



REPORT TO FULL BENCH

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

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(AM2019/17)

DEPUTY PRESIDENT CLANCY

MELBOURNE, 1 JUNE 2020

4 yearly review of modern awards – finalisation of Exposure Drafts and draft variation determinations – Tranche 3 awards – Electrical, Electronic and Communications Contracting Award 2010.

[1] Arising from the Decision of the Full Bench dated 27 April 2020¹ with respect to finalising the Tranche 3 awards, a conference of parties with an interest in the *Electrical, Electronic and Communications Contracting Award 2010* (the Electrical Award) was held on Monday 25 May 2020 in an effort to resolve the outstanding issues in dispute.

Definition of Ordinary Hourly Rate

[2] It was noted by the Full Bench at paragraph [83] of the Tranche 3 Background Paper dated 23 March 2020 that Schedule B.1.1 does not contain a definition of ‘ordinary hourly rate’ as such, but simply explains the basis for the calculation of the rates that follow. Australian Business Industrial & NSW Business Chamber Limited (ABI) submitted that the definition for ‘ordinary hourly rate’ in clause B.1.1 is different to the definition for ‘ordinary hourly rate’ in clause 2 of the Exposure Draft.

[3] Clause B.1.1 states:

“**Ordinary hourly rate** includes the industry allowance (clause 18.3(a)) and tool allowance as applicable (clause 18.3(g)) which are payable for all purposes.”

[4] Clause 2 states:

“**ordinary hourly rate** means the hourly rate for an employee’s classification specified in clause 16.2, plus the industry allowance. Where an employee is entitled to additional all-purpose allowances, these allowances form part of that employee’s ordinary hourly rate.”

¹ [2020] FWCFCB 2124.

[5] ABI submitted that to resolve this, the definition for ‘ordinary hourly rate’ in B.1.1 be amended to reflect the definition provided in clause 2 of the Exposure Draft.

[6] Ai Group noted there is a difference between the two definitions of “ordinary hourly rate” but does not foresee that this is likely to cause any conflict because the definition in B.1.1. reflects that the only all-purpose allowances to be included are the industry allowance and tool allowance (for applicable employees), whereas in the other parts of the Electrical Award, the definition is to be read to include every all-purpose allowance.

[7] Ai Group suggested one way to address confusion (if any) would be to amend clause B.1.1 to include the words “as set out in this schedule” after the words “Ordinary hourly rate” so as to read “Ordinary hourly rate, as set out in this schedule, includes the industry allowance (clause 18.3(a)) and tool allowances as applicable (clause 18.3(g)) which are payable for all purposes”.

[8] For its part, the CEPU submitted that to maintain clarity and consistency with the footnotes which appear in Schedule B with respect to the basis for the calculations in the rates tables in Schedule B, the wording in Schedule B.1.1 should be amended as follows:

“**Ordinary hourly rate** includes the industry allowance (clause 18.3(a)) and **for grade 5 and higher classifications** the tool allowances ~~as applicable~~ (clause 18.3(g)) which are payable for all purposes.”

[9] Following discussion at the conference, the parties agreed for the definition in clause B.1.1 to be amended as follows:

“**Ordinary hourly rate for the purposes of Schedule B** includes the industry allowance (clause 18.3(a)) and tool allowance as applicable (clause 18.3(g)) which are payable for all purposes.”

Replication of the “public holiday” column

[10] ABI submitted that Tables B.2.1, B.4.1, B.4.5 and B.4.9 set out ‘ordinary and penalty rates’ for other than shiftworkers and include a ‘public holiday’ column. Further, it submitted that Tables B.2.2, B.4.2, B.4.6 and B.4.10 set out ‘overtime rates’ for other than shiftworkers and also include the same ‘public holiday’ column. ABI suggested that replication of the ‘public holiday’ column may cause confusion for users of the Electrical Award and proposed a number of changes to multiple tables within Schedule B.

[11] Neither the CEPU nor Ai Group shared this view and further, suggested that there might be unintended consequences and confusion if ABI’s proposed changes were adopted.

[12] The outcome of the ensuing discussion at the Conference was that ABI no longer presses any changes it had advocated in relation to this item.

Incorrect public holiday penalties for shiftworkers

[13] ABI notes that Table B.2.4 provides for ‘overtime rates’ and includes a ‘public holiday’ column but submits that the percentage set out in that column (250%) is the incorrect percentage for all shiftworkers. It says that public holiday penalties for shiftworkers are contained in clause

13.15 of the Exposure Draft and that the penalty which applies on a public holiday differs depending on whether the employee is a continuous shiftworker or a shiftworker 'on other than a continuous work'. ABI submits that the applicable penalties payable on a public holiday to both categories of shiftworkers are correctly outlined in the last column of Table B.2.3.

