



IN THE FAIR WORK COMMISSION

Matter no: AM2016/8

Four Yearly Review of Modern Awards – Payment Of Wages

**SUBMISSIONS IN REPLY OF THE HEALTH SERVICES UNION
17 APRIL 2020**

1. The Health Services Union (**HSU**) makes these submissions in response to the applications by the Australian Industry Group (**AIG**) and Australian Business Industrial and New South Wales Business Chamber (**ABI**) to replace the payment of wages on termination clauses in the *Aged Care Award 2010* (**Aged Care Award**) and the *Supported Employment Services Award 2010* (**SES Award**) with the Fair Work Commission's payment of wages model term ('the model term').
2. The model term is set out in Decision [2019] FWCFB 5146 and provides as follows:
 - X. Payment on termination of employment*
 - (a) *The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:*
 - (i) *the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and*
 - (ii) *all other amounts that are due to the employee under this award and the NES.*
 - (b) *The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.*

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.

Note 2: Paragraph (b) allows the Commission to make an order delaying the requirement to make a payment under clause X. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

Note 3: State and Territory long service leave laws or long service leave entitlements under s.113 of the Act, may require an employer to pay an

employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

3. The HSU opposes the variations proposed by ABI and AIG. We deal with each award below.

Supported Employment Services Award

4. The HSU strongly opposes ABI's application to insert the model term in the *Supported Employment Services Award*.
5. As stated in our previous submissions of 7 September 2018, the payment of wages clause in this award is unique amongst the other modern awards, providing for immediate payment for all wages and other remuneration due on termination of employment. It provides, at 18.4, as follows:

Where an employee is discharged from employment the employee will be paid immediately for all wages, overtime, pro rata payment for annual leave, annual leave loading or any remuneration due. Payment may be made by cash, cheque or electronic funds transfer at the discretion of the employer.

6. It is uncontroversial that this award covers vulnerable employees, particularly many employees with intellectual disabilities. Additionally, most of these employees are low paid, as they are paid a supported wage in accordance with a wage assessment tool, at rates below the standard minimum wage. The current term is appropriate in these unique circumstances.
7. While ABI has included this award in its application and in its list of awards in paragraph 4.3 of its submissions of 21 August 2019, it has not addressed this award specifically. ABI has made no attempt to outline the reasons that the model clause is appropriate to the unique nature of supported employment services and in view of the vulnerability of employees covered by the award.
8. Moreover, the model term would represent a significant decrease in entitlements for employees covered by the award. In addition to the requirement that payment is to be made '*immediately*', the current term also requires payment of '*any remuneration due*'. By contrast, the model term provides for payment only of wages and other amounts due under the award and the NES to be paid on termination. This issue has not been addressed in ABI's submission.
9. For these reasons the ABI submission to vary the SES Award does not meet the modern awards objective to provide a fair and relevant safety net of terms and conditions for employees covered by the SES Award, and should be rejected.

Aged Care Award

10. ABI and AIG submit that the current payment on termination clause in the Aged Care Award should be replaced by the model term.
11. The current payment on termination clause, at clause 17.3 in the Aged Care Award provides as follows:

When notice of termination of employment has been given by an employee or an employee's services have been terminated by an employer, payment of all wages and other moneys owing to an employee will be made to the employee by no later than the last day of the formal notice period.

12. As indicated in our earlier submission dated 7 September 2018, the HSU's view is that the current term provides greater entitlements than the model term, and should therefore be retained. The current term requires payment of '*all wages and other moneys owing*' be made on termination. By contrast, the model term provides for payment only of wages and other amounts due under the award and the NES to be paid on termination.
13. The model term would therefore represent a substantial diminution in entitlements for employees. Neither ABI nor AIG provide any reasons or evidence in their submissions to justify this diminution in entitlement for aged care employees.
14. Additionally, neither ABI nor AIG have provided any substantive reasons as to why the current clause in the Aged Care Award in particular presents any practical difficulties. As AIG observes, the current Aged Care Award clause only applies where the employee's employment is terminated with notice, so arguments about unfairness of the clause to the employer hold little force.¹
15. The HSU acknowledges that the Aged Care Award is silent on the issue of how the current term operates in cases of summary dismissal and in cases of payment in lieu. We would therefore support inserting a limited variation of the current clause, reflecting the timing of payment in the model term, by adding the following paragraph to clause 17.3:

In all other circumstances, the employer must pay an employee no later than 7 days after the day on which the employee's employment terminates all wages and other moneys owing to an employee.

16. We have set out the above variation in the draft determination below.

Health Services Union

17 April 2020

¹ AIG Submission, 21 August 2019, 10.

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

Aged Care Award

(MA000018)

4 yearly review of modern awards – Payment of Wages

(AM2016/8)

JUSTICE ROSS, PRESIDENT

DEPUTY PRESIDENT GOSTENCNIK

DEPUTY PRESIDENT CLANCY

COMMISSIONER LEE

COMMISSIONER HUNT

SYDNEY, XX YYY 2020

4 yearly review of modern awards – payment of wages common issue – payment on termination – Aged Care Award 2010.

- [1] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2) (b) (i) of the *Fair Work Act 2009*, that the *Aged Care Award 2010* be varied as follows.
- [2] By deleting clause 17.3 and inserting in lieu:

When notice of termination of employment has been given by an employee or an employee's services have been terminated by an employer, payment of all wages and other moneys owing to an employee will be made to the employee by no later than the last day of the formal notice period.

In all other circumstances, the employer must pay an employee no later than 7 days after the day on which the employee's employment terminates all wages and other moneys owing to an employee.

B. This determination comes into operation from [insert date]. In accordance with s.165(3)

of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after [insert date].

PRESIDENT