

IN THE FAIR WORK COMMISSION

Matter No: AM2016/8

Section 156 - Four yearly review of modern awards – Payment of wages

SUBMISSION IN REPLY

UNITED VOICE

INTRODUCTION

1. This submission is made pursuant to the direction of the Full Bench in *AM2016/8 – Payment of Wages* of 15 August 2016.
2. This submission is in reply to a number of claims made by parties in the *Payment of Wages* common issue.
3. Additionally, this submission addresses the questions posed by the Fair Work Commission in the Statement of 8 September 2016 ([2016] FWCFB 6401) and the 25 draft determinations issued along with that statement.
4. Professor Andrew Steward has observed;

*When an employment relationship ends, the employee must be paid any wages or other remuneration still owing to them, together with any additional payment that is being made in lieu of notice.*¹

PAYMENT OF WAGES ON TERMINATION – CLAIMS MADE BY AUSTRALIAN BUSINESS INDUSTRIAL AND AUSTRALIAN INDUSTRY GROUP

5. Australian Industry Group ('AIG') and Australian Business Industrial ('ABI') (collectively 'the Applicants') have made claims concerning the timing of termination payments.
6. On 19 July 2016, AIG filed draft determinations for the following awards that United Voice has an interest in:
 - a. *Food, Beverage and Tobacco Manufacturing Award 2010* ('FBT Award');
 - b. *Manufacturing and Associated Industries and Occupations Award 2010* ('Manufacturing Award'); and
 - c. *Wine Industry Award 2010* ('Wine Award').
7. ABI has made similar claims to AIG in the awards listed above, with the addition of the *Support Employment Services Award 2010* ('SES Award') (collectively: 'the Awards'). ABI supports the draft determinations filed by AIG in the awards identified at paragraph 5. ABI

¹ *Employment Law*, third edition, Federation Press, p 299.

filed a draft determination with respect to the *SES Award* (collectively ‘*the termination payment variations*’) on 19 July 2016.

8. Broadly, the ABI and AIG are seeking to vary the Awards so that where the employee is paid by Electronic Funds Transfer (‘EFT’) the wages due to employees upon termination of employment may be paid in accordance with the usual pay cycle. This may mean that an employee’s termination entitlements are not paid concurrently with the termination and may be paid up to a month after the end of the employment relationship.
9. The termination payment variations can be characterised as matters that will provide an unwarranted financial advantage to employers at the expense of employees and are inconsistent with the modern awards objective.

United Voice’s response

10. United Voice opposes the employer group’s applications for the reasons set out below.

The employers have not advanced cogent reasons or probative evidence in support of the claim

11. The proper approach to the review has been dealt with by United Voice elsewhere in the four yearly review of modern awards.² For the sake of brevity, United Voice will not repeat those submissions here.
12. The proposed variations are substantive changes to the Awards. They would significantly change the obligations of employers in relation to the payment of termination entitlements.
13. The Commission should proceed on the basis that, prima facie, the modern award being reviewed achieved the modern awards objective at the time that it was made.³ Generally, the Applicants have not advanced a case sufficient to overturn this assumption.
14. The Applicants have not provided evidence to show that there is some practical problem with the payment of termination entitlements that necessitates the changes that are being sought. AIG has provided no evidence in support of its claim. ABI rely on a single witness statement that relates to a single employer, whose operations are almost entirely in the manufacturing industry. There is no attempt to demonstrate that the termination payment variations are necessary in the context of the industry specific conditions of the other awards.

² United Voice submission dated 21 March 2016, [17]-[53]; United Voice submission dated 22 February 2016, [12]-[16]

³ *Re Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFCB 1788, (2014) 241 IR 189 (*Jurisdictional Issues Decision*), [24].

The Applicants' claims are not necessary to achieve the modern awards objective in any award

15. There is no basis for the Applicants' submission that the proposed variations are necessary to achieve the modern awards objective.
16. The Applicants have only shown that there are minor administrative inconveniences and costs associated with paying monies owed on termination. There is little evidence before the Commission that demonstrates that the provisions impose additional employment costs or create an additional regulatory burden of any significance.
17. The advances in information technology over the past decade support the inference that it is easier and cheaper to make payments quickly than at any time in the past. ABI's own witness has estimated that the time to process a termination payment is only 30 minutes to an hour and the cost of making the EFT payment 'out of cycle' is around \$10.50.⁴ This cannot be described as onerous.
18. Were the Applicant's claim to be accepted, the employers would receive a cash flow and liquidity advantage at the expense of the terminated employee who should hold that cash. It is submitted that this is the real reason for the application rather than the stated reason.
19. It is inaccurate to describe the cost and the administrative task of processing a termination payment as unfair. The prompt payment of termination entitlements is necessarily an obligation of the employer.
20. Further, the Applicants have given no reasons as to why the expense to an employer associated with an out of cycle payment should outweigh the considerable hardship that these proposed variations may cause for employees. If the variations are made, delays in payment of termination entitlements could be quite lengthy, given that many employers pay on a monthly basis. The impacts on the employee may be more substantial.
21. The obligation to make termination payments on the date of termination or immediately thereafter is consistent with the practical and legal fact that the termination date signifies the end of the employment relationship. The employee may be unemployed and require the final remuneration for immediate living expenses. The more time passes after the date of termination, the harder it will become to resolve disputes without recourse to legal action.
22. Many terminations are acrimonious. Providing employers with the ability to delay the payment of entitlements may contribute to additional conflict.
23. The proposed variations will have no effect on flexibility or efficient work practices because they concern the payment of entitlements once the employment relationship has ended. The variations therefore cannot have any effect on the flexibility of employment practices as there is a real sense in which they concern matters outside the employment relationship at least in time.

