CFMEU
CONSTRUCTION

IN THE FAIR WORK COMMISSION

Matter Numbers: AM2016/23, AM2014/260, 274 and 278

Fair Work Act 2009

Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

Construction Awards

Building and Construction General On-Site Award 2010

[MA000020]

Joinery and Building Trades Award 2010

[MA000029]

Mobile Crane Hiring Award 2010

[MA000032]

4 yearly review of modern awards – award stage –Group 4C awards

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) RESPONSE TO STATEMENT ([2017] FWCFB 4239) ON CONSTRUCTION AWARDS

15th September, 2017

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Introduction

1. On 17th August 2017 the FWC Full Bench issued a Statement ([2017] FWCFB 4239) on the Construction Awards in which they expressed a provisional view as to particular approaches which might be taken to resolve the various employer and union applications to vary clauses 20.1, 21-22, 24.1-24.3, and 33 of the *Building and Construction General On-site Award 2010* (the Award).

2. The Statement made it clear that the proposed approaches did not represent any final or concluded view on the part of the Full Bench, and that the parties should not assume that the proposed approaches would ultimately be reflected in the Full Bench's decision.

3. The Full Bench invited each party to make submissions as to whether these approaches, either as proposed or in any identified modified form, would be appropriate to be included in the Award. Submissions were to be filed by 5pm on Friday 15th September 2017.

4. This submission is made in response to that invitation.

Tool and Employee Protection Allowance – Clause 20.1

5. The Full Bench proposal for clause 20.1 is to replace the whole clause. The main changes that are proposed appear to be the following:

    - In 20.1(a) to say that the tool allowance is "*in recognition of the maintenance and provision of the standard tools of trade*";
    - In 20.1(b) to say that "*Where any other tools are required for the performance of work by a tradesperson covered by paragraph (a), or where in the case of any other employee any tools are required for the performance of work, the employer shall: (i) provide the tools; or (ii) reimburse the employee for provision of the tools.*";
    - In 20.1 (c) there is a similar provision to apply "*Where any protective clothing or equipment, other than safety boots, is required for the safe performance of work*";
    - In 20.1(d) to retain, in a slightly modified form, the wording from the existing 20.1(b)(viii);
    - In 20.1(e) to retain, in a slightly modified form, the wording from the existing 20.1(d)(i) and (ii) (but not 20.1(d)(iii)); and
    - The removal of the existing provisions in clause 20.1(b)(i) to (vii) and 20.1(c).

6. The Award clause 20.1 currently contains a number of paragraphs dealing with tools and protective equipment not covered by the payment of the tool allowance, e.g. scrutch combs and rubber mallets for bricklayers; dogs and cramps, augers, trammels, spanners etc. for carpenters; cutting tools and jet sprays for stonemasons; all floating rules, trammels, centres, buckets and sieves for plasterers; waterproof protective clothing for civil construction employees, etc.

7. The CFMEU C&G is generally (save for the issues identified below) not opposed to the Full Bench proposal to the extent that the proposed clause removes the detail of the equipment not covered by the tool and employee protection allowance and replaces such detail with the wording in the proposed 20.1(b) and (c).

8. The CFMEU C&G is opposed to the deletion of the wording from 20.1(b)(vi) regarding mess personnel as the current provision not only deals with the reimbursement of the cost of clothing but also the laundering and maintenance of such clothing.

9. The CFMEU C&G is also opposed to the deletion of reimbursement of x-rays for refractory workers. An alternative clause was proposed by the CFMEU C&G in its 22nd June 2017 submission[1], and the CFMEU C&G position on it has not changed.

10. The clause proposed by the Full Bench retains at 20.1(d) the existing provisions regarding the reimbursement of the cost of purchasing steel toe capped safety boots on commencement of work and replacement each six months if required, and at 201.1(e) retains the separate provision whereby refractory bricklayers are paid an allowance instead. In the CFMEU C&G submission of 22nd June 2017 it stated

> "*14. At PN3358 to PN3367 of transcript, a series of questions were asked regarding safety boots and what was different about refractory bricklayers boots. Following further investigation the CFMEU C&G can advise that there is nothing different with the safety boots worn by refractory workers. The retention of the different award clause is a result of keeping the different provision as was contained in the NBCIA 2000. The CFMEU C&G submits that there is no good reason for keeping a separate provision and that if the heading of clause 20.1(b)(vii) is changed to "All employees" then the provisions relating to safety boots in 20.1(d) could be deleted*."

11. As there is nothing significantly different about the boots worn by refractory bricklayers the proposed clause 20.1(e) could be deleted, and 20.1(d) amended by the deletion of the words "other than refractory bricklayers".

Allowances - Clauses 21 and 22

12. In the Statement the Full Bench has proposed that a number of allowances in clauses 21 and 22 be abolished, and the industry allowance be increased by a compensatory amount.

