

4 YEARLY REVIEW OF MODERN AWARDS

Fair Work Act 2009 – s. 156

COMMON ISSUES – PAYMENT OF WAGES

(AM2016/8)

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, MINING AND ENERGY DIVISION

SUB CLAUSE 16.7 – PAYMENT OF WAGES UPON TERMINATION OF EMPLOYMENT - BLACK COAL MINING INDUSTRY AWARD 2010

1. In a statement issued on 2 August 2016, a Full Bench resolved to review the payment of wages upon termination of employment clauses in the modern awards that contain such a provision.¹ The Black Coal Mining Industry Award 2010 (“BCMIA”) is one such award.²
2. At the same time, the Full Bench resolved to prepare and issue draft determinations in respect of each of the relevant modern awards. However, in doing so the Full Bench made it clear that:

“The publication of these draft determinations is intended to facilitate the review of the relevant terms of the modern awards in Attachment A, they do not represent the concluded (or provisional) view of the Full Bench.”³

3. In a Statement and Directions issued on 15 August 2016, the Full Bench established a timetable for submissions on the payment of wages clause in any of the relevant awards. The timetable included a provision that any party seeking to vary the current payment of wages provision must file a submission and any supporting evidence by 4.00pm on Tuesday 20 September 2016.⁴ This submission is in compliance with that direction.

¹ [2016] FWCFB 5254, dated 2 August 2016, PN [14] The review of the payment of wages upon termination of employment formed part of a broader exercise being undertaken by the Fair Work Commission regarding modern award provisions on the payment of wages.

² MA000001, Sub clause 16.7

³ [2016] FWCFB 5254, PN [14]

⁴ [2016] FWCFB 5741, dated 15 August 2016, Attachment A

4. In a Statement dated 8 September 2016, the Full Bench issued a number of draft determinations, including a draft determination to vary the BCMIA.⁵
5. This submission seeks to identify the difference between the draft determination issued by the Full Bench and the draft determination prepared by the Construction, Forestry, Mining and Energy Division, Mining and Energy Division ("CFMEU"). A copy of the draft determination prepared by the CFMEU is attached to this submission as Attachment A. The submission then proceeds to advocate the reasons why the Full Bench should adopt the provision as sought by the CFMEU.
6. By way of background, the current relevant award provision – sub clause 16.7 – has been in black coal mining awards since at least 1990.⁶ It remained unchanged through both the award simplification process and the initial modern award process.⁷
7. It should also be noted that in the BCMIA, sub clause 16.4 provides that unless otherwise agreed between the employer and the majority of employees the payment of wages will be paid weekly; sub clause 16.5 provides that wages will be paid by cheque or electronic funds transfer; and sub clause 16.6 provides that an employer shall not keep more than a week's pay in hand.
8. Sub clause 16.7 in the current BCMIA provides that upon termination of employment an employer shall pay all wages owed to the employee on the day of termination of employment or forwarded by post, within 72 hours, to the last address notified in writing by the employee.
9. The draft provision prepared by the Full Bench retains sub clause 16.7 in its current form (albeit renumbered as sub clause 16.7(a)) whilst adding a further provision – being sub clause 16.7(b) – to the effect that where an employee is normally paid by electronic funds transfer ("EFT"), wages due may be transferred into the employee's account in accordance with the usual pay cycle.
10. The CFMEU draft determination also retains the current provision. It then adds a proviso that where an employee is paid by EFT, the wages owed may be transferred to the employee's account within 72 hours of the day of the termination of employment.

⁵ [2016] FWCFB 6401, dated 8 September 2016, ATTACHMENT A – Draft Determinations

⁶ Coal Mining Industry (Production and Engineering) Interim Consent Award, September 1990, CR4414, dated 23 November 1990, sub clause 9 (e)

⁷ Whilst the Payment of Wages clause in the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 was amended as part of the award simplification process, the sub clause under consideration remained unchanged. See Print No. S0657, dated 4 November 1999.

