DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 3, Item 16 - Application to terminate collective agreement-based transitional instrument

Olivia May Johnston-Wyly
(AG2017/5999)

THE YOGHURT SHOP PTY LTD COLLECTIVE AGREEMENT NUMBER ONE (2006)

Retail industry

COMMISSIONER HAMPTON ADELAIDE, 20 FEBRUARY 2018

Application for termination of the Yoghurt Shop Pty Ltd Collective Agreement Number One (2006).

1. The application and the parties

[1] This decision concerns an application by Ms Olivia May Johnston-Wyly pursuant to Item 16 of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act), and as a consequence, s.225 of the *Fair Work Act 2009* (the FW Act). The application seeks to terminate the *Yoghurt Shop Pty Ltd Collective Agreement Number One (2006)* (the Collective Agreement).

[2] The Collective Agreement was approved under the former *Workplace Relations Act 1986* (the WR Act) and is a collective agreement-based transitional instrument for the purposes of the Transitional Act[1] with a nominal expiry date in late November 2009.[2]

[3] The Collective Agreement covers a number of employers who operate one or more outlets trading as part of the Yoghurt Shops franchise in South Australia. Ms Johnston-Wyly, who is under the age of 18 years, is employed at a one of those shops. As a result, she is an employee covered by the Collective Agreement. Ms Johnston-Wyly was represented in this matter by her mother, Ms Johnston, who made the application as a guardian.

[4] The application was initially subject to a telephone directions conference on 20 December 2017. Ms Stewart of Business SA appeared on behalf of the Yoghurt Pty Ltd, the respondent employer.

[5] At the first directions conference, it became apparent that the respondent employer named in the application was only one of the employers covered by the Collective Agreement. As a result, directions were issued which required the provision of the names and contact details of all the employers who had acquired some of the business of Yoghurt Pty Ltd and

who had become covered by the Collective Agreement.[3] All of these employers were then provided with a copy of the application and certain directions issued at that time. These directions also required a copy of the application, the directions themselves, and a notice of listing for the second directions conference to be made available to all relevant employees at each location. The directions also provided the employees with contact details and processes to raise any concerns or express any views about the application by contacting the Commission.

[6] The second directions conference was convened on 9 February 2018. Ms Stewart appeared on behalf of all of the employers covered by the Collective Agreement and indicated that these parties agreed, in principle, to the termination of that instrument.[4] That position was subject to the views of the employees and Business SA, on behalf of the employers, contended that a separate process to canvass those views was required. Further, the employers sought a two month delay in the operation of any termination decision. The employers also indicated that the identity of the relevant modern award, which would apply and cover the employees following the termination of the Collective Agreement, was not necessarily agreed. That is, whether the *Fast Food Industry Award 2010* (the Fast Food award) or the *General Retail Industry Award 2010* (the General Retail award) would apply.

[7] The two month delay sought by the employers was not agreed by Ms Johnston-Wyly and a hearing by telephone was conducted on 16 February 2018 to deal with that issue and the application generally.

2. The relevant legislation

[8] Item 16 of Schedule 3 of the Transitional Act provides:

> "**16 Collective agreement-based transitional instruments: termination by the FWC**
>
> (1) Subdivision D of Division 7 of Part 2-4 of the FW Act (which deals with termination of enterprise agreements after their nominal expiry date) applies in relation to a collective agreement-based transitional instrument as if a reference to an enterprise agreement included a reference to a collective agreement-based transitional instrument.
>
> (2) For the purpose of the application of Subdivision D to an old IR agreement, the agreement's nominal expiry date is taken to be the end of the period of the agreement."

[9] Subdivision D of Division 7 of Part 2-4 of the FW Act states:

> "**225 Application for termination of an enterprise agreement after its nominal expiry date**
>
> If an enterprise agreement has passed its nominal expiry date, any of the following may apply to the FWC for the termination of the agreement:
>
> (a) one or more of the employers covered by the agreement;
>
> (b) an employee covered by the agreement;

(c) an employee organisation covered by the agreement.

226 When FWA must terminate an enterprise agreement

If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

(a) the FWC is satisfied that it is not contrary to the public interest to do so; and

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

227 When termination comes into operation

If an enterprise agreement is terminated under section 226, the termination operates from the day specified in the decision to terminate the agreement."

