DECISION

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

4 yearly review of modern awards – Building and Construction General (On-Site) Award 2020

(AM2020/101)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER HARPER-GREENWELL SYDNEY, 21 APRIL 2021

4 yearly review of modern awards – Building and Construction General (On-Site) Award 2020 – finalisation of awards exposure drafts – distant work payment provisions.

Background

[1] Master Builders Australia (MBA) and the Housing Industry Association (HIA) have raised an issue concerning the drafting of clause 26.4 of the *Building and Construction General On-Site Award 2020* (2020 Award). The 2020 Award replaced the *Building and Construction General On-site Award 2010* (2010 Award) effective from 1 March 2021.

[2] Clause 26 of the 2020 Award is expressed in relevantly the same terms as clause 25 of the 2010 Award, and provides as follows:

> **26. Travelling time entitlements**
>
> **…**
>
> **26.1 Fares and travel pattern allowance**
>
> **(a)** In recognition of the travel patterns and costs peculiar to the industry, which include mobility in employment and the nature of employment on construction work, an employee is to be paid an allowance of $17.43 per day for each day worked when the employee starts and finishes work on a construction site, or is required to perform prefabricated work in an open yard and is then required to erect or fix on-site.
>
> **(b)** An employee will not be entitled to the allowance in clause 26.1(a) on any day where the employer:
>
> > **(i)** provides or offers to provide transport free of charge from the employee's home to the place of work and return; or
> >
> > **(ii)** provides a fully maintained vehicle free of charge to the employee.

…

26.4 Distant work payment

(a) If an employee is required to travel to a construction site that is:

(i) not located in a metropolitan radial area in which the employee's usual place of residence is located; and

(ii) more than 50 kms by road from the employee's usual place of residence;

the employee will be entitled to the distant work payment in clause 26.4(b) in addition to the allowance in clause 26.1.

(b) The distant work payment is:

(i) payment for the time outside ordinary working hours reasonably spent in travel, paid at the ordinary time hourly rate, calculated to the next quarter of an hour, and with a minimum payment of one half an hour per day for each return journey; and

(ii) any expenses necessarily and reasonably incurred in such travel, which will be **$0.47** per kilometre where the employee uses their own vehicle.

(c) Despite clause 26.4(a), the distant work payment is not payable when, at the commencement of employment, the employee's usual place of residence was more than 50km by road from the construction site on which the employee was initially engaged.

(d) In this subclause, a metropolitan radial area is the area within a radius of 50 kilometres of:

(i) the GPO of a capital city of a State or Territory; or

(ii) the principal post office in a regional city or town in a State or Territory.

[3] The current terms of the distant work payment provisions in the 2020 Award arose from a consideration by a differently constituted Full Bench[1] of the substantive issues raised by the parties in respect of the 2010 Award in the context of the 4 yearly review of modern awards. In a decision issued on 26 September 2018[2] (September 2018 decision), that Full Bench dealt with proposals advanced by MBA and the HIA to modify the distant work payment provisions.

[4] The September 2018 decision included a proposed redraft of clause 25 of the 2010 Award, which included a redrafted clause 25.4 in the same terms as the current clause 26.4 of the 2020 Award. No submissions about the proposed redraft of clause 25.4 were made by MBA or the HIA (or by any other party). On 20 March 2020, the Full Bench made a determination[3]

[1] Hatcher VP, Hamilton DP, Gostencnik DP, Gregory C, Harper-Greenwell C

[2] [2018] FWCFB 6019

[3] PR715725

which, among other things, varied clause 25 of the 2010 Award in the terms of the proposed redraft contained in the September 2018 decision. The variation took effect on 1 July 2020.

