DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 3, Item 20A(4)—Application to extend default period for agreement-based transitional instruments

Application by Northern Inland Credit Union Limited and Kathy Beavan
(AG2023/534)

Application by Northern Inland Credit Union Limited and Anna Lise Clark
(AG2023/535)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT ROBERTS

SYDNEY, 6 JULY 2023

Application to extend the default period for Australian Workplace Agreements with Kathy Beavan and Anna Lise Clark.

Introduction

[1] This decision concerns two applications to extend the default period for individual agreement based transitional instruments pursuant to subitem (4) of item 20A of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act). The first application is made jointly by the Northern Inland Credit Union Limited (NICU) and Kathy Beavan, and concerns an Australian Workplace Agreement (AWA) made under the *Workplace Relations Act 1996* (Cth) (WR Act) in 2007. NICU and Ms Beavan are the parties to the AWA. The second application is made jointly by NICU and Ms Anna Clark, and similarly concerns an AWA made in 2007 under the WR Act to which NICU and Ms Clark are parties.

[2] The main aspects of the statutory framework applicable to these applications were detailed in the recent Full Bench decision in *Suncoast Scaffold Pty Ltd*.[1] In short, the two AWAs the subject of the applications are agreement-based transitional instruments preserved in operation after the repeal of the WR Act and the commencement of the *Fair Work Act 2009* (Cth) (FW Act) by item 2 of Sch 3 to the Transitional Act. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* amended Sch 3 to add item 20A. Item 20A provides for the automatic sunsetting of remaining agreement-based transitional instruments at the end of the 'default period'. The default period is the period ending on 6 December 2023 unless extended by the Commission. Subitem (6) of item 20A provides that, on application under subitem (4), the Commission must extend the default for a period of no more than four years if either:

> (a) subitem (7), (8) or (9) applies and it is otherwise appropriate in the circumstances to do so, or
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> (b) it its reasonable in the circumstances to do so.

[3] Subitem (7) applies only where the application is made at or after the notification time for a proposed enterprise agreement that, in the case of an individual agreement-based transitional instrument, will cover the employee covered by the instrument, and bargaining for the proposed enterprise agreement is occurring. It is not contended in respect of either application that subitem (7) applies. Subitem (9) applies only to applications relating to collective agreement-based transitional instruments and is therefore not relevant here. Subitem (8) provides:

> (8) This subitem applies if:
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> (a) the application relates to an individual agreement-based transitional instrument; and
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> (b) the employee covered by the instrument would be an award covered employee for the instrument under subitem (10) if the instrument were a collective agreement-based transitional instrument; and
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> (c) it is likely that, as at the time the application is made, the employee would be better off overall if the instrument applied to the employee than if the relevant modern award referred to in that subitem applied to the employee.

[4] The applications, as filed, implicitly invoked subitem (8) in that they contended that Ms Beavan and Ms Clark would be better off overall if their AWAs continued to apply to them than if the *Banking, Finance and Insurance Award 2020* applied to them. However, it was subsequently conceded by the applicants that the identified award did not apply to Ms Beavan or Ms Clark because of the seniority of their respective positions, and any reliance on the application of subitem (8) was eschewed. The application was ultimately advanced under subitem (6)(b).

[5] The applicants filed submissions in support of their application on 30 March 2023. On 27 June 2023 we sent to the applicants a document identifying a number of issues which we considered arose in the matters. The applicants each filed a further submission in response to these issues on 30 June 2023. The applicants agreed for the matters to be determined on the papers.

The AWAs

[6] The AWA between NICU and Ms Beavan was made on 5 October 2007, and has a nominal term of four years (cl 1.3). It identifies that Ms Beavan holds the Board-appointed position of Executive Manager Finance (cl 1.1), with duties determined by the Board in consultation with the Chief Executive Officer and subject to annual review (cl 2.1). The AWA specifies Ms Beavan's annual salary package effective from the first pay period in July 2007 (cls 8.1-8.2), which may be increased as part of a performance review and having regard to the CPI and industry standards (cl 7.3).