11. In essence, the distinction between the two determinations is the timing of any payment of monies due upon termination where payment is by EFT. The Full Bench draft determination provides for payment as per the normal pay cycle, which according to the BCMIA is, unless otherwise agreed between the employer and a majority of employees, weekly. Fortnightly pay cycles are common in the coal mining industry. As such an employee can wait up to 7 days for his/her termination pay and up to 14 days where fortnightly payment prevails. On the other hand, under the draft determination prepared by the CFMEU, the employee must be paid within 72 hours (3 days) of the day of termination of employment, regardless of the pay cycle. Of course, under both determinations, an employee can be paid on the day of termination of employment. In addition the CFMEU determination provides that payment can be made at any time up to 72 hours from the day of termination.
12. The CFMEU submits that its draft determination is preferable for the following reasons:
- 12.1 The CFMEU draft determination maintains the “up to 72 hours” provision for either method of payment upon termination of employment. Whilst the practical effect may differ due to the means of “transport”, the difference is not so significant as to warrant a different approach.
- 12.2 The CFMEU draft determination clarifies the payment under sub clause 16.7. For example, under the current provision, whilst an employee may be paid by EFT, the sub clause, on its face, does not prevent an employer from sending out the final pay through the post (albeit this would be unlikely). The CFMEU draft determination makes it clear that where an employee is paid by EFT, payment of wages on termination of employment can be made by bank transfer on the day of termination or within 72 hours.
- 12.3 Where an employee’s employment is terminated a period of notice is usually given, save for summary dismissal for serious misconduct.⁸ As such, an employer, in virtually all cases, has notice that an employee is leaving, thereby providing, in our submission, sufficient time to make up the employee’s final wage. As such, being in a position to pay an employee on his/her day of ceasing employment or at most within 72 hours is not an unreasonable imposition.

⁸ Sub clause 13.3(a) of the BCMIA provides that an employee give a week’s notice or forfeit to the employer a week’s pay. Sub clause 13.1 provides that an employer shall give notice as set out in the NES other than in sub clause 13.3, where an employee may be summarily dismissed for serious misconduct. Sub clause 13.4 provides that in circumstances of redundancy, an employee is entitled to a minimum of 4 week’s notice.

- 12.4 When the reasoning as set out in 12.3 above is considered together with the use of sophisticated information technology in payroll systems, it is hard to perceive how the provision as sought by the CFMEU could be considered as a regulatory burden. Further, the Fair Work Regulations require that an employer keep up to date records on wages, overtime, leave and superannuation.⁹ In these circumstances, an employer should have the records readily available and the making up of the final wages entitlements should be neither unreasonably time consuming nor unduly onerous.
- 12.5 The black coal mining industry is an industry occupied by predominantly large employers who have the resources and expertise to ensure that they can meet the timetable for final payment upon termination of employment.
- 12.6 Unlike an employee taking some form of leave, an employee, upon termination of employment, does not have an ongoing employment relationship with the employer. The employee may not have alternative employment. The employee will be required, however, to meet his/her ongoing costs. In those circumstances, it is reasonable for an employee to want his/her final payment as soon as possible in order to determine their financial situation and plan for at least the immediate future. Whilst the employee may have some idea of what the final pay is likely to be, the employee cannot be sure of what it is going to be.¹⁰ It is not reasonable to expect an employee to have to wait up to 14 days or near to, in order to receive his/her final pay.
- 12.7 It is submitted that the variation as sought in the CFMEU draft determination is compatible with the modern awards objective in that it ensures that the BCMIA, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions of employment.¹¹ It is fair because it ensures that an employee, upon termination of employment, is paid his/her final payment within a reasonable period in circumstances where such payment is required as soon as possible. It is fair because it can be complied with readily by an employer. It is fair because it is to the benefit of an employee with no additional cost to the employer. It is relevant because it relates to a common contemporary and historical award provision on the payment of wages that has a direct impact on an employee accessing his/her final pay upon termination of employment.

⁹ Fair Work Regulations, Chapter 3, Division 3, Regulations 3.31 to 3.46

¹⁰ For example, taxation considerations need to be taken into account.

¹¹ Section 134(1)

12.8 With respect to the matters to be taken into account in s. 134(1) it is submitted:

12.8.1 To the extent that the competent miner (and classifications below that level) covered by the BCMIA are on Award rates and conditions, he/she is "low paid" as mentioned in s 134 (1)(a).¹² Accordingly, the provision as sought by the CFMEU by contributing to a fair and relevant safety net is consistent with s. 134.

12.8.2 The provision sought by the CFMEU will have a neutral impact on the need to encourage collective bargaining (s. 134 (a)(b)).

