FURTHER STATEMENT

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

4 yearly review of modern awards—Sugar Industry Award 2010
(AM2017/56)

DEPUTY PRESIDENT ASBURY
DEPUTY PRESIDENT ANDERSON
COMMISSIONER MCKENNA BRISBANE, 22 APRIL 2020

4 yearly review of modern awards – Sugar Industry Award 2010 – substantive issues.

[1] This further statement concerns the issue of how ordinary hourly rates are to be expressed in clause 40.1 of the *Sugar Industry Award 2010* (the Award) and clause 19.1 and D.2.1 and D.2.3 of the Exposure Draft of the Award. This issue was identified by a Full Bench of the Commission in a Decision in relation to *4 yearly review of modern awards – Award stage – Group 3*[1] (the Group 3 Decision) as follows:

> "Items 50, 62, 63, 64, 64A, 64B, 64C – Schedule D – Summary of Hourly Rates of Pay
>
> [508] As with most exposure drafts, this exposure draft includes a schedule containing a summary of hourly rates of pay. The Employer parties seek the deletion of, or alternatively the simplification of, the tables. The Union parties seek to retain the schedule.
>
> [509] If the Schedule is to be retained, there were a number of issues identified in relation to the Schedule as follows.
>
> [510] The 15 January 2015 exposure draft sought clarification from the parties as to the effect clause 17.3(b) and (c) of that draft in respect of the hourly rates set out in Schedule D.2 (which are based on a 38 hour week).
>
> [511] The parties advised that the hourly rates prescribed in Schedule D.2 are calculated on a 38 hourly divisor and the schedule does not contemplate those employees whose pay rates are calculated on a 36 or 40 hourly divisor (as provided for in clause 17.3(b) and (c) of the 15 January 2015 exposure draft; renumbered as 15.3(b) and (c) in the 3 June 2016 exposure draft). It was proposed by AiGroup that a clear notation should be inserted that the Schedule D.2 hourly rates do not necessarily apply."

[2] In a Decision issued on 26 March 2019[2], this Full Bench considered and rejected a proposal advanced by the parties to address this issue. At that time we noted that there were inconsistencies between the tables setting out hourly rates in clause 40.1 of the Award and D.2.1 and D.2.3 of the Exposure Draft and other provisions of the Award and Exposure Draft dealing with how a 38 hour week is worked by Milling employees. The inconsistency arose because the hourly rates in clause 40.1 of the Award and clauses 19.1, D.2.1 and D.2.3 of the Exposure Draft are calculated by dividing the ordinary weekly rate by 38.

[3] The method of working a 38 hour week in the sugar milling sector is that employees work 40 ordinary hours per week in the nominal crushing season and 36 hours per week in the nominal slack season and are paid an hourly rate based on the minimum weekly rate divided by 40 in the crushing season and 36 in the slack season. As a result, the minimum hourly rates paid in the crushing season are less than the minimum hourly rates in clause 40.1 of the Award and clauses 19.1, D.2.1 and D.2.3 of the Exposure Draft. Clause 19.3(d) of the current Exposure Draft also provides that:

> "In no case will the average rate calculated in accordance with clause 19.3 be less than the relevant minimum hourly rate in clause 19.1."

[4] In a Statement issued on 24 March 2020[3], we expressed a provisional view that these issues could be addressed by the inclusion of Notes in clause 40.1 of the current Award and clause 19.1, D.2.1 and D.2.3 of the Exposure Draft. In the absence of objection, we proposed to vary the Award by inserting those Notes in clause 40.1 of the Award and in clauses 19.1, D.2.1 and D.2.3 of the Exposure Draft.

[5] On 31 March 2020, the Australian Industry Group (AiG) filed a submission expressing concern that the Notes we proposed would not adequately deal with the issues and were potentially confusing. In relation to the proposed variation to clause 40.1 of the Award the AiG pointed to the fact that the current Award does not contain the provision found in clause 19.3(d) of the Exposure Draft and on this basis, questioned the necessity for the insertion of a Note in the current Award.

[6] In our view, notwithstanding clause 19.3(d) of the Exposure Draft is not found in the current Award, it is the case the Award provides for ordinary working hours to be averaged over a maximum period of 12 months. It is also the case that Milling employees are currently working in accordance with arrangements of the kind referred to in clause 19.3 of the Exposure Draft.

[7] In short, Milling employees are working 40 ordinary hours per week in the nominal crushing season and 36 ordinary hours per week in the nominal slack season and their hourly rate is based on a 40 hour divisor in the nominal crushing season and a 36 hour divisor in the nominal slack season. As a result the minimum hourly rates for Milling employees set out in clause 40.1 of the Award notional and are not accurate. We remain of the view that a Note is required to clarify this matter.

[8] In relation to the proposed Note for insertion in clause 19.1 and D.2.2 and D.2.3 of the Exposure Draft, the AiG contends that:

- it does not adequately deal with the issue raised by the AiG in its 14 April 2016 Submission and which was sought to be addressed in a consent position reached with The Australian Workers' Union and other parties and communicated to the Commission on 25 September 2018;

- the words "actual ordinary weekly hours" appearing in the Note are potentially confusing given those words appear nowhere else in the Award and are undefined; and

- a requirement for the minimum hourly rate to be no less than the "minimum weekly rate divided by the actual ordinary weekly hours worked in the relevant period or season" potentially give rise to unintended results, particularly where the hours worked in a week are very small.

[9] To address these issues AiG requested that a conference of the parties be held in late April and stated that this would allow discussion between the parties to take place.

[10] A telephone conference has been scheduled for **Thursday, 23 April 2020** at **11.30 am AEST**.

[11] To facilitate the efficient conduct of the conference we express a view – again provisionally – that the concerns raised by AiG might be addressed by the following amendments to the Notes we have previously proposed:

Sugar Industry Award 2010 - Clause 40.1

"NOTE: The hourly rates for ordinary hours in clause 40.1 as they apply to Milling employees are notionally expressed on the basis of a 38 hour divisor. Where an averaging system is worked in accordance with clause 29.3(a) other divisors may be used on the basis that ordinary hours greater or less than 38 may worked to achieve an average, due to the seasonal nature of sugar milling."

Exposure Draft – Tables D.2.2 and D.2.3

"NOTE: The hourly rates for ordinary hours in clause19.1 and Schedule D clauses D.2.1 and D.2.3 as they apply to Milling employees are notionally expressed on the basis of a 38 hour divisor. Where an averaging system is worked in accordance with clause 19.3 the divisor for the purposes of establishing minimum hourly rates for Milling employees is as provided in clauses 19.3(b) and (c). All of the penalty rates in the tables in Schedule D.2 are calculated based on a divisor of 38."

[12] Parties seeking to attend the conference are required to provide contact telephone numbers by 9.00 am on 23 April 2020 to chambers.asbury.dp@fwc.gov.au.

THE SEAL OF THE FAIR WORK COMMISSION

DEPUTY PRESIDENT

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[1] [2017] FWCFB 5536.

[2] [2019] FWCFB 1980.

[3] [2020] FWCFB 1550.