DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Building and Construction General (On-Site) Award 2020

(AM2020/101)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER HARPER-GREENWELL SYDNEY, 2 MARCH 2021

4 yearly review of modern awards – Building and Construction General (On-Site) Award 2020 – finalisation of awards exposure drafts – distant work payment provisions

[1] Master Builders Australia (MBA) and the Housing Industry Association (HIA) have raised an issue concerning the drafting of clause 26.4 of the *Building and Construction General On-site Award 2020* (2020 Award). The 2020 Award replaced the *Building and Construction General On-site Award 2010* (2010 Award) effective from 1 March 2021. The issue concerning clause 26.4 of the 2020 Award was raised by MBA and the HIA in their submissions in response to a draft determination for the 2020 Award published by the Full Bench dealing with the finalisation of awards exposure drafts[1] on 7 October 2020.

[2] Clause 26 of the 2020 Award is expressed in relevantly the same terms as clause 25 of the 2010 Award, and relevantly provides as follows:

> **26. Travelling time entitlements**
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> . . .
>
> **26.1 Fares and travel pattern allowance**
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> (a) In recognition of the travel patterns and costs peculiar to the industry, which include mobility in employment and the nature of employment on construction work, an employee is to be paid an allowance of $17.43 per day for each day worked when the employee starts and finishes work on a construction site, or is required to perform prefabricated work in an open yard and is then required to erect or fix on-site.
>
> (b) An employee will not be entitled to the allowance in clause 26.1(a) on any day where the employer:

[1] Ross J, President, Clancy DP, Bissett C

(i) provides or offers to provide transport free of charge from the employee's home to the place of work and return; or

(ii) provides a fully maintained vehicle free of charge to the employee.

. . .

26.4 Distant work payment

(a) If an employee is required to travel to a construction site that is:

(i) not located in a metropolitan radial area in which the employee's usual place of residence is located; and

(ii) more than 50 kms by road from the employee's usual place of residence;
the employee will be entitled to the distant work payment in clause 26.4(b) in addition to the allowance in clause 26.1.

(b) The distant work payment is:

(i) payment for the time outside ordinary working hours reasonably spent in travel, paid at the ordinary time hourly rate, calculated to the next quarter of an hour, and with a minimum payment of one half an hour per day for each return journey; and

(ii) any expenses necessarily and reasonably incurred in such travel, which will be $0.47 per kilometre where the employee uses their own vehicle.

(c) Despite clause 26.4(a), the distant work payment is not payable when, at the commencement of employment, the employee's usual place of residence was more than 50km by road from the construction site on which the employee was initially engaged.

(d) In this subclause, a metropolitan radial area is the area within a radius of 50 kilometres of:

(i) the GPO of a capital city of a State or Territory; or

(ii) the principal post office in a regional city or town in a State or Territory.

[3] The current terms of the distant work payment provisions in the 2020 Award arose from a separate Full Bench's[2] consideration of the substantive issues raised by parties in respect of the 2010 Award in the context of the 4 yearly review of modern awards. In a decision issued on 26 September 2018[3] (September 2018 decision), that Full Bench dealt with proposals advanced by MBA and the HIA to modify the distant work payment provisions. The Full Bench relevantly stated in that decision:

[2] Hatcher VP, Hamilton DP, Gostencnik DP, Gregory C, Harper-Greenwell C

[3] [2018] FWCFB 6019

> "[181] We broadly accept the CFMMEU's characterisation of the purpose of the fares and travel patterns allowance. An essential feature of the work of employees covered by the Building Award who normally perform work on construction sites is that they must, over time, travel to different sites at different locations, and incur variable travel costs and associated inconveniences in doing so. This mobility will usually mean that an employee will use a private motor vehicle for travel purposes. Additionally there will be construction sites at locations where public transport will most likely be necessary (such as capital city CBD sites). The allowance compensates employees, on an averaging basis, for the cost and inconvenience associated with variable travel to and from work. Accordingly we do not consider there is a proper basis for any substantial alteration to the entitlement established by the clause 25 of the Building Award where it serves the purpose we have identified.
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> . . .
>
> [184] We also consider there is substance to the proposition advanced by the HIA that clause 25 is unnecessarily complex and confusing. We have had some regard to the evidence adduced by the HIA concerning member confusion about the obligations under clause 25, but primarily we have taken into account the way in which the clause is drafted. In particular, the provisions concerning distant work (clause 25.3), travel outside radial areas (clause 25.5), into radial areas from a residence outside any radial area (clause 25.6) and between radial areas (clause 25.7) are complex both in expression and their relationship to each other and to the primary criterion for payment in clause 25.2. We consider that clause 25 should be varied, so that the fares and travel pattern allowance and other travelling time entitlements are simplified as follows:…"

