



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.158 - Application to vary or revoke a modern award

Construction, Forestry, Mining and Energy Union

(AM2010/55)

BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2010

(AM2008/15) [MA000020]

Building, metal and civil construction industries

SENIOR DEPUTY PRESIDENT WATSON

MELBOURNE, 30 JUNE 2010

Application to vary modern award.

[1] This is an application by the Construction, Forestry, Mining and Energy Union (CFMEU) pursuant to ss.160 and 157 of the *Fair Work Act 2009* (the Act) to vary the *Building and Construction General On-site Award 2010*¹ (the modern award). The application seeks a variation to the award in respect of clause 19.7(e) to add the special allowance in clause 21.1 as an entitlement to be included, for apprentices, as part of the ordinary weekly wage for all purposes.

[2] Clause 19.7(e) of the building modern award, as made, reads:

“In addition to the above rates, apprentices will be paid amounts prescribed in:

clause 21.2—Industry allowance;

clause 21.3—Underground allowance; and

clause 20.1—Tool and employee protection allowance;

as part of the ordinary weekly wage for all purposes.”

[3] The special allowance in clause 21.1 of the building modern award is in the following terms:

“(a) Employees must be paid a special allowance of \$7.70 per week to compensate for the following matters:

(i) excess travelling time incurred by employees in the on-site building and construction industry; and

(ii) the removal of loadings from the various building awards in this industry.

(b) This allowance will not be adjusted.”

[4] The CFMEU brought the application under s.160 of the Act, to remove an ambiguity or uncertainty or to correct an error.

[5] In the alternative, the CFMEU submitted that the variation should be made under s.157(1) of the Act to vary modern award minimum wages, other than in respect of minimum wages, outside the system of four yearly reviews of modern awards, on the grounds that such a variation is necessary to achieve the modern awards objective in s.134 of the Act.

[6] The application was supported by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia (CEPU). It was opposed by the Master Builders Australia (MBA) and the Housing Industry Association (HIA).

[7] At the conclusion of the Consultation, I raised the possibility that there may be no ambiguity or uncertainty but it may be that clauses 19.7(e) and 21.1 were included in error, in that they departed from the weight of regulation of pre-modern awards and I suggested that the parties confer in relation to this issue. The CFMEU proposed a variation in the following terms, which was not opposed by the CEPU, the HIA or the MBA, subject in the latter case to an operative date from the date of the variation:

“A. By deleting clause 19.7(e) and inserting after clause 19.7(d) the following:

(e) In addition to the above rates apprentices will be paid the amounts prescribed in:

- clause 21.2 – Industry allowance;
- clause 20.1 – tool and employee protection allowance;
- the relevant percentage (as identified in 19.7(b) and (d) for the year of the apprenticeship) of the Special allowance contained in clause 21.1; and, where applicable,
- clause 21.3 – underground allowance; and
- for refractory bricklaying apprentices the relevant percentage (as identified in 19.7(b) for the year of the apprenticeship) of the Refractory bricklaying allowance contained in clause 21.8.

as part of the ordinary weekly wage for all purposes.”

[8] The proposed variation also addresses and corrects the failure of the current clause to incorporate, for apprentices, the refractory bricklaying allowance on a proportionate basis.

[9] I will give effect to the agreed variation for the following reasons.

[10] I am not satisfied that there is an ambiguity or uncertainty in clauses 19.7(e) and 21.1 as made. On its face, clause 19.7(e) specifies those additional payments, beyond the minimum classification rate, which form part of the ordinary weekly wage of apprentices for all purposes. It does not include the special allowance. On its face, clause 21.1 provides for payment to all employees, which includes apprentices, of the special allowance at the full rate of \$7.70 per week.

[11] The combined effect of the two clauses, on their face, is that apprentices are entitled to payment of the special allowance at the full rate of \$7.70 per week, but it does not form part of their all purpose rate for purposes such as the payment of overtime, shift allowances and paid leave. The effect is as stated by the CFMEU at paragraph 2.4 of its written submissions of 14 May 2010:

“As the special allowance is not identified in clause 19.7(e) it would appear that under the modern award it is not part of the all purpose rate (i.e. not included in the calculation of the hourly rate to which the appropriate overtime and shift penalties are applied), but is still to be paid as an allowance pursuant to clause 21.1.”

