DECISION

Fair Work Act 2009
s.225 and 226—Enterprise agreement

Retaining Solutions Design Construct Pty Ltd T/A Retaining Solutions Design Construct Pty Ltd

(AG2023/3762)

Building, metal and civil construction industries

COMMISSIONER CRAWFORD SYDNEY, 1 DECEMBER 2023

Application for termination of the Retaining Solutions Design Construct Pty Ltd Enterprise Agreement 2016 – 2020 – meaning of "unfair to employees" - insufficient evidence and material - application dismissed

Background

[1] An application has been made by Retaining Solutions Design Construct Pty Ltd (**Retaining Solutions**) for the termination of the *Retaining Solutions Design Construct Pty Ltd Enterprise Agreement 2016 – 2020* (**the Agreement**) pursuant to ss.225 and 226 of the *Fair Work Act 2009* (Cth) (**FW Act**). The Agreement's nominal expiry date is 14 March 2020. The Form F24B application was filed on 17 October 2023 and was accompanied by a Form F24C declaration made by Joanne Withnall (HR and Payroll Officer) on the same date.

[2] The Form F24B identified in part 2.1 that there are 41 employers covered by the Agreement and in part 2.3 indicated Retaining Solutions is not one of the 41 employers. Neither statement is correct. The Agreement covers only one employer and that is Retaining Solutions.

[3] The Form F24C declaration stated in part 2.2 that there are no employees covered by the Agreement but then stated in part 5.2 that there are 33 part-time employees, nine casual employees, seven employees under 21 years of age and four employees over 45 years of age covered by the Agreement.

[4] The Form F24C identified that Retaining Solutions is relying on s.226(1)(a) to terminate the Agreement on the ground of unfairness for the employees covered. The declaration stated in part 2.1:

> "Through better off testing, we have found it is better for our employees to work under the Onsite Building and Construction Award 2020 (sic). Changes in living standards, pay rates and allowances are updated annually within the award and clearly considers the best situation for our employees."

[5] I listed the application for Mention/Directions via video on 26 October 2023. Ms Withnall and Jennifer Caldwell (Finance Manager) appeared for Retaining Solutions. During the Mention/Directions hearing, Ms Withnall and Ms Caldwell confirmed there are employees covered by the Agreement. I indicated I was required to take account of the views of the employees in relation to the application and would require evidence of their views. I also indicated I required further material in support of the argument that all employees would be better off under the *Building and Construction General On-site Award 2020* (**Award**) given it appears the minimum rate for several operator classifications is higher under the Agreement. I directed Retaining Solutions to file the further material by 3 November 2023.

[6] On 3 November 2023, Retaining Solutions filed three spreadsheets containing:

- an example of weekly earnings for a skilled labourer under the Agreement and the Award;
- the classification levels for the relevant employees; and
- the relevant Award rate, Agreement rate, and current rate of pay for each employee.

Retaining Solutions also filed two emails containing information sent to staff about the application.

[7] The spreadsheet containing the relevant Award rate, Agreement rate and current rate of pay appeared to confirm several classification rates in the Agreement are superior to the Award. The spreadsheet also indicated most employees are not paid a rate specified in the Agreement or the Award, the employees appear to be paid higher contractual rates. The emails containing communications sent by Retaining Solutions to the employees about the application demonstrate some information was provided to employees about the application and its effects, but the information was incomplete and selective. None of the issues I refer to later in the decision were identified.

[8] On 7 November 2023, my chambers sent an email to Ms Withnall. The email indicated I remained concerned that some employees, particularly operators, are entitled to a higher rate of pay under the Agreement than they would be under the Award. I also indicated that common law contractual rates would have little relevance to my assessment of whether the Agreement should be terminated, given these rates are not prescribed in the Agreement or the Award. The email also suggested Retaining Solutions considers bargaining for a replacement agreement as this would also result in the Agreement ceasing to operate. The email requested a response by 14 November 2023.

[9] On 10 November 2023, Retaining Solutions filed further material in response to the email from my chambers. Retaining Solutions filed a spreadsheet which purported to show that Operator Level 6 and Level 7 employees would earn more under the Award than the Agreement. However, the spreadsheet used incorrect rates for the Award and indicated a full-time employee would only be paid for 22.8 ordinary hours in a week under the Award and 21.6 ordinary hours under the Agreement without providing any explanation for these figures.

[10] Given my concerns about the material provided by Retaining Solutions, I listed the application for conference on 17 November 2023.