⁴ See the Statement of Scott Farquharson, dated 16 September 2016, filed in these proceedings, [12].

24. Finally, while only a minority of modern awards include terms requiring payment of monies owed on termination on the date of termination, this is not a reason in of itself to make the variations. Subsection 156 (5) provides that in a review each modern award is reviewed ‘*in its own right*’. Different combinations or permutations of provisions may meet the modern awards objective.⁵

The proposed variations are more properly matters that can be resolved through bargaining

25. The employers’ apparent objective is more properly a matter for enterprise bargaining. No evidence has been presented of any award-based impediment to enterprise bargaining. It has led no evidence as to why it cannot achieve the results it seeks through enterprise bargaining.

26. In fact, the evidence before the Commission shows that employers covered by the Awards engage in enterprise bargaining and have been able to address any issues they may have through bargaining.

27. ABI’s witness, Scott Farquharson, is the payroll manager of CSR Ltd. CSR Ltd is a manufacturer of building products and has negotiated a number of enterprise agreements with a number of unions. United Voice and CSR Ltd are covered by a number of enterprise agreements.

28. The most recently approved agreements which cover United Voice and CSR Ltd are:

- the *CSR Bradford Dandenong Agreement 2014* (‘the *Dandenong Agreement*’);
- the *CSR Bradford Insulation Ingleburn Agreement 2013* (‘the *Ingleburn Agreement*’); and
- the *CSR Limited Welshpool WA Enterprise Bargaining Agreement 2016* (‘the *Welshpool Agreement*’).

29. It would appear that for CSR Ltd at least, bargaining is the norm and it has been able to tailor payment provisions to their specific workplaces.⁶ CSR Ltd has even adopted more rigid payment of wages clauses than those in the *Manufacturing Award* in some cases,⁷ suggesting that the problems identified by the Applicants are not as pressing as the termination payment variations would suggest.

⁵ *Four Yearly Review of Modern Awards—Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at para. 31 citing *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153 and *Australian Competition and Consumer Commission v Leelee Pty Ltd* [2000] ATPR 41-742 and *Edwards v Giudice* (1999) 94 FCR 561.

⁶ *Dandenong Agreement*, appendix B3.2; *Welshpool Agreement*, cl 16.2.

⁷ *Ingleburn Agreement*, clause 7 (c).

THE COMMISSIONS QUESTIONS FROM THE STATEMENT OF 8 SEPTEMBER 2016

30. In the Statement of 8 September 2016 the Fair Work Commission posed several questions regarding provisions for the payment of wages upon termination in the following awards that United Voice has an interest in:

- a. clause 17.3 (a) of the *Aged Care Award 2010* (***'Aged Care Award'***),
- b. clause 19.3 (a) of the *Children's Services Award 2010* (***'Children's Services Award'***), and
- c. clause 19.3 (a) of the *Dry Cleaning and Laundry Industry Award 2010* (***'Dry Cleaning Award'***).

31. For the reasons set out at paragraphs [8] to [25] of these submissions, the Commission should not make the variations regarding the timing of payment of monies owed on termination proposed in the 25 draft determinations attached to the 8 September Statement.

32. In relation to the *Aged Care Award* and the *Dry Cleaning Award* we agree that the provision for termination monies are to be paid by '*no later than the last day of the formal notice period*' may lead to confusion. We also agree that the award should specify a definite period. We propose that any termination monies should be paid on the date of termination. This wording would clarify the operation of the clause without changing the entitlement.

33. In relation to the *Children's Services Award*, we do not believe that the Award needs variation. Clause 19.3 of the *Children's Services Award* provides:

19.3 Where an employee lawfully leaves their employment they will be paid all moneys due at the time of leaving by cash, cheque or electronic funds transfer. Alternatively, the employee may be paid on the next working day where this is reasonable.

34. In practice, this clause is only used where an employee terminates their own employment without giving the requisite notice and otherwise reflects the position that termination entitlements are paid on termination.

REMOVAL OF PENALTY FOR LATE PAYMENT OF WAGES

35. On 19 July 2016, ABI filed a number of draft determination seeking the deletion of late payment of wages penalties in the following modern awards that United Voice has an interest in (***'the late payment penalty claims'***):

- a. the *Cleaning Services Award 2010* (***'Cleaning Award'***);

- b. the *Hospitality Industry (General) Award 2010* (**'Hospitality Award'**);
 - c. the *Registered and Licensed Clubs Award 2010* (**'Clubs Award'**); and
 - d. the *SES Award*.
36. The Australian Hotels Association (**'AHA'**) support's ABI's claims regarding the *Hospitality Award*.
37. United Voice does not support these changes to the awards described above and notes that an appropriate evidential and merit argument should be advanced in support of the variation sought.

ANNUAL LEAVE LOADING IN THE FBT AWARD

38. United Voice supports AIG's proposed variation to the annual leave loading clause of the *FBT Award*.

United Voice

13 October 2016