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 Margaret Ellen McDonald
(AG2023/2689)

DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT ROBERTS — SYDNEY, 22 SEPTEMBER 2023
DEPUTY PRESIDENT SLEVIN

Application to extend the default period for the Australian Workplace Agreement between Margaret McDonald and Commonwealth Bank of Australia

Introduction

[1] Ms Margaret McDonald has lodged an application to extend the default period for an individual agreement-based transitional instrument pursuant to subitem (4) of item 20A of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (**Transitional Act**). The relevant instrument is an Australian Workplace Agreement (**AWA**) made under the *Workplace Relations Act 1996* (**WR Act**) in 2006. The parties to the AWA are Ms McDonald and her employer, Commonwealth Bank of Australia (**CBA**). The application is supported by CBA.

[2] The main aspects of the statutory framework applicable to this application were detailed in the recent Full Bench decision in *Suncoast Scaffolding Pty Ltd*[1]. In short, the AWA the subject of the application is an agreement-based transitional instrument preserved in operation after the repeal of the WR Act and the commencement of the *Fair Work Act 2009* (**FW Act**) by items 2 and 3 of Sch 3 to the Transitional Act. *The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Amendment Act**) amended the Transitional Act to provide for, amongst other things, the automatic termination of all remaining transitional instruments. It did this by adding item 20A to Sch 3 of the Transitional Act. The SJBP Amendment Act refers to transitional instruments as 'zombie' agreements. Item 20A provides for the automatic sunsetting of remaining agreement-based transitional instruments at the end of a 'default period'. The default period is the period ending on 6 December 2023 unless extended by the Commission. Ms McDonald seeks to have the default period extended to 30 June 2024.

[3] Under subitem (6) of item 20A, upon application, the Commission is required to extend the default period for an agreement-based transitional instrument for a period of no more than four years if the Commission is satisfied that:

(a) Subitem (7), (8) or (9) applies and it is otherwise appropriate in the circumstances to do so; or

(b) it is reasonable in the circumstances to do so.

[4] The application is advanced under subitem 6(b) on the basis that it is reasonable in the circumstances to do so. Ms McDonald's circumstances are that she is retiring on 28 June 2024 and is due to take long service leave from 22 December 2023 to 28 June 2024. If the AWA terminates then the applicable industrial instrument covering Ms McDonald will be the *Commonwealth Bank Group Enterprise Agreement 2020* (**CBA EA**). Ms McDonald's long service entitlement will reduce if the AWA terminates, as the entitlement applicable to employees covered by the Enterprise Agreement is significantly less than under the AWA.

Confidentiality Order

[5] CBA appeared in the matter. It provided the Commission with information about the impact the termination of the AWA will have on Ms McDonald's long service leave entitlement. That information included details of Ms McDonald's remuneration and her long service leave entitlement. The CBA requested that an order be issued pursuant to s.594(1) of the *Fair Work Act 2009* (**FW Act**) prohibiting the publication of the Applicant's remuneration and the dollar amount difference of the Applicant's long service leave entitlement under the AWA compared to the CBA EA.

[6] Subitem (10A) of item 20A of Schedule 3 deals with the publication of decisions to extend the default period for zombie agreements. It requires the Commission to publish a decision under subitem (6) and any written reasons in relation to such a decision. Subitem (10C) provides that the Commission must not publish an individual agreement-based transitional instrument in relation to which an application under subitem (4) is made.

[7] Section 594 permits the Commission to make an order prohibiting or restricting the publication of confidential material if it is satisfied that it is desirable to do so because of the confidential nature of the material, or for any other reason. That material includes matters contained in documents lodged with the Commission or received into evidence. An order may be made whether or not the Commission holds a hearing in relation to the matter.

[8] In written submissions in support of its application, the CBA asserts that the information provided is confidential and should be treated as such. It submits that the information does not need to be on the public record for the purpose of dealing with the extension application as the fact that Ms McDonald has superior long service leave entitlements under the AWA can be stated without the need to identify the extent of the difference in those entitlements between the AWA and the Agreement. The CBA contends that the order would protect Ms McDonald from having details of her rates of pay and other conditions of employment available on the public record.