[4] What followed in the above passage in the September 2018 decision was a proposed redraft of clause 25 of the 2010 Award which included a redrafted clause 25.4 in the same terms as the current clause 26.4 of the 2020 Award. Interested parties were given an opportunity to make submissions in response to the proposed redrafted clause 25. No submissions about the proposed redraft of clause 25.4 were made by MBA or the HIA (or by any other party). On 20 March 2020, the Full Bench made a determination[4] which, among other things, varied clause 25 of the 2010 Award in the terms of the proposed redraft contained in the September 2018 decision. The variation took effect on 1 July 2020.

[5] The issues now raised by MBA and the HIA, and the position of relevant unions in response, were summarised by the Full Bench dealing with the finalisation of exposure drafts in a decision issued on 4 December 2020[5] as follows (footnotes omitted):

> "[66] The MBA submits that clause 26.4(a)(ii) was the subject of submissions before the substantive Full Bench dealing with the Construction Awards and that that Full Bench determined that the clause required simplification. The Full Bench issued a determination regarding the substantive matters on 20 March 2020 and it came into operation on 1 July 2020.
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> [67] The MBA contends that the amendments at clause 26.4(a)(ii) have '…given rise to a consequence that we submit is unintended and was not sought by any of the interested parties appearing in the Award stage proceedings.' The MBA submits that:

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[4] PR715725

[5] [2020] FWCFB 6040

> 'The previous clause 25 was underpinned by a concept that established 'radial areas' of 50km with a 'designated boundary' that was used to determine both eligibility and amounts payable for travel for work purposes. In simple terms, clause 25 operated by establishing amounts that were payable for travel within a radial area (50km from an employee's home).
>
> Where travel was required outside of the radial area, it was (save for some specifically identified circumstances) considered to be distant work and triggered a different allowance arrangement. This arrangement applied for travel from and beyond the 'designated boundary' (more than 50kms) and was payable in addition to the usual arrangement for travelling within the normal 'radial area' (less than 50km).
>
> The re-drafted provision can now be interpreted such that it creates a 'double-dip' outcome. That is, an employee will receive both the conventional travel allowance and distant work arrangement for all travel to and from distant work – whereas previously the distant work arrangement only applied for the distance from and beyond that normally travelled.'

[68] The MBA submits that the re-drafted clause removes the notion of 'designated boundary' contained in the previous version of the clause and as a consequence, the new clause 26.4(a) can be interpreted as creating an entitlement for employees to be paid for the entire distance travelled from their home to the distant work site (rather than for the return trip between the 50km radius point and the distant work site).

[69] The MBA further submits that clause 26.4(c) only precludes the allowance being payable in circumstances where the employee resided more than 50km from the site when they were initially employed. The MBA submits that this was different to the previous arrangement whereby the distant work allowance was payable only for travel beyond the metropolitan radial area, for example outside the 50km radial boundary and back to the boundary. The MBA submits that as a result the new provision can be read such that employees can now claim the fares and travel pattern allowance under clause 26.1 in addition to the distant work payment for travel from the employee's usual place of residence to the distant work site.

[70] The HIA advanced a similar submission to that made by the MBA and proposed the following amendment to clause 26.4(b):

> '(b) The distant work payment in respect of travel from the metropolitan radial area to the job and return to the metropolitan radial area is:' (amendment underlined)

[71] The CFMMEU objected to the proposal to vary the clause by the MBA and HIA and submits that:

> "Clause 26 - Travelling time entitlements, was determined by the Construction Awards Full bench in its September 2018 Decision and largely reflected the clause sought by the HIA. It should be noted that the whole clause was replaced by that decision. The Construction Awards Full Bench also published a draft

> variation dealing with this clause on 23rd November 2018 and, by directions also issued on 23rd November 2018, invited parties to comment…
>
> Given the level of scrutiny by all the parties, including the MBA and HIA, on the proposed variations to the clauses contained in the Building and Construction General On-site Award 2010, all parties were fully aware of the consequences of the clauses decided on by the Full Bench at the time the decisions were made. Moreover, the Construction Awards Full Bench gave ample opportunity to parties to comment on the draft determinations arising from its decisions. The MBA and HIA decided not to make any submissions on the specific issues that they now raise.'"

