



REPORT TO FULL BENCH

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards

(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 – Horticulture 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 *Horticulture Award 2010* (the Horticulture Award) was held on Tuesday 26 May 2020 in an effort to resolve the outstanding issues in dispute.

Clause 10.2

[2] Clause 10.2 of the Exposure Draft currently states:

‘**10.2** For each ordinary hour worked, a part-time employee will be paid no less than the ordinary hourly rate for the relevant classification in clause 15 – Minimum rates.’

[3] Ai Group submits that clause 10.2 is incomplete as a cross reference has been omitted and it should be amended such that it reads as follows:

‘**10.2** Subject to clause 15.2, for each ordinary hour worked, a part-time employee will be paid no less than the ordinary hourly rate for the classification.’

[4] Essentially, what the Ai Group suggests and seek is that there be an explicit ‘carve out’ in clause 10.2 for part time employees who are being paid at a piece rate. Further, Ai Group submits that as clause 15 just prescribes minimum rates, a reference to minimum rates in a clause that deals with the ordinary hourly rates (clause 10.2) is potentially confusing.

[5] The proposed amendment of the Ai Group was advanced on the following bases:

(a) The opening (underlined) words would make the interaction between clause 10.2 and clause 15.2 clear. As provided by 15.2(d), if an employee is paid a piecework rate, the employee is not entitled to the minimum rates specified at clause 15. Ai Group

¹ [2020] FWCFB 2124.

submitted that clause 10.2 is presently inconsistent with clause 15.2(d) and the added words rectify this.

(b) Ai Group does not consider that clause 15 or clause 15.1 are appropriate cross-references at the end of the clause because neither prescribe the ‘ordinary hourly rate’ and moreover, clause 15.1 prescribes only the adult rate.

[6] ABI agrees with Ai Group and does not oppose the insertion of the words ‘Subject to clause 15.2’ and also further suggested adding the words ‘(which deals with pieceworkers)’ immediately following the words ‘Subject to clause 15.2’. It says this would assist those reading the clause.

[7] ABI also raised the question of whether, for consistency, a similar amendment should be made to clause 11.3 dealing with Casual Employees.

[8] The NFF agreed with the submissions advanced by Ai Group and ABI.

[9] While the AWU had previously submitted the proposed additional words for clause 10.2 were unnecessary, following some discussion during the conference there was ultimately consensus that clause 10.2 be redrafted as follows:

‘**10.2 Subject to clause 15.2**, for each ordinary hour worked, a part-time employee will be paid no less than the ordinary hourly rate for the **relevant** classification.’

[10] Similarly, there was consensus amongst the parties that clause 11.3(a) relating to casual employees be redrafted as follows:

‘11.3 Casual loading

(a) **Subject to clause 15.2**, for each hour worked, a casual employee must be paid: ...’

Additional matter

[11] The NFF, taking up the opportunity outlined in the Decision of the Full Bench dated 27 April 2020 for interested parties to review the republished draft variation determination,² has flagged a concern with clause 21.4 of the Exposure Draft:

‘21.4 Payment for overtime—casual employees

Each hour worked in excess of 12 hours per engagement, 12 hour in a single day or 304 ordinary hours over an eight week period will be paid at a rate of **175%** of the employee’s ordinary hourly rate for his or her classification (inclusive of the casual loading).’

[12] As a result of the insertion of the annualised wage arrangements at clause 17, this clause (previously clause 20.4) has become clause 21.4. Further, clause 21.4 uses the term ‘employee’s ordinary hourly rate’, whereas the previous clause 20.4 had used ‘employee’s minimum hourly wage’. These changes appear to have been the result of the Full Bench’s consideration of the public holiday rates for casual employees in the Decision dated 27 April 2020:

² [2020] FWCFCB 2124 at [197].

“[191] Clause 26.4 states:

26.4 Public holiday rates—casual employees All hours worked by a casual employee on a public holiday (both ordinary hours and any overtime) will be paid at a rate of 225% of the employee’s minimum hourly wage for his or her classification (inclusive of the casual loading).

[192] The AWU submitted that ‘for consistency within this award and with other exposure drafts the reference to the ‘minimum hourly wage’ should be amended to ‘ordinary hourly rate’. We also note that the same issue may arise in clause 20.4.

[193] At [163] of the Tranche 3 BP we invited interested parties to comment on the AWU’s proposed amendment. ABI and Ai Group do not oppose the AWU’s proposal. We agree and will amend the Exposure Draft and variation determination accordingly. We note that due to the insertion of the annualised wage arrangements provision at clause 17, clause 26.4 has been renumbered as 27.4.”³ (my emphasis)

[13] The nature of the NFF’s concern is that if clause 21.4 adopts the language of ‘ordinary hourly rate’ rather than ‘minimum hourly wage’, which was in the Exposure Draft published on 29 January 2020 at clause 20.4 and is in the current Award at clause 25.3, overtime payments for casual employees will be calculated on a rate which is inclusive of the all-purpose allowance and this would a very significant change for the horticulture industry.

[14] The NFF has therefore foreshadowed submitting correspondence which expands upon the nature of its concerns regarding the wording in clause 21.4 that is contained in the draft variation determination dated 8 May 2020.



DEPUTY PRESIDENT

³ [2020] FWCFCB 2124 at [191]-[193].