

Speaking Points to NSW Labor Lawyers
“Termination of Enterprise Agreements – The New Fair Work Battle?”
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Standing

225(1)(b)—e’ee covered by the EA

225(1)(c)—e’ee org covered by the EA

Must terminate

226 if *satisfied*

- (a) not contrary to public interest
- (b) appropriate taking into account all the circumstances including:
 - (i) Views of e’ee, e’ee org and e’er covered by agreement
 - (ii) Their circumstances and the *likely effect* termination will have on them

Date of termination

227: termination operates from the day specified in the decision to terminate

Section 206—base rate of pay

- (1) Where EA applies and award covers e’ee, base rate under EA must not be less than award
- (2) Where base rate = less than award, agreement has effect as if agreement rate were equal to award rate

Note definition of ‘base rate of pay’ under s 16:

- Rate of pay payable to e’ee for ordinary hours *not including*:
 - Loadings
 - Allowances
 - Overtime
 - Other separately identifiable amounts

Proactive use of termination

Jane McIntyre [2018] FWC 5013

- NED 30 Nov 2013
- Application brought because e’ee of the view that would be better off under applicable modern award, at least in relation to minimum engagement
- Hamberger determined would not be better off + dismissed application

Ms Hollie McAuley [2017] FWC 2978

- NED 2014
- E’ees better off under the award
- [5] support by employer, likely effect = that e’ees will be better off

Ms Simone Lennox [2018] FWC 1282

- Jurisdictional objection e’ee ceased employment after application made
- Jurisdictional objection rejected by Colman DP
- See [11]-[12] and the matter of *Menchon* [2015] FWCA 8679 at [12]-[15]:

[14] Section 225(b) of the Act states that if an enterprise agreement has passed its nominal expiry date, an employee covered by the Agreement may apply to the Commission for the termination of the Agreement. At the time of application, Ms Menchon was an employee covered by the Agreement, and therefore had the necessary standing under s.225(b) to bring the application.

[15] As the preconditions of s.225 were met at the time of application i.e. the Agreement had exceeded its nominal expiry date; the applicant Ms Menchon, was an employee at the time of application and covered by the Agreement, Ms Menchon had standing to make the application. The fact that she is no longer an employee cannot detract from the validity of the application when made. Once an application has been validly made the Commission has an obligation to determine the matter under s.226 of the Act. As Ms Menchon is no longer an employee then her views under s.226(b) are not a consideration.

In *Menchon* it was concluded that some employees would be worse off and some better off @ [65]-[70]. The agreement was not underpinned by the award and there were a number of modern award entitlements which were absent: @ [68]

Application by Badman [2013] FWC 4409

- No clarity re award coverage
- Possibility employees not heard @ [55]
- Contrary to PI that there may be disputation concerning applicable award @ [54]
- [60] instability re employment conditions likely to cause confusion and difficulty in terms of reaching a replacement agreement

Application by Grace [2014] FWC 3943

- Refused on basis that bargaining in early stages; 12 months after expiry of NED
- Informed by *Tahmoor Coal* analysis re upsetting bargaining dynamics