[14] Following discussion, the parties agreed with a suggestion of the CEPU that this issue could be addressed by deleting the current public holiday column in Table B.2.4 and replacing it with the two public holiday sub-columns for continuous shiftworkers and other than continuous shiftworkers, from Table B.2.3.

[15] The CEPU raised an additional matter in relation to the column for Sunday work in Table B.2.3, submitting that this could be clarified for non-continuous shiftworkers with the insertion of a Note in relation to the heading of the 'Sunday' column (to become Note 5) that would state "*This is the rate at which shiftworkers on other than continuous work are to be paid for all time worked on a Sunday (see clause 13.15(b)(i)).*"

[16] This was agreed by ABI and the Ai Group.

Casual shiftworkers

[17] ABI notes that Clause B.3.2 of Schedule B for 'casual shiftworkers' includes a 'Day' column and submits this is unnecessary, as the table is for shiftworkers only and the rates applicable to day workers are already provided for in Table B.3.1.

[18] The parties agreed that the 'Day' column from Table B.3.2 be removed on the basis that it is unnecessary.²

All-purpose rates for apprentices - fare and travel time allowances

[19] With the Exposure Draft issued on 29 January 2020, the Commission asked the parties to consider whether the fares allowance in clause 18.6(d) and travel time allowance in clause 18.6(c) should be included in the all-purpose rate for apprentices.

[20] ABI submitted that the fares allowance and travel time allowance should not be included, because:

- a) neither allowance falls within clause 18.3 all-purpose allowances;
- b) clause 18.6(d) clearly states that the fares allowance only applies where an employee is required to start and/or cease work on a job site, which may not always be applicable;
- c) clause 18.6(c) clearly outlines the circumstances in which the travel time allowance must be paid, namely each day an employee presents to work and when an employee takes an RDO;
- d) clause 18.6(g) provides that the allowances in clause 18.6, which encompasses both the fares allowance in clause 18.6(d) and travel time allowance in clause 18.6(c) are not to be taken into account when calculating overtime penalty rates, annual leave, personal/carer's leave, long service leave or public holiday payments; and

² The CEPU confirmed its agreement in an email to the Commission shortly after the Conference on 25 May 2020.

e) the wording of the Exposure Draft does not indicate that clauses 18.6(c) and 18.6(d) should be applied any differently in relation to apprentices, particularly when these clauses are read in conjunction with clause 18.6(g) and clause 16.4(a).

[21] ABI proposed that the issue could be addressed by removing references to ‘fares allowance’ and ‘travel time allowance’ in each of clauses 16.4(a)(iii), 16.4(b)(iii), 16.4(b)(iv) and 16.4(b)(vii)

[22] Ai Group submitted that the fares allowance (in clause 18.6(d)) and the travel time allowance (in clause 18.6(c)) should not be included in the all purpose rate because an all-purpose rate is only paid for time worked and on certain forms of paid leave under the award (including annual leave and personal/carer’s leave), on public holidays not worked and where payment in lieu of notice upon termination is made.

[23] Ai Group submitted clause 18.6(c) clearly stipulates that the allowance is paid only on days the employee presents themselves for work and on rostered days off and it is not intended to be paid under any other circumstance. Similarly, it submitted that clause 18.6(d) is an allowance that is payable when the employee is actually working and required to start or cease work on a job site and is not intended to be paid under any other circumstance. As such, it was submitted that neither should be included in the all-purpose rate.

[24] The CEPU proposed that rather than removing references to fares allowance and travel time allowance from clauses 16.4(a)(iii), 16.4(b)(iii), 16.4(b)(iv), 16.4(b)(vi) and 16.4(b)(vii), clause 16.4(a)(iii) be amended and the wording of the current version of the Electrical Contracting Award used. The CEPU submitted the wording of clause 16.4(a)(iii) and 16.4(a)(iv) currently in the current Electrical Award accurately and clearly categorises and describes the fare and travel allowance, as well as the all purpose allowances payable to apprentices and therefore, should remain unchanged.

[25] The CEPU submitted that clause 16.4(a)(iii) in the Exposure Draft should be amended, with the following inserted instead:

(iii) In addition to the minimum wage payments arising from clause 16.4(a), apprentices will be paid the full amount of the tool allowance in clause 18.3(g) and the fares allowances in clause 18.6(d) and the percentages shown in clause 16.4(a) of the electrician’s licence allowance in clause 18.3(b), the travel time allowance in clause 18.6(c) and the industry allowance in clause 18.3. Any other special allowances in clauses 18.4 and 18.5 and allowances for travel and expenses in clauses 18.6 and 18.7 will be paid to apprentices on an ‘as incurred’ basis at the rate specified, subject to clause 18.2(b).