[5] The issues now raised by MBA and the HIA, and the position of relevant unions in response, were summarised by the Full Bench dealing with the finalisation of exposure drafts in a decision issued on 4 December 2020[4] as follows (footnotes omitted):

> "[66] The MBA submits that clause 26.4(a)(ii) was the subject of submissions before the substantive Full Bench dealing with the Construction Awards and that that Full Bench determined that the clause required simplification. The Full Bench issued a determination regarding the substantive matters on 20 March 2020 and it came into operation on 1 July 2020.
>
> [67] The MBA contends that the amendments at clause 26.4(a)(ii) have '…given rise to a consequence that we submit is unintended and was not sought by any of the interested parties appearing in the Award stage proceedings.' The MBA submits that:
>
> > 'The previous clause 25 was underpinned by a concept that established 'radial areas' of 50km with a 'designated boundary' that was used to determine both eligibility and amounts payable for travel for work purposes. In simple terms, clause 25 operated by establishing amounts that were payable for travel within a radial area (50km from an employee's home).
> >
> > Where travel was required outside of the radial area, it was (save for some specifically identified circumstances) considered to be distant work and triggered a different allowance arrangement. This arrangement applied for travel from and beyond the 'designated boundary' (more than 50kms) and was payable in addition to the usual arrangement for travelling within the normal 'radial area' (less than 50km).
> >
> > The re-drafted provision can now be interpreted such that it creates a 'double-dip' outcome. That is, an employee will receive both the conventional travel allowance and distant work arrangement for all travel to and from distant work – whereas previously the distant work arrangement only applied for the distance from and beyond that normally travelled.'
>
> [68] The MBA submits that the re-drafted clause removes the notion of 'designated boundary' contained in the previous version of the clause and as a consequence, the new clause 26.4(a) can be interpreted as creating an entitlement for employees to be paid for the entire distance travelled from their home to the distant work site (rather than for the return trip between the 50km radius point and the distant work site).
>
> [69] The MBA further submits that clause 26.4(c) only precludes the allowance being payable in circumstances where the employee resided more than 50km from the site when they were initially employed. The MBA submits that this was different to the previous arrangement whereby the distant work allowance was payable only for travel beyond the metropolitan radial area, for example outside the 50km radial boundary and back to the boundary. The MBA submits that as a result the new provision can be read

[4] [2020] FWCFB 6040

such that employees can now claim the fares and travel pattern allowance under clause 26.1 in addition to the distant work payment for travel from the employee's usual place of residence to the distant work site.

[70] The HIA advanced a similar submission to that made by the MBA and proposed the following amendment to clause 26.4(b):

> '(b) The distant work payment <u>in respect of travel from the metropolitan radial area to the job and return to the metropolitan radial area</u> is:' (amendment underlined)

[71] The CFMMEU objected to the proposal to vary the clause by the MBA and HIA and submits that:

> "Clause 26 - Travelling time entitlements, was determined by the Construction Awards Full bench in its September 2018 Decision and largely reflected the clause sought by the HIA. It should be noted that the whole clause was replaced by that decision. The Construction Awards Full Bench also published a draft variation dealing with this clause on 23rd November 2018 and, by directions also issued on 23rd November 2018, invited parties to comment…
>
> Given the level of scrutiny by all the parties, including the MBA and HIA, on the proposed variations to the clauses contained in the Building and Construction General On-site Award 2010, all parties were fully aware of the consequences of the clauses decided on by the Full Bench at the time the decisions were made. Moreover, the Construction Awards Full Bench gave ample opportunity to parties to comment on the draft determinations arising from its decisions. The MBA and HIA decided not to make any submissions on the specific issues that they now raise."

[6] The matter was referred to this Full Bench, which consists of three of the members of the Full Bench who made the September 2018 decision.

[7] In our decision[5] of 2 March 2021 (March 2021 decision), we accepted the submission by MBA and the HIA that the most logical reading of clause 26.4 of the 2020 Award is that where the criteria in clauses 26.4(a)(i) and (ii) are satisfied in relation to an employee, the employer is required to pay the employee the allowance provided in clause 26.1 *and* the distant work payment in clause 26.4 in respect of time and distance travelled from the employee's place of residence to the construction site.

[8] We further accepted that this would amount, in effect, to double compensation for that part of the travel which is within the relevant metropolitan radial area and within a radius of 50 kms from the employee's residence. As explained in [181] of the September 2018 decision, the allowance in clause 26.1 compensates an employee, on an averaging basis, for the cost and inconvenience associated with travel to and from varying construction sites. Read with clause 26.4, it can be inferred that clause 26.1 is intended to compensate for all such travel within a metropolitan radial area and within a radius of 50 kms from the employee's residence. However, an employee is compensated for that travel again under clause 26.4(b), which overlaps with the

[5] [2021] FWCFB 1105

functional operation of clause 26.1. We did not consider that this was the result intended by the September 2018 decision and, accordingly, we considered that an appropriate modification to clause 26.4 was necessary.

