From: Sarah McKinnon [mailto:SMcKinnon@nff.org.au]
Sent: Friday, 8 July 2016 1:21 PM
To: Chambers - Asbury DP
Cc: Garry Whiting; Sarah McKinnon; margaret.chan@ablawyers.com.au; Stephen Crawford (stephen.crawford@nat.awu.net.au); Dean Astley (dean.astley@amwu.asn.au); Nicola Street; Kimberly Pearsall
Subject: Review of the Sugar Industry Award - Exposure Draft

Dear all,

We refer to the Exposure Draft of the Sugar Industry Award 2010.

Our members have raised an issue in relation to the Single Contract Hourly Rate in proposed clause 13.2 of the Exposure Draft. In our view, the issue needs to be resolved so as to avoid a significant and unintended change of meaning. A full outline of the issue is attached, and summarised below:

- Clause 13.2 provides for a 15% loading for employees engaged on the Single Contract Hourly Rate. The loading applies to hours actually worked and is paid in lieu of weekend and overtime penalties.

- The 15% loading does not apply to leave and public holiday, as payment for these entitlements is not payment for hours worked.

- Inclusion of the column in clause 13.1 to specify the "Single Contract Hourly Rate" has the effect of changing the minimum hourly rate for employees engaged on this basis so that it includes the 15% loading for all purposes. This is due to clause 13.2(b) which defines the minimum hourly rate for employees engaged on the Single Contract Hourly Rate.

- In order to resolve this issue, we propose the following changes to the exposure draft:

    - Remove the column in clause 13.1 headed "Single Contract Hourly Rate";

    - Amend clause 13.2(a) to read as follows:

        "Field sector employees may be engaged in writing on a single contact hourly rate basis and will be paid a 15% loading above the minimum hourly rate for each hour actually worked instead of the provisions of clauses 11.2(c), 25.1 and 25.2, irrespective of the number of hours worked per day or per pay period or the days of the pay period on which work is performed."

    - Add a new clause 13.2(d) as follows:

        "To avoid doubt, the 15% loading payable under clause 13.2(a) does not apply to payment for public holiday and leave entitlements."

We would be happy to discuss the matter further during the conference next Thursday and welcome any comments in the meantime.

Yours sincerely,

Sarah

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IN THE FAIR WORK COMMISSION

4 yearly review of modern awards – Sugar Industry Award

Matter No. AM2014/247

CANEGROWERS Mackay

SUBMISSIONS ON EXPOSURE DRAFT – SUGAR INDUSTRY AWARD 2016

Date: 15th June 2016

1. Canegrowers organisation is a peak employer group representing sugar cane farmers.

2. Canegrowers Mackay is a branch of the Canegrowers organisation and provides services to cane farmers, including advice and guidance in relation to the application of the Sugar Industry Award 2010.

3. The Single Contract Hourly Rate provision of the Award is widely used by members of Canegrowers Mackay.

4. This submission is in response to the Exposure Draft published by the Commission on 1st June 2016.

5. This submission relates solely to the renumbered clause 13.2 – Single contract hourly rate, and the changes proposed to that clause.

Background:

6. The current wording of the clause provides:

20.1 Single contract hourly rate

[20.1(a) substituted by PR528591 ppc 07Sep12]

(a) Clause 20.1 (a) Field sector employees may be engaged in writing on a single contract hourly rate basis and will be paid a 15% loading above the ordinary hourly rate and must be paid that rate for each and every hour of work instead

of the provisions of clauses **Error! Reference source not found.**, **Error! Reference source not found.** and **Error! Reference source not found.**.

(b) The ordinary hourly rate, for the purposes of this clause, is calculated by dividing the relevant classification's weekly rate in clause **Error! Reference source not found.—Error! Reference source not found.**, by 38.

(c) Employees employed on this basis will be entitled to all other entitlements contained in this award.

7. In our view 20.1 (a) means that where 29.2(c), 31.1, or 31.2 would otherwise have applied, the employee is to be paid a 15% loading for those hours worked.

8. 20.1(c) then provides that all other entitlements provided under the award will continue to apply to these employees.

9. We contend that the payment of the 15% loading is limited to "hours worked" but does not include hours where another entitlement exists and which is not eliminated by the operation of 20.1(a).

10. For example, 35.2 provides that employees working on a public holiday are entitled to payment at double time and a half. This entitlement is not removed under 20.1(a), so remains payable to the employee under 20.1(c).

11. There is no suggestion that the 15% loading should apply to all entitlements, but simply to the "hours worked" under 20.1.

