[2024] FWCFB 86 [Note: A copy of the zombie agreement to which this decision relates (AE872737) is available on our website.]

DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 7, Item 30(4) - Application to extend default period for enterprise agreements made during the bridging period

Carter Tech Pty Ltd
(AG2023/4875)

CARTER TECH PTY LTD ENTERPRISE AGREEMENT FOR SPECIAL TRANSPORT WORKERS 2009-2011

Passenger vehicle transport (non-rail) industry

DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN
COMMISSIONER PERICA

SYDNEY, 16 FEBRUARY 2024

Application to extend the default period for the Carter Tech Pty Ltd Enterprise Agreement for Special Transport Workers 2009-2011

[1] Pursuant to Item 30(4) of Sch 7 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**), Carter Tech Pty Ltd (**Carter Tech**) has applied to extend the default period for the *Carter Tech Pty Ltd Enterprise Agreement for Special Transport Workers 2009-2011* (**Agreement**). The application seeks to extend the default period for the Agreement to 23 December 2024.

[2] The Agreement is a collective agreement that was made during the bridging period under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and was approved by Fair Work Australia on 17 December 2009.[1]

[3] The Transitional Act was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP (Secure Jobs Better Pay) Act**) to provide for the automatic termination of all remaining transitional instruments. Pursuant to items 30(1) and (2) of Schedule 7 to the Transitional Act, the Agreement would have terminated on 6 December 2023 (the end of the default period) unless extended by the Commission.

[4] Under subitem 30(6) of Sch 7, where an application is made under subitem 30(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 (a), subitem (7) or (8) applies and it is otherwise appropriate in the circumstances to do so, or (b), it is reasonable in the circumstances to do so. Subitem (7) applies if bargaining for a replacement agreement is occurring. Subitem (8) applies if it is likely that, as at the time the application is made, the award covered employees for the agreement under subitem (9), viewed as a group, would be better off overall if the agreement applied to

the employees than if the relevant modern award or awards referred to in that subitem applied to the employees.

Grounds relied upon

[5] The Agreement covers employees engaged in transport of disabled children to and from school under the New South Wales Department of Education Assisted School Travel (AST) Program. The program transports students meeting eligibility criteria to and from educational settings. Under the program, there is a 90-minute maximum trip time each way "and remuneration to contractors paid as such". The Applicant, in its submission, states it "provides a valuable service to the families that rely upon it to get their children to and from school."

[6] The Agreement currently covers two employees. One is employed as a casual providing one run under the AST Program. The other is employed as a relief driver. Both workers are classified as Grade One under the Agreement. AST services are typically carried out between 8:00 AM and 9:30 AM and 2:00 PM to 3:30 PM. The actual hours worked on each day depends upon student absences and traffic. The current roster worked by employees has been from 7:45 AM to 9:15 AM and 2:15 PM to 3:30 PM.

[7] The Applicant seeks an extension on the basis that in 2024, there will be a new AST) Scheme which will replace the current program which places further conditions on contractors "for only a slight uplift in remuneration". The Applicant indicates "it is unknown how these changes will play out and the Applicant seeks an extension to the end of the 2024 school year in order "to see if it will continue to provide AST services under the new arrangements". There is "no guarantee the Applicant will be offered work under the AST scheme in any case." The Applicant undertakes to bargain for a new enterprise agreement if it continues to perform services under the AST Scheme in 2024.

[8] The Applicant submits the *Passenger Vehicle Transportation Modern Award* (the Award) is impractical, given that the maximum trip time (1.5 hours) is shorter than the three-hour minimum engagement provision in the Award. Employees are only engaged during school terms, making it impractical to employ them on a part-time basis. The Applicant submits it currently pays a 1.5-hour shift minimum at the current casual award rate despite not being required to do so under the Agreement. The Applicant argues that "short runs (like those operated by the Applicant) would be unviable if the provisions of the Award were to apply."

[9] The analysis performed by the Commission demonstrates the Agreement provides less beneficial entitlements compared to the Award. The Agreement provides for a casual loading of 17.5%, compared to 25% under the Award. It is silent on 3-hour minimum engagement. The Agreement provides a penalty of 150% for hours worked on a Saturday and a penalty of 200% for work performed on a Sunday or a public holiday for casual employees. The Award provides that casual employees are paid weekend and public holiday penalties on a cumulative basis with the casual loading and receive a penalty of 175% (inclusive of casual loading) for work performed on a Saturday, a penalty of 225% (inclusive of casual loading) for work performed on a Sunday, and a penalty of 275% (inclusive of casual loading) for work performed on a public holidays There is also no annual leave loading payable under the Agreement and it is silent on all award allowances. The two casual employees, given the lower casual loading, and the lack of a minimum engagement per shift term, cannot be considered better off overall under the Agreement.

[10] The Agreement contains some more beneficial terms compared to the Award. Ordinary hours of work are within the hours of 6:30 AM to 10:00 AM and 2:30 PM to 6:00 PM, Monday to Friday, while the Award does not provide a span of hours. The Agreement also has a more beneficial overtime penalty where employees work more than 38 hours per week of 150% (first 2 hours) 200% (thereafter). The Award provides a penalty of 150% (first 3 hours) 200% beyond the first three hours.

[11] The actual wage rates payable to the employees under the Agreement are determined by the National Wage Case each year. Both employees, who are classified as Grade One under the Agreement, are paid as Grade Two under the Award, which is $31.09 per hour for a casual employee.

Consideration

[12] We cannot be satisfied for the purpose of subitem 6(a) that subitem (7) applies because there is no bargaining is taking place.

[13] After reviewing the terms of the Agreement and the relevant Award, we cannot be satisfied the employees, viewed as a group, are likely to be better off under the Agreement than they would be if the Award applied. We therefore cannot extend the default period under subitem (8).

[14] We can extend the default period under subitem (6)(b) if we are satisfied that it is reasonable in the circumstances to do so.

[15] 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, which is in the same terms as subitem 30(6)(b) of Sch 7, 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."

[16] We also consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The Explanatory Memorandum to the SJBP Act expressed the purpose of the provisions relating to extending the default period in this way.[3]

> *Provision would be made for the FWC to (upon application) extend the default period to ensure the automatic sunsetting of zombie agreements does not operate harshly, including by leaving employees worse off.*

[17] The two employees who are bound by this Agreement perform the important work of transporting disabled children to and from school. The nature of the work has a unique span of hours to accommodate the students' pick-ups and drop-offs. They work only on school days. The Applicant seeks a year-long extension of the default period to determine whether it will continue to provide services to the NSW Department of Education under a new arrangement

for the AST Program, which is anticipated to be offered in 2024. The Applicant has undertaken that should it be offered work under the new arrangements it will bargain for a contemporary agreement. We are therefore satisfied it is reasonable in the circumstances to extend the default period in accordance with subitem 30(6)(b) of Schedule 7.

[18] Pursuant to item 30(6) of Schedule 7 to the Transitional Act, we order that the default period for the Agreement is extended to 23 December 2024.

[19] The Agreement is published, in accordance with subitem 30(9A) on the Fair Work Commission's website.

DEPUTY PRESIDENT

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[1] [2009] FWAA 1673.

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

[3] Explanatory Memorandum *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [670].