

# Reminder: Payments in Lieu of Notice Must Be Paid at the Time of Termination (Not Afterwards)

Australia – July 2023

All permanent employees in Australia are subject to a notice period, whether this is specified in a contract of employment, relevant modern award, enterprise agreement, or otherwise under the National Employment Standards.

The Fair Work Act 2009 (Cth) (FW Act) (often supported by a provision in the employee's employment contract) allows the employer to make a payment in lieu of the notice period rather than have the employee work throughout the notice period.

Where an employer elects to make a payment in lieu of notice, it is often the case that the employer will communicate the immediate termination of the employment, making the payment in lieu of the notice period shortly thereafter or in the employer's next pay run.

However, in the case of *Southern Migrant and Refugee Centre Inc v Shum (No3)* [2022] FCA 481 (*Shum*), the Federal Court emphasised that employers are required to make the payment to the exiting employee prior to the termination to comply with the provisions of the FW Act.

## The Decision

In *Shum*, Ms. Shum raised various allegations against her former employer, Southern Migrant and Refugee Centre Inc (SMRC), including that section 117 of the FW Act had been contravened.

Under section 117(2) of the FW Act, an employer must not terminate an employee's employment unless it complies with one of the following requirements:

- a. The time between giving the notice and the day of the termination is at least the ... (minimum period of notice) ...
- b. The employer **has paid** to the employee ... payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee ... (our emphasis)

SMRC terminated Ms. Shum's employment with immediate effect, notifying Ms. Shum that she would receive payment in lieu of one week's notice "in the next week". The final payment, including the payment in lieu of the period of notice, was made to Ms. Shum on 23 June 2017, four days after her employment had come to an end.

The Federal Court found that SMRC's failure to pay Ms. Shum the amount in lieu of notice prior to terminating her employment did not satisfy the requirement under section 117 of the FW Act. While the Federal Court did not accept Ms. Shum's assertion that her termination date was, in fact, the date she received her payment in lieu of notice, it concluded that SMRC had contravened section 117 of the FW Act.

## What Does This Mean for Employers?

On a practical level, the requirements under s 117(2)(b) of the FW Act may present a significant limitation on an employer's ability to move quickly to termination. A failure to comply with this obligation will amount to a breach of the FW Act, which may carry penalties.

All employers should ensure that:

1. If a payment in lieu of notice is to be made to an employee as part of a termination package, the payment is made on or before the termination date.
2. All employment contracts include an express provision permitting payment in lieu of notice, as well as provisions permitting the employer to direct the employee not to perform their duties during some or all of their notice period. This would allow the employer to direct the employee not to perform any duties until the payment in lieu of notice has been made.

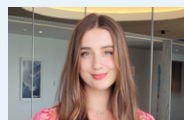
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