



# DETERMINATION

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

## **4 yearly review of modern awards—plain language re-drafting—standard clauses**

(AM2016/15)

### **EDUCATIONAL SERVICES (TEACHERS) AWARD 2010**

[MA000077]

Educational services

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT HATCHER  
COMMISSIONER HUNT

SYDNEY, 17 OCTOBER 2019

*4 yearly review of modern awards – plain language re-drafting – standard clauses – Educational Services (Teachers) Award 2010.*

A. Further to the Full Bench decision [\[\[2019\] FWCFB 6858\]](#),<sup>1</sup> issued by the Fair Work Commission on 9 October 2019, the above award is varied as follows:

1. By deleting clause 7—Award flexibility and inserting the following:

#### **7. Individual flexibility arrangements**

**7.1** Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer:

- (a) arrangements for when work is performed; or
- (b) overtime rates; or
- (c) penalty rates; or
- (d) allowances; or
- (e) annual leave loading.

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<sup>1</sup> See also [\[2019\] FWCFB 5409](#), [\[2018\] FWCFB 7447](#), [\[2018\] FWCFB 4704](#), [\[2018\] FWCFB 4177](#), [\[2018\] FWCFB 3009](#), [\[2017\] FWCFB 5258](#), [\[2017\] FWCFB 4419](#)

- 7.2** An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.
- 7.3** An agreement may only be made after the individual employee has commenced employment with the employer.
- 7.4** An employer who wishes to initiate the making of an agreement must:
- (a)** give the employee a written proposal; and
  - (b)** if the employer is aware that the employee has, or reasonably should be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.
- 7.5** An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.
- 7.6** An agreement must do all of the following:
- (a)** state the names of the employer and the employee; and
  - (b)** identify the award term, or award terms, the application of which is to be varied; and
  - (c)** set out how the application of the award term, or each award term, is varied; and
  - (d)** set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and
  - (e)** state the date the agreement is to start.
- 7.7** An agreement must be:
- (a)** in writing; and
  - (b)** signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.
- 7.8** Except as provided in clause 7.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.
- 7.9** The employer must keep the agreement as a time and wages record and give a copy to the employee.
- 7.10** The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

**7.11** An agreement may be terminated:

- (a) at any time, by written agreement between the employer and the employee; or
- (b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the [Act](#)).

**7.12** An agreement terminated as mentioned in clause 7.11(b) ceases to have effect at the end of the period of notice required under that clause.

**7.13** The right to make an agreement under clause 7 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

2. By deleting clause 8—Consultation and inserting the following:

## **8. Consultation about major workplace change**

**8.1** If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

- (a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and
- (b) discuss with affected employees and their representatives (if any):
  - (i) the introduction of the changes; and
  - (ii) their likely effect on employees; and
  - (iii) measures to avoid or reduce the adverse effects of the changes on employees; and
- (c) commence discussions as soon as practicable after a definite decision has been made.

**8.2** For the purposes of the discussion under clause 8.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

- (a) their nature; and

- (b) their expected effect on employees; and
- (c) any other matters likely to affect employees.

**8.3** Clause 8.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

**8.4** The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 8.1(b).

**8.5** In clause 8:

**significant effects**, on employees, includes any of the following:

- (a) termination of employment; or
- (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
- (c) loss of, or reduction in, job or promotion opportunities; or
- (d) loss of, or reduction in, job tenure; or
- (e) alteration of hours of work; or
- (f) the need for employees to be retrained or transferred to other work or locations;  
or
- (g) job restructuring.

**8.6** Where this award makes provision for alteration of any of the matters defined at clause 8.5, such alteration is taken not to have significant effect.

3. By inserting clause 8A as follows:

**8A. Consultation about changes to rosters or hours of work**

**8A.1** Clause 8A applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.

**8A.2** The employer must consult with any employees affected by the proposed change and their representatives (if any).

**8A.3** For the purpose of the consultation, the employer must:

- (a) provide to the employees and representatives mentioned in clause 8A.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and

- (b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.

**8A.4** The employer must consider any views given under clause 8A.3(b).

**8A.5** Clause 8A is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.

4. By deleting clause 9 and inserting the following:

## **9. Dispute resolution**

**9.1** Clause 9 sets out the procedures to be followed if a dispute arises about a matter under this award or in relation to the [NES](#).

**9.2** The parties to the dispute must first try to resolve the dispute at the workplace through discussion between the employee or employees concerned and the relevant supervisor.

**9.3** If the dispute is not resolved through discussion as mentioned in clause 9.2, the parties to the dispute must then try to resolve it in a timely manner at the workplace through discussion between the employee or employees concerned and more senior levels of management, as appropriate.

**9.4** If the dispute is unable to be resolved at the workplace and all appropriate steps have been taken under clauses 9.2 and 9.3, a party to the dispute may refer it to the Fair Work Commission.

**9.5** The parties may agree on the process to be followed by the Fair Work Commission in dealing with the dispute, including mediation, conciliation and consent arbitration.

**9.6** If the dispute remains unresolved, the Fair Work Commission may use any method of dispute resolution that it is permitted by the [Act](#) to use and that it considers appropriate for resolving the dispute.