[11] Prior to the conference on 17 November 2023, my chambers sent an email to Retaining Solutions with some basic calculations which demonstrated an Operator Level 6 would earn $202.68 more per week under the Agreement than the Award for a 38-hour week, and that a Level 7 Operator would earn $227.52 per week more under the Agreement than the Award. The email indicated the figures would be discussed at the conference later that day.

[12] No representative of Retaining Solutions attended the conference, and my associate was unable to contact anybody from the business.

[13] As a result of this non-attendance, my chambers sent an email to Ms Caldwell and Ms Withnall raising the non-attendance and requesting confirmation of whether the application was pressed by Retaining Solutions. The email also indicated I remained concerned that some employees will be disadvantaged if the Agreement is terminated and that I did not have sufficient evidence about the views of employees.

[14] On 20 November 2023, Ms Caldwell sent an email to chambers indicating she was out of the office on 17 November 2023 and Ms Withnall was unwell. No explanation was provided regarding why my chambers was not informed that the business was not able to arrange for anybody to attend the conference, which would have allowed the conference to be cancelled.

[15] Later in the day on 20 November 2023, Ms Caldwell sent a further email which suggested the information provided by my chambers on 17 November 2023 was "not reflective of correct rates/calculations for some information used". Ms Caldwell also provided a spreadsheet which purported to show that Operator Level 6 and Level 7 employees would earn more per week under the Award than the Agreement. The spreadsheet again used incorrect Award rates and suggested, without explanation, that the hypothetical employee would receive the daily fares and travel allowance each day under the Award but would not receive the higher daily fares and travel allowance under the Agreement on any occasions. The figures also did not involve a like-for-like comparison in terms of hours worked because they used a 38-hour week for the Award and a 36-hour week under the Agreement.

[16] On 21 November 2023, my chambers sent a further email to Ms Caldwell. The email identified the problems referred to above with the spreadsheet provided by Retaining Solutions on 20 November 2023. The email identified that I had not been provided with sufficient evidence concerning the views of the employees and had been provided with no evidence regarding the bargaining factors prescribed in s.226(4) of the FW Act. The email put Retaining Solutions on notice that I was providing one more opportunity for it to file material addressing all the factors in s.226 of the FW Act. The email indicated further material could be filed by 24 November 2023. The email ended by stating I intended to dismiss the application if sufficient material in support of the application was not filed by that date.

[17] On 24 November 2023, Ms Caldwell filed further material on behalf of Retaining Solutions. The material included an email with a table that appeared to accept that weekly earnings under the Award would be less than the Agreement in relation to the following classifications: Leading Hand, Operator Level 5, Operator Level 6, and Operator Level 7. A

spreadsheet was also filed as the purported "working document" for the table. However, the spreadsheet only contained calculations for a tradesman. Further, it used incorrect Award rates and suggested a tradesman could be classified at the Level 1(d) under the Award. As with all the previous material, the calculations suggested the weekly ordinary hours of 36 under the Agreement would operate detrimentally for employees without considering what additional overtime entitlements may be generated by the lower weekly ordinary hours.

[18] Retaining Solutions also filed petitions signed by employees that state:

> "As per email to all site staff on the 3rd August 2022, Retaining Solutions proposed that all site staff employees be prepared and presented new employment contracts to review and sign to be paid in accordance with the *Building and Construction General On-site Award 2020 (MA000020).* Retaining Solutions have (sic) presented evidence based on average current employment hours worked and conditions that the average pay will be more than currently received under the *Retaining Solutions Design Construct Pty Ltd Enterprise Agreement 2016 – 2020 (EA).*
>
> As employees, we agree that Retaining Solutions as an employer has given the employees sufficient information and evidence that we will not be disadvantaged by this change and we have been given the chance to raise any concerns or questions. As an employee I agree that any questions have been answered sufficiently, and agree to this change being implemented."

[19] I consider the petition raises more questions than answers. I have not been provided with copies of any employment contracts presented to staff on 3 August 2023 and have no idea of their relevance to the signing of the petitions by employees. Given the petitions were filed in conjunction with a table filed by Retaining Solutions that appears to accept employees at several classification levels are likely to have greater minimum entitlements under the Agreement than the Award, the petition is inaccurate and misleading. Retaining Solutions has not provided a witness statement or any other evidence about how the petition signatures were obtained. Given this array of significant issues, I could not give the petitions significant weight as evidence of the genuine and informed views of the employees.

Statutory provisions

[20] Sections 225, 226 and 227 of the FW Act regulate applications for the Commission to terminate an enterprise agreements after it has nominally expired.

