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 Angelika Requadt
(AG2023/4827)

DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN — SYDNEY, 1 FEBRUARY 2024
COMMISSIONER PERICA

Application to extend the default period for Marent Pty Ltd Collective Agreement 2006

[1] Ms. Angelika Requadt has made an application under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**the Transitional Act**) to extend the default period for the *Marent Pty Ltd Collective Agreement 2006* (**the Agreement**). The application seeks to extend the default period for the Agreement to 6 March 2024.

[2] Her employer, Marent Pty Ltd (**the Employer)**, is a lighting retailer that is a franchisee of Beacon Lighting. The Applicant submits that "to the best of her knowledge", the Agreement covers three full time employees of the employer. The Employer in its material states "it had seven employees covered by the Agreement until 6 December 2023" and that "four of these employees have signed employment contracts accepting employment under the *General Retail Industry Award 2020*" (**the Award**). "Three employees, including Ms. Requadt, are yet to confirm acceptance of that change."

[3] The Agreement is a collective agreement that was made under the *Workplace Relations Act 1996* (Cth) (**the WR Act**). It is dated 7 August 2006. It is a 'WR Act instrument' within the meaning of item 2(2) of Sch 3 of the Transitional Act. It is classified by item 2(5)(c)(i) of Sch 3 as a 'collective agreement-based transitional instrument'. Agreements of this kind are commonly referred to as 'zombie agreements.'

[4] The Transitional Act was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**the SJBP Act**) to provide for the automatic termination of all remaining transitional instruments. Pursuant to items 20A (1) and (2) of Schedule 3 to the Transitional Act, the Agreement would have terminated on 6 December 2023 (the end of the default period) unless extended by the Commission. The main features of item 20A of Schedule 3 to the Transitional Act are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd*.[1]

[5] Under subitem 20A(6)(a) of Sch 3, where an application is made under subitem 20A(4) for the default period to be extended, the Commission must extend the default period for a

period of no more than four years if either 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. 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 The Commission must also extend the default period under subitem (6)(b) if it is reasonable in the circumstances to do so.

Grounds relied upon

[6] Ms. Requadt's application submits the default period should be extended because she "considers herself better off under the Agreement" and that she "did not have sufficient time to discuss, clarify and negotiate" in relation to her terms and conditions of employment. She elaborated on her grounds in an e-mail dated 18 December 2023: "My concern relates to the time frame of the process, from the time of receiving my written notice, dated 3 October 2023, to inform me of legislative changes affecting my employment…I require more time to seek advice regarding the legal language in the new agreement."

[7] The employer neither supports nor opposes the application.

Consideration

[8] We cannot be satisfied for the purpose of subitem 6(a) that subitem (7) applies as bargaining has not commenced for a replacement agreement. As the Agreement is a collective agreement-based instrument, subitem (8) does not apply.

[9] We also cannot be satisfied that subitem (9) applies because the relevant employees, viewed as a group, would be better off under the Award than they would be under the Agreement for the reasons that follow.

[10] The Employer notes that rates under the Agreement have increased "with national wage cases". From the material filed by the Employer, it is apparent that there are a number of provisions in the Agreement which are inferior to the Award. The notice provision for probationers under clause 9.5 is inferior. The minimum engagement period for a "flexible casual" in clause 13.1.1 and for "part time and casual associates" under 27.2.1 is an hour less than that prescribed by the Award. The spread of hours under clause 14.1.1 is longer than that provided for in the Award. Under clause 14.1.2, for permanent full-time employees, ordinary hours are from 7:00 AM to 10:00 PM on Monday to Friday, an hour longer than in the Award which provides for 7:00 AM to 9:00 PM.

[11] Under clause 22.4.5, no additional payments are made for reasonable additional hours or overtime worked. The Saturday and Sunday rate for full time employees under clause 22.4.6 is less than the Award. The prescription for consecutive days off per fortnight for full time employees under the Agreement is for two days, while the Award prescribes three days. Under clause 27.1.2 of the Agreement, full time employees cannot claim overtime for attending meetings, trade/product nights and training outside normal working hours, while the Award provides that payment for all overtime. Clause 31.3 provides for payroll deductions for vehicle

"fines, costs and penalties", which is not provided for in the Award. Clause 35.6 of the Agreement provides that if leave accruals are more than 40 days, the Employer can direct the employee to take all or some of the accrued leave. This capacity is limited under the Award if the direction would result in the accrued paid leave entitlement to be less than six weeks. Under clause 38.1.5, the Employer has a capacity to deduct wages for any notice period not worked after a resignation, while the Award limits any such deduction to a week's wages.

[12] After reviewing the terms of the Agreement and the Award, we have determined the relevant employees, viewed as a group, would not be better off under the Agreement than they would be if the Award applied. The Agreement is old, having been negotiated eighteen years ago. It has inferior and outdated terms and conditions. As a result, the default period for the Agreement cannot be extended under subitem 20A(6)(a) and (9) of Sch 3.

[13] In *Suncoast Scaffold Pty Ltd*,[2] the Full Bench described the 'reasonable' criterion in item 20A(6)(b) of Sch 3 to the Transitional Act in this way:

> Subitem (6)(b) of item 20A constitutes an independent pathway to the grant of an extension. 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.

[14] We are not satisfied that it is "reasonable in the circumstances" to extend the default period in accordance with subitem 20A(6)(b) of Sch 3. Ms. Requadt requiring more time to seek advice on a new contract of employment is not an adequate reason for extending the default period. Ms. Requadt has been on notice of the legislative changes for some time. This has provided her with a sufficient period to seek advice.

[15] In all the circumstances, this application is dismissed.

[16] 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 20A(11) 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 15 February 2024.

DEPUTY PRESIDENT

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[1] [2023] FWCFB 105 at [3] to [18].

[2] [2023] FWCFB 105 at [17].