3. The positions and circumstances of the parties

[10] Ms Johnston-Wyly contends that:[5]

- The terms and conditions provided in the collective agreement have fallen below the minimum standards of the Fast Food award (or the General Retail award);
- Increases in the rates of pay have not kept up with the rate of increases in the modern awards so that over time the buy-out of penalty rates has been absorbed and the base rate of pay no longer compensates for lower penalty rates leaving employees working evenings, Saturdays, Sundays and Public Holidays worse off;
- Upon consideration of all the rates of pay and the terms and conditions of employment under the Collective Agreement, the employees suffer a disadvantage when compared with the rates of pay and terms and conditions of employment under the modern awards;
- In today's industrial environment, the existing Collective Agreement would not meet the Better Off Overall Test (BOOT) provided by s.193 of the FW Act; and
- The rate of pay specified in the Collective Agreement for those employees undertaking a school-based traineeship is below the relevant rate of pay which is now prescribed in the *Miscellaneous Award 2010.*

[11] The factual assertions set out in this position are not relevantly in dispute.

[12] In terms of the date of effect of any termination, Ms Johnston-Wyly contends that the employers have known since early December 2017, when the application was made, that the

Collective Agreement could be terminated and given the present significant financial disadvantage to the employees, the termination should take effect immediately. In addition, Ms Johnston-Wyly submitted that the immediate termination of the Collective Agreement would be consistent with the public interest given that competitors of the employers covered by the agreement continue to be at a significant disadvantage and the employees are not being paid the established minimum standards applicable in the community.

[13] Ms Johnston-Wyly further contends that:

- The payroll changes necessary to give effect to the relevant modern award should be relatively simple and contracted assistance should be available;
- The Collective Agreement does not contain a consultation provision, and as a result, the termination should take effect immediately to ensure that the employers are required to consult with their employees about any changes that are proposed; and
- The existing rosters were not fixed and already changed each week.

[14] The Commission has been advised that there are mixed views about the application amongst the employers. This includes the view that in an ideal world, the Collective Agreement would not be terminated and would continue so as to avoid any increase in employment costs. However, the employers' formal position was to acknowledge that the Collective Agreement is now a very old instrument and that its termination was not inappropriate and was supported in principle.[6] The employers also continued to seek that the views of the employees be further canvassed (beyond the process established by the Commission) on the basis that this was the practice in at least some other termination applications and the Commission was required to have regard to the views of the employees.

[15] The employers seek a delay in the date of effect of any termination of some two months and contend that:

- The cost of higher rates on weekends will mean that the owners/operators of each store may have to work additional shifts;
- The increase in pay rates on Saturdays, and Sundays in particular, will require current staffing arrangements to be restructured which may result in a reduction of shifts for some employees; and
- The profit margins will be reduced due to the increased cost of wages, and as a result, the employers will require time to consider changes to their business so that they remain cost-effective and profitable.

[16] There is also an implication in the submissions made on behalf of the employers that the new pay rates were not budgeted for or understood by them when taking on the franchise businesses.[7]

[17] These submissions were not supported by direct evidence[8] that would permit the details and substance of those matters to be tested. I do however accept that the self-evident nature and extent of the change from the present Collective Agreement to the relevant modern award, is likely to lead to some changes to staffing and other arrangements. Using the examples provided, the rate for 17 year old casual employees on Saturday and Sunday would increase from the current rate on both days of $15.06 per hour (being the base rate under both

modern awards), to $16.27/$18.08 per hour on Saturdays and $23.50/$20.44 per hour on Sundays depending upon which modern award applies.[9] I note that this illustrates both the degree to which the Collective Agreement is out of step with the contemporary minimum standards set by the modern awards and the extent to which the hourly rates for employment on those days will increase if the Collective Agreement is terminated.

[18] The staffing changes are likely to include the extent to which the owners/operators undertake work during what will become penalty hours and this, in turn, will impact on the shifts offered to staff, at least in the short term. It is also feasible that the employees will be paid the same, or similar, total wages for working less hours on Saturdays and Sundays. It is not possible to make any more conclusive findings given the nature of the evidentiary material that is before the Commission.

[19] I will further deal with the practical circumstances of the employers below.

4. The relevant modern award

[20] As outlined above, there are competing views as to which modern award would apply upon termination of the Collective Agreement.

[21] Each of the Yoghurt shops covered by the Collective Agreement sell both pre-packaged yoghurt, frozen berries and granola (all manufactured elsewhere) and tubs of product filled from display containers for customers. This involves receiving and preparing goods for display and sale and the taking of orders and provision of the products. The primary source of sales income comes from the sale of bulk products for later consumption at home; however this may vary between stores to some degree. There are no tables or facilities for eating the products on the premises.