[21] Section 225 of the FW Act states:

> **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

[22] Section 226 of the FW Act states:

Terminating an enterprise agreement after its nominal expiry date

(1) 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 the continued operation of the agreement would be unfair for the employees covered by the agreement; or

(b) the FWC is satisfied that the agreement does not, and is not likely to, cover any employees; or

(c) all of the following apply:

(i) the FWC is satisfied that the continued operation of the enterprise agreement would pose a significant threat to the viability of a business carried on by the employer, or employers, covered by the agreement;

(ii) the FWC is satisfied that the termination of the enterprise agreement would be likely to reduce the potential of terminations of employment covered by subsection (2) for the employees covered by the agreement;

(iii) if the agreement contains terms providing entitlements relating to the termination of employees' employment--each employer covered by the agreement has given the FWC a guarantee of termination entitlements in relation to the termination of the agreement.

(1A) However, the FWC must terminate the enterprise agreement under subsection (1) only if the FWC is satisfied that it is appropriate in all the circumstances to do so.

(2) This subsection covers a termination of the employment of an employee:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

(3) In deciding whether to terminate the agreement, the FWC must consider the views of the following covered by the agreement:

(a) the employees (unless there are no employees covered by the agreement);

(b) each employer;

(c) each employee organisation (if any).

Note: The President may be required to direct a Full Bench to perform a function or exercise a power in relation to the matter if any of the employers, employees, or employee organisations, covered by the agreement oppose the termination (see subsection 615A(3)).

(4) In deciding whether to terminate the agreement (the ***existing agreement***), the FWC must have regard to:

(a) whether the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as the existing agreement; and

(b) whether bargaining for the proposed enterprise agreement is occurring; and

(c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.

(5) In deciding whether to terminate the agreement, the FWC may also have regard to any other relevant matter.

[23] Section 227 of the FW Act states:

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.

Consideration

The operation of s.226 of the FW Act

[24] Where an application is made under s.225 of the FW Act to terminate an enterprise agreement that has passed its nominal expiry date, the Commission "must" terminate the agreement where one of the grounds in s.226(1) of the FW Act is satisfied. However, the Commission "must" also:

- be satisfied it is appropriate in all the circumstances to terminate the agreement in accordance with s.226(1A);
- consider the views of the employer, employees and employee organisations covered by the agreement in accordance with s.226(3); and
- have regard to the bargaining-related matters identified in s.226(4).

The Commission "may" also have regard to any other relevant matter in accordance with s.226(5).

[25] The term "unfair" is not defined in the FW Act. The term "unfair dismissal" is effectively defined in s.385 of the FW Act. However, the term "unfair" is used in other sections of the FW Act with no explicit guidance as to its meaning. For example, s.228(1)(e) refers to "unfair conduct" in the context of the good faith bargaining requirements and s.596 uses the term "unfair" in a section directed at the Commission's power to grant permission for a person to be represented in a matter.

[26] In *R v Swaffield,*[1] the High Court (Toohey, Gaudron and Gummow JJ) referred to the term "unfairness" as necessarily lacking precision and being vague:

> "The term "unfairness" necessarily lacks precision; it involves an evaluation of circumstances."[2]

> "It has been said, rightly, that fairness is a vague concept."[3]

[27] In a dissenting High Court judgment in *Em v The Queen,*[4] Kirby J provided the following guidance regarding the interpretation of the word "unfair" when considering its meaning in the *Evidence Act 1995* (NSW) (endnotes omitted):

> *"Textual considerations*: The word "unfair" in s 90 is not defined either in the Dictionary at the end of the Act or elsewhere. However, the word is one of common use in the law. It must take its meaning from the context and purpose of its use. Depending on such context, the word connotes "not fair"; "biased or partial"; "not just or equitable"; "unjust"; or "marked by deceptive dishonest practices".
>
> Unfairness, for the purposes of s 90, cannot be defined comprehensively or precisely. A general law on evidence (such as the Act) must cover the admission (or rejection) of evidence adduced in a vast range of predictable and unpredictable circumstances. Moreover, what is "unfair" will vary over time in response to changing community attitudes and perceptions. The language of s 90 of the Act expresses the concept of unfairness "in the widest possible form".
>
> This fact, and the fact that the power afforded under s 90 is to be exercised at the moment that evidence is tendered for admission before a court, indicates that the judgment must be made on a case-by-case basis, normally on the run. The section envisages individual decision-making by reference to all relevant facts, not *a priori* rules of universal application. What would be "unfair" in one set of circumstances might not be so if just a few of the integers were changed."[5]

[28] Turning then to what "unfair" is intended to mean in s.226(1)(a) of the FW Act, what I consider is clear from the words used in s.226(1)(a) of the FW Act is that the required assessment is solely directed at the interests of the relevant employees. There is no indication the impact of the agreement being terminated for the employer is relevant to the assessment under s.226(1)(a) and neither is there any indication that the public interest should be considered.

