



6 October 2017

The Hon. Justice Ross
President
Fair Work Commission
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Dear President Ross,

AM2016/8 – Four-yearly review of modern awards – payment of wages

I write with respect to the above matter pursuant to the directions of the Fair Work Commission issued 19 September 2017.

Payment of wages and other amounts

NRA has particular concern with the model ‘payment of wages and other amounts’ clause set out at paragraph [34] of the decision of the Full Bench made 1 December 2016 ([2016] FWCFB 8463) with respect to the *General Retail Industry Award 2010*, the *Fast Food Industry Award 2010* and the *Restaurant Industry Award 2010* (the **modern awards**).

‘Pay day’ without legal obligation

NRA has concern that the requirement to specify a ‘pay day’ per X.1(c) has capacity to generate confusion and uncertainty for employers and employees alike when coupled with the obligations imposed by clause X.1(a), thereby causing greater scope for disputes between employers and employees.

The term ‘pay day’ is not defined, and would therefore take on its ordinary natural meaning as ‘the day on which a person is paid’. As such, it is natural to assume that a legal obligation is imposed on the employer to make payment on that day specified as the ‘pay day’.

However, under the terms of clause X.1(a), the actual obligation on employers to make payments are entirely unrelated to the concept of a ‘pay day’.

Although clause X.1(a) does not require that payment be made on the ‘pay day’, failure to do so is likely to cause disruption to the relationship between the employer and the employee, even if the employer has complied with all obligations under that clause. Consequently, we consider that the inclusion of the term ‘pay day’ in clause X.1(c) operates only to obfuscate the actual rights and obligations of employers and employees.

Whilst we acknowledge the need for employees have a measure of certainty as to when they will receive their pay there are multiple factors, such as illness of payroll staff or delays by third parties such as banks, which may prevent an employer from making payment on a specified 'pay day' through no fault of the employer.

NRA therefore substantially concurs with the comments made by AI Group in their submissions dated 23 December 2016 at paragraphs 22 – 33 with respect to clause X.1(c).

However, NRA considers that the interests of certainty for employees and flexibility for employers is best served by omitting the words "pay day and" from clause X.1(c).

Redundancy of regulation

As a matter of streamlining the modern awards, NRA notes that the contents of clause X.2 of the model clause reiterates the contents of s 323(2) of the *Fair Work Act 2009*, save for the exclusion of money orders, postal orders and similar orders by operation of s 323(3).

It is the experience of NRA and its members in the retail and fast food sectors that money orders, postal orders and their ilk are not used for the purposes of paying wages.

As such NRA questions whether the inclusion of clause X.2 engenders any particular efficiency in the administration of rights and obligations under the modern awards, and thereby whether its inclusion in the modern awards achieves the objective of being a 'simple, easy to understand' system of modern awards.

As such, we suggest that clause X.2 be removed.

Payment of termination of employment

NRA also has concerns with the proposed 'payment on termination of employment' model term, in particular the contents of Note 1.

Note 1 of the model term provides:

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

Our concern is with the apparent emphasis placed on the expression "has paid" by the use of quotation marks.

This apparent emphasis on the expression "has paid" would tend towards giving these words greater emphasis in the model provision than is given to them under the *Fair Work Act 2009*.



The apparent emphasis on the expression “has paid” appears to indicate that an employee’s employment cannot end until all entitlements have been paid.

NRA has concern that this may lead to confusion where the question of when a dismissal took effect is a point of contention in matters before the Fair Work Commission, such as in applications for an unfair dismissal remedy under s 394.

Historically, the Fair Work Commission has attached very little relevance to the date on which an employee received their termination entitlements when determining when a dismissal took effect (the authorities summarized in *Ayub v NSW Trains* [2016] FWCFB 5500). The key factor in this regard is rather the date unequivocally communicated by the employer to the employee as the date on which the dismissal will take effect.

In this regard, the authorities take into account the practical reality that where an employee is dismissed, and payment is to be made in lieu of notice, such dismissal generally ‘takes effect’ immediately, and any necessary payments are processed thereafter.

NRA notes that this question was considered by the Full Bench of the Fair Work Commission in *Metropolitan Fire and Emergency Services Board v Duggan* [2017] FWCFB 4878 (22 September 2017). The Full Bench held that the requirements under s 117(2) and s 383(a) are separate and distinct requirements, with a failure to comply with s 117(2) (for example) not invalidating a notice of dismissal under s 383(a), although it may give rise to a separate and distinct cause of action.

The additional emphasis placed on the past-tense expression “has paid” would seem to indicate that notwithstanding a dismissal ‘taking effect’ within the meaning of the authorities, the employment relationship is in fact ongoing until the employee has received their final pay in lieu of notice. This therefore raises the question whether a dismissal has ‘taken effect’ if those entitlements are not yet ‘paid’.

This may therefore have a negative impact on the ability of employers and employees to fully understand their rights, entitlements, and obligations under relevant laws, including but not limited to when the time limit for making an unfair dismissal claim expires.

In an effort to avoid any confusion this may cause, NRA suggests that the quotation marks encompassing the expression “has paid” in Note 1 be removed.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Dominique Lamb', written in a cursive style.

Dominique Lamb
Chief Executive Officer
National Retail Association