13. The Full Bench has categorised the allowances in these clauses as expense, disability and skill allowances. The categorisation for the most part reflects a position agreed to by the industrial parties during conciliation before SDP Watson. The CFMEU C&G has identified that a few of the allowances are however incorrectly categorised, i.e:

- There is no plant room allowance, clause 21.4(e) is part of the multistorey allowance and identifies how a plant room on top of a multistorey building is to be treated for the purpose of calculating the number of storeys;
- The pile driving allowance (clause 22.2(u)) and dual lift allowance (clause 22.2(v)) are skill related.

14. It is the disability allowances that the Full Bench proposes be abolished and rolled up into a new industry allowance.

15. The Full Bench proposal also suggests that the quantum of the new industry allowance be different for the different sectors of the building and construction industry. The sectors the Full Bench have in mind are:

- The residential construction sector (which encompasses both cottage construction and multi-unit apartment buildings construction);
- The commercial building and construction sector;

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1 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-cfmeu-220617.pdf at paragraph 8

- The civil construction sector; and
- The metal and engineering construction sector;

16. The Full Bench identified the following issues arising from their proposal:

    (a) the appropriate definitions for each sector having regard to the coverage definitional provisions in clause 4.10 of the Award;

    (b) the quantum of the industry allowance that should apply in each sector; and

    (c) whether any existing disability related allowances should be retained.

17. The CFMEU C&G opposes having separate industry allowances for different sectors of the industry and submits that it is not appropriate for this Award. Including different industry allowances for the sectors identified would add a significant amount of complexity to the Award.

18. The proposal increases the number of sectors to 4 where only 3 currently exist (i.e. general building and construction (clause 4.10(a)), civil construction (clause 4.10(b)), and metal and engineering construction (clause 4.10(c))). The definition of the residential construction sector is contrary to the accepted norm (i.e. there is no significant difference between the disabilities associated with multi-unit apartment buildings and commercial buildings), and even if the sectors were limited to general building and construction, civil construction and metal and engineering construction, there would still be confusion as to what industry allowance is payable to employees.

19. The proposal would also create 4 different hourly rates for each classification and occupation under the Award (because the industry allowance is all purpose). So instead of having approximately less than 30 identifiable all purpose hourly rates of pay (inclusive of industry allowance and tool allowances, etc.), for daily hire employees, the Award would have up to 120 different hourly rates for daily hire employees There would be a similar number of hourly rates for weekly hire employees (not including apprentices and trainees).

20. The CFMEU C&G submits that having one rate of industry allowance for the Award is simple and has worked well in the industry for nearly 100 years and should continue.

21. In regard to the more general proposition of abolishing disability allowances and compensating employees through an increase in the industry allowance, the problem we foresee is that the industrial parties will have opposing views on both the level of the quantum of any new industry allowance and what disability allowances should remain separate.

22. In the earlier proceedings the CFMEU C&G proposed a variation to the Award which would allow an agreement between employers and employees to pay a consolidated disability allowance (of 7.9% of the standard rate) in lieu of special rates except for:

    - Hot work
    - Cold work
    - Confined space
    - Swing scaffold
    - Asbestos
    - Asbestos eradication
    - Suspended perimeter work platform
    - Towers allowance
    - Compressed air work

(NB this would not have included the allowances in clause 21, e.g. multi-storey allowance, refractory allowance, first aid allowance, in charge of plant allowance etc.))

23. If the Full Bench were to consider a new industry allowance the disability allowances from clauses 21 and 22 not to be included, based on the CFMEU C&G's earlier submission, would be the following:

- Underground allowance
- Multistorey allowance
- Laser Safety officer allowance
- Carpenter-diver allowance
- Refractory bricklaying allowance (this would require suitable modification)
- Cofferdam worker
- First aid allowance
- Electrician's licence allowance
- In charge of plant allowance
- Hot work
- Cold work
- Confined space
- Swing scaffold
- Asbestos
- Asbestos eradication
- Suspended perimeter work platform
- Towers allowance
- Pile driving
- Dual lift allowance
- Computing quantities
- Certificate allowance
- Compressed air work

24. As for any quantum of a new industry allowance it is submitted that based on the allowance of 7.9% in lieu of special rates sought in our original application, a new industry allowance (which also took into account the special allowance of $7.70) of 12.55% of the weekly standard rate would be appropriate.

25. If the Full Bench decides not to go down this path there are other options to reduce the number of allowances under the Award that could be considered, e.g.

- The special rates for furnace work and acid work be combined with the refractory bricklaying allowance.
- The cofferdam worker allowance and compressed air work allowances be combined into one provision.
- The height work allowance, towers allowance and roof repairs allowance be combined into one height allowance paid for every 15 metres in height. The allowance would not by payable where multistorey allowance or swing scaffold allowance applies.