[9] We expressed a *provisional view* in the March 2021 decision that the simplest solution to the problem of double compensation was to make the allowance in clause 26.1 of the 2020 Award inapplicable to employees who qualify for distant work payments under clause 26.4(a).

[10] This would require clause 26.4(a) to be amended as follows:

> **26.4 Distant work payment**
>
> **(a)** If an employee is required to travel to a construction site that is:
>
> **(i)** not located in a metropolitan radial area in which the employee's usual place of residence is located; and
>
> (ii) more than 50 kms by road from the employee's usual place of residence;
>
> the employee will be entitled to the distant work payment in paragraph (b) ~~**in addition to**~~ **instead of** the allowance in clause 25.1.

[11] Interested parties were invited to file submissions in response to this provisional view.

Submissions in response to provisional view

[12] We received submissions in response to our provisional view from the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), the HIA, the Australian Workers' Union (AWU), the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), the Australian Manufacturing Workers' Union (AMWU) and MBA.

[13] The CEPU,[6] AWU,[7] CFMMEU[8] and AMWU[9] supported the provisional view.

[14] The HIA submitted[10] that the provisional view would result in a significant change to the award provision not intended in the September 2018 decision for which there is no proper basis. The HIA acknowledged that the provisional view overcomes a potential double dip outcome and is simple and easy to understand, but that it would not return award-reliant employers to the position they would have been in prior to the September 2018 decision and would impose additional costs when compared to that which was payable under the former provision. It referred to an example of the performance of travelling to distant work given in the MBA submission of 27 October 2020, which under the current 2020 Award would cost

[6] Submission, CEPU dated 9 March 2021.

[7] Submission, AWU dated 9 March 2021

[8] Submission, CFMMEU dated 9 March 2021

[9] Submission, AMWU dated 9 March 2021

[10] Submission, HIA dated 9 March 2021.

$133.33 per day and would only be reduced to $115.90 per day under the provisional approach, compared to $57.93 per day under the provision in the 2010 Award pre-1 July 2020.

[15] The HIA further submitted that the proposed change would unwind a variation adopted as a result of the 2 yearly review of modern awards ([2013] FWC 4576) which was intended to clarify that both time spent travelling outside ordinary working hours and reimbursement for expenses associated with travelling outside the radial area is calculated from the designated radial boundary to the job and return.

[16] The HIA submitted that to ensure the integrity of the provision, maintain consistency and stability within the 2020 Award and provide a solution that is as simple as possible in light of the current obligations under the 2020 Award, the following amendment should be made to clause 26.4:

> "**26.4 Distant work payment**
>
> …
>
> **(b)** The distant work payment, ~~is~~ in respect of travel from the 50km boundary of the metropolitan radial area or 50kms from the employee's usual place of residence (whichever is greater) to the construction site, is:
>
> …" (amendments underlined)

[17] The MBA submitted[11] that the proposed variation to clause 26 improves the existing provision by reducing the potential for it to be read as giving rise to a "double dip" entitlement. However, it submitted, the proposed amendment does not reflect the September 2018 decision, which was relevantly confined to drafting changes that reduced complexity. The MBA submitted that the provision should be amended to provide a clause that is abundantly clear and entirely consistent with the September 2018 decision. The MBA submitted its proposed amendment would both clarify when the distant work travel allowance is payable and be more akin to the predecessor provision by retaining its key component that the allowance is payable from the radial boundary and return.

[18] The MBA propose as follows (in mark-up):

> "**26.4 Distant work payment**
>
> **(a)** If an employee is required to travel to a construction site that is~~:~~
>
> ~~**(i)** not located in a metropolitan radial area, in which the employee's usual place of residence is located; and~~
>
> ~~**(ii)** more than 50 kms by road from the employee's usual place of residence;~~
>
> the employee will be entitled to the distant work payment in clause 26.4(b).~~in addition to the allowance in clause 26.1.~~
>
> **(b)** The distant work payment is:

[11] Submission, MBA dated 9 March 2021

> **(i)** payment for the time outside ordinary working hours reasonably spent in travel, from the boundary of the metropolitan radial area to the distant work construction site and return to the boundary; and
>
> **(ii)** paid at the ordinary time hourly rate, calculated to the next quarter of an hour, and with a minimum payment of one half an hour per day for each return journey; and
>
> **(ii)** any expenses necessarily and reasonably incurred in such travel, which will be **$0.47** per kilometre where the employee uses their own vehicle.

