CIVIL CONTRACTORS FEDERATION

The Voice of the Industry

4 YEAR REVIEW OF MODERN AWARDS – CONSTRUCTION AWARDS (AM2016/23)

WRITTEN SUBMISSIONS OF THE CIVIL CONTRACTORS FEDERATION IN RESPONSE TO 17 AUGUST 2017 STATEMENT [2017] FWCFB 4239

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1. Introduction

1.1. In paragraph [1] of the Statement [2017] FWCFB 4239 issued on 17 August 2017 (**Statement**), the Full Bench of the Fair Work Commission (**FWCFB**) invited parties "to make submissions whether these approaches, either as proposed or in any identified modified form, would be appropriate to be included in the Award." The Award is the *Building and Construction General On-Site Award 2010* (**Award**). The approaches referred to relate to alterations proposed by the FWCFB to clauses 20.1, 21-22, 24.1-24.3 and 33 of the Award as set out in the Statement.

1.2. Although the parties were given until 15 September 2017 to file the written submissions, the Civil Contractors Federation (**CCF**) sought an extension from the FWCFB to 29 September 2017. The extension to file the submissions on 29 September 2017 was granted to the CCF by the FBWC on 15 August 2017.

2. Clause 20.1 Tool and employee protection allowance

2.1. Clause 20.1(a) of the Award currently specifies the weekly allowance payable for tools generally used by employees in certain specified classifications. Clause 20.1(b) of the Award then proceeds to require employers either to provide specified tools, protective clothing and equipment or to reimburse an employee who is required to provide the **specified** tools, protective clothing and equipment for work.

2.2. Under the proposed amendment, the weekly tools allowance for classifications specified in clause 20.1(a) of the Award are maintained. What was clause 20.1(b) of the Award now becomes clause 20.1(b) – tool allowances and clause 20.1(c) protective clothing and equipment.

2.3. The CCF supports the proposed amendment to clause 20.1(a) of the Award as it makes it clear that the allowance is "in recognition of the **maintenance and provision** of the standard tools of trade". However, the CCF has concerns with what is proposed to become clauses 20.1(b) and 20.1(c) of the Award. Under the proposal, an employer will be obliged to reimburse or provide for **all:**

(a) tools required for the performance of work; and

(b) protective clothing and equipment required for the safe performance of work.

2.4. It will no longer be limited to the **specified**:

(a) tools required for the performance of work; and

(b) protective clothing and equipment required for the safe performance of work,

set out in existing clause 20.1(b) of the Award.

2.5. Thus, under the proposal, an employer will have an obligation to provide or reimburse for tools and protective clothing and equipment not specified in clause 20.1(a) of the Award in the circumstances set out in the proposed clauses 20.1(b) and 20.1(c) of the Award.

2.6. While the proposal requires the tools to be "required for the performance of work" and clothing and equipment other than safety boots "required for the safe performance of work" the current tools have been included as they have been identified as required for the performance of work. Likewise, the safety clothing and equipment has been included as they have been identified as required for the safe performance of work. This avoids disputes. The proposal is most likely to give rise to demands for further tools and protective equipment to be provided or reimbursed and disputes to arise will arise whether they are "required for the performance of work". This will likely result in different obligations falling upon different employers and stop the Award conditions on tools, safety clothing and equipment being common. At present, employers know exactly what needs to be provided. If, for example, an additional tool was sought to be provided or reimbursed that is required for the performance of work, the party pursuing it as an entitlement would be required to make an application to vary the Award under the provisions of the *Fair Work Act 2009 (Cth)* (**FW Act**) or alternatively enter into an enterprise agreement which covers those other tools or safety clothing and equipment sought to be included.

3. Allowances – clause 21 and 22

Reordering of allowances

3.1. The CCF supports the reordering of allowances as proposed in paragraph [4] of the Statement. However, the CCF notes that there are differing views as to the grouping. This is a matter that may be addressed by conference.

Abolition of allowances and increase the industry allowance

3.2. While there is theoretical merit in abolishing a number of allowances and creating a singular allowance, the CCF is of the view that this will give rise to practical difficulties. For that reason, it does not support the proposal.

3.3. The CCF notes that paragraph [5] of the Statement refers to the abolition of the disability allowances and increasing the industry allowance. However, the language in paragraph [3] of the Statement does not appear to be limited to disability allowances. This could result in allowances other than disability allowances, unintentionally being caught up.

3.4. The CCF does not support the abolition of disability allowances (subject to the possibility of certain exclusions) and an increase in the industry allowance as proposed by the FWCFB. The industry allowance is an all-purpose allowance. The payment is made as the matters it seeks to redress by the payment are matters common across the whole of the industry covered by the Award. Disability allowances, however, represent "a means of compensation for additional difficulty or discomfort associated with particular work, or as a legitimate means of inducing employees to work in particular areas." (*Australian Chamber of Commerce and Industry v Australian Council of Trade Unions* [2015] FCAFC 131 at [15]). It is generally not all purpose. Thus, by rolling disability allowances into an industry allowance, the specified

protections paid for the disparity caused by the disability is lost. It will apply to all employees in the relevant industry, irrespective of whether or not they are subject to the relevant disability, that is the additional difficulty or discomfort associated with particular work. It thus loses its characterisation as a disability allowance.

3.5. As the CCF is opposed to the proposition of abolishing disability allowances (subject to the possibility of certain exclusions) and an increase in the industry allowance, the CCF:

(a) is not in a position to identify the quantum of the allowance that should apply;

(b) recognises that there is a definition of "civil construction sector" in clause 4.10(b) of the Award; and

(c) makes no comment on other sectors.

