[2021] FWC 1588

The attached document replaces the document previously issued with the above code on 31 March 2021.

Typographical errors corrected at paragraphs 5, 32, 41, 78 and 87.

Associate to Commissioner Bissett

Dated 17 June 2021

[2021] FWC 1588

DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
v
McCain Foods (Aust) Pty Ltd
(C2020/7116)

COMMISSIONER BISSETT MELBOURNE, 31 MARCH 2021

Alleged dispute about any matters arising under the enterprise agreement – casual conversion – reasons for refusal – refusal unreasonable.

[1] The AMWU has made an application for the Commission to deal with a dispute pursuant to s.739 of the *Fair Work Act 2009* (FW Act). The dispute is in relation to a request for conversion from casual to permanent employment at McCain Foods (Aust) Pty Ltd (McCain) and arises under the *McCain Foods (Aust) Pty Ltd Ballarat Production Enterprise Agreement 2019* (the 2019 Agreement).

[2] The application was heard before me on 29 January 2021 and 9 February 2021. The AMWU was represented by Mr Raoul Wainwright and McCain by Mr Andrew Denton of Counsel, by permission of the Commission.

JURISDICTION

[3] The dispute arises from a decision by McCain to refuse a request for conversion of Mr Brett Stephenson.

[4] Clause 31 of the Agreement states:

> 31.1 Casual employees other than irregular casual employees, who have been engaged by the Company for a sequence of periods of employment under this Agreement during a period of six (6) months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time (depending upon the pattern of engagement) if the employment is to continue beyond the conversion process, in accordance with the provisions of Clause 13.4 of the Award.

[5] The Award referred to is the *Food, Beverage and Tobacco Manufacturing Award 2020*[1] (the 2020 Award). Clause 10.8 of the Award deals with casual conversion:

> **10.8 Casual conversion to full-time or part-time employment**
>
> (a) A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of 6 months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.
>
> (b) Every employer of such an employee must give the employee notice in writing of the provisions of clause 10.8 within 4 weeks of the employee having attained such period of 6 months. The employee retains their right of election under clause 10.8 if the employer fails to comply with clause 10.8(b).
>
> (c) Any such casual employee who does not within 4 weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.
>
> (d) Any casual employee who has a right to elect under clause 10.8(a), on receiving notice under clause 10.8(b) or after the expiry of the time for giving such notice, may give 4 weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within 4 weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.
>
> (e) Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.
>
> (f) If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause 10.8(d), the employer and employee must, subject to clause 10.8(d), discuss and agree on:
>
> (i) which form of employment the employee will convert to, being full-time or part-time; and
>
> (ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 9—Part-time employees.

[1] Clause 3 of the Agreement provides that the applicable award is the *Food, Beverage and Tobacco Manufacturing Award 2010* "or any Award that supersedes that Award". In November 2020 the 2020 Award replaced the 2010 Award. The relevant provisions with respect to casual conversion did not change. The 2020 Award is referenced in this decision with submissions from the parties stated in this decision reflective of the 2020 Award.

(g) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

(h) Following such agreement being reached, the employee converts to full-time or part-time employment.

(i) Where, in accordance with clause 10.8(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.

(j) By agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 10.8(a) as if the reference to 6 months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the 2 months prior to the period of 6 months referred to in clause 10.8(a).

(k) For the purposes of clause 10.8, an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

[6] Mr Stephenson's application to convert from casual employment was rejected by McCain. It says it was not unreasonable to do so but the AMWU disputes this.

[7] I am satisfied (and it was not disputed) that the parties have attempted to resolve this dispute in accordance with clause 9 – Dispute Resolution Process.

[8] I am satisfied that the dispute is a matter arising under the 2019 Agreement. I am therefore satisfied that I have jurisdiction to deal with the dispute.

QUESTION TO BE ANSWERED

[9] Prior to the issue of directions to the parties, my chambers was advised that the parties had agreed on the question to be answered. That was:

> Given the circumstances, was it be reasonable (in accordance with the terms of Clause 13.4(d) of the Food, Beverage, Tobacco Manufacturing Award 2010) for the Respondent to refuse to convert Mr Stephenson from casual to full time?

[10] In its submissions however McCain said that the real question to be answered is whether, given the circumstances, was it be unreasonable (as opposed to whether it was reasonable) for the request to be refused.

[11] Clause 10.8(d) above contains the operative provision of the 2020 Award. It specifies that the employer must not unreasonably refuse a request to convert from casual employment.

[12] In the circumstances, I consider it appropriate to answer the question to which the 2020 Award is directly addressed – that is the unreasonableness of the refusal of the request. Whilst this may appear to be an exercise in semantics it is critical that the right question is asked. Given the 2020 Award requirements I am satisfied that the correct question is:

> Given the circumstances, was it unreasonable (in accordance with the terms of Clause 10.8(d) of the Food, Beverage, Tobacco Manufacturing Award 2020) for the Respondent to refuse to convert Mr Stephenson from casual to full time?

[13] I do not consider that this nuanced alteration to the question to be answered adversely impacted upon the ability of the AMWU or McCain to put their respective case.