[22] I am informed[10] that the shops concerned do not open on public holidays, do not all trade on Sundays, and with very limited exceptions, do not open beyond 6.30pm. Most, but not all, of the stores are located in a general retail complex, including major shopping centres, and in one case, the Adelaide Central Market. There are some stores that operate as stand-alone shops.

[23] The General Retail award covers the "general retail industry" as relevantly defined in the following terms:

> "**general retail industry** means the sale or hire of goods or services to final consumers for personal, household or business consumption including:
>
> - food retailing, supermarkets, grocery stores;
>
> … …;
>
> but does not include;
>
> - fast food operations;
>
> ...."[11]

[24] The (excluded) "Fast food operations" is defined in that award in the following terms:

"**fast food operations** means taking orders for and/or preparation and/or sale and/or delivery of:

- meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale; and/or
- take away foods and beverages packaged sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or
- food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment."[12]

[25] The classifications with the General Retail award include the following:

"**B.1 Retail Employee Level 1**

B.1.1 An employee performing one or more of the following functions at a retail establishment:

- the receiving and preparation for sale and or display of goods in or about any shop;
- the pre-packing or packing, weighing, assembling, pricing or preparing of goods or provisions or produce for sale;
- the display, shelf filling, replenishing or any other method of exposure or presentation for sale of goods;
- the sale or hire of goods by any means;
- the receiving, arranging or making payment by any means;
- the recording by any means of a sale or sales;
- the wrapping or packing of goods for despatch and the despatch of goods;
- the delivery of goods;
- window dressing and merchandising;
- loss prevention;
- demonstration of goods for sale;
- the provision of information, advice and assistance to customers;
- the receipt, preparation, packing of goods for repair or replacement and the minor repair of goods;
- all directly employed persons engaged in retail stores in cleaning, store greeting, security, lift attending, store cafeterias and food services;
- Clerical Assistants functions Level 1; or
- work which is incidental to or in connection with any of the above.

… …"[13]

[26] Clause 4.1 of the General Retail award expressly excludes employers who are covered by the Fast Food award.

[27] The Fast Food award covers the "fast food industry" and this is defined[14] in the same terms as used in the General retail award for the expression "fast food operations" as set out above. Clause 4.1 of the Fast Food award expressly excludes employers in the general retail industry. That term is not defined but it is a reasonable inference that this is a reference to the coverage of the General Retail award.

[28] The classifications within the Fast Food award form part of the coverage of that award as defined by clause 4.1 and are as follows:

> **"B.1 Fast Food Employee Level 1**
>
> B.1.1 An employee engaged in the preparation, the receipt of orders, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres.
>
> B.1.2 A Fast Food Employee Level 1 will undertake duties as directed within the limits of their competence, skills and training including incidental cleaning and cleaning of toilets.
>
> **B.2 Fast Food Employee Level 2**
>
> An employee who has the major responsibility on a day to day basis for supervising Fast Food employees Level 1 and/or training new employees or an employee required to exercise trade skills.
>
> **B.3 Fast Food Employee Level 3**
>
> An employee appointed by the employer to be in charge of a shop, food outlet, or delivery outlet."[15]

[29] In *Carpenter v Corona Manufacturing Pty Ltd* a Full Bench of the Australian Industrial Relations Commission stated:

> "In our view, in determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed."[16]

[30] Both of the modern awards considered could potentially cover the employers and employees concerned in this matter. In the end result, a fine judgment would be required to assess which modern award was most relevant given their stated intention to exclude each other's coverage.

[31] There is however a common view adopted by the parties that given the present statutory context, it is not necessary for the Commission to make any conclusive findings on the issue. This is a reasonable course given that I do not have sufficient evidence about the

location and the precise nature of operations of each of the stores concerned and this could impact upon the ultimate determination of the relevant modern award coverage for that employer. Further, the two modern awards concerned have almost the same base wages (with the exception of one junior rate) and general conditions. There is however a difference of provisions between the two modern awards in terms of the span and scope of ordinary hours and the additional payments required on certain days and at certain times.

[32] As a result of the above, I have assessed the various statutory considerations in the context of both the Fast Food award and the General Retail award.

5. Consideration

[33] There is no dispute that Ms Johnston-Wyly is eligible to bring this application and that the statutory provisions set out earlier in this decision apply to the matter.

