WEEKLY LABOUR BULLETIN

Commercial Farmers Union Bulletin #24
Part 1



15th October 2026

CFU WEEKLY LABOUR BULLETIN - 15th October 2026

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CAN A CASH ALLOWANCE BE REPLACED WITH AN IN-KIND BENEFIT?

PART 1: WHAT DOES THE LAW REQUIRE?

INTRODUCTION

Farmers may sometimes want to provide employees with goods or services instead of paying cash allowances. For example, a farmer may provide solar lighting instead of a lighting allowance or transport instead of a transport allowance. The question is whether the farmer can make this change without the employee's agreement.

The CBA makes payment of the prescribed allowances compulsory. The NEC Agriculture Collective Bargaining Agreement, S.I. 41 of 2022, is legally binding. Under section 80 of the Labour Act [Chapter 28:01], once a collective bargaining agreement is registered and published as a statutory instrument, its terms become legally binding from the date of publication or another date stated in the agreement.

Section 82 of the Labour Act also states that the agreement binds employers and employees in the relevant industry. Failing to follow a binding agreement may amount to an unfair labour practice and an offence.

This means that S.I. 41 of 2022 is not just a set of guidelines. Farmers and employees cannot simply ignore its requirements or replace the prescribed cash allowances with other benefits at their own discretion.

WHAT DOES S.I. 41 OF 2022 SAY ABOUT ALLOWANCES?

Section 7(1) provides as follows: ***"Allowances, in addition to an employee's basic wages, SHALL be paid in accordance with the provisions of the Second Schedule."*** The Second Schedule then provides that, in addition to basic wage earnings, employers **SHALL** provide employees with the specified allowances, subject to the terms of any other applicable enactment or collective bargaining agreement of NEC Agriculture.

The use of "*shall*", together with the binding nature of the CBA, means that where an employee qualifies for an allowance prescribed by the Agreement, the employer has an obligation to provide that allowance.

CAN THE EMPLOYER AND EMPLOYEE SIMPLY AGREE TO WAIVE THE ALLOWANCE?

No. Section 1(3) of S.I. 41 of 2022 states that each provision of the Agreement creates a separate right or obligation that cannot be waived by either the employer or the employee. However, the employer may grant an employee a greater right than the Agreement provides. This creates an important distinction:

PROVIDING AN ADDITIONAL BENEFIT:

An employer may provide an employee with a benefit that is greater than the CBA entitlement. For example, a farmer may provide solar lighting while continuing to pay the applicable light allowance

REPLACING THE CBA ENTITLEMENT:

If the employer provides solar lighting and then stops paying the light allowance on the basis that the solar lighting has replaced it, the employer is no longer simply providing an additional benefit. The employer is seeking to depart from the allowance provision of the CBA.

An employee's agreement does not, by itself, remove the obligation created by section 7 because section 1(3) expressly states that the right or obligation may not be waived.

BUT DOES THE LABOUR ACT ALLOW REMUNERATION IN KIND?

Yes, but this does not give an employer a free-standing right to replace a CBA allowance. Section 12A (2) of the Labour Act recognises remuneration in kind in industries or occupations where such payment is customary, subject to conditions including that the benefit must be appropriate for the employee and family, its value must be fair and reasonable, and remuneration in kind must not entirely substitute remuneration in money.

Importantly, section 12A (3) provides that the payment of wages at regular intervals is **subject to any collective bargaining agreement**. Therefore, section 12A confirms that remuneration in kind is recognised by the Labour Act, but it must be applied consistently with the applicable collective bargaining agreement.

WHAT IF A FARMER WANTS THE IN-KIND BENEFIT TO REPLACE THE ALLOWANCE?

This is where Section 29 of S.I. 41 of 2022 becomes important. Section 29 provides an exemption mechanism. The Exemption Committee of the National Employment Council for the Agricultural Industry may, at its discretion and on reasonable grounds, grant an exemption in writing from any provision of the Agreement to an employer or employee, subject to such terms and conditions as it may determine.

Therefore, where a farmer wishes to provide an in-kind benefit in place of an allowance which the CBA requires the employer to provide, the farmer should not simply stop paying the allowance and rely on the employee's consent. The farmer should seek an exemption under section 29.

WHERE DOES EMPLOYEE AGREEMENT FIT IN?

The proposed alternative should first be discussed with the affected employee. The employee should be informed of:

- the benefit being proposed;
- how it will meet the purpose of the allowance;
- its value and duration;
- who will be responsible for maintenance, repairs or replacement;
- what happens if the benefit stops working or becomes inadequate; and
- the fact that the arrangement is being proposed as an alternative to the CBA allowance.

Where the employee agrees, that agreement should be recorded in writing and may be submitted in support of the section 29 exemption application. However, the employee's agreement is not itself the exemption. The legal authority to depart from the CBA provision must come through the exemption mechanism provided by section 29.

The position in simple terms. A farmer should therefore distinguish between these three situations:

1. ADDITIONAL BENEFIT

The farmer provides the CBA allowance and also provides an in-kind benefit. No substitution is taking place.

2. UNILATERAL SUBSTITUTION

The farmer stops paying the CBA allowance because the farmer believes an in-kind benefit is equivalent. This does not comply with the CBA merely because the farmer considers the benefit adequate.

3. AGREED ALTERNATIVE SUPPORTED BY AN EXEMPTION

The farmer proposes the alternative, discusses it with the employee, records the employee's agreement where obtained, and applies for a written exemption under section 29. If the exemption is granted, the alternative can operate subject to the terms and conditions of that exemption.

CONCLUSION

A farmer cannot replace an allowance required by S.I. 41 of 2022 with a benefit in kind without the necessary exemption. Employee agreement alone is not enough. Until a written exemption is granted under section 29, the farmer must continue paying the prescribed allowance.

Note: Farmers providing benefits in kind instead of cash allowances without an exemption risk disputes and legal liability. Existing arrangements should be regularised.

CFU is engaging the NEC to amend the CBA and create a clear legal framework for benefits in kind as alternatives to cash allowances.

Coming in Part 2: We will explain the section 29 exemption process, the role of employee agreement, and the requirements for ensuring that a benefit in kind is a genuine and adequate alternative to the prescribed allowance.

Disclaimer: This article is issued to serve as a general guide to farmers and does not substitute legal advice that may be required to address a particular situation with peculiar circumstances.

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