



# DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 7, Item 30(4) - Application to extend default period for enterprise agreement made during bridging period

**Hamamas (Australia) Pty Ltd T/A Hog's Breath Cafe Mackay**  
(AG2023/4976)

## **HAMAMAS (AUSTRALIA) PTY LTD - ENTERPRISE AGREEMENT 2009-2013**

DEPUTY PRESIDENT SLEVIN  
COMMISSIONER CRAWFORD  
COMMISSIONER THORNTON

SYDNEY, 24 JANUARY 2024

*Application to extend the default period for the Hamamas (Australia) Pty Ltd – Single Enterprise Agreement 2023*

[1] Hamamas (Australia) Pty Ltd (**Hamamas**) has applied, pursuant to item 30(4) of Sch 7 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**), to extend the default period for the *Hamamas (Australia) Pty Ltd - Enterprise Agreement 2009-2013* (**Agreement**). The application seeks to extend the Agreement for a period of 12 months until 1 December 2024.

[2] The Agreement was made in 2009 and approved under the *Fair Work Act 2009* (FW Act). It was made during the bridging period as defined in Sch 2 Item 2 of the Transitional Act.

[3] Item 30 of Sch 7 to the Transitional Act provides for the automatic sunset of agreements made during the bridging period by the end of the default period on 6 December 2023, subject to the capacity to apply to the Commission for an extension of that period for up to four years in prescribed circumstances. The agreements to which these provisions apply are known as zombie agreements. The main features of similar provisions in item 20A of Sch 3 are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd (Suncoast)*.<sup>1</sup> The provisions in item 30 of Sch 7 are relevantly the same and we rely upon what is said in that decision.

[4] The application is made under subitem (4) of item 30 of Sch 7 on two bases. First, that the Commission can be satisfied under subitem 30(6)(a) that subitem 30(7) applies and it is otherwise appropriate in the circumstances to extend the default period. Subitem 30(7) applies if bargaining for an enterprise agreement to replace the zombie agreement is occurring. The

second basis for the application is that the Commission can be satisfied under subitem(6)(b) that it is reasonable in the circumstances to extend the Agreement.

## **Background**

[5] Hamamas operates a Hogs Breath Cafe restaurant franchise in Mackay in Queensland. It employs 15 employees under the Agreement. If the Agreement did not apply the *Restaurant Industry Award 2020* (Award) would apply to the employees. Hamamas contends that it requires an extension of the Agreement to enable it to finalise a replacement enterprise agreement, and to prepare and lodge the replacement agreement with the Commission for approval.

[6] Hamamas lodged its application to extend the default period for the Agreement on 6 December 2023, the last day it was permitted to do so. The application attached a copy of a Notice of Representational Rights (NERR) that had been provided to employees by email on 6 December 2023. The application stated that the applicant was yet to establish a bargaining committee to negotiate the new agreement but intended to do so. In information provided following the filing of the application Hamamas indicated that it intended to conduct the first bargaining committee meeting on 11 January 2024.

[7] The Agreement covers full time and part time employees. The Award is expressly excluded from the Agreement. Hamamas has not provided any information about the hours of operation for the business or common rosters worked by employees covered by the Agreement. It is likely, given the nature of the business, employees are required to work evenings and on weekends.

[8] As the Agreement was reached in 2009 the Agreement rates of pay have fallen well below the Award. It provides for three increases of 3% in the first three years of operation. Even when taking into account the wage increases, rates of pay are below the Award, and would therefore be deemed equal to the Award in accordance with s.206 of the FW Act.

[9] The Agreement contains the following terms which are less beneficial than the Award:

- The ability for the employer to change the employee's employment status unilaterally.
- Employees can perform alternative roles, and the Agreement does not contain the same safeguards around maintaining pay as the Award.
- Less beneficial higher duties provisions.
- No payment for employees who engage in voluntary training.
- A broader span of hours.
- No annual leave loading is payable.
- Part time employees' hours can be varied during a roster, with no penalty payable for additional hours worked.
- Employees can agree to work extra hours at ordinary rates rather than being paid overtime penalties.
- No weekend, shift, public holiday penalties or allowances are payable.

[10] In response to questions posed by the Commission Hamamas drew our attention to the following provisions in the Agreement which are said to be more beneficial to employees than the Award:

- Part-time Level 1 or 2 Juniors (less than 20 years) are paid no less than \$21.50 per hour.
- Competent Level 1 and 2 part-time staff are paid between \$25 to \$27 an hour.
- Senior part time floor staff Level 2 staff are paid between \$30 to \$35 an hour.
- Cooks (Level 3) are paid no less than \$65,000 per annum and overtime rates as per the Agreement for any hours worked beyond 43 hours per week.
- Chefs (Level 4) are paid \$75,000 per annum and overtime rates as per the Agreement for any hours worked beyond 40 hours per week.

[11] Hamamas pays its employees an hourly rate that is above both the Agreement and the Award hourly rate. As these payments are in excess of those required by the industrial instruments they have little bearing on the current application. This application is about whether the Agreement terms and conditions should continue or whether the employees should revert to the Award.

[12] In terms of the question of whether the terms of the Agreement are more beneficial to employees than the terms in the Award, we are of the view that the employees cannot be considered better off under the Agreement. Especially where the rates of pay are said to compensate employees for all hours worked, including weekends, shifts work, public holidays, and all overtime. It is likely, given the nature of the business, that the employees work evenings and weekends when such penalties would apply. The minimum rates of pay are not high enough to compensate for the range of penalties that are foregone.