AGREED FACTS

[14] It is not in dispute that Mr Stephenson was engaged as a casual employee on a regular and systematic basis for the periods:

> 9 September 2019 – 9 October 2019 and
>
> 6 January 2020 – August 2020.

[15] Mr Stephenson worked on a temporary contract in accordance with the 2019 Agreement for the period 14 October 2019 to 20 December 2019.[2]

[16] Mr Stephenson did not attend work from 21 December 2019 to 5 January 2020 as McCain was shut down. During the period 6 January 2020 to August 2020 Mr Stephenson's local manager understood that Mr Stephenson to be employed under a temporary contract.

[2] Witness statement of Karsten Munstege

BACKGROUND

[17] Mr Stephenson has worked on the night shift pizza crust line since about early 2018. He has worked variously on temporary contracts or as a casual employee.

[18] The 2019 Agreement provides, at clause 32, for temporary employment. It restricts temporary employment to circumstances where:

- a permanent role is left vacant due to the permanent employee not being available to fulfil the duties temporarily, or
- a permanent role will cease to exist within the next 12 months.[3]

[19] Temporary employment is not to be used to displace permanent employment[4] and temporary employment will be offered, in the first place, to McCain casual employees, subject to the skills requirement of the position.[5]

[20] Casual employment is subject to the provisions of clause 30 of the 2019 Agreement. This includes rate of pay, loadings and shift allowances,[6] minimum engagement[7] casual seniority and nomination of availability,[8] skill recognition, seniority recognition and availability over the Christmas period.[9]

[21] It is not disputed that for the period Mr Stephenson worked on a temporary contract that period did not count as casual employment for the purposes of casual conversion.

[22] The night shift pizza crust line consists of three full time permanent employees (operators) and one reliever. The reliever works so as to allow each of the operators to take their breaks without having to shut down the line.

[23] Since September 2019, an operator (employee X) on the night shift pizza crust line has been on an extended welfare plan. This has involved employee X working on day shift and receiving appropriate support from McCain until such time as he can return to his position on the night shift. Mr Stephenson backfilled this position on a temporary contract for the period 14 October 2019 to 20 December 2019.[10] Due to an administrative oversight by McCain, Mr Stephenson was not issued with a contract variation to extend his temporary contract for the period after 20 December 2019. Mr Stephenson however continued to work on the night shift pizza crust line from 6 January 2020 to August 2020. Mr Stephenson was paid as a casual employee for this period.[11]

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[3] 2019 Agreement, clause 32.1-30.2

[4] 2019 Agreement, clause 32.5.1

[5] 2019 Agreement, clause 32.5.3

[6] 2019 Agreement, clause 30.1

[7] 2019 Agreement, clause 30.4

[8] 2019 Agreement, clause 30.6.2-30.6.3

[9] 2019 Agreement, clauses 30.6.4-30.6.5 and 30.7

[10] Witness statement of Karsten Munstege, paragraph 14-16

[11] Supplementary witness statement of Karsten Munstege, paragraph 1

[24] In July 2020 it was realised that Mr Stephenson had not been issued with a contract extension from the end of 2019. On 17 July 2020 Mr Stephenson was given a letter in which he was offered an "Extension to Temporary Employment Contract"[12] (the July extension) which read, in part:

> I refer to the temporary contract you are currently employed under, replacing an employee currently working in another role, which has a termination date of 20th December, 2019.

[25] That contract extension was to end on 25 September 2020.[13]

[26] Mr Stephenson met with Mr Vernon Svilicic, the Pizza Production Manager, to discuss the July extension on 21 August 2020. Mr Stephenson advised that he was being paid as a casual employee, but Mr Svilicic told him there had been an administrative error in not issuing a contract extension to him earlier in the year as he had been working as a replacement for employee X.[14]

[27] There was some discussion (the terms of which are disputed) between Mr Stephenson and Mr Svilicic about Mr Stephenson exercising the casual conversion rights under the Agreement. Mr Stephenson said he was told by Mr Svilicic not to force his hand[15] while Mr Svilicic said he told Mr Stephenson that his position was properly characterised as a temporary contract position and therefore he was not eligible for conversion.[16]

THE CONVERSION REQUEST

[28] Mr Stephenson put in a formal request to convert from casual to permanent employment on 25 August 2020 (the conversion request).[17] In the conversion request Mr Stephenson detailed what he considered his employment pattern to be (a mixture of casual and temporary engagements). Relevantly Mr Stephenson said that he had worked on an uncontracted (casual) basis on the night shift pizza crust line from 6 January 2020 until the date of the request.

