



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

Mr Mark Albrecht
(AG2023/3949)

INDIVIDUAL TRANSITIONAL EMPLOYMENT AGREEMENT BETWEEN QUEENSLAND BULK HANDLING PTY LIMITED AND MARK ALBRECHT

Coal export terminals

DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN

SYDNEY, 14 FEBRUARY 2024

Application to extend the default period for an Individual Transitional Enterprise Agreement between Queensland Bulk Handling Pty Ltd and Mark Albrecht

[1] Mr. Mark Albrecht (**Applicant**) has applied under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for an individual transitional enterprise agreement No 0911445889 (**Agreement**). The Agreement covers the Applicant and his employer Queensland Bulk Handling Pty Ltd (**QBH**).

[2] The application seeks to extend the default period until 6 December 2025.

[3] The Agreement was made during the bridging period pursuant to Division 7 of Part 2 of Sch 8 of the Transitional Act. It is classified by item 2(5)(d)(i) of Sch 3 as an ‘individual agreement-based transitional instrument.’ Agreements of this kind are commonly referred to as “zombie agreements”.

[4] The Transitional Act was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBPA Act) to provide for the automatic termination of all remaining transitional instruments. Pursuant to items 20A(1) and (2) of Schedule 3 to the Transitional Act, the Agreement was to terminate on 6 December 2023 (the end of the default period) unless extended by the Commission.

[5] Under Subitem 20A(6) of Sch 3, where an application is made under subitem 20A(4) for the default period to be extended, the Commission must extend the default period 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 (b), it is reasonable in the circumstances to do so. Subitem (7) applies in specified circumstances where bargaining for a replacement agreement is occurring. Subitem (8) applies if the application relates to an individual agreement-based transitional instrument and it is likely that as at the time the application is made, the award covered employee would be better off overall if the agreement continued to apply than if the relevant modern award applied. Subitem (9) relates to collective agreement-based transitional instruments and is not relevant here.

Grounds relied upon

[6] The Applicant made the application on the basis that he would be better off under the Agreement than he would be under the existing QBH agreement. We note that the relevant comparison under subitem (8) is with the relevant modern award, namely the *Coal Export Terminals Award 2020 (Award)*, rather than with the existing enterprise agreement.

[7] QBH did not oppose the application however it advised that bargaining was underway for a new enterprise agreement that would cover its employees, including the Applicant. QBH said it wanted to align all of its employees' conditions under that new agreement to provide for consistency in understanding and application across the business.

Consideration

[8] Given the advice received that bargaining is taking place in the Applicant's workplace, we propose to consider the application under subitem (7) in the first instance.

[9] The Full Bench in *ISS Health Services Pty Ltd*¹ described the circumstances in which subitem 7 applies. These circumstances are, relevantly for this case, first, that 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. Second, that the proposed enterprise agreement must cover the employee covered by the individual agreement-based transitional instrument. The third requirement is that bargaining for the proposed enterprise agreement is occurring.

[10] We are satisfied that each of the above requirements have been met here. QBH advised that bargaining for the new agreement commenced on 25 October 2023. The application was filed on 29 October 2023. QBH provided a copy of the Notice of Employee Representational Rights (**NERR**) that had been issued to the employees. Having regard to the terms of the NERR we are satisfied that the proposed agreement will cover the Applicant. Finally, we were recently advised that bargaining is in its final stages and the new agreement is to be voted upon in the near future. We are satisfied that bargaining has been taking place, and is currently occurring. Having determined that subitem (7) applies in this case, it is unnecessary to consider whether subitem (8) also applies.

[11] We also consider that it is otherwise appropriate to extend the default period for the zombie agreement as contemplated by subitem 20A(6)(a). The Agreement provides for a loaded annualised salary which compensates for two particular roster patterns, including hours worked on weekends, public holidays and shift work. It also provides for CPI wage adjustments. Where the employee works the roster patterns set out in the Agreement, the Commission's modelling

shows that the employee would be better off despite the fact that a number of award benefits are not included in the Agreement. Further, QBH has undertaken that they will maintain the Applicant's remuneration at its current rate (currently higher than that of the existing agreement) or until the agreement exceeds his current rates. We also note that the Applicant has had the opportunity to participate in the current bargaining processes.

[12] In the circumstances we consider it is appropriate to grant a short extension of the Agreement. Having regard to the advanced status of the negotiations, we will extend the default period for the Agreement until the earlier of either 30 April 2024, or the date on which the replacement agreement commences to operate.



DEPUTY PRESIDENT

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¹ [\[2023\] FWCFB 122](#)