) 58 CAR 610 refers to a penalty rate as one where:

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[2] Macquarie Dictionary, 3rd ed, pg 851
[3] Macquarie Dictionary, 3rd ed, pg 851
[4] See *Federated Gas Employees Industrial Union v Geelong Gas Company and Others* (1919) 13 AR 468-469 and *The Metal Trades Award re Rheem Manufacturing* (1947) 58 CAR 609,

"...***work is done*** *under special conditions of time, place or circumstance*".[5] (emphasis added)

9.3 This rationale was developed in a more recent penalty rates decision, *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635, where the Full Bench of the Commission held that:

> "*Although described in the modern awards as penalty rates, they are in reality a* ***loading*** *which compensates for disabilities.* ***In the modern award context these loadings must recognise the disabilities of working at unsociable times****; be sufficient to induce people with appropriate skills to voluntarily work the relevant hours, and be set having regard to whether employers in the industry concerned normally trade at such times. These factors and the elements of the modern awards objective need to be balanced and weighed accordingly.*" (emphasis added)

9.4 The description of penalty rates as loading is of particular interest, as it connotes that the rates go hand in hand with work being performed (as opposed to the rates being paid as a penalty for something unrelated to the performance of work).

9.5 Ultimately, the industrial case law history, academic literature[6] and the wording of section 139(1)(e) itself all point towards penalty rates being inextricably linked to unsociable or undesirable working hours.

9.6 The terms of the existing EFT Late Payment Penalties stand in stark contrast to all of the matters raised above. The clauses do not identify any undesirable hours of work. Indeed, they do not focus on the performance of work at all. Rather, as has been previously stated:

(a) the clause relates to a payment for a period of time after the conclusion of work. The notion that employees can be paid "*penalty rates*" in respect of a period when they are not working is entirely inconsistent with the long history of industrial jurisprudence pertaining to penalty rates; and

(b) to the extent that a payment has still not been rectified before an employee recommences their next regular work shift, the EFT Late Payment Penalties impose penalties on work performed during ordinary hours. In this circumstance, none of the motivations associated with penalty rates arise as the employee is performing their normal rostered hours of work.

"Penalty" vs "Penalty rate"

9.7 In reality, the United Voice appears to be conflating the notion of a "*penalty*" with a "*penalty rate*". There is no doubt that the EFT Late Payment Penalties impose a penalty or 'fine' upon the employer. It is not, however, a "*penalty rate*".

9.8 This borne out in the *Weekend Penalty Rates Case,* where Drake-Brockman ACJ and Sugarman J considered whether a general test could be enunciated to describe what the phrase "*penalty rate*" meant within the meaning of relevant industrial regulations in operation at the time. Their honours held:

> "*Such a test* [regarding the meaning of a "penalty rate"], *and a satisfactory one, may, we think, be found. If an award contains a prescription of conditions to be observed by parties and goes on to provide for payments higher than normal to be* ***made for work done outside the prescribed conditions, those payments may properly be***

[5] At 615

[6] For instance, *Stewart, A 'Stewart's Guide to Employment Law' 2nd Edition, 195* defines penalty rates as a "*loading or premium for working extra or anti-social hours*" and as being designed to compensate for work performed on weekends or public holidays

***described as "penalty rates". There are then both the express prescription of a normal course of conduct and the provision of a deterrent against infringing that prescription which apart from special usages, are ordinarily involved in the idea of a "penalty".*"** (emphasis added)

9.9 In the passage above, the Court distinguishes between the notion of:

(a) a "*penalty rate*" - which relates to payments made for work done outside prescribed conditions; and

(b) a "*penalty*" - which arises where the award wishes to deter an employer from infringing an award "*prescription*".

10. CONCLUSION

10.1 For the reasons advanced above, NSWBC and ABI maintain that the EFT Late Payment Penalties are not "penalty rates" within the meaning contemplated by section 139 of the FW Act.

10.2 This means that, to retain the terms in the relevant modern awards, the Commission must be satisfied that the terms must satisfy the pre-requisites outlined in section 142 of the FW Act. This means the terms must be essential in order to enable the award to operate in a practical way. Put another way, the Commission must be satisfied that, without the terms, the Award cannot operate in a practical way.

10.3 For the reasons previously advanced in ABI's Initial Submissions, there is no basis to conclude that such a substantial threshold is satisfied by the relevant award terms in the present case.

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