[34] Without canvassing all of the terms of the Collective Agreement, that instrument was designed to operate in the context of the WR Act and as such provides what might be described as a loaded rate which apparently compensated for all penalty and additional payments. It also was drafted to rely upon the then Australian Fair Pay and Conditions Standard (AFPCS) and other leave provisions applicable at that time. Leave loading of 17.5% is provided on annual leave. The Collective Agreement specifies maximum average hours of 38 per week but does not define ordinary hours of work and the rates of pay specified in the agreement subsumes all shift, weekend, overtime, public holiday and other penalties.

[35] The Collective Agreement also provides for certain arrangements concerning the employers' authority to deduct from the employees' wages and other provisions which might be problematic in light of the provisions of the FW Act.[17]

[36] I note that as a result of the operation of the Transitional Act and certain provisions of the FW Act, in terms of the rate of pay and basic conditions of employment, the net result at present is:

- The employers are presently bound to pay the employees the **base** rate of pay provided by the relevant modern award but not the penalties and other additional payments provided by that award;[18] and
- The terms of the National Employment Standards (NES) are applicable in lieu of the former AFPCS to the extent that the NES is more favourable.[19]

[37] This means, amongst other elements, that the termination of the Collective Agreement will result in the employers being required to pay, and the employees receiving, the relevant late night, Saturday, Sunday and Public Holiday provisions (if applicable) of the relevant modern award for the first time.

[38] The fact that the Collective Agreement should be terminated is not disputed by the parties appearing in this matter. The Commission must however consider and apply the considerations set out in s.226 of the FW Act. In so doing, I have considered whether a separate and additional process to canvass the views of the employees was required.

[39] There is no doubt that the Commission must consider and take into account the views of the employees (amongst other parties) under s.226(b)(i) of the FW Act. This involves the Commission treating that consideration as a matter of significance in the decision making process,[20] and I have done so in this case. Under s.590 of the FW Act, the Commission may, except as provided by the legislation, inform itself in relation to any matter before it in such a manner as it considers appropriate. In many circumstances, particularly where there is no employee organisation representing the workforce, a separate process, such as a survey, to canvass the views of employees as contended by Business SA may well be required in an application of this nature. However, in this case, I do not consider that a process, beyond that already established by the Commission, is necessary. The circumstances leading to that view here include:

- The application for termination has been made by an employee;
- There is a very strong case that the termination of the Collective Agreement is in the best interests of the employees and there is no indication from the employers (or anyone) that any employees have any concerns with the application;
- The comprehensive grounds of the application have been provided to the employees and this would have assisted them to consider whether any informed concerns arise from the application. This includes the fact that the employers have had an opportunity to discuss the implications of the application with their employees, and given the fact that it is not the employers who have made the application, there is no suggestion that employees would be reluctant to raise their concerns;
- All employees have been given an accessible opportunity to communicate their views about the application to the Commission and no concerns have been raised; and
- The application is not opposed by any party.

[40] Turning to the considerations of s.226(b)(i) of the FW Act, the employers support the termination in principle, Ms Johnston-Wyly has made the application and clearly supports the termination and the other employees may support, or at the very least are not opposed, to the application, and there is no employee organisation covered by the Collective Agreement. I have had regard to those views and the reasoning underpinning them.

[41] The termination of the Collective Agreement will mean that the more contemporary conditions and provisions of the relevant modern award will apply to the parties. Further, the problematic interaction between the present instrument and the operation of the FW Act will be removed. This is pertinent as almost all of the major terms of the present agreement are affected by the overriding impact of certain minimum standards and other provisions of the FW Act and cannot be applied on their face. The termination may also lead to some staffing and other business changes as discussed earlier and this must be taken into account as part of the overall assessment. All of these matters are relevant to the considerations provided by s.226(b)(ii) of the FW Act.

[42] There is presently no bargaining for a new enterprise agreement taking place; and none has been foreshadowed.

[43] In all of the circumstances I am satisfied that the termination of the Collective Agreement would not be contrary to the public interest.[21] I am also satisfied that the

termination is appropriate having regard to the likely effect of that action and the views and circumstances of the parties.

[44] As a result of these findings, the Commission is obliged by the operation of s.226 of the FW Act to terminate the Collective Agreement.

6. The date of effect

[45] Under s.227 of the FW Act, the termination operates from the day specified in the decision to terminate the agreement. This means that there is a general discretion given to the Commission to determine when the termination takes effect.

[46] I consider that this determination should have regard to all of the relevant circumstances including those assessed in determining whether the agreement should be terminated. That is, the determination of the date of effect must be an overall assessment having regard to all of the relevant circumstances taking into account the needs and particular circumstances of the parties. Further, public interest considerations may also have a role to play and each matter must be determined in its own circumstances.