[9] CBA also submits as a relevant matter the fact that other CBA employees on zombie agreements who may seek to have the default period for those agreements extended have different circumstances to Ms McDonald.

[10] Ms McDonald made no submission on the CBA application. She has made no application for a confidentiality order.

[11] CBA's first contention that the AWA is confidential can be readily accepted. So much is clear from the statutory history and context. Prior to the commencement of the FW Act, Part VID of the WR Act provided for the making of AWAs. Part VID included express provisions that maintained the confidentiality of AWAs. Section 170WHB provided that a person who had obtained information about an AWA in the course of working in the Australian Industrial Registry or through an authorised communication from a Registry official, must not disclose that information if it would identify a person as being or having been a party to an AWA. Section 170WHC prohibited any published determination approving or refusing to approve an AWA disclosing the identity of the parties to the AWA. Section 170WHD provided that any hearing before the Commission under the Part be held in private. Section 170WI provided that any document filed, issued or approved by the Commission or the Employment Advocate, who had a role in approving AWAs, must only be issued to persons who were party to the AWA. Part VID was repealed when the FW Act came into effect.

[12] After the repeal of Part VID of the WR Act, the Transitional Act continued some statutory support to maintaining the confidentiality of AWAs. Items 12 and 13 of Schedule 16 of the Transitional Act prohibit disclosure of the identity of a person covered by an AWA where that information was acquired for the purpose of a protected action ballot.

[13] We note that at the time Part VID was repealed the object of the Act was amended to include at subsection 3(c) the following:

> (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;

[14] The 2009 changes meant new AWAs were no longer available, preserved existing AWAs, and continued to afford them a level of statutory support to maintain their confidential nature.

[15] The changes to the Transitional Act brought about by the SJBP Amendment Act will result in the termination of all remaining AWAs. This will occur at the end of the default period on 6 December 2023 unless that period is extended by the Commission or at the end of the period of extension, which can be no later than 6 December 2027. The Commission may only grant the extension on application. For those who apply for extensions there are no equivalent provisions in the Transitional Act to the repealed WR Act provisions which protected the identity of those who made application for the approval of AWAs. Indeed, in contrast to the WR Act provisions, subitem 10A of item 20A of Schedule 3 requires the publication of reasons for decisions to extend the default period. Such decisions will, in the usual course, identify the parties to the AWA. This is in contrast to the now repealed WR Act provisions which prohibited publication of decisions and so preserved the confidentiality of the parties to those proceedings. Consequently, where a party seeks to have the default period for an AWA extended, the identity

of the parties to the AWA will be no longer be confidential unless an order is made suppressing the parties' identities. We note that a level of confidentiality going to the content of the AWA is maintained by subitem (10C) of Item 20A which provides that when publishing its reasons, the Commission must not also publish the AWA. However, that provision goes to publication of the AWA in its entirety.

[16] We take from the legislative background that under the WR Act AWAs were regarded as confidential documents and statutory support was given to ensuring the identity of parties and the content of the AWAs remained confidential. When AWAs ceased to be an option for the regulation of employment arrangements by the repeal of Part VID of the WR Act in 2009 the maintenance of the confidentiality of the identity of parties was continued in limited circumstances. The recent amendments which are directed at terminating all remaining AWAs no longer protect the identity of parties.

[17] While we accept that the AWA is a confidential document that was made and approved under a statutory scheme that ensured a level of confidentiality, we note that the statutory protections have diminished over time. We take that into account in weighing the submission made by CBA that the confidential nature of the AWA supports the making of an order under s.594(1). We further note that the CBA application seeks to suppress limited information going to the long service leave entitlement available to Ms McDonald under the AWA.

