Fair Work Act 2009

Application to vary a modern award (*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, Part 2 of Schedule 5)

APPLICATION TO VARY A MODERN AWARD – TWO YEARLY REVIEW

Applications to vary multiple awards re apprentices

AM2012/18 and Ors

SUBMISSIONS re AM2012/160 – Building and Construction General On-Site Award 2010

29 OCTOBER 2013

CEPU
COMMUNICATIONS
ELECTRICAL
PLUMBING
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1. Under paragraph 42.2(a) of the Building and Construction General On-Site Award 2010 ("the Award"), a lift industry allowance is payable to "*electrical and metal tradespersons and their assistants who perform work in connection with the installation, major modernisation, servicing, repairing and/or maintenance of lifts and escalators*." Under paragraph 42.2(c), an employee in receipt of this allowance will not be entitled to any of the special rates provided at clause 22 of the award.

2. At paragraph 42.2(b), apprentices are paid a proportion of the lift industry allowance in accordance with their year of apprenticeship:

> ***(b)*** *Apprentices must be paid the following proportion of the appropriate lift industry allowance as follows:*
>
> | ***Year of apprenticeship*** | ***% of allowance*** |
> |---|---|
> | *First year of apprenticeship* | *42* |
> | *Second year of apprenticeship* | *55* |
> | *Third year of apprenticeship* | *75* |
> | *Fourth year of apprenticeship* | *88* |

3. In AM2012/160 ("the lift industry allowance application"), the CEPU now proposes that paragraph 42.2(b) be amended to reflect the proportion of minimum rates generally payable to apprentices under the Award, so that:

> ***(b)*** *Apprentices must be paid the following proportion of the appropriate lift industry allowance as follows:*
>
> | ***Year of apprenticeship*** | ***% of allowance*** |
> |---|---|
> | *First year of apprenticeship* | *<u>55</u>* |
> | *Second year of apprenticeship* | *<u>65</u>* |
> | *Third year of apprenticeship* | *75* |
> | *Fourth year of apprenticeship* | *<u>90</u>* |

4. In the decision of the Full Bench in these matters of 22 August 2013, ("the common matters decision")[1] the Commission sought that the parties should confer about matters "*how the CEPU proposal in respect to the lift industry allowance should be considered by the Full Bench*." Following conferences before Roe C, ultimately the parties in support of and opposed to the CEPU application agreed that the matter should be settled by the Full Bench following submissions being filed by those parties.

[1] [2013] FWCFB 5411

5. On 31 January 2013, the CEPU filed written submissions in these proceedings, including the following in support of the lift industry allowance application:

"C. BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2010

7. The CEPU has applied to vary the Building and Construction General On-site Award 2010 (the "Modern Building Award") in matter AM2012/160. The application concerns the payment of the lift industry allowance to apprentices under the Modern Building Award through a variation to cl.42.2(b) of the Award.

8. Under cl.42 of the *Modern Building Award*, electrical and metal tradespersons and their trades assistants receive an all-purpose lift industry allowance when performing work in connection with the installation, major modernisation, servicing, repairing and/or maintenance of lifts and escalators. Employees receiving the allowance are not entitled to any of the Special Rates in cl.22 of the award.

9. Paragraph 42.2(b) of the *Modern Building Award* provides that the allowance will apply to apprentices on a proportional basis. The proportions are:

Year of apprenticeship	**% of allowance**
First year of apprenticeship	42
Second year of apprenticeship	55
Third year of apprenticeship	75
Fourth year of apprenticeship	88

10. The variation sought by the CEPU would vary the above proportions to be the same as those sought by the CFMEU in relation to apprentice wages more generally in the award in AM2012/129 (in accordance with item 13 of the CFMEU's amended application). The proposed variations are:

Year of apprenticeship	**% of allowance**
First year of apprenticeship	60
Second year of apprenticeship	65
Third year of apprenticeship	75
Fourth year of apprenticeship	90

11. The pre-modern award based instrument that contained the lift industry allowance that now appears in the *Building and Construction General On-site Award 2010* was the *National Metal and Engineering Onsite Construction Industry Award 2002*. Under c.12.4.9 of the *National Metal and Engineering Onsite Construction Industry Award 2002* apprentices, excepting those engaged on air-conditioning or refrigeration work, received the following proportions of the wage rate of a fitter: 42% for a first year apprentice; 55% for a second year apprentice; 75% for a third year apprentice and 88% for a fourth year apprentice.

12. Appendix A to the *National Metal and Engineering Onsite Construction Industry Award 2002* provided, at subclause 3.3, that apprentices would receive the same proportions of the lift industry allowance, that is 42% for a first year apprentice, 55% for a second year apprentice, 75% for a third year apprentice and 88% for a fourth year apprentice.

13. A similar approach had been utilised under the award that the *National Metal and Engineering Onsite Construction Industry Award 2002* had replaced, the *National Metal and Engineering On-site Construction Industry Award 1989*. In the *National Metal and Engineering On-site Construction Industry Award 1989*, wages received by an apprentice in the lift industry included a common proportion of the fitter rate and the lift industry allowance: Pt I:25 and Pt II: 3. Again the relevant percentages were 42% for a first year apprentice, 55% for a second year apprentice, 75% for a third year apprentice and 88% for a fourth year apprentice. This appears to reflect the historical manner in which the proportion of the lift industry allowance paid to apprentices was the same as that applied to wages: see also the *Metal Industry Award 1984* – Part 1 clauses 14 and 37H.