[12] However, for the reasons which follow, I am satisfied that the provisions in clauses 19.7(e) and 21.1 reflect error on the part of the Award Modernisation Full Bench.

[13] That error may be discerned from the history of the relevant provisions in the award modernisation proceedings. The Exposure Draft of January 2009 did not contain a provision for apprentices in respect of the ordinary weekly wage for all purposes. Rather, in clause 20.8, it provided that when allowances applied to apprentices, they would be paid at specified proportions. The only comment on this aspect of the Exposure Draft was by The Australian Workers’ Union, which in written submissions, supported by the CFMEU during the Consultation,² submitted that “*The provision of proportionate allowances to apprentices and trainees represents a diminution of entitlement. Existing practice is that such employees receive a proportionate wage but full allowances*”.³

[14] No substantive submissions were made as to the specific issue of the relationship between the special allowance and the ordinary weekly wage for all purposes for apprentices. The issue was not addressed in the statement or decision of the Award Modernisation Full Bench in relation to the making of the modern award.

[15] An examination of the relevant provisions, dealing with the application of the special allowances to apprentices, shows that generally apprentices received the special allowance on a proportionate basis, as part of their ordinary weekly wage for all purposes. In the context of the approach of the Award Modernisation Full Bench of generally adopting terms and conditions which have wide application in the existing awards in the relevant industry or occupation,⁴ clauses 19.7(e) and 21.1 of the modern award which removed the special allowance from the all purpose rate and provided an entitlement to the full allowance on a non-all purpose basis do not reflect the weight of previous award regulation. In my view, these provisions were made in error in the absence of any substantive information or submissions about them in Stage 2 of the modern award making process. The allowances will be varied to reflect the terms and conditions which had wide application in the pre-existing awards in the industry, consistent with the agreed draft variation proposed by the CFMEU, CEPU, HIA and the MBA.

[16] In the course of the Consultation the MBA noted the failure to qualify the underground allowance, in the clause 19.3 calculation of the hourly rate calculation by the words “where applicable”, as decided by the Full Bench in [2009] AIRCFB 989.⁵ Clause 19.3(a)(ii) will be amended to read as follows:

“(ii) For this purpose the hourly rate, calculated to the nearest cent (less than half a cent to be disregarded), will be calculated by multiplying the sum of the appropriate amounts prescribed in:

- clause 19.1—Minimum wages;
- clause 21.2—Industry allowance;

and where applicable,

- clause 20.1—Tool and employee protection allowance;
- clause 21.3—Underground allowance;

by 52 over 50.4 (52/50.4) rounded to the nearest cent, adding to that subtotal the amount prescribed in clause 21.1—Special allowance, and dividing the total by 38.

Provided that in the case of a carpenter-diver, the divisor will be 31, and for refractory bricklayers and their assistants the allowance contained in clause 20.1(d)—Special conditions to apply to bricklayers engaged on construction or repairs to refractory brickwork, will be added to the hourly rate.”

[17] The CFMEU proposed that the agreed variations have effect from 1 January 2010. The MBA opposed that date of effect, submitting that the variation should have effect from the date of the determination. It did so on the basis that the variation was justified on the basis of uncertainty or ambiguity, rather than error.

[18] The variations will have effect from 1 January 2010 to reflect the weight of previous regulation within the modern award. An operative date of 1 January 2010 is justified in the exceptional circumstances by which, uncorrected, the modern award provisions on their face would otherwise require payment of the full special allowance to apprentices since it commenced operation on 1 January 2010, as explained in paragraph 11 above.

[19] A determination [MA000020 PR998600] varying the award will be issued accordingly.

SENIOR DEPUTY PRESIDENT

Appearances:

S. Maxwell on behalf of the Construction, Forestry, Mining and Energy Union.

A. Kentish on behalf of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

A. Matheson with *D. Humphrey* on behalf of the Housing Industry Association.

R. Calver with *J. Thomas* on behalf of the Master Builders Australia.

Hearing details:

2010.

Melbourne:

May 31.

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¹ [MA000020].

² Transcript of 25 February 2009, at para 1831.

³ The Australian Workers' Union submission of 18 February 2009, at para 6.

⁴ [2009] AIRCFB 800, 2 September 2009, at para 4.

⁵ At paragraphs 22 -24.