[13] If the actual remuneration paid is in excess of what is required under either the Agreement or the Award, then Hamamas may continue to pay those rates in the same fashion as it currently does, that is, on the basis that they are paying in excess of the requirements in the applicable industrial instrument.

[14] In response to questions posed by the Commission, Hamamas indicated that it had taken further steps in bargaining. On 21 December 2023 members of the bargaining committee were nominated. We were told that a draft proposed agreement was prepared in November 2023 but there is no indication that the draft has been provided to employees. It also said that it intended to conduct a group information session with employees on 11 January 2024 and hold a meeting of the bargaining committee to discuss the proposed agreement on the same day.

### **Consideration**

[15] The Full Bench in *ISS Health Services Pty Ltd*<sup>2</sup> described the three requirements for subitem (7) to apply. The first is the requirement that the application is made at or after the 'notification time' for the proposed replacement agreement. Notification time is defined in s.173(2) of the *Fair Work Act 2009* (FW Act). The definition includes the time when the employer agrees to or initiates bargaining. An NERR indicates the employer agrees to bargain for the purpose of s173(2). The second is that the proposed agreement must cover the same or substantially the same group of employees as the zombie agreement. The Full Bench stated that this could be established by comparing the NERR for the proposed agreement to the coverage

clause of the zombie agreement. The NERR here establishes that requirement. Relevantly, the third is that bargaining for the proposed agreement is occurring.

[16] We are of the view that the application satisfies the first two requirements for subitem (7) but does not satisfy the third. Since the application was filed Hamamas has taken some steps towards commencing bargaining. It relies upon those steps to establish that bargaining is occurring. However, given Hamamas had not held discussions with employees about its proposed agreement we cannot be satisfied that bargaining is occurring. The default period for the Agreement therefore cannot be extended in accordance with subitem (6)(a).

[17] Even if it could be said that the issuing of a NERR combined with the steps taken by Hamamas since 6 December 2023 to prepare for bargaining could be said to satisfy the third requirement under subitem (7), we would not extend the Agreement under subitem (6)(a) because it is not appropriate to do so. It is not appropriate to do so because the inferior conditions in the Agreement mean it is likely that there would be a disadvantage to employees if the Agreement continues to apply prior to the finalisation of a new agreement. Given the nature of the business, it is likely employees work evenings and weekends. It is unlikely the hourly rate compensates for the loss of overtime payments and weekend penalties provided for by the Award. If the over award pay rates result in the employees receiving more than the Award, the termination of the Agreement will have no impact on the ongoing payment of those above award rates.

[18] Further, the workforce is small and negotiating a replacement agreement should not be onerous. The Applicant has had 12 months to do so but waited until the final moment before proposing negotiations towards a replacement agreement. The application to extend the Agreement a further 12 months is also excessive. We do not consider negotiations for a new enterprise agreement would take the twelve months that the Applicant seeks.

[19] Hamamas also applies to have the default period extended pursuant to subitem 30(6)(b). The subitem requires a consideration of whether it is reasonable in the circumstances to extend the default period. This involves the application of a broad evaluative judgement.

[20] In *Suncoast*,<sup>3</sup> the Full Bench said:

“[17] 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.”

[21] In *Peter Frick*,<sup>4</sup> the Full Bench considered that the default position of the statute to automatically terminate transitional instruments on 6 December 2023 suggests a policy preference for employees covered by transitional instruments to be regulated by contemporary instruments.<sup>5</sup> In *Kalfresh Management Services Pty Ltd*,<sup>6</sup> the Full Bench expressed the view that where an agreement contains inferior and outdated terms and conditions, this weighs strongly against a conclusion that it is reasonable in the circumstances to extend a default period.<sup>7</sup>

[22] The Applicant suggest that the employees would be better off if the Agreement continued to apply. We are of the view that they would not. The Agreement provides terms and conditions that are inferior to the Award. We are of the view that the Agreement should be replaced by a modern instrument that meets the requirements of the FW Act. We have taken into account that Hamamas has taken some steps to commence bargaining for a new enterprise agreement. This fact however does not convince us that we should extend the life of the zombie agreement. For these reasons, and applying the reasoning in earlier Full Bench decisions, we are not satisfied that it is reasonable in the circumstances to extend the default period of the Agreement. The Application is dismissed.

[23] As our decision is to refuse to extend the default period under subitem 30(6) of Sch 7 and our decision is made after the sunset date in the Transitional Act, subitem 30(10) provides that we must extend the default period to the day of this decision or specify a day that is not more than 14 days after the day of this decision. We have decided that to enable the parties to make the necessary administrative arrangements to give effect to the sunseting of the Agreement the default period is extended to 7 February 2024.



DEPUTY PRESIDENT

Printed by authority of the Commonwealth Government Printer

<[AE872920](#) PR770640>

---

<sup>1</sup> [\[2023\] FWCFB 105](#).

<sup>2</sup> [\[2023\] FWCFB 122](#) at [4].

<sup>3</sup> [\[2023\] FWCFB 105](#).

<sup>4</sup> [\[2023\] FWCFB 137](#).

<sup>5</sup> *Ibid*, [32].

<sup>6</sup> *Kallium Management Services Pty Ltd As Trustee For The Kalium Labour Trust T/A Kalfresh Pty Ltd* [\[2023\] FWCFB 217](#).

<sup>7</sup> *Ibid*, [14].