12.8.3 To the extent that ensuring employees receive their final pay either upon termination or within a short time thereafter, it may assist in providing funds necessary for an employee to facilitate and expedite the search for alternative employment. In that respect it is a positive contributor to increased workforce participation (s. 134(1) (c)).

12.8.4 With respect to s. 134(1)(da), (e) and (h), the variation is neutral.

12.8.5 With respect to s. 134(1)(f) it is submitted that the variation will not have any undue effect on productivity, employment costs and the regulatory burden.

12.8.6 With respect to s. 134(1)(g), it is submitted that the variation will assist in ensuring the BCMIA is easy to understand and provides a stable and modern award base.

12.9 The variation, as sought, does not represent a significant change to the Award. The variation amounts to a relatively simple change to the method of payment of payment upon termination of employment. As such it is submitted that the probative evidence necessary to

¹² In the 2015-2016 Annual Wage Review, the Expert Panel took the figure of two thirds of the median weekly earnings of \$800 per week as at August 2014 as an indicator of being low paid – see [2016] FWCFB 3500, dated 31 May 2016, PN [363]. As the comparable wage rate for a competent miner at that time was \$791.90 (see PR 551589), it follows that under the BCMIA, a competent miner and lower classifications fall into the category of low paid. In Schedule B of the BCMIA all classifications in Group A would be low paid. The rate quoted from the Annual Wage Review is the lower to two rates used as an indicator. The higher rate is \$880 as at May 2014. If that figure were used as the comparator with the rates in the BCMIA as at May 2014, it would mean that all classifications in Schedule A other than the Miner Specialist (the highest classification) and all classifications in Group A-G in Schedule B would be low paid (see Print PR536666)

demonstrate the facts necessary to support a significant variation to the BCMIA is not necessary.¹³

12.10 As noted in paragraph 6 above, the history of the current BCMIA provision, going back to 1990 shows that the relevant provision has not been amended for some time even though the relevant award was subject to the award simplification process in the late 1990's and the modern award process in 2008-2009. As such, it is submitted that to the extent that the historical context and any contested issues are to be taken into account they do not count against the variation as sought.¹⁴

12.11 As part of the 4 yearly modern award review, the Fair Work Commission has resolved to address the provisions of modern awards regarding the payment of wages to ensure they meet the modern awards objective. In this context and for the reasons as set out herein, the CFMEU submits that the variation is necessary to achieve the modern awards objective.¹⁵

13. In summary, the CFMEU submits that with respect to the payment of wages upon termination of employment, the BCMIA should be varied to provide that with respect to payment by EFT, an employee is either paid his/her final pay on the day of termination or within 72 hours of the day of termination. This provides a necessary component of the fair and relevant minimum safety net of wages and conditions for employees covered by the BCMIA. The CFMEU submits that the Full Bench should vary the BCMIA in the matter sought in this submission.

Construction, Forestry, Mining and Energy Union

Mining and Energy Division

20 September 2016

¹³ See the Preliminary Jurisdictional Issues Decision, [2014] FWCFB 1788, dated 17 March 2014, Point 3 of PN [60]

¹⁴ [2014] FWCFB 1788, dated 17 March 2014, Point 3 of PN [60]

¹⁵ [2014] FWCFB 1788, dated 17 March 2014, Point 5 of PN [60]

DRAFT DETERMINATION

Fair Work Act 2009 s. 156 – 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages
(AM2016/8)

BLACK COAL MINING INDUSTRY AWARD
(MA000001)

Black Coal Mining Industry

JUSTICE ROSS
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIB
COMMISSIONER HUNT

MELBOURNE, XX SEPTEMBER 2016

4 yearly review of modern awards – payment of wages common issue – payment of wages on termination of employment

A. Further to the Full Bench decision issued by the Fair Work Commission on XX MONTH 2016, the above award is varied as follows:

1. By deleting clause 16.7 and inserting the following:

16.7 Upon termination of employment, wages due to an employee will be paid on the day of such termination or forwarded by post, within 72 hours, to the last address notified in writing by the employee. Provided that where payment is normally made by electronic funds transfer (EFT), the wages due to an employee may be transferred into the employee's account within 72 hours of the termination of employment.

B. This determination comes into operation from XX MONTH 2016. In accordance with s. 165(3) of the *Fair Work Act 2009* the determination does not take effect until the start of the first full pay period that starts on or after XX MONTH 2016

PRESIDENT