

IN THE FAIR WORK COMMISSION

Matter No: AM2016/8

s156 – 4 yearly review of modern awards

Payment of wages on termination

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia reply submissions

Introduction

1. On 23 August 2019, the Full Bench issued a Decision¹ regarding payments on termination of employment. Paragraphs [15] to [19] of the Decision summarised applications to vary 17 modern awards to insert the payment of wages on termination of employment model term (**model term**).
2. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) has an interest in several of the 17 modern awards referred to in paragraph [15] of the Decision. These include (but are not limited to):
 - a. Black Coal Mining Industry Award 2010;
 - b. Building and Construction General On-site Award 2010;
 - c. Electrical, Electronic and Communications Contracting Award 2010;
 - d. Manufacturing and Associated Industries and Occupations Award 2010;
 - e. Plumbing and Fire Sprinklers Award 2010; and
 - f. Business Equipment Award 2010.
3. Australian Business Industrial and NSW Business Chamber (**ABI**) filed submissions² seeking to vary the following modern awards to insert the model term:
 - a. Business Equipment Award 2010;
 - b. Plumbing and Fire Sprinklers Award 2010;
 - c. Manufacturing and Associated Industries and Occupations Award 2010.
4. Australian Industry Group (**Ai Group**) filed submissions³ seeking to vary the following modern awards to insert the model term:

¹ [2019] FWCFB 5868.

² <https://www.fwc.gov.au/sites/awardsmodernfouryr/am20168-sub-abinswbc-210819.pdf>

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20168-sub-aig-210819.pdf>

- a. Black Coal Mining Industry Award 2010;
 - b. Building and Construction General On-Site Award 2010;
 - c. Business Equipment Award 2010;
 - d. Electrical, Electronic and Communications Contracting Award 2010;
 - e. Manufacturing and Associated Industries and Occupations Award 2010; and
 - f. Plumbing and Fire Sprinklers Award 2010.
5. Housing Industry Association (**HIA**) filed submissions⁴ in support of Ai Group’s application to insert the model term into the Building and Construction General On-Site Award 2010.
 6. ABI, HIA and Ai Group (**employer groups**) were provided the opportunity to adduce evidence in relation to their respective applications by 21 August 2019. The CEPU notes that the employer groups did not file any evidence to accompany their respective submissions.
 7. The CEPU’s submissions are limited to the following modern awards to be varied:
 - a. Electrical, Electronic and Communications Contracting Award 2010; and
 - b. Business Equipment Award 2010.(collectively, **the relevant modern awards**)

Summary of Employers’ submissions

8. The employer group’s submissions comprise similar arguments to justify the insertion of the model term into the relevant modern awards.
9. Ai Group’s submission relies on the following arguments in support of its application:
 - a. the Commission’s prior consideration of the relevant issues;
 - b. the alleged unfairness to employers due to some awards providing a “limited period of time” for “potentially significant sums of money”;
 - c. the alleged unfairness to employers due to “additional costs incurred and regulatory burden”;
 - d. the alleged unfairness to employers in circumstances where an employee resigns without providing notice;
 - e. the alleged unfairness to employees as the modern awards does not regulate payment of amounts other than wages;

⁴ <https://www.fwc.gov.au/sites/awardsmodernfouryr/am20168-sub-hia-210819.pdf>

- f. the modern awards’ relevant provisions currently do not appropriately balance the interests of the employees and employer;
- g. the modern awards’ relevant provisions do not reflect a relevant safety net;
- h. if the model clause is not inserted into the modern awards, they would become “out of step with the 86 awards that have been varied to include the model clause”;
- i. concerns regarding the limitation of cash payments sent via post;
- j. that the variation would enhance the needs of the low paid;
- k. that the variation sought would not undermine s134(1)(b) of the Fair Work Act 2009 (Cth) (**FW Act**);
- l. that the variation is consistent with the need to promote flexible modern work practices;
- m. that the variation proposed is consistent with the need to ensure a simple, easy to understand modern awards system; and
- n. that the variation is unlikely to have an adverse impact on employment growth, inflation or the sustainability, performance and competitiveness of the national economy.