[7] Ms Beavan's leave entitlements under the AWA are as follows:

- personal leave is in accordance with the Australian Fair Pay and Conditions Standard (AFPCS) as provided for by the WR Act and, in addition, three days per quarter to be taken within the year in which they accrue (cls 10.1 and 10.5);
- annual leave in accordance with the AFPCS (cl 10.2), with up to two weeks' leave each year able to be cashed out by agreement;
- long service leave in accordance with the *Credit Union Award 1998* (cl 10.3);
- proclaimed public holidays (cl 10.4); and
- study leave days (cl 10.6).

[8] Other relevant provisions of the AWA include:

- on termination for other than cause, a payment in lieu of notice which increases with service is payable (cl 3.2.4);
- accrued sick leave is payable on termination other than for cause (cl 3.2.7);
- a generous redundancy payment is required if the employment is not continued by election of either party upon NICU entering into a merger or transfer of business (cl 4);
- Ms Beavan is subject to an indemnity against loss, claim or cause of action arising from her employment provides she acts honestly, diligently and in good faith (cl 5.3);
- Ms Beavan's hours of work are 38 per week with reasonable additional hours as agreed, with the 38 hours able to be worked on any number of days Monday to Friday and at any NICU site or off site provided that Ms Beavan is telephone contactable and attends meetings and events as notified by NICU (cl 9);
- any disputes which cannot be resolved by the parties is to be determined by decision of an agreed mediator, with the mediator's fees to be shared equally between the parties (cl 15); and
- Ms Beavan's employment is subject to the provisions of the AWA and all policy and procedure documents established by NICU from time to time (cl 16).

[9] Ms Clark's AWA was made on 28 May 2007 and has a nominal term of five years (cl 1.3). The AWA states that Ms Clark holds the Board-appointed position of Executive Manager Compliance, Human Resources and Training (cl 1.1), with duties determined by the Board in consultation with the Chief Executive Officer and subject to annual review (cl 2.1). The AWA specifies Ms Clark's annual salary package effective from the first pay period in July 2007 (cls 8.1-8.2), which may be increased as part of a performance review and having regard to the CPI

and industry standards (cl 7.3). Ms Clark's AWA is otherwise in the same terms as Ms Beavan's in respect of the matters identified in paragraphs [6] and [7] above except that there is no study leave entitlement.

Applicants' submissions

[10] The primary submissions advanced by the joint applicants in each matter are substantially the same. It is submitted that the 'central relevant consideration' in the application of item 20A of Sch 3 to the Transitional Act is whether the automatic sunsetting of the AWAs would leave Ms Beavan or Ms Clark worse off or at a disadvantage. The applicants in each matter rely on the following factual circumstances as demonstrating reasonableness in the circumstances:

- the mutual desire and wish of both parties to each AWA to extend it;
- the more favourable entitlements and conditions under the AWAs compared to the minimum entitlements and conditions under the National Minimum Wage (NMW) and the FW Act; and
- the capacity of Ms Beavan and Ms Clark to pursue civil penalties for breach of a term of their AWAs under item 2(2) of Sch 16 of the Transitional Act.

[11] The applicants submit that the AWAs provide 'clear benefits' in respect of:

- salary, which in each case is substantially higher than under the NMW Order;
- redundancy, which is more beneficial than the minimum National Employment Standards (NES) redundancy entitlement under s 119(2) of the FW Act;
- notice of termination, which is more beneficial than the NES notice requirement in s 117(3) of the FW Act;
- the payment of accrued sick leave upon cessation of employment, for which the FW Act makes no provision;
- professional indemnity, for which the FW Act makes no provision;
- flexibility as to where and when hours of work are to performed, for which the FW Act makes no provision; and
- additional entitlements to personal leave (for both employees) and study leave (in Ms Beavan's case), for which the FW Act makes no provision.

[12] The applicants in each matter submit that it is reasonable in these circumstances, where the automatic sunsetting of the AWA would operate harshly to leave Ms Beavan and Ms Clark worse off, for the Commission to extend the default period of each AWA by four years.

Consideration

[13] For the reasons which follow, we are not satisfied for the purpose of subitem 6(b) of item 20A of Sch 3 to the Transitional Act that it is reasonable in the circumstances to extend the default period for either Ms Beavan's or Ms Clark's AWA.

