

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION

Matter Number: AM2016/8

Fair Work Act 2009

Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

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

**SUBMISSION OF THE CONSTRUCTION, FORESTRY, MINING AND ENERGY
UNION (CONSTRUCTION & GENERAL DIVISION) ON QUESTIONS FROM THE 14TH
OCTOBER 2016 STATEMENT ([2016] FWCFB 7455)**

21st October 2016

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Introduction

1. In a Statement released on 14th October 2016 ([2016] FWCFB 7455) the Full Bench expressed a preliminary view about the payment of wages on termination and posed a number of questions for the parties to respond to. This submission is the CFMEU's (Construction and General Division) (CFMEU C&G) response to those questions.

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

2. The CFMEU (C&G) does not support the provisional default term. The provisional default term amounts to the loss by employees of their entitlement to be paid on termination under the 3 major awards that we have an interest in, i.e. the *Building and Construction General On-site Award 2010*, the *Joinery and Building Trades Award 2010* and the *Mobile Crane Hiring Award 2010*.
3. Under the *Building and Construction General On-site Award 2010*, all monies due to the employee must be paid at the time of termination or, where this is not practicable, the employer has 2 working days to send the monies due by registered post or transfer the monies due into the employee's account if they are paid by EFT (clause 31.4). The provisional default fund would extend the period to within 7 days after the employee's last day of employment.
4. Under the *Mobile Crane Hiring Award 2010*, wages due to an employee must be paid on the day of termination or forwarded by electronic transfer or post on the next working day (clause 19.5). The provisional default term would result in the extension of this period to within 7 days after the employee's last day of employment.
5. Under the *Joinery and Building Trades Award 2010* there is no specific provision regarding payment of wages on termination. We are concerned however that, given the provisional view expressed in paragraph [18] of the Statement that "*there is some utility in a common payment on termination provision across all 122 modern awards*", should the provisional default term be proposed to be inserted into this award it would be a reduction of employee's existing entitlements. Under the *Joinery and Building Trades Award 2010*, all monies due to an employee by the employer in relation to the performance of work must be paid and be available by no later than the time of cessation of ordinary hours of work on Thursday of each working week, provided that in any week in which a public holiday falls on a Thursday or a Friday mutually acceptable alternative arrangements must be made. We submit that this provision applies also to the payment of wages due on termination. The provisional default term would extend the period to within 7 days after the employee's last day of employment.

6. The provisional default term would also be a lesser standard than the provision that currently applies under the *Manufacturing and Associated Industries and Occupations Award 2010*, in which we have an interest.

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

7. The CFMEU (C&G) opposes the insertion of the provisional default term into other awards including those awards that already have a provision that is more beneficial to employees, and the specific awards identified above.
8. The CFMEU (C&G) is extremely concerned that the consideration of the provision of the requirement to pay wages on termination of employment appears to be one sided, i.e. what is the impact on employers of the current provision? There appears to be no consideration given to the potential impact on employees if such provisions are altered in a manner adverse to employees. Whilst we accept that the Fair Work Commission (the Commission) has already decided that there is a need to balance the competing requirements of the modern awards objective and that not all of the objectives will apply in the consideration of a particular matter, we do not believe that this allows the Commission to ignore the effects or impacts on employees. The Commission is obligated to consider fairness having regard to both sides of the employment relationship.
9. In the 14th October 2016 Statement, the Full Bench refers to the employer’s claims and the reasons advanced for them, and reaches a provisional view based on a concern that employers not be required to make termination payments within a very short time frame and what are perceived as modern payroll practices. Nowhere is there any mention or consideration given to the potential impact on employees. The implications for employees appear to have completely escaped attention.
10. To say that employees have an expectation to be paid out their entitlements immediately on termination, especially where termination is at the initiative of the employer should not require explanation or evidence. There is over 100 years of award regulation particularly in the building and construction industry where this practice has been acceptance as the norm. There has been no evidence led, or claims made by employer organisations that this is not the case. There is no evidence at all that employers desire or require this to change.
11. To the extent that the Commission requires evidence from parties opposing a change in award conditions (rather than those supporting a change in award provisions), we would alert the Commission to the recent report “*The Stressed Financial Landscape Data Analysis –October*

2015”¹ by Digital Finance Analytics and Monash University Centre for Commercial Law and Regulatory Studies. The report is based on a base sample of 26,000 Australian households.