[6] The matter has been referred to this Full Bench, which consists of members of the Full Bench who made the September 2018 decision.

[7] We have considered the written submissions made by the parties, as well as supplementary oral submissions made by parties at a hearing before us on 1 March 2021. We accept the submission by MBA and the HIA that the most logical reading of clause 26.4 of the 2020 Award is that where the criteria in clause 26.4(a)(i) and (ii) are satisfied in relation to an employee, the employer is required to pay the employee the allowance provided in clause 26.1 *and* the distant work payment in clause 26.4 in respect of time and distance travelled from the employee's place of residence to the construction site. We further accept that this would amount, in effect, to double compensation for that part of the travel which is within the relevant metropolitan radial area and within a radius of 50 kms from the employee's residence. As explained in [181] of the September 2018 decision, the allowance in clause 26.1 compensates an employee, on an averaging basis, for the cost and inconvenience associated with travel to and from varying construction sites. Read with clause 26.4, it can be inferred that clause 26.1 is intended to compensate for all such travel within a metropolitan radial area and within a radius of 50 kms from the employee's residence. However, an employee is compensated for that travel again under clause 26.4(b), which overlaps with the functional operation of clause 26.1. We do not consider that this was the result intended by the September 2018 decision. Accordingly, we consider that an appropriate modification to clause 26.4 is necessary.

[8] The modification to clause 26.4(b) proposed by MBA to correct this difficulty is as follows (with the key change in bold):

> "(b) The distant work payment is:
>
> (i) payment for the time outside ordinary working hours reasonably spent in travel **from the 50 km boundary of the metropolitan radial area or 50 kms from the employee's usual place of residence (whichever is the greater), to the construction site;**
>
> (ii) paid at the ordinary time hourly rate, calculated to the next quarter of an hour, and with a minimum payment of one half an hour per day for each return journey; and
>
> (iii) any expenses necessarily and reasonably incurred in such travel, which will be $0.47 per kilometre where the employee uses their own vehicle."

[9] MBA's proposed variation essentially involves a reversion to the position which applied before the March 2020 variation. We do not consider that this constitutes an appropriate resolution of the identified difficulty. The September 2018 decision, at [184], characterised clause 25 of the 2010 Award as it then was as being subject to complexity and confusion, and the alterations to the clause were intended to remedy this. MBA's proposal would require the employer, in respect of each eligible employee, to undertake a double calculation as to the time spent in travel and to pay the greater amount. There may also be difficulty in identifying the point on the boundary of the metropolitan radial area, and the point that is 50 kms from the employee's place of residence, which are to be used as the starting and finishing points for the calculations. This, it seems to us, would involve excessive administrative complexity and may give rise to unnecessary disputation.

[10] Our *provisional view* is that the simplest solution to the problem of double compensation is to make the allowance in clause 26.1 of the 2020 Award inapplicable to employees who qualify for distant work payments under clause 26.4(a). This would require clause 26.4(a) to be amended as follows:

"**26.4 Distant work payment**

(a) If an employee is required to travel to a construction site that is:

(i) not located in a metropolitan radial area in which the employee's usual place of residence is located; and

(ii) more than 50 kms by road from the employee's usual place of residence;

the employee will be entitled to the distant work payment in paragraph (b) ~~**in addition to**~~ **instead of** the allowance in clause 25.1.

[11] Interested parties may file submissions in response to this provisional view on or before **5.00pm on Tuesday 9 March 2021**.

[12] During the hearing on 1 March 2021, the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) raised a concern about the operation of clause 26.4(c) of the 2020 Award and proposed an amendment it suggested would clarify its operation. The proposal is beyond the scope of the matters that have been referred to this Full Bench. If the CFMMEU wishes to press its proposed alteration, it may apply to vary the 2020 Award, either on its merits or to remove any ambiguity or uncertainty.

VICE PRESIDENT

Appearances:

Ms *R Sostarko* for Master Builders Australia.
Ms *M Adler* for Housing Industry Association.
Ms *V Paul* for the Australian Industry Group.
Mr *S Maxwell* for the Construction, Forestry, Maritime, Mining and Energy Union and the Australia Workers' Union.
Ms *Y Abousleiman* for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

Hearing details:

2021.

Sydney (video-link).
1 March.

Final written submissions:

Master Builders Australia on 1 March 2021.
Housing Industry Association on 26 October 2021.
Construction, Forestry, Mining and Energy Union on 28 October 2021.

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