**9.7** A party to the dispute may appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 9.

**9.8** While procedures are being followed under clause 9 in relation to a dispute:

- (a) work must continue in accordance with this award and the [Act](#); and
- (b) an employee must not unreasonably fail to comply with any direction given by the employer about performing work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

**9.9** Clause 9.8 is subject to any applicable work health and safety legislation.

5. By deleting clause 11 and inserting the following:

## **11. Termination of employment**

NOTE: Sections 117 and 123 of the [Act](#) set out requirements for notice of termination by an employer under the [NES](#). Clauses 11.1 and 11.2 require an employer to give a greater minimum period of notice than that generally required under the [NES](#).

### **11.1 Notice of termination by an employer—schools**

- (a) Clause 11.1 applies to an employee employed in a school.
- (b) Subject to clause 12.4, the employment of an employee (other than a casual employee) will not be terminated without at least 7 term weeks' notice (inclusive of the notice required under the [NES](#)), the payment of 7 weeks' salary instead of notice, or part notice and part payment instead of notice provided that the total weeks' notice and weeks' payment instead equal 7.

### **11.2 Notice of termination by an employer—other than schools**

- (a) Clause 11.2 applies to an employee who is not employed in a school.
- (b) The employment of an employee (other than a casual employee) will not be terminated without at least 4 weeks' notice (inclusive of the notice required under the [NES](#)), or 4 preschool term weeks in the case of a preschool employee, or the payment of 4 weeks' salary instead of notice. If the employee is over 45 years of age and has completed at least 2 years of service, the [NES](#) notice period will apply.

### **11.3 Notice of termination by an employee**

- (a) The notice of termination required to be given by an employee is the same as that required of the employee's employer under clause 11.1 or 11.2.
- (b) If an employee does not give the period of notice required under paragraph (a), then the employer may deduct from wages due to the employee under this award an amount that is no more than two weeks' wages for the employee.
- (a) If the employer has agreed to a shorter period of notice than that required under paragraph (a), then no deduction can be made under paragraph (b).
- (b) Any deduction under paragraph (b) must not be unreasonable in the circumstances.

### **11.4 Job search entitlement**

Where an employer has given notice of termination to an employee, the employee must be allowed time off without loss of pay of up to one day for the purpose of seeking other employment.

**11.5** The time off under clause 11.4 is to be taken at times that are convenient to the employee after consultation with the employer.

**11.6 Exclusions**

Employees who are excluded from coverage of the notice of termination provisions in the [NES](#) are also excluded from coverage of the notice of termination provisions in this award.

**11.7 Statement of service**

Upon the termination of employment of an employee (other than a casual employee) the employer will provide upon the request of the employee, a statement of service setting out the commencement and cessation dates of employment.

**11.8 Termination of casual employment by an employer—early childhood teachers**

- (a) Clause 11.8 applies to a casual early childhood teacher.
- (b) On termination of casual employment, the employer will indicate on the employee's service card the length of service with the employer. Upon request a casual employee will also be given a statement setting out the number of days of duty worked by the employee during the period of the engagement.

6. By deleting clause 12 and inserting the following:

**12. Redundancy**

NOTE: Redundancy pay is provided for in the [NES](#). See sections 119–123 of the [Act](#). This clause provides industry specific detail and supplements the [NES](#).

**12.1 Transfer to lower paid duties on redundancy**

- (a) Clause 12.1 applies if, because of redundancy, an employee is transferred to new duties to which a lower ordinary rate of pay applies.
- (b) The employer may:
  - (i) give the employee notice of the transfer of at least the same length as the employee would be entitled to under section 117 of the [Act](#) as if it were a notice of termination given by the employer; or
  - (ii) transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer, provided that the employer pays the employee as set out in paragraph (c).
- (c) If the employer acts as mentioned in paragraph (b)(ii), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) for the hours of work the employee

would have worked in the first role, and the ordinary rate of pay (also inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.

## **12.2 Employee leaving during redundancy notice period**

- (a) An employee given notice of termination in circumstances of redundancy may terminate their employment during the minimum period of notice prescribed by section 117(3) of the [Act](#).
- (b) The employee is entitled to receive the benefits and payments they would have received under clause 12 or under sections 119–123 of the [Act](#) had they remained in employment until the expiry of the notice.
- (c) However, the employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to be employed.

## **12.3 Job search entitlement**

- (a) Where an employer has given notice of termination to an employee in circumstances of redundancy, the employee must be allowed time off without loss of pay of up to one day each week of the minimum period of notice prescribed by section 117(3) of the [Act](#) for the purpose of seeking other employment.
- (b) If an employee is allowed time off without loss of pay of more than one day under paragraph (a), the employee must, at the request of the employer, produce proof of attendance at an interview.
- (c) A statutory declaration is sufficient for the purpose of paragraph (b).
- (d) An employee who fails to produce proof when required under paragraph (b) is not entitled to be paid for the time off.
- (e) This entitlement applies instead of clauses 11.4 and 11.5.

## **12.4 Interaction of this clause with clause 11—Termination of employment**

Where the employee's employment is terminated on the grounds of redundancy, the employee will be entitled only to the greater of:

- (a) notice of termination under clause 11.1 or 11.2; or
- (b) notice of termination and severance payments under the [NES](#).

## **12.5 Part-time employees**

If a part-time employee's hours are reduced, without their consent, by more than 25% they will be entitled to the provisions of this clause.



7. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation from 24 October 2019. 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 24 October 2019.

PRESIDENT

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