According to this report:

- Financially distressed households include those unable to find \$2000 in an emergency within 7 days. (p.8)
- The 2015 data survey indicates that 1.8 million households (just over 20 per cent of all households) are now financially distressed. (p.8)
- Loss of employment is identified by 15.6% of households who register as financially stressed as a reason for their difficulty. (p.10)
- Financially distressed households (i.e. those who generally have no savings or assets to draw upon) (p.12) make up 59%, and financially stressed households 41%, of households who use payday lending services. (p.14)
- The most common reason for taking out a payday loan is for emergency cash for household expenses, which includes children’s needs, clothing, medical bills, food, healthcare needs, school trips and fares/travel costs (p.18)
- The construction and maintenance industry sector accounted for 12.6% of payday borrowers in 2015. (p.22)
- Over 90% of payday borrowers had an annual income of under \$50,000. (p.23)

12. The CFMEU C&G is not claiming that all workers who are terminated will fall within the financially stressed or financially distressed categories. Clearly, employees on very high wages and those with substantial assets and savings would not. But as termination of employment is a significant causal factor, many low paid employees on minimum award wages, especially those at the trade level and below, would potentially fall into these categories. The Commission, through the Expert Panel in the Annual Wage Review 2015-16 decision, has recognised that,

*“[369] Whilst no specific conclusion is available, the information as a whole suggests that a sizeable proportion—probably a majority—of employees who are award reliant are also low paid by reference to the two-thirds of median weekly earnings benchmark.”*²

13. It is undisputed that the modern awards objective requires the Commission to ensure that modern awards provide a fair and relevant minimum safety net and that one of the factors that the

¹ <http://financialrights.org.au/wp-content/uploads/2015/10/The-Stressed-Financial-Landscape-Data-Analysis-DFA2.pdf>

² [2016] FWCFB 3500

Commission is to take into account is relative living standards and the needs of the low paid.³ We submit that changing the requirement for the payment of wages on termination, particularly increasing the time period within which payments are to be made can have adverse effects for some workers who are low paid, particularly those on who are financially stressed and/or on the border of financially distressed.

14. As stated previously the Commission is faced with assessing the competing claims and reaching a conclusion as to what is a fair and relevant minimum safety net of terms and conditions. We submit that changing an existing and longstanding award provision, based on the unsubstantiated, undocumented and unproven cost of an extra pay run (baldly asserted by some to be in the vicinity of \$10), could hardly be seen as justified and of merit if it delayed an employee receiving their termination payments and forced an employee into the clutches of pay day lenders, or even worse delayed the worker getting medical treatment or providing food to their family.

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

15. The CFMEU C&G seeks the retention of the current award provisions identified in paragraphs 3 to 6 above. The purpose of the provisions to be retained is straightforward: i.e. to provide employees who are terminated, for whatever reason, payment of their full entitlements at the time of termination.
16. What we seek to retain is not a new concept, but rather one that has been the usual practice, especially in the building and construction and manufacturing industries, for well over 100 years of award regulation. They are provisions that have been recognised by previous tribunals as being fair and justified where such provisions were inserted into awards in exercise of conciliation and arbitration powers, and which to date have been recognised by the AIRC and this Commission as being part of a fair and relevant safety net of terms and conditions that met the modern awards objective.
17. Although we find it somewhat curious that we are asked to explain how an existing modern award provision meets the modern award objective, especially where no significant change in circumstances has been identified, we would refer the Full Bench to the Preliminary Jurisdictional Issues decision where it states,

³ S.134(1)(a) of the FW Act.

“[24] In conducting the review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objectiveIn the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.”⁴

18. Not only did the AIRC find that the existing award provisions for the payment of wages (including payment on termination) met the modern awards objective, but there have been similar findings made by the Commission. In *Building and Construction General On-site Award 2010* ([2010] FWA 2894), Senior Deputy President Watson, in dealing with an application by Simpson Personnel Pty Ltd to vary the payment of wages provision in that award, considered the modern awards objective. Significantly, SDP Watson found that,

“[33] Section 134(1)(d) in my view relates to “flexible modern work practices and the efficient and productive performance of work” of employees covered by a modern award. The frequency of the payment of wages would not impact on the performance of work of building employees. To the extent that it impacts on the work of administrative staff, covered by another modern award, it will affect the volume of work, rather than the efficiency and productiveness associated with the work or work practices. Further I am not satisfied that the payment of wages will invoke consideration under s.134(1)(h) which is directed to the impact of modern awards on “the national economy”.”