[14] *First*, we are not satisfied that the automatic sunsetting of the AWAs would operate harshly by leaving Ms Beavan or Ms Clark worse off. There is no contention, let alone evidence, that Ms Beavan or Ms Clark would *actually* be worse off upon the sunsetting of their AWAs in the sense that NICU would take advantage of this by altering their conditions of employment to their detriment. Indeed, the fact that NICU seeks in each case for the AWAs to continue operating indicates that it is content with the current employment terms of Ms Beavan and Ms Clark rather than that it would seek to change them if given the opportunity.

[15] In this context, the applicants' comparison between the terms of the AWAs and the otherwise applicable provisions of the NES and the NMW Order is of little weight. It might be said that the sunsetting of the AWAs would alter the minimum legal entitlements of employment of Ms Beavan and Ms Clark. But this need not be the case. It would be a reasonably simple matter for the conditions of each AWA to be reproduced in new contracts of employment in the same or similar terms. Ms Beavan and Ms Clark are not employees lacking in bargaining power: they are clearly key employees of NICU since they hold executive management positions and have been employed by NICU for 25 and 20 years respectively.

[16] The applicants submitted, in their further submissions, that if the AWAs terminated at the end of the grace period,[2] the parties would be required 'at their expense and inconvenience' to negotiate, draft and agree upon new contracts, Ms Beavan and Ms Clark would be required to obtain independent legal advice to ensure the terms of the new contract are not less advantageous than the AWAs, and there is no guarantee the parties will agree to the same terms and condition in the AWA in the new contracts. We consider that these submissions are overstated and self-serving. As already stated, the establishment of new contracts of employment need not involve any real complexity or inconvenience. In the case of Ms Beavan, as we explain below, a new contract may not be needed at all.

[17] The applicants' submission that, unlike a private employment contract, the AWAs may be enforced by seeking civil penalties is theoretically correct but has no practical significance in these matters. There is nothing before us to indicate that compliance with the AWAs by NICU has ever been an issue and, in their further submissions, the applicants concede that no compliance issues have ever arisen. Accordingly, there is no reason to think that NICU might not comply with any future employment contract it makes with Ms Beavan or Ms Clark. The applicants contend in their further submissions that they 'enjoy comfort knowing that the AWA was approved under a federal legislative scheme and wish for it continue within the jurisdiction of the Fair Work Commission' and that 'having an independent industrial … umpire available to the parties should there ever be cause for review of compliance concerns is reassuring to the parties'. This is rejected: the AWAs are not 'within the jurisdiction' of the Commission and, as to dispute resolution, clause 15 of the AWAs merely requires this function to be undertaken by an agreed mediator.

[18] *Second*, the AWAs are not consistent with the current circumstances of Ms Beavan or Ms Clark's employment and are substantially obsolete. The position currently held by Ms Beavan is Deputy Chief Executive Officer and Chief Financial Officer. Ms Clark's current position is Company Secretary and Chief Risk Officer – Compliance and Risk. These are not the role descriptions in the AWAs. Although the applicants submit that the current positions are 'evolutions over time' of the positions referred to in the AWAs, they appear on their face to be positions involving wider or different responsibilities, and the descriptions of the roles in the applicants' submissions tend to confirm this. The value of Ms Beavan's current salary package is more than twice that specified in her AWA, and Ms Clark's is almost twice as much. We do not consider that the current salary packages, even if they are the result of the performance reviews contemplated by cl 7.3, are enforceable as terms of either AWA because no provision of either AWA renders any adjusted salary amount an entitlement under the AWA.

[19] In the case of Ms Beavan, the further submissions disclose that she had in fact entered into a new contract of employment with NICU in 2019 to give effect to her appointment as Deputy CEO. This contract specifies her duties and functions, reporting line, work location, entitlement to travel expenses and hours of work. Although this contract states that it is not intended to 'negate, cancel or otherwise terminate' her AWA, we consider that it renders the terms of her AWA substantially irrelevant to her employment.

