



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

Kings Jewellers Pty Ltd
(AG2023/4989)

ANTHONY'S FINE JEWELLERY AND KINGS JEWELLERS – CERTIFIED AGREEMENT 2000-2003

DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT O'KEEFE
COMMISSIONER TRAN

SYDNEY, 13 FEBRUARY 2024

Application to extend the default period for the Anthony's Fine Jewellery and Kings Jewellers – Certified Agreement 2000-2003

[1] Kings Jewellers Pty Ktd (**Kings Jewellers**) 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 *Anthony's Fine Jewellery and Kings Jewellers – Certified Agreement 2000-2003* (**Agreement**). The application seeks to extend the Agreement for a period of 12 months until 1 December 2024.

[2] The Agreement was made in 2000, 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)*¹ 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.

[5] Kings Jewellers operates jewellery stores in Queensland. If the Agreement did not apply, the *General Retail Industry Award 2020 (Award)* would apply to the employees. Kings Jewellers 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] Kings Jewellers lodged its application to extend the default period on 6 December 2023, the day it was due to terminate in accordance with the Transitional Act. 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 Kings Jewellers intended to establish a bargaining committee to negotiate the new agreement. In response to requests for further information Kings Jewellers informed the Commission that it had formed a bargaining committee and proposed to have meetings towards a replacement agreement in December 2023 and January 2024. It also advised that it would be content with a 6-month extension.

[7] In response to an inquiry as to whether the employees would be better off under the Award, Kings Jewellers pointed a number of provisions in the Agreement that it asserted were more beneficial. It listed the following conditions:

- The Agreement provides better security of employment by providing only for full-time or part-time engagement.
- Clause 3.2.6 and Appendix 1 of the Agreement provide equitable rostering and an ability to request an audit so as to ensure an employee is equal to or better off than under the Award.
- Clause 3.3 of the Agreement provides for junior employees to be paid the adult rate of pay at age 20 years (as opposed to the Award that provides for the adult rate of pay at 21 years). Additionally, all junior employees aged 17, 18 or 19 years are being paid 10% higher than the Award and junior employees under 17 years are paid 20% – 25% higher than the Award.
- Clause 3.5 provides for staff commissions.
- Clause 5.3.1 of the Agreement provides for better long service leave entitlement of 15 weeks for 15 years of continuous service.
- Clause 6.6 of the Agreement provides for significant staff discounts of 60% to 75% on retail products depending on the employee's period of service.

[8] We note that Kings Jewellers was not accurate with respect to rates for junior employees under the Award, which currently provides that the adult rate of pay is payable to an employee who is 20 years of age and has been employed by the employer for more than 6 months.

[9] The application made no reference to less beneficial provisions in the Agreement, of which there are many. They are as follows:

- The Agreement was made in 2003, so the wage rates as specified are well below the Award. There is a term in the Agreement requiring King Jewellers to review wages at the end of each calendar year. If there is a shortfall then the employer is required to make up the difference by the third full pay period after the end of each calendar year.
- The hourly rates of pay in the Agreement are inclusive of all weekend penalties, some public holiday penalties, days in lieu, annual leave loading, and all applicable allowances as set out in the Award.
- The only obligation on the employer to ensure that the hourly rate sufficiently compensates for Award penalties and allowances is a requirement that the employer to 'make every effort' to ensure that the hourly rate of pay at least equals what the employee would have been paid under the Award. The Agreement indicates that this will be done through rostering arrangements so that employees are not disadvantaged unless operational requirements and employee availability dictates otherwise.
- An employee may seek a review of their hourly rates of pay but must do so 6 weeks from the end of each year of continuous service, and the review will only apply to the previous 12 months.
- The Agreement provides the employer will only make up the difference if there has been a net financial disadvantage and the employee has not made a request that they work a particular roster on a regular basis to meet their personal needs.
- The Agreement allows wages to be paid monthly.
- Part time employees' hours of work are between 40 and 152 hours per 4 week period, whereas the Award provides that this is fewer than 38 hours per week.
- Ordinary hours are between 2 and 12 hours per day within a span of 14 hours, but no identified times. The Award provides an employee can work up to 11 ordinary hours on one day per week and specified times for the span of hours.
- Part time employees' hours can be worked on 10 consecutive days.
- The minimum hours of work for a part-time employee is 2 hours, as opposed to 3 hours minimum daily engagement in the Award.
- The minimum break between shifts is 8 hours.
- Overtime provisions apply outside of the span of hours described.