[29] Mr Svilicic said that he considered Mr Stephenson had been on a temporary contract backfilling a night shift pizza crust role from 14 October 2019 to 21 December 2019 and from January 2020 to August 2020. Mr Svilicic said Mr Stephenson was backfilling for employee X on a fixed term contract which was not a period of casual employment and hence, did not count for the purposes of casual conversion. Further, Mr Svilicic said the position that Mr Stephenson "was seeking conversion into was not a role that was available because it belongs to an employee who is on a welfare plan."[18]

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[12] Witness statement of Vernon Svilicic, annexure VS-2

[13] Witness statement of Vernon Svilicic, paragraph 8

[14] Witness statement of Vernon Svilicic, paragraph 9

[15] Witness statement of Mr Stephenson, paragraph 40

[16] Witness statement of Vernon Svilicic, paragraph 11

[17] Witness statement of Vernon Svilicic, annexure VS3

[18] Witness statement of Vernon Svilicic, paragraph 14

[30] On 9 September 2020, in response to a request from Mr Stephenson for a formal response to the conversion request, Mr Svilicic sent Mr Stephenson an email outlining the reasons for the refusal to grant his request to convert from casual to permanent employment.[19] That email said, in part:

> After receiving your correspondence dated 1st September outlining the exact dates pertaining to your application for conversion to permanent employment, we have been able to complete a review of your work pattern in line with clause 31.1.
>
> Unfortunately, your application to convert to permanent employment has not been successful. This is based on the following reasons:
>
> 1. The role you have been filling (contracted or otherwise) has been in the capacity of backfill for another permanent employee, currently seconded elsewhere in the plant.
>
> 2. Our records indicate the length of your engagement in the role does not meet the threshold of 6 months or longer as prescribed in clause 31.1 of the 2019 EA.
>
> Thank-you for taking the time to provide such a detailed application. I trust you will continue to make a valued contribution to McCain Foods in the future.
>
> Kind Regards
>
> Vernon Svilicic

[31] The AMWU notified its dispute in relation to the conversion request on 21 September 2020. By letter dated 16 October 2020 McCain further expanded on the reasons for refusal of the conversion request.[20] That letter said, in part:

> To confirm these grounds of refusal, the following covers the key considerations as we have reviewed and regarded in the assessment of your application:
>
> 1. Consistent with the above, the periods worked by yourself under both temporary and casual contract since the 10th of October 2019 were backfilling a position contracted to a permanent full time employee.
>
> 2. It is reasonably foreseeable that the contracted employee will return to their contracted days and hours within 12 months.
>
> 3. Therefore, it is also reasonably foreseeable that the backfill position you have been supporting will cease to exist within the period of 12 months post your request submission (25th of August, 2020).

[19] Witness statement of Vernon Svilicic, annexure VS-5

[20] Court Book page 81

[32] To the extent that McCain now agrees that Mr Stephenson was employed as a casual employee for the period January to August 2020, the relevant reason for refusing the conversion request is that the role Mr Stephenson has occupied "has been in the capacity of backfill for another permanent employee, currently seconded elsewhere in the plant" and that, because of the "reasonably foreseeable" return of the employee to his position, that position in which Mr Stephenson was backfilling will cease to exist within 12 months.

WAS THE REASON FOR REFUSING CONVERSION UNREASONABLE?

Evidence of Mr Stephenson

[33] Mr Stephenson agreed that in October 2019 he signed a temporary employment contract working on the night shift pizza crust line that ceased on 19 December 2019. Mr Stephenson said that if an extension contract had been offered to him at that time, he would have accepted it.[21] From January 2020 to August 2020, Mr Stephenson considered himself to be an uncontracted permanent employee working in the same role.[22] Mr Stephenson said that from late 2019 until August 2020 he worked as an operator and not a causal reliever. During this period Mr Stephenson worked on the night shift pizza crust line with Mr Evan Teble,[23] Mr Jeff Castle (a non-permanent employee) and "a revolving cast of casuals". The casual employee performs the reliever role on the team, covering breaks of the other team members[24] although there is little difference in the actual work performed by all four members of the team.[25] Mr Stephenson stepped into Mr Teble's role when Mr Teble was absent on annual leave in 2019 and personal leave in 2020.

[34] On 17 July 2020 Mr Stephenson was given a "contract extension". The details of that letter are set out above at [24]. Mr Stephenson replied on 18 July 2020 by email, advising Mr Svilicic that there had been no extension to his contract that concluded on 20 December 2019 and that he had remained "employed as a permanent casual since returning to work on 6 January 2020…" He indicated he was prepared to accept a temporary employment contract if the dates could be discussed as any backdating to December 2019 would have substantial ramifications for him.[26]

[35] Mr Stepheson said he met with Mr Svilicic on 21 August 2020. He says that in this meeting Mr Svilicic "indicated that he would prefer for me not to submit, and that he would rather make me a permanent employee on his terms and not by having his hand forced by a submission."[27]

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[21] Transcript PN 174

[22] Transcript PN 159-164

[23] Note that Mr Teble's name is incorrectly given as "Temple" in Mr Stephenson's supplementary witness statement.

[24] Transcript PN 156-8

[25] Transcript PN 137

[26] AMWU materials, attachment AMWU-6. Court Book page 179

[27] Witness statement of Brett Stephenson paragraph 40, Court Book page 124

[36] Mr Stephenson made a formal written request for conversion on 25 August 2020.[28] On 7 September 2020 Mr Stephenson followed up the meeting with an email to Mr Svilicic which detailed Mr Stephenson's recollection of the meeting of 21 August 2020. That email also recorded that since their conversation Mr Stephenson was "moved back on to the casual pool managed by the McCain Labour Team", submitted his request for conversion on 25 August 2020 and, on 4 September 2020, received his roster which had his hours reduced "from the systematic and regular hours" he had been employed on since 2018.

