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BUILDING SERVICE CONTRACTORS ASSOCIATION OF AUSTRALIA LTD
Reply Submission to the Fair Work Commission
Exposure Draft Cleaning Services Award

Re Exposure Draft Cleaning Services Award, Clause 15.7 Payment of accrued leave on termination of employment

The Building Service Contractors Association of Australia Limited (BSCAA) writes in respect of the Exposure Draft for the Cleaning Services Award 2015 and notes the statement from the Fair Work Commission that the Exposure Draft does not seek to amend any entitlements under the Cleaning Award but has been prepared to address some of the structural issues identified in modern awards.

In its submission to the Commission on 14 October 2014 BSCAA drew attention to an amendment in Clause 15 Annual Leave and particular clause 15.7 Annual leave on termination, the submission was originally submitted during the negotiations for Group 1 Awards. At the Hearing on 1 December 2014 Justice Ross directed that the clause would be considered with the Common Issues - Annual Leave Provisions, it would seem that the submission may have been overlooked.

Clause 29.4 (a) of the Cleaning Services Award states for the purposes of annual leave ordinary pay is calculated on the ordinary time rate of pay and includes leading hand allowance, first aid allowance, penalty rates for shift work and ordinary hours rostered on weekends plus the part time allowance

Clause 29.4 (b) of the Cleaning Services Award states if the employee would have received saved, transitional, shift or penalty rates according to the roster had they not been on leave and those payments would have entitled the employee to a greater amount than 17.5% then such rates will be paid instead of the 17.5% loading.

Clause 29.7 in the current Cleaning Services Award states:

*“ 29.7 Payment of accrued annual leave on termination.
 Where an employee is entitled to payment of untaken annual leave on termination of employment under the terms of the NES, the employer must also pay the employee a loading of 17.5% calculated on an employee’s ordinary time rate of pay.”*

The NES definition of ordinary time rate of pay is *The base rate of pay of any employee...is the rate of pay payable to the employee for his or her ordinary hours of work but not including any of the following:*

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) any other separately identifiable amounts.

Clause 15.6 of the Exposure Draft reflects the intent of Clause 29.4 of the current Award, annual leave is calculated on the minimum hourly rate plus 17.5% or the minimum hourly rate plus applicable penalties, and allowances according to the roster or projected roster had the employee not been on leave, whichever is the greater.

Clause 15.7 of the Exposure Draft states:

- (a) The NES provides for payment of accrued annual leave upon termination of employment.
For the full NES entitlement see s.90(2) of the Act

15.7 amended in accordance with para [43] [2015] FWCFB 4658

- (b) Where an employee is entitled to payment of untaken annual leave on termination of employment under the terms of the NES, the employer must also pay the employee a loading of 17.5% calculated on an employee's ~~ordinary~~ minimum hourly rate (as defined in clause 15.6).

BSCAA contends:

- (1) that Clause 15.7 (b) should be amended to delete the words ".....(as defined in clause 15.6.....)" for the following reasons:

- a) FWCFB 4658 refers to an all purpose allowance and says a definition of an all purpose allowance has been included in all applicable awards. There is no definition of an all purpose allowance in the definitions of the exposure draft for the Cleaning Services Award 2015.
b) There is no roster or projected roster for an employee whose services have been terminated
c) Clause 15.7(b) in its present form applies a penalty on a penalty - one which is not available to employees still employed and taking annual leave.

- (2) The amendment referred to in Clause 15.7 - [43] [2015] FWCFB 4658 states:

"[43] The term 'ordinary hourly rate' has been used in contrast to 'minimum hourly rate' in affected awards to make it clear that all purpose allowances must be added to the minimum rate of pay before calculating any penalty rate."

The Cleaning Services Award does not have an all purpose allowance, therefore all references throughout the draft to "minimum hourly rate" should be deleted and revert to "ordinary hourly rate" That said, BSCAA would respectfully suggest the term "base rate" which is clearly defined in the NES as the minimum hourly rate excluding any separately identifiable amount, if substituted for "ordinary hourly rate" would avoid with the current confusion with the term "ordinary pay" used in the Annual Leave Clause.

Respectfully,



Barbara Connolly
National Officer
Building Service Contractors Association of Australia Ltd
16 September 2016.