14. The CEPU respectfully submits that if apprentices are to continue only receiving a proportion of the lift industry allowance in the *Building and Construction General On-site Award 2010*, the historical approach of using the same proportion as that applying to an apprentice's wages should be adopted into the award. The CEPU submits that the current provisions are anomalous in the context of the apprentice wages provisions in the award, being percentages that are not elsewhere applicable to any other payment made to apprentices.

15. Consistent with this approach, it is the CEPU's submission that if the CFMEU application to vary the wages for years one and two is not successful, or only partially successful, the CEPU would press that cl.42.2 be varied to reflect whatever pay rates

apply to junior apprentices in the *Building and Construction General On-site Award 2010*.

16. In addition to the material brought by the CFMEU, the CEPU will rely upon the witness statement of Mr Scott Reichmann with respect to the ubiquitousness of over award payments in the Queensland lift industry. It is the submission of the CEPU that such payments are common throughout Australia in the lift industry.

17. The CEPU is unaware of any apprentices in the lift industry who do not receive wages substantially above those proposed by the CFMEU in its application."

6. The CEPU continues to rely on these submissions, whilst now pressing for rates to reflect the common matters decision of the Full Bench. In addition, the CEPU makes the further submissions below.

7. By way of context, the CEPU notes that in return for receiving a proportion of the lift industry allowance, relevant lift industry apprentices forego allowances that would otherwise be payable under clause 22 – Special rates of the Award. Those apprentices under the Award who are *not* in the lift industry receive special rates allowances under clause 22 at the full adult rate – there is no proportional discount for being an apprentice.

8. In the CEPU's submission then, the apprentice rate for the lift industry allowance must bear a relationship to the minimum wage rate generally payable to apprentices, or there is no justification for discounting the lift industry allowance at all.

9. The CEPU accepts that there is a historical relationship between the proportion of the lift industry allowance payable to apprentices and the proportion of the minimum wage payable to apprentices under the relevant award, and that this relationship has justified apprentices receiving the discounted lift industry allowance over time. However, if the submissions of certain employer groups are accepted by the Commission - that there is no such historical relationship - then the CEPU would submit that apprentices in the lift industry are entitled to one hundred per cent of the lift industry allowance rate – providing equity with the proportion of Special rates payable to non-lift industry apprentices under clause 22 of the Award.

10. The provisions which give rise to clause 42 of the Award were first inserted by consent into the Metal Trades Award 1952, in 1967.[2] Following an application by the ETU, an allowance of $3.50 per week was inserted for all purposes of the award. A person entitled to this new allowance was not to be entitled to a "*building and construction industry allowance with respect to multi-storey buildings*."[3]

[2] 118 CAR 736.
[3] ibid at 737

11. In 1973, the ETU applied for an increase to the allowance in the Metal Industry Award 1971, which was at that time an amount of $4.85.[4] Williams J held:

    "*...I consider that an increase in the present allowance of $4.85 is justified and I fix an amount of $9.85 per week which is an increase of $5.00 per week.*

    The amounts under clause 8(e)(ii) for apprentices will, by agreement, be 42, 55, 75 and 88 per cent respectively of the above amount. These are the current percentages of the adult rate prescribed by clause 14(i)(i) of the award."[5] (emphasis added)

12. Clearly, when the percentage proportion of the lift industry allowance payable to apprentices was provided in 1973, it was the identical percentage proportion to the rates of pay of apprentices at the time.

13. These identical percentages continued through the making to the Metal Industry Award 1984[6], at which time the lift industry allowance was payable to the exclusion of "*any of the other special rates prescribed in clause 17 of the award*."[7]

14. When the National Metal and Engineering On-site Construction Industry Award 1989 was made,[8] those apprentice percentages applying for the purposes of the lift industry allowance[9] and for minimum weekly wages[10] continued to be the same identical percentages as had applied under the Metal Industry Award 1984.

15. As is noted in the CEPU submissions of 31 January 2013, extracted above, this historical relationship continued throughout the life of the National Metal and Engineering On-site Construction Industry Award 1989 and the National Metal and Engineering Onsite Construction Industry Award 2002.

16. It is only on the modernisation of the National Metal and Engineering Onsite Construction Industry Award 2002 and the making of the Modern Building and Constructions Industry Award 2010 that the nexus was broken between the minimum rates percentages and lift industry allowance percentages payable to apprentices under the award.

17. In the CEPU's submission, there is no evidence of submissions being made at the time of modernisation to provide a basis for this change.