Evidence of Mr Karsten Munstege

[37] Mr Karsten Munstege is the Manager, Prepared Foods at McCain in Ballarat. He gave evidence about the operational arrangements of the night shift pizza crust line. He said it currently operates 24 hours per day, five days a week with the team made up of three operators and a casual reliever. The reliever is necessary to cover the breaks of the operators. Operators currently have 2 x 15 minute tea breaks, 1 x 35 minute lunch break and 4 x 10 minute pause breaks. This amounts to 105 minutes per operator or 315 minutes that need to be covered.[29]

[38] An operational review is being undertaken (delayed by Covid-19). Changes arising will result in operators having a total of 65 minutes in breaks across the shift. These changes will result in relievers only being required for a bit over four hours per shift instead of the current seven hours.[30]

[39] Mr Munstege said that there are three permanent employees contracted to the pizza crust night shift line. Since 2019 there have been two separate contracted back fill positions – Mr Stephenson from October to December 2019 and Mr Jeff Castle from September 2020. In the period from January to August 2020 it was thought that Mr Stephenson was on a back fill (temporary) contract but he wasn't and this was an administrative error.[31] The table provided by McCain[32] does not show who was actually working on the night shift pizza crust line from October 2019 to January 2021. The "black" block against Mr Castle signifies that he was not on a temporary contract at that time (as is true of Mr Stephenson). Rather Mr Castle could have been working in any variety of areas as a casual employee.[33]

[40] Mr Munstege said that around mid to July 2020 he became aware that Mr Stephenson was being paid as a casual although he does not accept he was working as a casual employee.[34]

[41] Mr Munstege said that the welfare plan for employee X is an evolving plan designed to return that employee to his position on the night shift pizza crust line.[35] As to the specifics of the welfare plan for employee X, Mr Munstege gave evidence that the welfare plan was not for a defined 12 month period:

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[28] AMWU materials, attachment AMWU-2. Court Book page 159

[29] Transcript PN 235 and 244

[30] Transcript PN 247

[31] Transcript PN 238. See also McCain additional documents Court Book pages 225-248

[32] McCain additional documents, Court Book page 225

[33] Transcript PN 405

[34] Transcript PN 284

[35] Transcript PN 290

> We have a reasonable projected view that it is reasonable for us to believe that this person will return into their role in less than 12 months from the time of the application or from the time of the date of that conversion but I cannot tell you whether that date is two weeks or six months.[36]
>
> It is measured by the progress that person makes in their advances to return, and to be honest our intent here is to look after the welfare… I can only make that assessment on the evidence and the information available to me at that time, not what is not yet known to me which could be six months down the track. So to put definitive dates and boundaries to it is extremely difficult, because we also maintain an open mindedness.[37]

Evidence of Mr Vernon Svilicic

[42] Mr Vernon Svilicic gave evidence that Mr Stephenson had been on a temporary contract back filling for an employee on a welfare plan. That contract expired in December 2019 although Mr Stephenson continued to perform that role. He said that it was an administrative error that no extension contract was provided to Mr Stephenson at the conclusion of the contract in December 2019.

[43] Mr Svilicic said that when he gave Mr Stephenson the extension contract in July 2020 he referred to the temporary contract Mr Stephenson was "currently employed under" because he believed this reflected Mr Stephenson's status as he was back filling.[38]

[44] Mr Svilicic gave evidence that the employee Mr Stephenson was backfilling for remains on a welfare plan with the aim to get him back to working in the night shift on the pizza crust line. There is no current date for his return to the night shift position.[39]

Submission of the AMWU

[45] The AMWU submits that the decision of McCain to refuse the conversion request of Mr Stephenson was unreasonable.

[46] The AMWU submits that the 2019 Agreement does not allow McCain to engage a casual employee to displace permanent employment.[40] It is therefore submitted that, having agreed that Mr Stephenson was engaged as a casual employee on a regular and systematic basis for a period exceeding six months, McCain is not entitled to say that he was "backfilling" a permanent position as this is barred by the 2019 Agreement.

[47] The AMWU submits that it is not permissible for McCain to borrow from provisions in relation to temporary employment to assist them in the interpretation of the casual

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[36] Transcript PN 294

[37] Transcript PN 299

[38] Transcript PN 593

[39] Transcript PN 484-485

[40] 2019 Agreement, Clause 30

employment provisions. In this respect the AMWU rely on the "syntactical presumption *lex specialis derogate legi generali.*"[41]

[48] The AMWU further submits that the 2020 Award provides a bar to the Respondent seeking to rely on any new grounds to refuse the request. The 2020 Award requires at clause 10.8(i) that where an employer refuses a conversion request "the reason for doing so must be fully stated to and discussed with the employee concerned…" [my emphasis]. The word "fully" means that the reasons provided at the time must be "comprehensive, considered and complete." It follows therefore that the reasons provided by Mr Svilicic in the email of 9 September 2020 must be the full reasons and hence cannot be supplemented at some later stage in the process.