12. In other words, the loaded rate applies as a form of "flat rate" which is limited to

    a. ordinary hours which would not have attracted a penalty rate,
    b. ordinary hours which would have attracted weekend penalties,
    c. overtime during the week, and
    d. overtime on weekends

13. The Single Contract Hourly rate effectively operates to replace certain loadings and penalties with a lower general loading on all those hours. In the case of public holidays, the employee is still entitled to the full penalty payment as applies to other employees, so there is no logic in then paying an employee on the Single Contract Hourly Rate an even higher penalty than applies to other employees.

14. Therefore an employee engaged under the Single Contract Hourly Rate, and working on a public holiday is entitled to the usual provision relating to work on public holidays, ie payment at double time and a half of the base rate, not the loaded rate.

15. There is nothing within the clause to suggest that the employee is entitled to payment at double time and a half, and also entitled to payment of the 15% loading.

16. There is also nothing within the clause to suggest that the 15% loading should apply to anything other than "hours worked", so it has no impact on provisions such as payment for annual leave, or payment for personal/carer's leave.

17. There are numerous decisions of the various courts and tribunals which establish that the correct application of an Award is to apply its clear meaning, if it has one. There is no prerogative to engage in interpreting a meaning other than the one expressed in the Award.

18. The Fair Work Ombudsman's site currently proffers an interpretation of this clause, which has the effect of making the 15% loading an "all purpose rate", applying not only to "hours worked" but also to be added to the payment for public holidays worked, and payment for annual leave and personal/carer's leave.

19. This interpretation is not valid because it construes an interpretation contrary to the clear meaning of the clause.

20. It defeats 20.1(a) by applying the loading to all entitlements paid, rather than all hours worked.

21. It also defeats 20.1(c) by modifying the application of those other entitlements under the award. 20.1(c) simply provides that those other clauses continue to apply, not that they continue to apply subject to the impact of 20.1(a).

22. This interpretation is also invalid when viewed against the modern awards objective, of providing a safety net of entitlements.

23. For example, the safety net is established by paying double time and a half of the base rate for work on public holidays. If the provisions are interpreted as providing an entitlement beyond the safety net that has already been established, it is not establishing a safety net, but is installing a higher entitlement above the safety net.

24. Establishing an entitlement above the safety net has the effect of "maintaining or increasing an over-award payment" which is also contrary to the modern awards objective.

25. The NFF submission cites and concurs with the AI Group submission that the meaning of the clause should not be altered by changes to the wording in the draft stage.

26. We agree with that proposition, but in fact the proposed wording clearly does change the meaning of the clause.

27. The proposed new clause is:

13.2 Single contract hourly rate

(a) Field sector employees may be engaged in writing on a single contract hourly

rate basis and will be paid **115%** of the minimum hourly rate and must be paid that rate for each and every hour of work instead of the provisions of clauses 11.2(c), 25.1 and 25.2.
(b) The minimum hourly rate, for the purposes of this clause, is the minimum hourly rate for the employee's classification in clause 13.1.
(c) Employees employed on this basis will be entitled to all other entitlements contained in this award.
(d) Employees engaged on a single contract hourly rate in accordance with clause 13.2 shall be paid the number of hours worked per day at 115% of the minimum hourly rate irrespective of the number of hours worked per day or per pay period or the days of the pay period on which work is performed.

28. The current part (a) provides that employees are paid 15% above the base rate for certain hours. This has the effect of maintaining their "Base Rate" for other purposes of the award, at the Award Base Rate.

29. The proposed rewording to say that they are paid 115% of the base rate raises the conjecture that this then becomes their base rate. This is already a confused issue, and needs to be clarified, rather than compounded.

30. There is then a proposal to add a new part (d) in which clause 13.2 then refers to itself, then repeats clause (a), but omitting the clauses excluded from operation by the Single Contract Hourly Rate as provided in part (a).

31. The proposed part (d) effectively negates part (a), and also extends the coverage of the clause so that work on public holidays would now only be subject to the 15% loading, not the double time and a half provided for work on public holidays.

Conclusion

32. We are therefore of the view that the proposed rewording inappropriately changes the meaning of the clause, and also confuses the issue.

33. We do however agree that a variation is necessary to ensure there is clarity as to the meaning of the clause and its impact on other entitlements under the Award.

Submission

34. It is our submission that the current wording of the clause should be retained other than for the necessary renumbering of the affected clauses.

35. We further submit that in order to ensure clarity, that a note be added following the current clause with words to the effect of:

    "For the avoidance of doubt, other entitlements under this Award including payment for working public holidays, and payment for annual leave and personal/carer's leave are paid in accordance with the relevant provisions of the Award, not subject to the 15% Single Contract Hourly Rate loading."