19. We note that SDP Watson then went on to consider s.134(1)(f) and found that the payment of wages and the frequency thereof would impact on employment costs and the regulatory burden, but he did so on the basis that,

“[34]A greater frequency of payment will increase administrative costs of employing labour and impose a greater regulatory burden, which should be avoided, particularly in circumstances where employees have been subject to less frequent payment under previously applicable award-based transitional instruments.

⁴ [2014] FWCFB 1788

[35] *In relation to s.134(1)(f), if the applicant, and other employers, have paid wages fortnightly in compliance with relevant pre-modern awards or award-based transitional instruments, there is force in an argument that a requirement to now pay weekly would conflict with the modern awards objective in relation to employment costs and regulatory burden in circumstances where relevant employees would suffer no detriment through continuation of fortnightly payment". (Underlining added)*

20. In the decision SDP Watson referred to the content of pre-modern award instruments and noted that *"the payment of wages provisions of those instruments are predominately in the terms of clause 31, in respect of both the frequency of payment and payment for periods in which employees are kept waiting for their wages."*⁵ He further observed that,

"[46] It should be noted that modern awards have been made with regard to pre-modern awards and award-based transitional instruments previously governing the relevant industry. It follows that reliance on provisions in other awards, determined in the particular circumstances of the relevant industry, are of limited assistance. In this regard, the provision for and high incidence of daily hire employment within the building and construction industry provided a context in which the payment of wages provisions in pre-existing instruments and the 2010 Modern Award were determined. In this context, it may be noted that the Stage 2 award modernisation Full Bench invited interested parties to address it on the continuing role of the unusual daily hire mode of employment in the building and construction industry. Those parties who addressed the issue strongly supported the retention of the daily hire mode of employment within the industry, given it remained a form of employment traditionally used in the industry and in light of the project-based nature of the work."

21. SDP Watson then went on to say that,

*"I am not satisfied that making a determination varying the 2010 Modern Award generally, as sought by the applicant or its supporters, is necessary to achieve the modern awards objective. I am, however satisfied that a variation permitting employers, who were availing themselves of a longer frequency of payment permitted by a relevant award or award-based transitional instrument applying to them immediately before the making of the 2010 Modern Award, to continue to do so is necessary to achieve the modern awards objective."*⁶

⁵ Ibid at [38]

⁶ Ibid at [50]

22. In contrast to that decision, there is no evidence in the current matter that any of the pre-modern awards and award-based transitional instruments previously governing the building and construction industry (or industry for that matter) had any different provisions for the payment of wages on termination than that found in clause 31.4 of the *Building and Construction General On-site Award 2010*.
23. We would further direct the Full Bench to the decision in regard to the 2012 Award Review of the Joinery and Building Trades Products Award 2010⁷. Here a Full Bench considered clause 26 of that award in the context of an application by the MBA to vary clause 26.3⁸. The Full Bench rejected the application, stating that,

“[80] We are not persuaded we should make the variations sought to clauses 11.8, 12.3 and 26.3 of the JBT Award concerning part-time employees, casuals and payment of wages. There was an insufficient evidentiary case presented in support of the submissions made for the variations. We are unable to conclude that such variations are warranted on the bases that the JBT Award is not achieving the “modern awards objective” or is operating other than “effectively, without anomalies or technical problems arising from the Part 10A award modernisation process” because of the extant clauses 11.8, 12.3 and 26.3 in the JBT.”

24. Similarly in these proceedings there is insufficient evidence (in fact, there is no evidence) to conclude that the award provisions at issue are not meeting the modern awards objective.
25. The final point we would make here is that paragraphs 9 to 14 above support why the existing award provisions meet the modern awards objective particularly in regard to the needs of the low paid.

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).

26. The CFMEU C&G is opposed to the provisional default term. The default term, so far as it concerns notice in lieu of termination, would contravene s 55(1) of the FW Act and by s 56 have no effect. It ought not be inserted into any Modern Award for that reason alone. We have generally dealt with s.117(2)(b) in our 14th October 2016 submission.
27. We suggest that in the event the Commission is ultimately minded, contrary to our submissions, to introduce a term akin to the one proposed, that such term provide an exception to the effect

⁷ [2013] FWCFB 3751

⁸ See paragraphs [37] to [42]

that the award provision does not override or detract from the obligations prescribed s.117(2)(b) of the FW Act.