[49] The AMWU, on this point, relies on the decision of Commissioner Dangerfield in the *Clerks' (South Australia) Award Casual Provisions Appeal Case*[42] where it was found:

> The time for considering the reasonableness or otherwise of the respondent's decision to refuse the applications for conversion of the two employees was during the four week period immediately following the date of the applications, namely, in the window from 2 January 2003 through 30 January 2003.[43]

[50] The AMWU further submits that McCain does not come to this dispute with clean hands and that it is improper for it to profit in such circumstances.

[51] The 2020 Award states at clause 10.8(b) that the employer must give the employee notice in writing of the provisions of the clause within four weeks of the employee having attained six months qualifying period of employment. This a clear, unequivocal obligation on the employer with which McCain failed to comply. The AMWU states that the unclean hands and the disparity in power between McCain (a large multi-national business with over 22,000 employees and a regulated casual pool of 200 employees) and Mr Stephenson mitigates a conclusion that there could be circumstances where it might be reasonable to refuse a conversion request.

[52] The AMWU also submits that Mr Stephenson worked on a regular and systematic basis as a casual employee from 30 June 2019 to 4 September 2020 as is demonstrated by his pay slips. To the extent that it might be claimed that Mr Stephenson spent some of that period as a temporary employee, the AMWU submits that this period should be viewed as a "hiatus" at the end of which he reverted to his status as a casual employee in accordance with clause 32.4.1 of the 2019 Agreement. Further, the Christmas shut down should not be seen to break the "continuity" of the casual employment.

[53] The AMWU submits that Mr Stephenson was a regular and systematic employee who had a reasonable expectation of continuing employment.

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[41] Where there is a conflict between general and specific provisions, the specific provisions will prevail.

[42] [2004] SAIRComm 4

[43] Ibid, paragraph 165

Submissions of McCain

[54] McCain submits that clause 31 of the 2019 Agreement confers a right to casual conversion if the person has been employed *under* the 2019 Agreement. The 2019 Agreement commenced operation from 14 October 2019 and hence it is only employment since that time that contributes to the qualifying period for conversion. For this reason, McCain submits that earlier periods of casual employment are not relevant to the determination of the question before the Commission.

[55] McCain agrees that, for the purpose of resolving this dispute, Mr Stephenson was employed as a casual employee for the period 6 January to August 2020.

[56] By way of background McCain submits:

- In September 2019 employee X on the night shift pizza crust line became unable to perform his duties for personal reasons. As a result, a night shift temporary position was required to be filled on a temporary basis;
- McCain is obliged to return employee X to his night shift position when his welfare plan comes to a conclusion;
- Mr Stephenson was offered, and accepted, a temporary contract which was to backfill the temporary vacancy which was expressed to be from 14 October 2019 to 20 December 2019;
- From 21 December 2019 to 5 January 2020 Mr Stephenson did not attend work because of the Christmas shutdown;
- On return on 6 January 2020 Mr Stephenson continued to perform "the night shift position" with the permanent operator still on a welfare plan;
- From 6 January 2020 "McCain inadvertently did not provide Mr Stephenson with a written extension of the Temporary employment". Mr Stephenson reverted to being paid on a casual basis.

[57] McCain submits that the only reason Mr Stephenson was working the night shift pizza crust line from 6 January 2020 to 20 August 2020 was to fill the vacancy left by employee X. Further, the only reason McCain has agreed, for the purpose of this dispute, that Mr Stephenson is a casual employee is because of an administrative error.

[58] McCain submits that the position in which Mr Stephenson seeks to convert his employment is, in fact, a position that is occupied by a permanent employee. In such circumstances it says it is not unreasonable to refuse the conversion request.

[59] As to the requirements of the 2019 Agreement, McCain submits that:

- Clause 32.5.3 of the 2019 Agreement makes it clear that a backfill (defined in clause 3 as "filling of a role of another employee due to the permanent employee who usually holds the role not being able to fulfil the duties of the role temporarily) position is, in the first instance to be offered to casual employees;

- If an absent permanent employee does not return to their position the process in clause 34 is to be followed in filling the position. To allow a casual employee to convert in a backfill position would therefore be incongruous;

- The 2019 Agreement requires a casual employee to regularly provide availability. Should they fail to notify availability for 14 days or more they will be removed from the register.

[60] McCain submits that the 2019 Agreement does not contemplate casual employees who are engaged "on a backfill contract" to convert into permanent employment simply by reason of the backfill arrangement.

[61] McCain submits that, while it accepts Mr Stephenson was not "strictly temporarily employed pursuant to clause 32" of the 2019 Agreement from January to August 2020, this is "solely by reason of administrative error rather than the intention of the parties." In such circumstances McCain submits that it cannot be unreasonable to refuse the request to convert permanently into to the night shift position where the "objective conduct of the parties" had them acting in accordance with the 2019 Agreement which would not allow such a course.