3.6. If contrary to the CCF's submission, the FWCFB decides to implement its proposal, in the alternative, the CCF submits that:

(a) the industry allowance should vary across sectors as the disabilities vary;

(b) the parties interested should engage in conferences on this matter including:

(i) the relevant sectors;

(ii) which allowances are disability allowances;

(iii) which disability allowances are common and which are not;

(iv) which disability allowances should be excluded; and

(v) the percentage increase in the industry allowance.

4. LAFHA – clauses 24.1 to 24.3

Clauses 24.1 and 24.2

4.1. Deleting existing clause 24.1(b) and amending clause 24.2 of the current Award as proposed has the effect of reversing the obligations that operate under the Award. The onus shifts from the employee to the employer and even then, severely restricts the basis upon which the employee becomes disentitled to the living away from home allowance (**LAFHA**).

4.2. At present, the obligation is cast up on the employee to provide details and if the employee knowingly makes a false statement, the employee is disentitled to the LAFHA. Secondly if there is a change of address the employer must agree for the purposes of the LAFHA. Under the proposal, there is a default obligation to make the payment and even when the employer has requested proof unless the documents provided response are fraudulent there is still the obligation to pay the LAFHA. "Fraudulent" has a specific legal meaning whereas "knowingly makes a false statement" has an everyday meaning more in line with the terms of an Award. It is a lesser standard. Even in the judicial system there is an aversion to making allegations of fraud and Courts warn against pleading fraud unless the evidence supports it (See *Chen & Ors v Chan & Ors* [2009] VSCA 233; *ASIC v Flugge (No 2)* [2017] VSC 117; *NIML Ltd v Man Financial Australia Ltd (No. 2)* [2004] VSC 510 *Spiliotopoulos v National*

Australia Bank Limited [2017] NSWSC 971; rules 15.3 and 15.4 of the *Uniform Civil Procedure Rules (NSW)*).

4.3. In addition to the only exclusionary ground being fraud, further difficulties arise with the proposed clause as follows:

(a) the payment must be made even if the employee has failed to provide the correct address details but employer has failed to take reasonable steps to verify the address details;

(b) even if the employer seeks to verify the address details, the employer's ability to investigate documents that are suspicious are restricted; and

(c) the consent of the employer is not required when there is a change of address.

4.4. In the circumstances, the CCF does not support the proposal.

Clause 24.3

4.5. The CCF supports the removal of the weekly rate and specifying just a daily rate. However, if an employee seeks a higher LAFHA than the specified rate, the employee is currently required to satisfy the employer that a higher amount was payable. At present, the specified rate is the default rate and any more is an exception, whereas under the proposal, the higher rate as long as it is reasonable is simply an alternative to the specified rate. Thus, the onus changes.

4.6. Under the proposal, the reasonable higher rate also becomes an entitlement rather than an exception. Reasonableness is always an elusive term and means different things to different people. Of course, it is tied in to legal terminology. Award clauses should be simple not only to understand but also to apply. In the circumstances, the CCF does not support this variation.

4.7. The CCF previously proposed that when a meal allowance is to be paid, that just as there is a LAHFA, a breakfast, lunch and dinner rate should be specified. This provides certainty and moves away from the uncertain concept of reasonableness. If, however, the FWCFB is not mindful to further consider specified rates, it is supportive of the following alternatives that would be available under the proposal:

(a) pay the LAFHA or the greater amount (subject to the satisfaction of the employer);

(b) provide accommodation and 3 meals per day; or

(c) provide accommodation and reimburse for all reasonable meals per day.

4.8. The CCF is supportive of the proposed amendments to clause 24.3(b) of the Award.

5. Hours of Work – clause 33

Working and changes to RDOs

5.1. The proposal, for the most part simplifies the clause as it enables RDOs to be worked in alternative ways rather than having a default position with exceptions. This reflects the reality that employers under the Award need to operate RDOs flexibly.

5.2. However, that flexibility is limited by the requirement of having a **written** roster which must be published 7 days in advance of the commencement the roster cycle unless:

(a) a majority of employees agree and it is in writing; or

(b) an emergency exists requiring 48 hours written notice.

5.3. In some instances, the rosters do not change so the need to have a written roster cycle becomes otiose. Further, there are many small businesses who operate in a less formal manner and depending on what the requirements of published written roster means, may become onerous. If, in the past the roster has been communicated other than in writing, there is no reason why an additional responsibility should be imposed on those employers. Nevertheless, the CCF seeks that this matter be clarified.

5.4. In addition to the above, the requirement to give 48 hours' notice of a change due to an emergency is a new obligation which appears unnecessary and in fact, not practical. When there is an emergency it is unlikely that an employer will have the benefit of 48 hours prior notice themselves to then be able to give 48 hours' notice to the employee. CCF does not agree to the 48 hour notice requirement. The CCF is also of the view that the ability for an employer and employee other than in the case of emergency to change the roster for that employee for one off or short term purposes, is prevented and would not practically come under the purview of an IFA.

Banking of RDOs

5.5. The CCF supports the banking of RDO across the industry covered by the Award without the previous restrictions. However, the CCF is of the view that if more than one day of banked RDOs is to be taken the notice of taking the RDOs should be in writing and should specify the number of days and dates and should be given, unless the parties agree otherwise, at least 2 weeks before the banked RDOs are taken. This will allow an employer to plan for the absences when 2 or more RDOs are taken in a row.

Operating under a non RDO system

5.6. The CCF has concerns the only system now available with the proposed amendment to clause 33.1 and proposed deletion of clause 33.1(vii) of the Award, is a system of RDOs. A number of CCF members do not operate on an RDO system but work a 38 hour week. It is critical that the Award provides the ability to work a 38 hour week Monday to Friday with a maximum of 8 hours on any one day.