[29] The employer's views must be considered under s.226(3) and the public interest could be relevant under s.226(1A) or s.226(5). However, I read s.226 to mean that consideration is only given to the matters identified in s.226(1A), (3), (4) and (5) if the Commission satisfied the application meets either s.226(1)(a), (b) or (c). The statement that the Commission "must" terminate the agreement in s.226(1) is arguably misleading when read in isolation, given the remainder of s.226 suggests terminating an agreement is a discretionary decision for the Commission. If I am reading the FW Act correctly, s.226(1) effectively prescribes three options for accessing the Commission's discretionary jurisdiction to terminate an enterprise agreement. If s.226(1) is not satisfied, the discretion cannot be exercised.

[30] I also consider the use of the words "unfair for the employees" in s.226(1)(a) indicates the interests of **all** employees covered by the Agreement must be assessed for the purposes of s.226(1)(a) of the FW Act. I interpret this to mean that the impact of terminating the agreement must be considered for each employee or class of employee, and then an overall wholistic assessment made of whether the continued operation of the agreement would be unfair. This assessment has some similarities to the better off overall test (**BOOT**) prescribed in s.193 of the FW Act, but also appears to have an important difference. The BOOT requires "each award covered employee, and each reasonably foreseeable employee" to be better off. One employee being worse off is enough to prevent an agreement being approved due to s.186(2)(d). In contrast, I read s.226(1)(a) as requiring a wholistic overall assessment of "fairness" taking into account the impact for each employee or class of employee. As a result, s.226(1)(a) could still be satisfied even if the Commission considers the continued operation of the agreement would not be unfair for each employee. This last point is significant in relation the facts of this case.

Would the continued operation of the Agreement be unfair for the employees?

[31] Retaining Solutions' application relies on the ground in s.226(1)(a) which is triggered where "the FWC is satisfied that the continued operation of the agreement would be unfair for the employees to be covered".

[32] The difficulty in this case is that I consider it is clear the outcome of terminating the Agreement will not be uniform for the relevant employees. I should qualify that by indicating the practical "outcome" of the decision is likely to be whether the Agreement or the Award will provide a minimum safety net of conditions, given it appears the rate of pay actually paid to employees will not generally be affected because they are paid higher contractual rates.

[33] I consider it is likely that the conditions in the Award may provide a better safety net for some employees covered by the Agreement because the Award has several superior conditions, such as overtime penalty rates, shift work conditions and annual leave loading. If it was lawful for Retaining Solutions to pay the minimum rates in the Agreement, there would be no doubt that many employees would be better off under the Award. However, s.206 of the FW Act operates to lift the base rates in the Agreement up to the base rates in the Award. That means the base rates in the Agreement are equal to the Award base rate where the Agreement prescribes a lower base rate. Retaining Solutions did not provide evidence concerning the earnings of employees under the Agreement in circumstances whereby s.206 operates to replace the Agreement rate with the higher Award rate.

[34] On the other hand, all the Operator rates of pay in the Agreement currently exceed the Award rates, as do the Tradesman and Leading Hand rates. In addition, the Agreement prescribes 36 ordinary hours of work per week whereas the Award prescribes 38 ordinary hours. Given Ms Caldwell's email to my chambers dated 20 November 2023 states "employees work a 40-hour week", employees would be entitled to two extra hours of overtime payments or RDO accruals under the Agreement. The travel allowance in Appendix A of the Agreement is $25 per day which exceeds the current entitlement in clause 26.1(a) of the Award.

[35] The following basic calculations demonstrate why I am concerned some employees could be significantly worse off if the Agreement is terminated:

AGREEMENT EARNINGS **Operator Level 6**	**AWARD EARNINGS** **CW6**
Min hourly rate = $34.50	Min hourly rate[6] = $30.14
36 ordinary hours = 36 x $34.50 = $1,242.00	38 ordinary hours = 38 x $30.14 = $1,145.32
4 overtime hours at time and a half[7] = 4 x $51.75 = $207.00	2 overtime hours at 150%[8] = 2 x $45.21 = $90.42
5 days of travel allowance = 5 x $25.00 = $125.00	5 days of travel allowance = 5 x $21.19 = $105.95
Total weekly gross earnings = $1,574.00	Total weekly gross earnings = $1,341.69