The CFMEU C&G suggests that this is not an exhaustive list and other options may be worth exploring at a conference of the industrial parties.

Living Away From Home – distant work entitlement - Clauses 24.1 to 24.3

26. The Full Bench proposal only deals with three parts of the living away from home clause: 24.1- Qualification, 24.2 – Employee's address and 24.3 – Entitlement.

27. In 24.1 there are minor amendments which remove the existing provision in 24.1(b) (which stated that an employee was not entitled to payment under this clause if they gave false address), and insert the word "correct" in the new 24.1(c) so that it reads that an employee is entitled to the payments under the clause provided that "the employee has provided the correct details of their usual place of residence, or any separately maintained address to the employer".

28. In the proposed clause 24.2:

- In 24.2(a) the words removed from 24.1(b) (identified above) have been added.
- The current wording in 24.2(b) relating to change of address has been deleted.
- A new 24.2(b) has been inserted that requires the employer to take reasonable steps to verify the address details provided by the employee, such as by the provision of a drivers licence.
- A new 24.2(c) inserted which states that the employer is liable to pay or provide the entitlements under the clause if the employee has failed to provide the correct address details and the employer has failed to take reasonable steps to verify the address details. The employer is not liable to pay if the employee has provided fraudulent documents.

29. In the proposed 24.3 the main changes are:

- The wording in 24.3(a)(i) is changed so that the employer is required to pay the greater of $68.45 per day or an amount which fully reimburses the employee for all reasonable accommodation and meal expenses occurred.
- A new 24.3(a)(iii) is added to allow the employer to provide the worker with accommodation and reimburse the employee for all reasonable meal expenses.
- The wording in 24.3(b) is changed so that it refers to "communications" instead of "mail facilities, radio or telephone contact", and "contemporary community living standards" instead of "reasonable standard" having regard to the location in which work is performed.

30. The proposed changes to 24.2 go some way to address the concern of the CFMEU C&G over gate starts, but they do not deal with the issue of undue pressure by the employer which is sought to be addressed by the CFMEU C&G's proposed variation.

31. In the proposed clause 24.3, in (a) there is no change to the amount to be paid although it is recognised that it does remove any discretion the employer has to not pay the higher amount by reimbursement. In (b) there is nothing there that really adds to the existing clause and it does not address the issues the CFMEU C&G has raised regarding single room accommodation, motelling in camps and internet and mobile phone access. It is also highly likely that there would be disputes over what is meant by "contemporary community living standards" having regard to the location in which work is performed.

32. The CFMEU C&G therefore submits that the proposed 24.1 and 24.2 would be acceptable and appropriate for the award if the following words were added to 24.2(a): "An employer

must not exercise undue influence for the purpose of avoiding the obligations under this clause, in persuading an existing employee to give a false address".

33. In regard to 24.3 the CFMEU C&G opposes the Full Bench proposal as it does not address the issues raised in the initial CFMEU C&G submission supporting the variations sought[2], and by the witness statements and evidence provided during the hearing on the inadequacy of the minimum amount payable and the specific issues of single room accommodation, internet and phone access, motelling in camps, etc. The CFMEU C&G submits that the draft clause put forward by the CFMEU C&G is more appropriate for the award and should be adopted by the Full Bench.

Hours of work – clause 33

34. The Full Bench proposal is to replace clause 33 of the award with a totally new clause. The most significant changes are that the clause:

- Removes the default position of the RDO being taken on the fourth Monday in each four week cycle.
- Removes the absolute requirement for agreement to be reached between an employer and a majority of employees on any substitute day for the RDO.
- Permits employers who give 7 days written notice before the start of a 20 day cycle to:
    - fix a day on which all employees will take an RDO; or
    - Fix different days during the cycle on which particular employees will take an RDO.
- Allows an employer and an employee to agree to allow an employee to bank up to 5 RDO's.
- Allows employers to give 48 hours or more written notice to an employee to require the employee to work on an RDO if the work is necessary to allow other employees to be employed productively, etc.
- Provides that if an employee is required to work on an RDO they are to be paid Saturday penalty rates, but no mention is made of accrued entitlements.
- Continues with the error in regard to the working hours of miners driving tunnels, etc.

35. The changes proposed in this clause are significant. The changes are detrimental to employees as they remove any certainty as to when RDO's are to be usually taken (i.e. the fourth Monday in each four week cycle), and reduce the ability of employees to plan ahead for time to be enjoyed with family and friends. The clause gives absolute power to employers to determine when the RDO's are to be taken (which can be varied by 7 days' notice before each cycle) and removes any obligation on employers to reach agreement with their employees on when RDO's are to be taken. The clause also fails to address what happens to accrued entitlements when an employee is required to work on an RDO. The CFMEU C&G therefore opposes the proposed clause 33 and submits that it is not appropriate for this Award.

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2 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-cfmeu-091216.pdf