



# DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 3, Item 20A(4) - Application to extend default period for agreement-based transitional instruments

**Grunt Restaurants Pty Ltd T/A Hog's Breath Cafe Logan And Main Beach**  
(AG2023/4991)

## **GRUNT RESTAURANTS PTY LTD - ENTERPRISE AGREEMENT 2005-2008**

DEPUTY PRESIDENT SLEVIN  
COMMISSIONER CRAWFORD  
COMMISSIONER THORNTON

SYDNEY, 24 JANUARY 2024

*Application to extend the default period for the Grunt Restaurants Pty Ltd - Certified Agreement 2005 - 2008*

[1] Grunt Restaurants Pty Ltd (**Grunt Restaurants**) has applied, pursuant to item 20A(4) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**), to extend the default period for the *Grunt Restaurants Pty Ltd - Enterprise Agreement 2005-2008* (**Agreement**). The application seeks to extend the Agreement for a period of 12 months until 1 December 2024.

[2] The Agreement was made in 2005 and approved under the *Workplace Relations Act 1996* (Cth) (WR Act). The Agreement is a 'WR Act Instrument' within the meaning of item 2(2) of Sch. 3 to the Transitional Act. It is classified by item 2(5)(c)(i) of Sch. 3 as a 'collective agreement-based transitional instrument'.

[3] Item 20A of Sch 3 to the Transitional Act provides for the automatic sunset of agreement-based transitional instruments by the end of the default period on 6 December 2023, subject to the capacity to apply to the Commission for an extension of that period for up to four years in prescribed circumstances. The agreements to which these provisions apply are known as zombie agreements. The main features of item 20A of Sch 3 are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd (Suncoast)*<sup>1</sup> and we rely upon what is said in that decision.

[4] The application is made under subitem (4) of item 20A of Sch 3 to the Transitional Act, on two bases. First, that the Commission can be satisfied under subitem (6)(a) that subitem (7) applies and it is otherwise appropriate in the circumstances to extend the default period for the Agreement. Subitem (7) applies if bargaining for an enterprise agreement to replace the zombie

agreement is occurring. The second basis for the application is that the Commission can be satisfied that it is otherwise reasonable to extend the Agreement.

## **Background**

[5] Grunt Restaurants operates two Hogs Breath Cafe restaurant franchises in Logan and Main Beach in Queensland. It employs 44 employees under the Agreement. If the Agreement did not apply, the Restaurant Industry Award 2020 (Award) would apply to the employees. Grunt Restaurants submits that it requires an extension of the Agreement to enable it to finalise a replacement enterprise agreement, and to prepare and lodge the replacement agreement with the Commission for approval.

[6] Grunt Restaurants lodged its application to extend the default period for the Agreement on 6 December 2023, the last day it was permitted to do so. The application attached a copy of a Notice of Representational Rights (NERR) that had been provided to employees by email on 6 December 2023. The application stated that the applicant was yet to establish a bargaining committee to negotiate the new agreement but intended to do so. In information provided following the filing of the application Grunt Restaurants indicated that it intended to conduct the first bargaining committee meeting on 25 January 2024.

[7] The Agreement has hourly rates of pay which are below the Award. Item 13 of Sch 9 to the Transitional Act provides that the base rates under the Agreement must not be less than the Award. It operates to require Grunt Restaurants to pay the Award rates. Appendix 2 of the Agreement also provides a mechanism for ensuring Award rates are paid by providing an entitlement for employees to seek a review of their wages in comparison to the Award on the anniversary of the certification of the Agreement or on the termination of employment comparing what the employee would have received under the Award with what they received under the Agreement.

[8] Provisions of the Agreement which are less beneficial than the Award include:

- The Agreement contains reduced redundancy entitlements.
- The Agreement permits the employer to engage an employee on a two-hour trial shift without payment to assess whether to employ the individual.
- No weekend, shift, public holiday penalties, or allowances are payable.
- No annual leave loading is payable under the Agreement.
- The span of ordinary hours is broader and less beneficial compared to the Award on the basis of reduced minimum hours per shift, broad span of hours and greater maximum daily hours.
- Part time employees' hours can be varied during a roster to be increased or decreased without payment of overtime.
- Employees can agree to work extra hours at ordinary rates rather than being paid overtime penalties.