[62] McCain submits that the provisions of the 2020 Award in relation to casual conversion can be seen "through" the decision by the Full Bench in the *Metal, Engineering and Associated Industries Award – Part 1*[44] *case (Metals Award case)* and, in particular, two important matters:

> (a) *first,* the central focus is on the employer's requirements of that casual employee in performing the particular work that he or she was engaged to perform;
>
> (b) *second*, the conversion is to result in the same number of hours and same times of work as previously worked.[45]

[63] Further, McCain submits that the 2019 Agreement was made after the decision of the Full Bench in *4 yearly review of modern awards – Casual employment and Part-time employment* (Casual and Part-time employment decision)[46] In that decision the Full Bench said, with respect to the ability of the employer to refuse a conversion request:

> [380] In relation to the fourth question, we do not consider that the employer should be deprived of the capacity to refuse a casual conversion request on reasonable grounds. If it would require a significant adjustment to the casual employee's hours of work to accommodate them in fulltime or part-time employment in accordance with the terms of the applicable modern award, or it is known or reasonably foreseeable that the casual employee's position will cease to exist or the employee's hours of work will significantly change or be reduced within the next 12 months, we consider that it would be unreasonable to require the employer nonetheless to convert the employee in those circumstances. The circumstances we have identified would generally constitute the grounds upon which a conversion request could reasonably be refused, although

[44] AIRC Print T4991

[45] Written submissions of McCain, paragraph 41

[46] [2017] FWCFB 3541

there may be other grounds which we currently cannot contemplate. We emphasise that for a ground for refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable, and not be based on speculation or some general lack of certainty about the employee's future employment.

[64] McCain said that the Full Bench ultimately amended the model clause to include the following:

> (f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.
>
> (g) Reasonable grounds for refusal include that:
>
> (i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual as defined in paragraph (b);
>
> (ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;
>
> (iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or
>
> (iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.[47]

[65] McCain submits that in the circumstances confronting it, it was not unreasonable to refuse the conversion request of Mr Stephenson.

CONSIDERATION

[66] I am satisfied that from August 2019 to December 2019 Mr Stephenson was working on a temporary employment contract (the backfill contract) back filling for an employee who was on a welfare plan.

[67] I am satisfied that the temporary contract was not extended when Mr Stephenson returned from the Christmas close down on 6 January 2020. From this date, Mr Stephenson was paid as a casual employee although remained on the night shift pizza crust line. I am satisfied that the failure to issue the contract extension was an administrative oversight in that

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[47] *4 yearly review of modern awards - Part-time employment and Casual employment* [2018] FWCFB 4695; 282 IR 135 at [31].

it was not a deliberate act on the part of anyone at McCain. This does not alter Mr Stephenson's status as a casual employee.

[68] It is not in dispute (at least for the purposes of this application) and I am satisfied that Mr Stephenson had competed at least six months employment as a regular and systematic casual employee at the time he lodged his conversion request with Mr Svilicic. In this respect I am satisfied that Mr Stephenson was qualified to make the conversion request in accordance with clause 10.8 of the 2020 Award.

[69] Mr Stephenson was presented with a contract extension on 17 July 2020. Arising from this Mr Stephenson met with Mr Svilicic on 21 August 2020. Mr Stephenson made his conversion request by email on 25 August 2020.

[70] On 9 September 2020 Mr Svilicic, in response to an email from Mr Stephenson, formally responded to the conversion request. In rejecting the conversion request Mr Svilicic said the reasons for the rejection were:

1. The role you have been filling (contracted or otherwise) has been in the capacity of backfill for another permanent employee, currently seconded elsewhere in the plant.

2. Our records indicate the length of your engagement in the role does not meet the threshold of six months or longer as prescribed in clause 31.1 of the 2019 EA.

[71] The second of those reasons does not require further consideration as it has been conceded that, for these proceedings, Mr Stephenson does meet the required threshold of six months.

The casual conversion provisions of the 2020 Award

[72] I accept that clause 10.8(a) of the 2020 Award gives an employee a right to make an application for conversion from casual employment to permanent employment, subject to a qualifying period and that the employee was not an irregular casual employee.

[73] Further, I am satisfied that an employer, pursuant to clause 10.8(d) of the 2020 Award must, within four weeks of the request "consent to or refuse the election". It seems to me that neither is given precedence in the consideration of the employer. Rather, the clause requires that the employer make one of two possible decisions.

[74] A decision to consent to a request does not have to be reasonable, justifiable or have any other consideration attached to it. The limitation is that a refusal decision, when made, must not be unreasonable. If the refusal is unreasonable the clause strongly suggests that consent must then prevail. There is no other option.

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[75] Clause 10.8(i) does require discussion with an employee where a conversion request is refused, the reason for refusal be *fully* stated and a genuine attempt made to reach agreement.

[76] The task before me is to determine if the refusal by McCain of Mr Stephenson's conversion request was unreasonable.

[77] The determination of whether the refusal was unreasonable must be objectively made taking into account the circumstances at the time the refusal decision was made.

[78] I would note, with respect to the decision of the Full Bench in the *Casual and Part-time employment* case that the amendments to the model clause referenced by McCain in its submissions were not included in the 2020 Award applicable in this case. This is not to suggest the observations of the Full Bench are not relevant, but it is noteworthy that the observations were not made in relation to this (or the 2010) Award.