[20] The leave entitlements in the AWAs operate by reference to external provisions which are no longer operative. As earlier stated, under the AWAs, annual leave and personal leave entitlements apply in accordance with the AFPCS. The AFPCS provisions of the WR Act were repealed effective from 1 July 2009. They were replaced by the NES provisions of the FW Act. The NES provisions of the FW Act concerning annual leave and personal leave are different to those of the AFPCS in a number of respects. Under item 23(1) of Sch 3 of the Transitional Act, a term of a transitional instrument (including an AWA) is of no effect to the extent that it is detrimental to any employee *in any respect* when compared to an entitlement of the employee under the NES. It is sufficient to say that this calls into question whether cls 10.1 and 10.2 of the AWAs remain operative. We note that, in relation to annual leave, the further submissions disclose that Ms Beavan and Ms Clark now receive annual leave entitlements in accordance with the NES provisions of the FW Act and, in addition, receive a 17.5 percent annual leave loading – a benefit which is not provided for in the AWAs. This is further demonstrative of the irrelevance of the AWAs.

[21] As to cl 10.3 of the AWAs, long service leave entitlements are said to be in accordance with the long service entitlement provisions of the *Credit Union Award 1998*, but this award was terminated on 10 August 2011. The operative effect of this clause is therefore also in question. In their further submissions, the applicants contend that the termination of the *Credit Union Award 1998* had no practical effect because, relevantly, it provided for long service entitlements in accordance with the *Long Service Leave Act 1955* (NSW) (LSL Act), and the position now is that the LSL Act, which is not excluded by the FW Act, applies to Ms Beavan and Ms Clark. This may be accepted, but it does not assist the applicants. Their entitlements are drawn directly from the LSL Act, not the AWAs, and the termination of the AWAs would therefore have no effect on long service leave entitlements.

[22] *Third*, the applications for extension of the default period are not supported by any proposal to transition within a reasonable period of time to a contemporary employment

arrangement consistent with the FW Act and the current circumstances of Ms Beavan's and Ms Clark's employment. The applicants have simply applied for the maximum available extension to the default period. It appears to be possible under item 20A to make an application for and obtain further extensions to a default period which has already been extended under subitem 6,[3] so the grant of the four-year extensions now sought by the applicants might open the door to further extensions down the track. In the further submissions, it is stated in respect of Ms Beavan that '[a]t this point in time, the parties do not have an end date for when they seek the operation of the AWA to come to an end' and, in Ms Clark's case, the intention is to have her AWA to continue to operate until her anticipated retirement within the next four years.

[23] We do not consider that it is consistent with the statutory intention to sunset transitional instruments as the default position that AWAs should be allowed to continue to operate merely because the parties agree that this should occur absent any other relevant consideration which would render it reasonable to do so.

[24] We also note that part of the object of the FW Act contained in s 3(c), which provides:

> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system;
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> (underlining added)

[25] The Full Bench in *All Trades Queensland Pty Limited v CEPU & CFMMEU and Others*[4] observed that the Transitional Act is legislation which is cognate to the FW Act, and because both Acts operate as component parts of an overall scheme of industrial relations legislation, the two Acts should generally be interpreted in a co-ordinated way as far as their respective texts permit. We similarly consider that the object of the FW Act may be taken into account in the exercise of any discretion or the making of any evaluative judgment required under the Transitional Act. Our conclusion in paragraph [23] above is, we consider, supported by, but is not dependent on, that part of the object of the FW Act contained in s 3(c).

[26] The applications are, accordingly, dismissed.

PRESIDENT

Appearances:

H Dawson, solicitor, with *V Renshaw* for Northern Inland Credit Union Limited.
K Beavan, employee, in person.
A Clark, employee, in person.

Hearing details:

2023.

Video using Microsoft Teams:
16 March, 5 April.

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[1] [2023] FWCFB 105 at [3]-[18].

[2] That is, after 6 December 2023: *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Sch 3 item 20A(2)(a).

[3] See item 20A(2)(b) of Sch 3 to the Transitional Act – 'if the default period is extended for the instrument on one or more occasions under subitem (6)' (underlining added).

[4] [2017] FWCFB 132, 264 IR 364 affirmed on judicial review in in *All Trades Queensland Pty Limited v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 189, 256 FCR 19, 272 IR 219.