[9] In response to questions posed by the Commission Grunt Restaurants directed our attention to the following provisions in the Agreement, which are said to be more beneficial to employees than the Award:

- The Agreement provides that an employee may request an audit or review of their hourly rate on termination of employment or on each anniversary date of operation of the Agreement to compare what they were paid under the Agreement against the Award.
- The Agreement provides for Junior Employees to be paid a percentage of the adult rate of pay that is 5% higher than the Award for juniors employees aged 18, 17, and under 17 years.
- The Agreement provides for an unpaid 30 minute meal break after 5 hours of work.
- The Agreement provides for long service leave to be taken or paid at 5 years of service.
- The Agreement provides for food, beverage and retail discounts of between 25-50%.

[10] Our attention was also drawn to the following current pay practices:

- All hourly staff are currently paid between 8.5%-12.5% above the relevant Modern Award Monday to Friday rate of pay.
- All Level 1 and Level 2 Front of House staff aged 19, 18, 17, and under 17 years staff are paid no less than \$23.23 (which is between 13.5% to 100% additional on the relevant minimum hourly rate of pay).
- All salaried staff are paid salaries no less than \$62,000 per annum.
- If there are any terms of the Agreement less beneficial than the National Employment Standards (NES) then the NES is complied with not the Agreement term.

[11] While Grunt Restaurants pays its employees an hourly rate that is above the Award those rates do not correspond to the wages set out in the Agreement. So, it appears the actual rates paid are in excess of the Agreement. If the rates are in excess of what is required under either the Agreement or the Award then Grunt Restaurants may continue to pay those rates in the same fashion as it currently does, that is, on the basis that they are paying in excess of the requirements in the industrial instrument regardless of whether the default period is extended.

[12] In terms of the question of whether the terms of the Agreement are more beneficial to employees than the terms in the Award, we are of the view that the employees cannot be considered better off under the Agreement. Especially where the rates of pay are said to compensate employees for all hours worked, including weekends, shifts work, public holidays, and all overtime. It is likely, given the nature of the business, that the employees work evenings and weekends when such penalties would apply.

[13] In response to questions posed by the Commission Grunt Restaurants indicated that it had taken further steps in bargaining. On 29 December 2023 its lawyers provided a draft agreement to be used in negotiations. Grunt Restaurants also said that it intended to conduct a group information session with employees on 25 January 2024 and commence negotiations at a meeting of the bargaining committee to discuss the proposed agreement on the same day.

### **Consideration**

[14] The Full Bench in *ISS Health Services Pty Ltd*<sup>2</sup> described the three requirements for subitem (7) to apply. The first is the requirement that the application is made at or after the 'notification time' for the proposed replacement agreement. Notification time is defined in s.173(2) of the *Fair Work Act 2009*. The definition includes the time when the employer agrees to or initiates bargaining. An NERR indicates the agreement of the employer to bargain for the

purpose of s.173(2). The second is that the proposed agreement must cover the same or substantially the same group of employees as the zombie agreement. The Full Bench stated that this could be established by comparing the NERR for the proposed agreement to the coverage clause of the zombie agreement. The NERR here meets the requirement. Relevantly, the third is that bargaining for the proposed agreement is occurring.

[15] We are of the view that the application satisfies the first two requirements for subitem (7) but does not satisfy the third. Since the application was filed Grunt Restaurants has taken some steps towards commencing bargaining. It relies upon those steps to establish that bargaining is occurring. However, given Grunt Restaurants has yet to hold discussions with employees about its proposed agreement we cannot be satisfied that bargaining is occurring. The default period for the Agreement therefore cannot be extended in accordance with subitem (6)(a).