What was the operative reason for the refusal of the conversion request?

[79] The conversion request of Mr Stephenson was formally refused by McCain in the email from Mr Svilicic of 9 September 2020. The relevant reason that requires consideration by me was that the role being filled by Mr Stephenson was that of another permanent employee, currently seconded elsewhere in the plant. This reason was expanded upon as outlined above in the letter from McCain to Mr Stephenson on 16 October 2020. The language in the reason of that letter reflects the language adopted by the Full Bench in the *Casuals and Part-time employment decision* which, as I observed above, does not form part of the 2020 Award.

Was that reason for refusal unreasonable?

[80] The AMWU put in its closing submissions that I could conclude, form the evidence, that McCain did not make a "genuine attempt to reach agreement', presumably with Mr Stephenson, with respect to his request [in accordance with clause 10.8(i) of the 2020 Award].

[81] The evidence shows that Mr Svilicic and Mr Stephenson met on 21 August 2020, four days prior to Mr Stephenson making his conversion request. There is no evidence of any conversations in relation to Mr Stephenson's request after that request was formally made. The evidence does not support a conclusion that there was any further meeting or that any attempt – genuine or otherwise – was made to reach agreement.

[82] The AMWU suggests that I should take account of materials attached to the witness statement of Mr Stephenson in relation to insecure work.[48] Whilst I note the contents of the extracts of the Report provided, I am not convinced of its relevance to the matter before me. It is necessary that I determine the dispute by reference to the provisions of the 2019 Agreement.

[83] The AMWU drew my attention to the decision of VP Watson in *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v SPC Ardmona Operations Limited*.[49] In that decision the Vice President was considering a conversion request of an employee of SPC. The relevant agreement provision being considered in that decision is remarkably similar to clause 10.8 of the 2020 Award. I have noted the observations of the Vice President particularly at [19]-[21] where he said:

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[48] Witness statement of Mr Stephenson, appendix 1 – Extracts from the *Victorian Parliamentary Inquiry into the Labour Hire Industry and insecure Work*

[49] [2011] FWA 4405

> [19] In my view it is important to consider the purpose of clause S7.9.1 of the Agreement. The clause confers rights on seasonal employees. It is in line with similar clauses in some awards and agreements, including this Agreement, regarding casual employees. The concept involved is that employees with less secure and regular employment than full-time and part-time employees who serve a qualifying period of employment can elect to convert the status of their employment to full-time or part-time status subject to the consent of the employer. The wording of the clause connotes more than a right to request a conversion. It is phrased as an election of the employee which must be actioned unless the employer has reasonable grounds to refuse the request.
>
> [20] In my view, seasonal employees engaged under this Agreement have a legitimate expectation of conversion unless there are unusual circumstances which render that course inappropriate, and hence the employer's refusal reasonable. The clause is the product of the Agreement of the employer and employees in the operation and must be applied on its terms regardless of views of the employer about the consequences of its application.
>
> [21] It is clear that the natural consequence of the operation of the clause is that conversions will result in a change in the mix of what the Agreement describes as permanent employees (full-time and part-time) and seasonal employees. The same is true for the operation of the clause regarding casual employees. The underlying concept is that employees with less secure employment after a qualifying period of service in that capacity can improve their status unless the business cannot sustain that outcome or there is some other reasonable reason to refuse an election to convert. In my view it is not open to SPCA, having agreed to the creation of the right, to interpret and apply the clause in a way that fundamentally undermines that right and the purpose of the clause.

[84] Given the similarity of the clause under consideration in that and this matter, the observations are not irrelevant.

[85] I agree with the submissions of the AMWU that, if it is that a request for conversion cannot be accommodated because there is no vacant permanent position in which to place the casual employee, much of the purpose of a casual conversion clause falls away.

[86] Mr Stephenson does not look to "take" the job of the employee X on a welfare plan, he just seeks conversion to permanent employment.

[87] McCain submits that the 2020 Award provisions "speak of the election to convert a contract" such that a contract is being converted (from casual to permanent) and not being created. McCain submits that the 2020 Award provision does not "envisage the creation of a new job or a new contract. It does not envisage someone performing different duties, different times and different working hours."

[88] McCain further put, and said it was conceded by the AMWU, that casual conversion should result in an employee working the same hours and same times post the conversion that the employee was working as a casual employee. I agree with this submission of McCain and that outcome is certainly envisaged by the 2020 Award (clause 10.8(g)) except that the clause

does allow a different outcome. An employee who worked full time has the right to elect to convert their contract to full time employment and a part-time employee to part-time employment "unless other arrangements are agreed upon between the employer and employee." Further, I would observe that having the same hours and times of work on conversion is not the same as having the same position as a result of that conversion. There are casual employees who work on a regular and systematic basis but are not necessarily engaged in the same position over the qualifying period but remain eligible to apply for conversion. On McCain's view, regardless the length of engagement, the lack of a permanent position would bar such a person from conversion.

