[2023] FWCFB 122 [Note: A copy of the zombie agreement to which this decision relates (AG550002) is available on our website.]

DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch 3A, Item 26A(4)—Application to extend default period for Division 2B State employment agreements

Application by ISS Health Services Pty Ltd
(AG2023/2110)

TEMPO HEALTH SUPPORT SERVICES ENTERPRISE AGREEMENT 2004

Health and welfare services

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN

SYDNEY, 7 JULY 2023

Application to extend the default period for the Tempo Health Support Services Enterprise Agreement 2004.

[1] ISS Health Services Pty Ltd (ISS) has applied, pursuant to item 26A(4) of Sch 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act), to extend the default period for the *Tempo Health Support Services Enterprise Agreement 2004* (Agreement).[1] The Agreement is a Division 2B State employment agreement to which Sch 3A applies, since it was originally made as an enterprise agreement under the *Industrial and Employee Relations Act 1994* (SA) and approved on that basis by the Enterprise Agreement Commissioner of the Industrial Relations Commission of South Australia on 1 July 2004. The United Workers Union (UWU), which is a party bound by the Agreement[2] and has substantial membership amongst the employees covered by the Agreement, supports the application.

[2] Item 26A of Sch 3A to the Transitional Act provides for the automatic sunsetting of Division 2B State employment agreements by the end of the default period on 6 December 2023, subject to the capacity to apply to the Commission for an extension of the default period for up to four years in prescribed circumstances. Item 26A is relevantly in identical terms to item 20A of Sch 3 to the Transitional Act, which is concerned with the automatic sunsetting of and applications for extension of the default period for agreement-based transitional instruments. The main features of item 20A of Sch 3 are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd*,[3] and that analysis applies equally to item 26A of Sch 3A. It is not necessary to repeat it here.

[3] The application (as amended) does not, in terms, identify whether it is advanced under paragraph (a) or (b) of subitem (6) of item 26A, nor in respect of paragraph (a) does it contend in terms that subitem (7), (8) or (9) is applicable. However, the application refers in its grounds to a notice of representational rights (NERR) having been issued on 8 June 2023 to all employees covered by the Agreement, and we take it from this that the application is primarily advanced under paragraph (a) of subitem (6) on the basis that subitem (7) applies. Subitem (7) provides:

> (7) This subitem applies if:
>
> (a) the application is made at or after the notification time for a proposed enterprise agreement; and
>
> (b) the proposed enterprise agreement will cover:
>
> (i) if the application relates to an individual Division 2B State employment agreement—the employee covered by the individual Division 2B State employment agreement; or
>
> (ii) if the application relates to a collective Division 2B State employment agreement—the same, or substantially the same, group of employees as the Division 2B State employment agreement; and
>
> (c) bargaining for the proposed enterprise agreement is occurring.

[4] For subitem (7) to apply in the case of (as here) a collective Division 2B State employment agreement, three requirements must be satisfied:

(1) The application must have been made at or after the 'notification time' for a proposed enterprise agreement. The notification time for an enterprise agreement is defined in s 173(2) of the *Fair Work Act 2009* (Cth) (FW Act) and includes (in paragraph (a)) the time when the employer agrees to bargain, or initiates bargaining, for the agreement. Under s 173(3) of the FW Act, the employer must give the NERR required by s 173(1) to each employee covered by the proposed enterprise agreement within 14 days of the notification time. Section 174 prescribes the content of the NERR.

(2) The proposed enterprise agreement must cover the same, or substantially the same, group of employees as the Division 2B State employment agreement. Where bargaining has been agreed to or initiated by the employer, satisfaction of this requirement can practically be tested by comparing the coverage of the proposed agreement as described in the NERR to the coverage clause of the relevant Division 2B State employment agreement.