(iv) The all-purpose rate to be paid to an apprentice will be the sum of the minimum wage rate arising from clause 16.4(a), the full amount of the tool allowance in clause 18.3(g) and the percentages shown in clause 16.4(a) of the electrician’s licence allowance in clause 18.3(b), and the industry allowance in clause 18.3. The weekly all-purpose rate of pay is payable for all purposes of the award and will be included as appropriate when calculating payments for overtime, all forms of paid leave, annual leave loading, public holidays and pro rata payments on termination.

[26] The CEPU contended that since clauses 16.4(b)(iii), 16.4(b)(iv), 16.4(b)(vi) and 16.4(b)(vii) of the Exposure draft are consistent with the current Electrical Award, they should be retained.

[27] There was productive and constructive discussion and the parties agreed that the fares allowance in clause 18.6(d) and the travel time allowance in clause 18.6(c) should not be included in the all-purpose rate. The proposal outlined by the CEPU, which would result in the deletion of clause 16.4(a)(iii) of the Exposure Draft and the insertion of the following was endorsed, with the highlighted, agreed amendments:

(iii) In addition to the minimum wage payments arising from clause 16.4(a)(i) or clause 16.4(a)(ii), apprentices will be paid the full amount of the tool allowance in clause 18.3(g) and the fares allowances in clause 18.6(d) and the percentages shown in clause 16.4(a)(i) or clause 16.4(a)(ii) of the electrician's licence allowance in clause 18.3(b), the travel time allowance in clause 18.6(c) and the industry allowance in clause 18.3(a). Any other special allowances in clauses 18.4 and 18.5 and allowances for travel and expenses in clauses 18.6 and 18.7 will be paid to apprentices on an 'as incurred' basis at the rate specified, subject to clause 18.2(b).

(iv) The weekly all-purpose rate to be paid to an apprentice will be the sum of the minimum wage rate arising from clause 16.4(a)(i) or clause 16.4(a)(ii), the full amount of the tool allowance in clause 18.3(g) and the percentages shown in clause 16.4(a)(i) or clause 16.4(a)(ii) of the electrician's licence allowance in clause 18.3(b), and the industry allowance in clause 18.3(a). The weekly all-purpose rate of pay is payable for all purposes of the award and will be included as appropriate when calculating payments for overtime, all forms of paid leave, annual leave loading, public holidays and pro rata payments on termination

[28] The parties agreed that such changes would resolve all issues relating to all-purpose rates for apprentices, in so far as there was a question as to whether they should include fare and travel time allowances.

[29] The only further matter ultimately pressed by ABI from amongst those we outlined at [66] of the 27 April 2020 Decision³ was in relation to the wording defining the various Apprentice rates in Schedule B.4. It concerned a minor proposed amendment to the fourth paragraph underneath the heading '**Schedule B.4 Apprentice rates**'. So as to ensure consistency with the changes proposed to be made to clause 16.4(a) for junior apprentices outlined at [27] above, the parties agreed that the fourth paragraph underneath the heading '**Schedule B.4 Apprentice rates**' should be amended as follows:

"The apprentice hourly rate for junior apprentices is calculated in accordance with clause 16.4(a)(iv)."

[30] Finally, the CEPU had made an alternate submission that the various footnotes for '**Apprentice hourly rate**' under each table throughout Schedule B.4 be amended as follows:

³ [2020] FWCFB 2124.

“**Apprentice hourly rate** includes the industry allowance, tool allowance and electricians licence allowance payable to all employees for all purposes. Any additional ~~all-~~ ~~purpose~~ allowances applicable need to be added to these rates.”

[31] The CEPU submitted that by removing the words ‘*all purpose*’ from the last line of the footnote, the footnote would capture all other allowances to be paid in addition to the apprentices’ hourly rate, including the fare and travel time allowance.

[32] There was some discussion about whether this was necessary and whether there would be some unintended consequences if this was done. The parties ultimately agreed that all the footnote needs to confirm is how the apprentice hourly rate is to be calculated and that the second sentence (“*Any additional all-purpose allowances applicable need to be added to these rates*”) should be deleted altogether from each of the footnotes defining the ‘**Apprentice hourly rate**’ in every table within Schedule B.4.



DEPUTY PRESIDENT