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

Application by Megan Anne Hermann
(AG2023/4759)

Barossa Valley Resort Union Collective Agreement 2008

DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN
COMMISSIONER PERICA

MELBOURNE, 31 JANUARY 2024

Application to extend the default period for the Barossa Valley Resort Union Collective Agreement 2008

[1] Ms. Megan Anne Hermann has applied, pursuant to item 20A (4) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**the Transitional Act**), to extend the default period for the *Barossa Valley Resort Union Collective Agreement 2008* (**the Agreement**). The Agreement was approved on 6 October 2008 and came into operation on 13 October 2008. It is an agreement-based transitional instrument to which item 20A applies.

[2] The Applicant, a guest services agent supported by one other employee, has sought to have the default period of the Agreement extended to 6 December 2025. The Trustee for the Barossa Valley Resort, the employer covered by the Agreement (**the Employer**), neither supports nor objects to the application.

[3] The Employer runs the Novotel Barossa Valley Resort, a 140-room hotel. The agreement presently covers 83 employees, 10 are employed full time, 37 are employed part time and 36 are employed as casual employees. The Modern Award that would cover these employees is the *Hospitality Industry (General) Award 2020* (**the Award**), which is expressly excluded by the Agreement.

[4] Item 20A of Sch 3 to the Transitional Act provides for the automatic sunsetting 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*[1] and we rely upon what is said in that decision.

[5] Relevant to this matter, when an application is made under subitem (4) of item 20A of Sch 3 to the Transitional Act the Commission is required under subitem (6)(a) to extend the default period if the Commission is satisfied that subitem (7), (8) or (9) applies and it is otherwise appropriate in the circumstances to do so. Subitem (7) applies if bargaining for a replacement agreement is occurring. Subitem (8) relates to individual agreement-based transitional instruments. As the Agreement is a collective agreement-based instrument subitem (8) does not apply. Subitem (9) applies if the application relates to a collective agreement-based transitional agreements and it is likely that as at the time the application is made the award covered employees viewed as a group would be better off overall if the agreement continued to apply than if the relevant modern award applied.

Consideration – Subitem (7)

[6] The Applicant has requested an extension of time of the default period on the basis that "employees did not understand the process and the consequences to the Agreement terminating" and that "employees are looking to form a work group consultative group to enter bargaining for a new agreement/to update the existing Agreement."

[7] The Employer refutes this and responds: "Employees were notified on 4 separate occasions in writing and invited on multiple occasions to consult with the General Manager, Financial Controller and Talent & Culture Co-ordinator." The employer states: "Very few followed up, nor are we aware of a work group being formed to negotiate a new agreement."

[8] The Full Bench in *ISS Health Services Pty Ltd*[2] 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 a proposed agreement as defined in s.173(2) of the *Fair Work Act 2009* (FW Act). 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 third is that bargaining for the proposed agreement has commenced.

[9] Even on the most generous view of the Applicant's position, bargaining has not commenced. Consequently, subitem (7) does not apply.

Consideration - Subitem (9)

[10] The Applicant also submits that "many employees would be worse off under the Award and are seeking employment elsewhere due to the loss of pay and conditions." The employer agrees that "some will better off, and some will be worse off under the Award."

[11] Item 20A sub-item (9) requires, at the time the application is made, the award covered employees for the Agreement, viewed as a group, would be better off if the Agreement applied to employees rather than the Award.

[12] In *Suncoast*,[3] the Full Bench observed that the application of the better off overall test in Item 9 of Item 20A in Schedule 3 requires a broad evaluative judgment based upon an overall comparison of the terms of the Agreement and relevant modern award in its application to the cohort of award covered employees. We apply the same approach here.

[13] The Agreement offers terms and conditions mostly aligned with the Award for the full time and part time employees, however, does offer a reduced overtime penalty, reduced shift penalties and a slightly broader span of hours.

[14] The Agreement provides greater weekend penalties for permanent employees and part time employees are entitled to a 10% loading for work on Monday to Friday. Rates of pay for full time and part time employees are 3.5% above the Award and full time and part time employees may be considered better off under the Agreement if engaged to work weekdays or weekends (i.e. times where penalties are either equal to or greater compared to the Award). However, if full time and part time employees work at times when a reduced penalty applies (i.e. overtime and/or shift work) the rates of pay are likely to not be high enough to compensate for the reductions and employees are likely not to be better off under the Agreement.

[15] Casual employees are generally paid in accordance with the Award, howeverthey are entitled to a higher casual loading of 50%. The casual loading compensates employees for all penalties and loadings otherwise set out in the Agreement, including overtime, weekend, shift and public holiday penalties. The casual loading is not high enough to compensate employees for the removal of all penalties and loadings, where a casual employee is required to work at times otherwise subject to penalties and loadings under the Award (i.e. weekends, shifts, public holidays and/or a combination of these hours). Further, as the rates of pay for casuals include a higher casual loading and with a lack of penalties, the rate of pay for casuals could be considered a casual loaded rate. As the *Loaded Rates in Agreements*[4] decision at [121] provides, it will be difficult for casual employees with loaded rates to pass the BOOT because 'it would always be possible for the casual employee, in a given pay period, to be engaged to work on a day or at a time which would attract the payment of penalty rates under the relevant award and not to be engaged on any other hours or at any other times'. Consequently, it is not likely that casual employees are better off overall if the Agreement continues to apply.

[16] We are not satisfied that the award covered employees for the Agreement, viewed as a group, would be better off if the Agreement continued to apply to employees rather than the Award. Consequently, subitem 20A(9) and we cannot extend the default period on that basis.

[17] When an application is made under subitem (4) of item 20A of Sch 3 to the Transitional Act the Commission may also extend the default period for a zombie agreement under subitem (6)(b) if it is satisfied that it is reasonable in the circumstances to do so.

[18] In *Suncoast Scaffold Pty Ltd* (*Suncoast*),[5] the Full Bench said:

> "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."

[19] In *Peter Frick*,[6] 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.[7] In *Kalfresh Management Services Pty Ltd*,[8] 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.[9]

[20] The Agreement is old, having been negotiated around 16 years ago. While no bargaining has taken place to replace the Agreement, the Applicant has indicated that she is taking steps to initiate bargaining for a replacement agreement. This approach is consistent with the purpose of the Transitional Act. In the meantime, given some of the terms of the Agreement are inferior for all classes of employees, while others could be equivalent or better than the terms of the Hospitality Award, it is appropriate for the Award to apply. This will ensure that the employees are covered by contemporary terms and conditions while a replacement agreement is sought.

[21] We take the view that it is not reasonable in the circumstances to extend the default period. In the event that bargaining is ultimately formally initiated we consider it reasonable that the modern award is the relevant underpinning instrument for those negotiations.

[22] Having found for the purposes of subitem (6)(a) that none of subitems (7), (8) or (9) of item 20A apply to the Agreement and that it is not otherwise reasonable to extend the default period under subitem(6)(b) the Application must fail. 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 sunsetting of the Agreement, the default period is extended to 13 February 2024.

DEPUTY PRESDENT

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[1] [2023] FWCFB 105.

[2] [2023] FWCFB 122 at [4].

[3] Ibid at [15].

[4] [2018] FWCFB 3610

[5] [2023] FWCFB 105 at [17].

[6] [2023] FWCFB 137.

[7] Ibid, [32].

[8] *Kallium Management Services Pty Ltd As Trustee For The Kalium Labour Trust T/A Kalfresh Pty Ltd* [2023] FWCFB 217.

[9] Ibid, [14].