[89] McCain submits that Mr Stephenson was engaged from January to August 2020 to backfill the position normally occupied by an employee who was on a welfare plan. To the extent it says that the AMWU said it is not talking about the position that was occupied by Mr Stephenson during 2020 – such that it is not seeking that Mr Stephenson occupy that position permanently – the conversion request would require McCain to create a position for Mr Stephenson.

CONCLUSION

[90] In reaching my decision I have paid careful regard to the submissions of the parties and the wording of the 2020 Award clause. I would observe, in considering the provisions of the 2019 Agreement, that it is not possible to draw any conclusion as to the influence of the decision in the *Casual and Part-time employment decision* on the 2019 Agreement. It is not apparent how the *Causal and Part-time employment decision* influenced either way the 2019 Agreement.

[91] As to the decision in the *Metals Award case,* the wording of the 2020 Award does not vary substantially in relevant respects from that arising from that decision, including that conversion should be on the basis of the same number of hours and times worked unless other arrangements are agreed upon between the employer and employee. Likewise the *Metals Award case* does not specify that the employee must perform the same job on conversion as was carried out as a casual employee.

[92] The position of McCain in refusing the conversion request of Mr Stephenson is predicated on Mr Stephenson "backfilling" the position occupied by employee X where it is planned that employee X would return to that position (with a welfare plan in place directed to that objective) and that it was reasonably foreseeable that this would occur within 12 months of the decision to refuse Mr Stephenson's request. McCain says that, therefore, there is no vacant position in which Mr Stephenson could convert from casual to permanent employment.

[93] There are two things to say of the refusal of McCain. Firstly, the position of McCain is that it supposes the pre-existence of a permanently vacant position in which an employee may work following conversion for conversion to occur. McCain therefore, in my opinion, confuses the conversion from casual to permanent employment with the existence of a vacant position. No such limitation on conversion is established in the 2020 Award clause. If this was intended to be a pre-condition for conversion or form the basis of a refusal of a request to convert deemed to not be unreasonable, that could easily have been specified but it is not. In circumstances where the parties have themselves further considered in bargaining matters associated with casual conversion this is not a condition placed on access to conversion by a

casual employee in the 2019 Agreement. This does not mean it is not a reasonable consideration, but it is not the basis on which Mr Stephenson's request was refused.

[94] Second, that employee X may return to his position at some stage is not, in my opinion, a reasonable basis on which to refuse the conversion request of Mr Stephenson. Although it may be a relevant consideration it cannot be that the position Mr Stephenson was working in was not permanently vacant to be the determining factor (as was evidenced by the reason for refusal provided by Mr Svilicic to Mr Stephenson on 11 September 2020 and confirmed by McCain following the notification of the dispute to the Commission by the AMWU). The apparent failure to meet with Mr Stephenson to attempt to reach agreement (as is required by clause 10.8((i) of the 2020 Award) means that other options for accommodating the conversion request in the short and long term were not explored. If other means by which the request may have been accommodated were explored by McCain, it is not apparent from the reasons for refusal given to Mr Stephenson of what these options were and why they were dismissed.

[95] I accept that the AMWU did not call evidence and did not cross examine McCain witnesses in relation to any meetings with McCain and Mr Stephenson beyond that with Mr Svilicic of 21 August 2020, but I note that there is no suggestion of such a meeting after the conversion request was made. The reasons for refusal of the conversion request, as expanded on by McCain in its letter of 16 October 2020, does not suggest that any exploration of possibilities, as mandated by the 2020 Award or otherwise, took place. The only reason for refusal of the conversion request is therefore the lack of a vacant position and that Mr Stephenson was backfilling a role employee X was to return to.

[96] Alternatively, the evidence does not suggest as to when employee X might return to his position on the night shift pizza crust line. This is not to suggest he does not wish to return, or that there is not an objective that he return, but is an observation of the state of the evidence before me. Employee X has been absent from the night shift for some time. The welfare plan is ongoing and is constantly modified to meet the changing needs of employee X but to maintain that it is reasonably foreseeable that he would return within 12 months (that is, by August 2021) without supporting evidence suggests that the impending return of employee X as the basis for the refusal of the request makes that refusal unreasonable.

[97] Had McCain sought to give confidential evidence of that matter, it would have been accommodated by me, just as evidence as to the identity of employee X was provided on a confidential basis.

[98] The evidence and submissions before me suggest that the underlying reason for the refusal of Mr Stephenson's request was driven by a belief that he was a "de facto" temporary employee and it was only an administrative error that had him being paid otherwise. Further to my findings above I would observe that a refusal to convert for this reason would be unreasonable – leaving Mr Stephenson in a place not contemplated by the 2020 Award or 2019 Agreement.

[99] In circumstances, where the only stated reason for refusal of the conversion request was that Mr Stephenson was backfilling for employee X, I find that refusal unreasonable. It suggests a very narrow approach to a consideration of the conversion request of Mr Stephenson by McCain.

[100] Given my finding that the refusal was unreasonable it follows, on the AMWU's preferred question, that the refusal of the request was not reasonable.

COMMISSIONER

Appearances:
R. Wainwright for the Applicant.
A. Denton of Counsel for the Respondent.

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2021.
Melbourne, via video:
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