[18] A countervailing consideration is the application of the principles of open justice. The Full Bench in *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board*[2] considered the power to issue confidentiality orders under ss 593 and 594 of the FW Act. The Full Bench noted the presumption that hearings be conducted in public and the applicability of the principles of open justice. The Supreme Court of New South Wales in *Seven Network (Operations) Limited & Ors v James Warburton (No 1)*[3] ('*Seven Network (No 1*') canvassed a number of authorities on the importance of observing those principles. The principles in *Seven Network No.1* have also been followed in a number of first instance decisions in the Commission[4]

[19] The principles of open justice described in *Seven Network No. 1* include that proceedings be conducted in open for the purpose of ensuring decisions are exposed to public and professional scrutiny and criticism, and to allow interested observers to follow and comprehend evidence, submissions and reasons for judgment. Departure from those principles is only justified in circumstances that would result in unfairly damaging some material private or public interest. The contention that material is embarrassing, damaging or inconvenient has never been regarded as a reason for the suppression of evidence.

[20] In endorsing those principles, the Full Bench in *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* said this:

> [34] The principles of open justice elicited above are applicable to the proceedings before the Commission. Importantly, we note that the departure from the principles of open justice is only justified where observance of the principle would frustrate the administration of justice by unfairly damaging some material private or public interest. Thus, it is incumbent upon us to make such an observation in order to issue an ongoing confidentiality order for the purposes of the matter before us.

[21] We are not convinced that the confidential nature of the information is such that a confidentiality order is necessary in these proceedings. The statutory support for that confidentiality has diminished over time. The principles of open justice are an important consideration. In these proceedings we are required by the Transitional Act to publish reasons. The material that CBA seeks to have suppressed is information about the extent of the detriment Ms McDonald will suffer should the AWA terminate at the end of the default period. That detriment is the sole basis for the application under subitem (6)(b) of item 20A. The key issue for our consideration is whether that detriment is sufficient to make it reasonable in all the circumstances to extend the default period. We do not consider it would be possible to adequately meet the requirement in subitem (10)(b) to publish reasons for our decision if we do not set out the extent of the detriment. We are of the view that interested observers could not follow and comprehend our reasons if that key information was suppressed.

[22] CBA's further contention that the order is necessary to protect Ms McDonald from having details of her rates of pay and other conditions of employment available on the public record is not accepted. First, Ms McDonald makes no application or submission seeking such protection. Second, such disclosure is necessary to determine her application to have the default period for her AWA extended. Third, any perceived private interest of Ms McDonald not having her remuneration or long service leave entitlement on the public record is outweighed by the principle that proceedings be conducted in an open fashion.

[23] CBA made a submission that other CBA employees on zombie agreements may seek to have the default period for those agreements extended even though they have different circumstances to Ms McDonald. We understand this to be a submission that the publication of the material may lead to inconvenience for CBA vis-à-vis other employees seeking to have their AWAs extended. We do not find the submission persuasive.

[24] CBA advises the Commission that it has as many as 2,000 zombie AWAs. We are not in a position to speculate as to how many of these AWAs are likely to result in extension applications, however it seems likely that, depending on the approach CBA takes to the terms and conditions it applies to employees whose zombie AWAs terminate, there may be many applications. And while it may be said that it will be inconvenient for the CBA, and for that matter the Commission, to have to deal with extension applications for other agreements, as the Court said in *Seven Network No. 1*, contentions based on notions that the publication of material is inconvenient have never been regarded as a reason for the suppression of evidence. We also fail to see how the suppression of the details of Ms McDonald's AWA will necessarily avoid the inconvenience. It may well be that employees will seek to have their AWAs extended regardless of the information that CBA seeks to have suppressed.

[25] For these reasons we decline to make the order sought under s.584 of the FW Act as we are not satisfied that it is desirable to do so because of the confidential nature of the material, or for any other reason.