10. Furthermore, Ai Group provides the following additional comments in respect of the relevant modern awards:

Relevant Modern Awards	Ai Group’s concern
Business Equipment Award 2010	<ul style="list-style-type: none"> • Deals only with wages • Requires payment on the day of termination • Concerns regarding payment by post • Termination without notice is unfair and will have an adverse impact on the business⁵
Electrical, Electronic and Communications Contracting Award 2010	<ul style="list-style-type: none"> • Deals only with wages • Requires payment on the day of termination • Concerns regarding payment by post • Termination without notice is unfair and will have an adverse impact on the business (same as Business Equipment Award 2010)⁶

11. Paragraph [4.4] of ABI’s submission provides the following reasons as to why the modern awards are “impractical and inconsistent with the modern awards objective”:

⁵ See [42]-[43] Ibid.

⁶ See [44][45] Ibid.

- a. the growth in EFT transactions has changed the way employees receive termination payments;
 - b. the provisions in the proposed award currently apply to all terminations including those which arise summarily;
 - c. employers can have difficulty promptly obtaining wage information to process payments instantly;
 - d. employers sometimes need time to make funds available for payment; and
 - e. processing termination manually imposes time and administrative cost on employers.
12. The HIA submission also illustrate similar concerns raised by Ai Group and ABI in respect of the Building and Construction General On-Site Award 2010. In particular, HIA submits that the current provisions of the the Building and Construction General On-Site Award 2010 are “not fairly balanced”, there are “impracticalities and inherent difficulties in providing termination payments” with short notice and that it attracts “additional costs to business”.
13. None of the employer groups filed or relied on any evidence to support their claims to insert the model term in the relevant modern awards.

The applications should be dismissed

14. In the 17 July 2019 decision in respect of the finalisation of payment on termination model term, the Full Bench stated ⁷:

[...]

The review of the remaining 36 modern awards will proceed on an award by award basis and any variation will have to be justified on its merits. We do not think it appropriate to proceed from the prima facie position that existing provisions in respect of payments on termination should be replaced by the model term.

15. The CEPU submits that the applications to insert the model term into the relevant modern awards should be dismissed as the submissions by the employer group’s

⁷ <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb3566.htm> [2018] FWCFB 3566 at [156].

provide no evidence in support of their applications and the Commission cannot be satisfied there is merit to the applications.

16. The first major issue raised throughout the employer group's submissions is the claim that the current provisions of the relevant modern awards impose additional cost and regulatory burden on employers who are to make a payment of wages. The employer groups have not provided any witness statements, data or examples quantifying the cost. The employer groups have not provided evidence from employers subjected to these alleged "additional costs" or what "regulatory burden" is imposed on these impacted employers in the relevant industries.
17. The second major issue raised in the employer groups submissions is the concern of payment of wages being required on the day of termination. Again, the employer groups have failed to provide evidence or quantify the difficulty for an employer to pay an employee's wages on the termination day in the relevant industries. The CEPU notes that the current provisions of the relevant modern awards contemplate only payment of wages and does not contemplate other entitlements.
18. The employer groups have not provided any evidence of employers not being able to make the payment of wages within the timeframe in the relevant industries (i.e. data on breaches/failure to pay wages on termination under the relevant modern awards).
19. The third major issue is payments of cash made by post. Specifically, Ai Group raised concerns about the limitation on the amount of cash that can be made via post.⁸ The CEPU notes that the relevant modern awards all contemplate other methods such as providing a cheque or bank transfer.⁹ Therefore, any amounts exceeding \$200¹⁰ can be paid via an alternate method, as cited in the relevant modern awards. The employer groups have not provided evidence to justify why cash payment via post is unfair to the employer particularly where there are other methods available for the employer. The employer group's argument about the growth of EFT transactions contradicts their argument about it being difficult to make a payment of wages on the day of termination, as this technological advancement has enabled payroll activities to be conducted instantaneously.

⁸ See [27]-[29] Ai Group's submission.

⁹ See clause 25.1 of the Business Equipment Award 2010 & clause 22.2 of the Electrical, Electronic and Communications Contracting Award 2010.

¹⁰ Ai Group's position is that cash exceeding \$200 in value cannot be sent by post. See [27] of Ai Groups submissions.

20. The fourth major issue raised by the employer groups is that a “termination without notice is unfair and will have an adverse impact on the business”. Again, the employer groups have not provided evidence regarding the “adverse impact on the business” in the relevant industries. The employer groups submissions do not demonstrate how it is “unfair” for the payment of an employee’s wages to occur on the day of termination, especially given the employer’s comments about the growth in EFT transaction, which should further assist the employer to make that payment of wages on termination easier.

Conclusion

21. Based on the above, the CEPU submits that the Commission cannot be satisfied that the employer groups have provided sufficient merit-based arguments to insert the model term into the relevant modern awards. Accordingly, the applications ought to be dismissed.

25 September 2019