[47] In this case, I consider that given the impact of the termination upon the employers, some delay is appropriate to enable the businesses to deal with those consequences. This may lead to changes in staffing and other arrangements with the consequential need to consult those affected and to have regard to their individual interests.[22] Although I accept that the Collective Agreement does not contain a consultation obligation, if that instrument is terminated immediately, there will be no opportunity for the employers to do so before the impact of the termination is felt. Further, because the identity of the relevant modern award needs to be confirmed by each of the employers, some opportunity to do that and to deal with the results is appropriate. That is, the capacity for the employers to comply with the legal obligations which would arise when an agreement is terminated is an important consideration.

[48] The factors outlined above must be weighed against the fact that the Collective Agreement is well below the minimum safety net determined by the Commission and the continuing impact of any delay upon the employees covered by the agreement, and the community more generally, is also a relevant and important contrary consideration.

[49] I have also taken into account the fact that the employers have known since early February 2018, when they indicated in principle support for the application, that the termination of the Collective Agreement may well occur. This would have permitted some planning and preparation to commence; albeit without the certainty of a decision of the Commission.

[50] Each of the employers apparently runs their own payroll system and it is unclear whether any common pay periods exist. Further, as these employers are small businesses, the notion that they can simply outsource the payroll and other changes as contended by the applicant is not realistic. However, given the size of the businesses and apparent nature of employment, the required changes to the payroll systems are unlikely to be complex.

[51] On balance, I consider that a delay in the termination until Friday 23 March 2018 is appropriate and reasonable. In so doing, I note that this provides a period covering at least two full (fortnightly)[23] pay periods after the decision has been issued.

[52] The termination of the *Yoghurt Shop Pty Ltd Collective Agreement Number One (2006)* will take effect at 11.59 pm on 23 March 2018.

COMMISSIONER

Hearing details:

Adelaide
2017
December 20 (Directions)

2018
February 9 (Directions)
February 16.

Appearances:

L Johnston (as guardian) on behalf of Ms Olivia May Johnston-Wyly, the applicant employee.

Y Stewart of Business SA, on behalf of the respondent employers.

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<AC303401 PR600323>

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[1] Item 2(5)(c)(i) of Schedule 3 of the Transitional Act.

[2] The exact date for the expiry operates by reference to the filing receipt issued by the Employment Advocate, which is not before the Commission.

[3] As a result of the transmission of business provisions of the *Workplace Relations Act 1996* or the transfer of business provisions of the FW Act.

[4] Position outline of the respondent employers, 5 February 2018.

[5] Statutory Declaration of Olivia May Johnston-Wyly dated 6 December 2017 as supplemented by later submissions.

[6] Confirmed during the course of the hearing of the matter.

[7] Statement and Statutory Declaration of Ms Stewart.

[8] Ms Stewart provided a Statutory Declaration containing comments that had been made by some of the employers; however, the basis of the assertions was not subject to evidence or even revealed and could not be tested in any way.

[9] The penalty rates payable under these awards are also being reduced over a number of years as a result of the Penalty Rates decision of the Commission conducted as part of the 4 yearly Review – see: *4 Yearly Review of modern awards – Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001.

[10] Position outline of the respondent employers, 5 February 2018.

[11] Clause 3 of the General Retail award.

[12] Ibid.

[13] Schedule B of the General Retail award.

[14] Clause 3 of the Fast Food award.

[15] Schedule B of the Fast Food award.

[16] *Carpenter v Corona Manufacturing Pty Ltd* [PR925731] at [9]. See also *Australian Aviation Equipment Pty Ltd* [2009] FWA 713 for a discussion of some of the principles and the history of previous industrial instruments that might shed some light of the intended scope of these awards.

[17] Including s.326 of the FW Act.

[18] Item 13 of Schedule 9 of the Transitional Act.

[19] Item 23 of Schedule 3 of the Transitional Act.

[20] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 and *Nestle Australia Ltd v Federal Commissioner of Taxation* (1987) 16 FCR 167 at 184.

[21] The application of the public interest test was canvassed by the then AIRC in *Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000* (2005) 139 IR 34 and by the Full Federal Court in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126.

[22] See for example *Re Shop, Distributive and Allied Employees Association* [2017] FWCA 5703 at [7] where the Commission has taken into account the desirability of allowing employers a transitional period to deal with the consequences of an agreement termination.

[23] Referenced in the Collective Agreement.