Ms McDonald's case

[26] Ms McDonald's applies to extend the default period for the AWA under Item 20A(6)(b) on the basis that it is reasonable in all of the circumstances to do so. In *Suncoast Scaffolding Pty Ltd* the Full Bench described the 'reasonable' criterion in applications to extend default periods as follows[5]:

> [17] Subitem (6)(b) of item 20A constitutes an independent pathway to the grant of an extension. The 'reasonable' criterion in the subitem should, in our view, be applied in accordance with the ordinary meaning of the word –that is, 'agreeable to reason or sound judgment'. Reasonableness must be assessed by reference to the 'circumstances' of the case, that is, the relevant matters and conditions accompanying the case. Again, a broad evaluative judgment is required to be made.

[27] The Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* included at [670] a statement that provision would be made for the FWC to extend the default period to ensure the automatic sunsetting of zombie agreements does not operate harshly, including by leaving employees worse off.

[28] Ms McDonald is retiring on 28 June 2024. Leading up to her retirement she is taking a period of long service leave. Her last working day will be 21 December 2023. If her AWA terminates after the end of the default period, then her long service leave entitlement will no longer be determined by the AWA and she will suffer a detriment. Ms McDonald contends that it is reasonable in her circumstances for the default period to be extended so that her long service leave can be taken in accordance with the terms of the AWA.

[29] CBA provided the Commission with information about Ms McDonald's long service leave entitlement under the AWA compared to her entitlement should the AWA terminate. The comparison is done on the assumption the CBA EA will apply at the end of the default period. The calculations also assume that there is no material change to Ms McDonald's employment in that she will continue to be employed on a full-time basis in her current role. The calculations do not take into account any change to remuneration under the AWA arising from the application of remuneration review provisions.

[30] CBA advises that currently, under the AWA, long service leave is determined by a combination of the terms of the AWA and the *Long Service Leave Act 1955* (NSW) (**LSL Act NSW**). Relevantly, the LSL Act NSW includes bonuses in the calculation of ordinary pay. When the AWA terminates, CBA advises that Ms McDonald will be offered a new employment arrangement which is underpinned by the CBA EA. Practically, this means the source of Ms McDonald's long service leave entitlement will be determined by clause 28 of the CBA EA. In Ms McDonald's case, due to the CBA EA preserving historical award entitlements, this will be an award-derived long service leave entitlement under the Commonwealth Bank of Australia Employees Award 1999 (**CBA Award 1999**). For Ms McDonald the accrued leave under the AWA will be the same as under the CBA Award and so the amount of leave will be unchanged. However, the CBA Award 1999 does not include bonuses in the calculation of ordinary pay for the purposes of long service leave.

[31] Consequently, as at 21 December 2023 when Ms McDonald will proceed on leave, Ms McDonald's long service leave balance will be 145 days under both the CBA EA and her AWA. Her daily rate under for the purposes of payment whilst on that leave however will drop from $693.53 per day to $573.12 per day, a decrease of $120.41 per day or $17,459.45.

[32] We are of the view that it is reasonable in Ms McDonald's circumstances to extend the default period to 30 June 2024. The automatic sunsetting of the AWA in December 2023 would operate harshly, leaving Ms McDonald significantly worse off. We consider that would be unreasonable in Ms McDonald's circumstances where she is retiring from the workforce, the

last six months of her employment will involve the taking of long service leave, and the value of that leave will reduce significantly if the default period is not extended.

[33] Accordingly, we grant the Application to extend the default period for the AWA to 30 June 2024. An order to give effect to this decision will be published separately.

DEPUTY PRESIDENT

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[1] [2023] FWCFB 105 at [3] to [18]

[2] [2017] FWCFB 2500

[3] [2011] NSWSC 385

[4] See: *Johnson v Benex Civil Pty Ltd* [2022] FWC 339; *Mrs Loredana Pastor* [2019] FWC 257; *Michelle Narustrang v Murdoch University T/A Murdoch University* [2018] FWC 378; *Mac v Bank of Queensland Limited* [2015] FWC 774; 67 AILR ¶102–339

[5] Op cit