(c) Despite paragraph (a), …"

[19] The MBA submitted that during the Full Bench hearing on 1 March 2021, the Commission presented the parties with two options to address the anomaly arising from clause 26.4, with the first option ultimately being adopted as the provisional view. In the alternative to its own position, MBA expressed a preference for the second option.

Consideration

[20] Notwithstanding the submissions of the HIA and MBA, we have decided to vary the 2020 Award in accordance with the provisional view we expressed in the March 2021 decision. Contrary to the submissions of those parties, it is not the case that no substantive variation to clause 25 of the 2010 Award was intended in the September 2018 decision. As paragraph [184] of that decision makes clear enough, the Full Bench considered that clause 25 was unnecessarily complex and confusing, and required simplification. This encompassed the way in which the concept of radial areas operated. The new clause 25.4 established as a consequence of the September 2018 decision was intended to recast the existing distant work payment system into a new scheme that would be simpler conceptually and administratively. Accordingly, the restoration of the pre-existing system as the solution to the double-compensation problem identified in the March 2021 decision, as is effectively proposed by the HIA and MBA, would reverse the outcome of the 4-yearly review. It cannot be accepted for that reason.

[21] All parties accept that the award variation proposed in that decision would resolve the identified double-compensation problem. We also note the HIA's acceptance that the proposed variation would give rise to an award entitlement which is simple and easy to understand. We are not persuaded that the variation would result in any significant increase, or indeed any increase at all, in the aggregate costs of distant work payment for employers bound by the 2020 Award. The practical example given in MBA's submission of 27 October 2020 concerned an employee (classified as CW3) living within the 50 km radial area who is required to travel to a distant work site 75 kms from the GPO using their own vehicle. It may be accepted that, in that example, the cost of the entitlement if the criteria in clause 25.5 of the 2010 Award as it was pre-July 2020 are applied (using MBA's assumptions concerning time of travel) would be $57.93 per day, compared to $115.90 per day under the variation proposed in the March 2021 decision.

[22] However, that is a worst-case scenario. In other scenarios, the cost to the employer is reduced. A contrary example would be an employee residing 5 kms within the radial boundary who is required to travel to a site that is 40 kms by road outside the radial boundary (and 90 kms from the GPO). Under the pre-1 July 2020 provision in the award, that employee (using

their own vehicle) would be entitled to a total daily payment of $77.73 (consisting of $22.70 for one hour of travel time to and from the construction site outside of ordinary hours, assuming a speed of 80kms/hr + $37.60 for travelling a distance of 80 kms return outside the radial boundary at $0.47 per kilometre + the allowance of $17.43 per day for travel within the radial boundary). Under the variation proposed in the March 2021 decision, the employee would not be entitled to any distant work payment at all because the employee has not been required to travel more than 50 kms by road from their residence to the work site. In that case, the employee would be entitled to the allowance of $17.43 per day – a reduction in cost of about $60.30 per day.

[23] Neither the HIA nor MBA's submission attempt any aggregate estimate of the relative cost of the proposed variation across a representative sample of employees and worksites. Accordingly, they have not demonstrated that the proposed variation would have any cost impact.

[24] We consider that the proposed variation is necessary to achieve the modern awards objective in s 134(1) of the *Fair Work Act 2009*. It is fairer and more relevant because it resolves the existing double compensation problem and appropriately compensates employees who actually travel long distances to a work site, and not just those who cross an arbitrary radial boundary. As to the matters in s 134(1), we conclude that the considerations in paragraphs (f) and (g) favour the variation because it reduces employment costs by removing the double compensation problem and results in an administratively simpler and easily understood provision. We do not consider that any of the other considerations are relevant and accordingly we do not assign them weight in reaching our decision.

[25] A determination giving effect to this decision will be published in conjunction with this decision. The variation will operate from 1 May 2021.

VICE PRESIDENT

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