[16] Even if it could be said that the issuing of a NERR combined with the steps taken by Grunt Restaurants since 6 December 2023 to prepare for bargaining could be said to satisfy the third requirement under subitem (7), we would not extend the agreement under subitem (6)(a) because it is not appropriate to do so.

[17] It would not be appropriate to do so because the inferior conditions in the Agreement mean it is likely that it would disadvantage employees if the Agreement continues to apply prior to the finalisation of a new agreement. Grunt Restaurants suggests that it pays its employees an hourly rate that is above the Award. As we have said, given the nature of the business, it is likely employees work evenings and weekends. It is unlikely the hourly rate compensates for the loss of overtime payments and weekend penalties. If the over award pay rates do result in the employees receiving more, the termination of the Agreement will have no impact on the ongoing payment of those above award rates.

[18] Further, the workforce is small and negotiating a replacement agreement should not be onerous. The Applicant has had 12 months to do so but waited until the final moment before proposing negotiations towards a replacement agreement. The time suggested in the application to extend the Agreement a further 12 months is excessive. We do not consider negotiating a new enterprise agreement would take the 12 months that the Applicant seeks.

[19] Grunt Restaurants applies in the alternative to have the default period extended pursuant to subitem 30(6)(b). The subitem requires a consideration of whether it is reasonable in the circumstances to extend the default period. This involves the application of a broad evaluative judgement.

[20] In *Suncoast*,<sup>3</sup> the Full Bench said:

“[17] The ‘reasonable’ criterion in the subitem should, in our view, be applied in accordance with the ordinary meaning of the word – that is, “agreeable to reason or sound judgment”. Reasonableness must be assessed by reference to the circumstances of the case, that is, the relevant matters and conditions accompanying the case. Again, a broad evaluative judgment is required to be made.”

[21] In *Peter Frick*,<sup>4</sup> the Full Bench considered that the default position of the statute to automatically terminate transitional instruments on 6 December 2023 suggests a policy

preference for employees covered by transitional instruments to be regulated by contemporary instruments.<sup>5</sup> In *Kalfresh Management Services Pty Ltd*,<sup>6</sup> the Full Bench expressed the view that where an agreement contains inferior and outdated terms and conditions, this weighs strongly against a conclusion that it is reasonable in the circumstances to extend a default period.<sup>7</sup>

[22] Taking those matters into account we do not think it is reasonable to extend the default period for the Agreement. The Agreement contains inferior conditions to the Award, in particular in relation to penalty rates. We have taken into account that Grunt Restaurants has taken some steps to commence bargaining for a new enterprise agreement. These factors however do not convince us that we should extend the life of a zombie agreement that provides for terms and conditions that are inferior to the relevant modern award. We are of the view that the Agreement should be replaced by a modern instrument that meets the requirements of the FW Act. We are not satisfied that it is reasonable in the circumstances to extend the default period of the Agreement. The Application is dismissed.

[23] As our decision is to refuse to extend the default period under subitem 20A(6) of Sch 3 and our decision is made after the sunset date in the Transitional Act, subitem (11)(e) provides that we must extend the default period to the day of this decision or specify a day that is not more than 14 days after the day of this decision. We have decided that to enable the parties to make the necessary administrative arrangements to give effect to the sunset of the Agreement the default period is extended to 7 February 2024.



DEPUTY PRESIDENT

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<sup>1</sup> [\[2023\] FWCFB 105](#).

<sup>2</sup> [\[2023\] FWCFB 122](#) at [4].

<sup>3</sup> [\[2023\] FWCFB 105](#).

<sup>4</sup> [\[2023\] FWCFB 137](#).

<sup>5</sup> *Ibid*, [32].

<sup>6</sup> *Kallium Management Services Pty Ltd As Trustee For The Kallium Labour Trust T/A Kalfresh Pty Ltd* [\[2023\] FWCFB 217](#).

<sup>7</sup> *Ibid*, [14].