(3) Bargaining for the proposed enterprise agreement must be occurring. The term 'bargaining' is not defined in the FW Act or the Transitional Act. In *Endeavour Coal Pty Limited v APESMA*,[4] the Federal Court (Flick J) resorted to dictionary definitions of 'bargaining', which included '[d]iscussion between two parties over terms; haggling', and of 'negotiate', namely to '[c]ommunicate or confer (with

> another or others) for the purpose of arranging some matter by mutual agreement; have a discussion or discussion with a view to some compromise or settlement'.[5] In addition, the Court determined that, in the statutory context of the FW Act, 'bargaining' incorporates a requirement to do so in good faith[6] with the objective of ultimately reaching agreement, if possible.[7] The good faith bargaining requirements provided for in s 228 of the FW Act suggest that such bargaining includes attending and participating in meetings, disclosing relevant information, considering and responding to proposals and recognising other bargaining representatives for the purpose of bargaining.

[5] In this case, we are satisfied that each of these three requirements is satisfied. *First*, we consider that the NERR issued by ISS, a copy of which it has provided to the Commission, evidences that it has agreed to or initiated bargaining. *Second*, the NERR identifies that the proposed agreement will cover 'employees that perform work in the classifications covered by the current Tempo Health Support Services 2004 [A]greement', and thus will have the same coverage as the Agreement. *Third*, ISS has had preliminary communications with the UWU about the bargaining process, has requested that the UWU provide a log of claims, and a first formal bargaining meeting has been scheduled for later this month. We are satisfied that this is sufficient to indicate the commencement of bargaining and that it is currently occurring.

[6] We are also satisfied that it is appropriate in the circumstances to extend the default period for the following reasons:

(1) ISS and the UWU intend to negotiate a new enterprise agreement to replace the Agreement. Thus, this is not a case where the parties seek the extension of the default period merely to have a zombie agreement remain the operative industrial instrument for the maximum possible period of time.

(2) It will be difficult for the parties to conclude an enterprise agreement by 6 December 2023. The bargaining will involve some complexity because the Agreement covers a number of different sites and a diverse range of classifications, and pay rates are linked to a South Australian industrial instrument (previously the *Private Contractors (Public Hospitals) Award* and now the *South Australian Public Sector Wages Parity Enterprise Agreement: Weekly Paid 2017*). A previous attempt at bargaining lasted for an extended period and did not succeed.

(3) All parties agree, and we accept, that while the Agreement remains in effect, employees covered by it will be better remunerated, to a significant degree, than under the applicable modern awards (the *Health Professionals and Support Services Award 2020* and the *Cleaning Services Award 2020*). The UWU stated, and we accept, that it had consulted widely with its membership about the application and they strongly supported it on the basis that they would be better off than if paid under the relevant awards.

[7] Because we are satisfied as to the matters in subitem (6)(a), we are required to extend the default period; however, we have a discretion as to the length of the extension (subject to the limitation of a four-year maximum extension) and we are not bound to grant the period of

extension sought in the application.[8] In this case, ISS has sought an extension for a period of two years. We consider that this is longer than is reasonably necessary for the parties to negotiate a replacement agreement, and may encourage dilatoriness in bargaining. We note that, in the event that the parties run into difficulties in bargaining, they may access the assistance of the Commission under s 240 of the FW Act and, as a last resort, may seek an intractable bargaining declaration, leading to arbitration by the Commission, not earlier than nine months after the commencement of bargaining pursuant to s 235 of the FW Act. We also note the UWU's concession that if there were a one-year extension, the parties would almost certainly be able to reach an agreement within that period. Having regard to these matters, we will order an extension of the default period until 6 December 2024. This will allow a period of approximately 18 months from the notification time for the parties to reach an agreement and have it approved.

[8] An order to give effect to this decision will be published separately. The Agreement is published, in accordance with subitem (10A)(c), as an annexure to this decision.

PRESIDENT

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[1] ISS's application, as filed on 23 June 2023, incorrectly indicated that the application was made pursuant to item 20A(4) of Sch 3 to the Transitional Act. On this error being identified, ISS amended its application to identify the correct provision at the initial hearing on 30 June 2023.

[2] The UWU is referred to in the Agreement in its earlier guise as the Liquor, Hospitality and Miscellaneous Union – see cls 3.5 [sic, 3.6] and 4.3.

[3] [2023] FWCFB 105.

[4] [2012] FCA 764, 206 FCR 576.

[5] Ibid at [39].

[6] Ibid at [41].

[7] Ibid at [45].

[8] *Suncoast Scaffold Pty Ltd* [2023] FWCFB 105 at [18].