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[4] 149 CAR 494
[5] ibid at 499.
[6] M0039, cl.37H(iii).
[7] cl.37H(iv).
[8] N100, Print H8482, 29 September 1989.
[9] ibid at Pt II, cl.3(b)
[10] ibid at Pt I, cl.25(j)(iii)

18. Prior to the common matters decision of the Full Bench, the percentages for apprentices for minimum rates under the Award were 45/55/75/90%, whereas for the lift industry allowance the percentages remained as they were under the National Metal and Engineering Onsite Construction Industry Award 2002, 42/55/75/88%, as they were since they were introduced in 1973 as the "*current percentages of the adult rate prescribed"* for wages.

19. In the CEPU's submission, it is plain that an historical anomaly arose in setting the apprentice percentage rates of the lift industry allowance at the time of award modernisation.[11] Those percentages now bear no relationship to anything. The discount from the full lift industry allowance payable is no longer justifiable on the basis that it is the same percentage discount from full minimum rates that applies to apprentices – because it no longer is the same.

20. Consequently, the CEPU application AM2012/160 is to restore the nexus between minimum rates payable to apprentices and the percentage of the lift industry allowance payable. An alternative application may have been to remove any percentage discount for apprentices from the lift industry allowance altogether. This would place apprentices under this Award in the lift industry in the same position as apprentices under this Award to whom special rates are payable under cl.22.

21. However, whilst the anomaly in the current rates is clearly unjustifiable, the CEPU considered that the consent position which had endured for almost forty years should be maintained – the rates payable to apprentices in respect of the lift industry allowance should reflect the rates payable to apprentices in respect of their minimum wage rates.

22. Following the Full bench decision in respect of common matters, therefore, the CEPU proposed a draft order providing for the Award to be amended:

    1. *By deleting the table under subclause 42.2(b) and replacing it with:*

Four Year Apprenticeship	***% of allowance***
First year of apprenticeship	*55*
Second year of apprenticeship	*65*
Third year of apprenticeship	*75*
Fourth year of apprenticeship	*88*

23. The fourth year rate of "88%" was an error in that draft – the CEPU application AM2012/160 sought a fourth year rate of 90% to address the anomaly in the treatment of the lift industry allowance. The 90% rate is pressed.

[11] These proceedings are discussed in the submissions of the Housing Industry Association filed 1 October 2013 in these matters (http://www.fwc.gov.au/documents/awardmod/review/AM2012160_sub_hia_011013.pdf).

24. Given the different percentage rates to apply to apprentices' minimum rates of pay following the making of the Full Bench common matters decision, an alternative determination in respect of the lift industry allowance would be to remove a reference to explicit percentages in paragraph 42.2(b) altogether, so that the paragraph would be deleted and replaced with the following wording:

    "***(b)*** *An apprentice must be paid the proportion of the appropriate lift industry allowance corresponding to the percentage of the standard rate payable to that apprentice under clause 19.7 of this Award."*

    Whilst requiring cross referencing, this wording would maintain the historical nexus between the two sets of percentages, whilst allowing for any phasing in of rates that may apply. This would be an acceptable alternative formulation to the CEPU.

25. It is plain, that subclause 42.2(b) is not operating effectively without anomalies or technical problems that have arisen from the award modernisation process. Upon modernisation, the nexus was broken between the percentage of minimum rates and the lift industry allowance which is required to be paid to apprentices under the Award. In our submission, that anomaly can and should be remedied further to item 6(2)(b) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009.

26. Further to item 6(2)(a) of Schedule 5, and the modern awards objective at s.134 of the *FW Act*, to restore fairness and relevance to the percentage discount from the full rate of the lift industry allowance that apprentices receive – and particularly the relative living standards and needs of the low paid – that percentage should once again relate to the proportion of the full minimum rate that the Full Bench has determined that apprentices should receive under this Award in the common matters decision.

27. The CEPU seeks that a determination be made in the form of the draft determination attached at "A", which contains both options proposed by the CEPU which would address the anomaly that currently exists for apprentices in the lift industry covered by this Award.

CEPU
29 October 2013.

ATTACHMENT "A"

MA000020 PR

DRAFT DETERMINATION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Item 6, Sch.5 – Modern awards review

Modern Awards Review – Apprentices, Trainees and Juniors
(AM2012/18 and others)

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
(AM2012/160)

BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2010

Building and construction industry

JUSTICE BOULTON, SENIOR DEPUTY PRESIDENT
SENIOR DEPUTY PRESIDENT HARRISON
COMMISSIONER ROE SYDNEY, NOVEMBER 2013

A. Further to the decision of 22 August 2013 ([2013] FWCFB 5411) and pursuant to Item 6, Sch.5 of the s.160 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, the *Building and Construction General On-site Award 2010*[12] is varied as follows:

OPTION 1

1. By deleting paragraph 42.2(b) and inserting the following in its place:

(b) *An apprentice must be paid the proportion of the appropriate lift industry allowance corresponding to the percentage of the standard rate payable to that apprentice under clause 19.7 of this Award.*

[12] MA000020

OPTION 2:

1. By deleting the table at paragraph 42.2(b) and inserting the following in its place:

Four Year Apprenticeship	**% of allowance**
First year of apprenticeship	55
Second year of apprenticeship	65
Third year of apprenticeship	75
Fourth year of apprenticeship	90

B. This determination comes into effect on and from 1 January 2014.

SENIOR DEPUTY PRESIDENT