- The hours provisions in the Agreement provide for ordinary hours for full time employees to be worked between 3 hours and 12 hours per day within a 14 hour span. It allows work on 10 consecutive days.

Consideration

[10] The Full Bench in *ISS Health Services Pty Ltd*² described the three requirements for subitem (7) to apply.

[11] 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 (FW Act)*. The definition includes the time when the employer agrees to or initiates bargaining. A NERR indicates the employer’s agreement to bargain for the purpose of s.173(2).

[12] The second is that the proposed agreement must cover the same or substantially the same group of employees as the Agreement. The Full Bench stated that this could be established by comparing the scope in the NERR for the proposed agreement to the coverage clause of the Agreement. Here the NERR meets this requirement.

[13] Relevantly, the third is that bargaining for the proposed agreement is occurring. Here we were told that bargaining was occurring.

[14] We are of the view that the application satisfies the three requirements for subitem (7) to apply. We are required to also consider whether it would be appropriate to extend the Agreement. This involves a broad evaluative judgment.

[15] We are of the view that it would not be appropriate to do so because the inferior conditions in the Agreement mean that it is likely that there would be a disadvantage to employees if the Agreement continues to apply prior to the finalisation of a new agreement. Kings Jewellers suggests that in some instances it pays its employees an hourly rate that is above the Award. Given the nature of the business, however, 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 result in the employees receiving more, the termination of the Agreement will have no impact on Kings Jewellers making ongoing payment of those above award rates while negotiating a replacement agreement.

[16] We are of the view that it is unlikely that employees are receiving remuneration that is equal to the Award and that the mechanisms in the Agreement requiring employees to make an annual request for wage reviews is an inadequate means of protecting award wages and conditions.

[17] Further, the Applicant had 12 months to commence bargaining for a replacement agreement from the time the relevant amendments to the Transitional Act were made. It waited until the final moment before proposing negotiations for a replacement agreement. The time suggested in the application to extend the Agreement a further 12 months is also excessive. We do not consider negotiating a new enterprise agreement would take the 12 months that the

Applicant seeks. Kings Jewellers appears to agree by accepting that 6 months would be sufficient.

[18] Kings Jewellers applies in the alternative to have the default period extended pursuant to subitem 20A(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.

[19] In *Suncoast*,³ 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.

[20] The Agreement was made and approved under the terms of the *Workplace Relations Act 1996*. The terms of the Agreement reflect the benchmarks created by the legislative scheme under which it came into operation, and that scheme has long since been superseded. The terms fall short of the safety net standards provided for by the FW Act and modern awards made under the FW Act.

[21] In *Peter Frick*,⁴ 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 made under the Act.⁵ In *Kalfresh Management Services Pty Ltd*,⁶ 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.⁷

[22] We consider these factors weigh against granting the current application. The Applicant does not go so far as to suggest that the employees would be better off if the Agreement continued to apply. It merely identified what it considered to be better conditions in the Agreement. We are of the view that the employees would not be better off. The terms of the Agreement are outdated and do not reflect contemporary standards.

[23] We have also taken into account that Kings Jewellers has taken some steps to commence bargaining for a new enterprise agreement. This fact however does not convince us that we should extend the life of an agreement that provides for terms and conditions that are inferior to the Award. We are of the view that the Agreement should be replaced by a modern instrument that meets the requirements of the FW Act.

[24] For these reasons we are not satisfied that it is reasonable in the circumstances to extend the default period of the Agreement. The Application is dismissed.

[25] 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 until to 27 February 2024.



DEPUTY PRESIDENT

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¹ [\[2023\] FWCFB 105](#).

² [\[2023\] FWCFB 122](#) at [4].

³ [\[2023\] FWCFB 105](#).

⁴ [\[2023\] FWCFB 137](#).

⁵ *Ibid*, [32].

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

⁷ *Ibid*, [14].