AGREEMENT EARNINGS **Operator Level 7**	**AWARD EARNINGS** **CW7**
Min hourly rate = $36.00	Min hourly rate[9] = $30.96
36 ordinary hours = 36 x $36.00 = $1,296.00	38 ordinary hours = 38 x $30.96 = $1,176.48
4 overtime hours at time and a half[10] = 4 x $54.00 = $216	2 overtime hours at 150%[11] = 2 x $46.44 = $92.88
5 days of travel allowance = 5 x $25 = $125	5 days of travel allowance = 5 x $21.19 = $105.95
Total weekly gross earnings = $1,637.00	Total weekly gross earnings = $1,375.31

AGREEMENT EARNINGS **Leading Hand**	**AWARD EARNINGS** **CW7**
Min hourly rate = $31.00	Min hourly rate[12] = $29.14
36 ordinary hours = 36 x $31.00 = $1,116.00	38 ordinary hours = 38 x $29.14 = $1,107.32
4 overtime hours at time and a half[13] = 4 x $46.50 = $186.00	2 overtime hours at 150%[14] = 2 x $43.71 = $87.42
5 days of travel allowance = 5 x $25 = $125	5 days of travel allowance = 5 x $21.19 = $105.95
Total weekly gross earnings = $1,427.00	Total weekly gross earnings = $1,300.69

[36] The spreadsheet provided by Retaining Solutions on 3 November 2023 containing classification levels and pay rates for its employees indicates Retaining Solutions has two employees engaged as an Operator Level 7 and one employee as an Operator Level 6. Further, the spreadsheet indicates Retaining Solutions currently employs four Leading Hands.

[37] Once the employees listed as having resigned are removed from the spreadsheet of employees provided by Retaining Solutions on 3 November 2023, the spreadsheet only includes details for 13 employees that would be covered by the Agreement. Based on the assessment above, seven out of the 13 employees may be significantly worse off if the Agreement is terminated, at least in terms of their minimum safety net instrument.

[38] As a result, I am not satisfied based on the material filed by Retaining Solutions that the "continued operation of the Agreement would be unfair for the employees covered by the Agreement" for the purposes of s.226(1)(a) of the FW Act. To the contrary, I am concerned that terminating the Agreement will be unfair for a significant proportion of the employees because the Agreement conditions remain superior to the conditions in the Award for their classifications. I do not consider I have sufficient evidence to conclude whether employees receiving the Award base rate of pay pursuant to s.206 of the FW Act, while the Agreement otherwise still applies to them, would be better off if the Agreement was terminated or not.

[39] I provided Retaining Solutions with several opportunities to provide material to address my concerns and the material it filed was not satisfactory. There were various errors, conflicts, and unexplained assumptions in the material it filed which means I could not confidently rely on its accuracy.

[40] Given my conclusion above, there is no jurisdiction to terminate the Agreement under s.226 of the FW Act and the application must be dismissed. That also means the other criteria in s.226(1A), (3), (4) and (5) do not need to be considered.

[41] I end by noting that I raised the option of negotiating an updated version of the Agreement with Retaining Solutions in writing on two separate occasions. Retaining Solutions ignored the point and never provided any explanation regarding whether it intended to bargain for a new agreement, either now or in the future. I find this lack of an explanation to be problematic given the negotiation of an updated enterprise agreement would appear to be the most logical way to secure improved minimum conditions for **all** its employees. It is clear there are several outdated provisions in the Agreement, and I agree with Retaining Solutions that something should be done about it. However, I do not agree terminating the Agreement under s.226 of the FW Act is currently the most appropriate way of achieving this based on the limited material before me.

Conclusion

[42] I am not satisfied that the continued operation of the Agreement would be unfair for the employees covered by the Agreement.

[43] The application is dismissed.

COMMISSIONER

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Article I. [1] *R v Swaffield* [1998] HCA 1; 192 CLR 159; 151 ALR 98; 72 ALJR 339.

[2] Ibid at [53].

[3] Ibid at [66].

[4] *Em v The Queen* [2007] HCA 46.

[5] Ibid at [176] to [178].

[6] This includes the industry allowance as per clause 22 of the Award.

[7] Clause 11.3.1 of the Agreement.

[8] Clause 29.4 of the Award.

[9] This includes the industry allowance as per clause 22 of the Award.

[10] Clause 11.3.1 of the Agreement.

[11] Clause 29.4 of the Award.

[12] This includes the industry allowance as per clause 22 of the Award and the leading hand allowance for 2-5 employees in clause 19.2 of the Award.

[13] Clause 11.3.1 of the Agreement.

[14] Clause 29.4 of the Award.