DECISION

Fair Work Act 2009
s.225—Enterprise agreement

Chantelle Zentveld
(AG2022/142)

IPCA (VIC, ACT & NT) ENTERPRISE AGREEMENT 2011

Fast food industry

DEPUTY PRESIDENT YOUNG MELBOURNE, 15 JUNE 2022

Application for termination of the IPCA (VIC, ACT & NT) Enterprise Agreement 2011- Agreement terminated from 13 July 2022

[1] An application was filed with the Fair Work Commission (Commission) by Ms Chantelle Zentveld, seeking the termination of the *IPCA (Vic, ACT & NT) Enterprise Agreement 2011* (the Agreement) pursuant of section 225 of the *Fair Work Act 2009* (Act) (Application). The Agreement's nominal expiry date was 21 July 2015.

[2] The Shop, Distributive and Allied Employees' Association (SDA) represent Ms Zentveld.

[3] The Agreement covers various franchisees of Subway stores in Victoria, the Australian Capital Territory and the Northern Territory pursuant to a single interest employer authorisation issued on 5 January 2011 (PR505633), and varied on 15 February 2011 (PR506760) and 21 July 2011 (PR512363) and all its employees employed by the employers in the job classifications set out in the Agreement. The employer parties to the Agreement at the time it was made are listed in Schedule 1 of the Agreement. Since the time the Agreement was made in 2011, a number of the employers listed in Schedule 1 of the Agreement have been deregistered and it also appeared likely that the businesses of some of the employers had been acquired and that acquiring entities may have become covered by the Agreement by operation of the transfer of business provisions in the Act. Given these matters, the Subway franchisor, Subway Systems Australia Pty Ltd (SSA) agreed to provide assistance in identifying the employers to whom the Agreement currently applied (Employers) and assist with service.

Directions

[4] Initial directions were issued on 1 February 2022.

[5] On 23 February 2022 I issued amended directions which required the following:

- By close of business 9 March 2022 SSA is to provide to the Applicant a schedule of employers currently covered by the Agreement reconciled against the employers covered by the Agreement already served by the Applicant.

- By close of business 9 March 2022 the Independent Purchasing Company (Australasia) Limited (IPCA) and the SSA are to issue a statement to all Employers explaining the process of the Application thus far.

- By close of business 16 March 2022 the Applicant is to provide a copy of the directions, Form F24B and Form F24C to all Employers and file proof of compliance with this direction.

- By close of business 23 March 2022 each of the Employers is to provide a copy of the directions, Form F24B and Form F24C to their employees that are covered by the Agreement via email, place a copy on a noticeboard used for communication with staff and file proof of compliance with this direction.

- By close of business 6 April 2022 the Applicant is to file in the Commission, serve on all Employers and IPCA, any further material in support of the application to terminate the Agreement.

- By close of business 20 April 2022 any employee who wishes to do so is to file, serve on the Applicant, their Employer and IPCA any materials and witness statements upon which they rely.

- By close of business 20 April 2022 IPCA and/or any Employer is to file, serve on the Applicant and all of their employees any materials and witness statements upon which they rely.

- By close of business 27 April 2021 the Applicant is to file and serve on all Employers and IPCA any submissions in reply upon which she wishes to rely by 27 April 2022.

[6] On 23 March 2022 Beecham Nominees Pty Ltd provided proof of compliance with the Direction to provide a copy of the directions, Form F24B and Form F24C to its employees that are covered by the Agreement via email and placing a copy of these documents on a noticeboard used for communication with staff. It was the only Employer to do so.

[7] The SDA filed written submissions on behalf of the Applicant, as well as a detailed document comparing the terms of the Agreement with those of the Fast Food Industry Award 2010 (Award). The Applicant also filed a statutory declaration. No Employer or employee other than the Applicant filed any submissions or other material in accordance with the above directions, however the following response was received on 11 April 2022 from Mr Kalariya (Employer One) seeking a copy of the Applicant's submissions and stating the following:

> *"I am also requesting to provide us until 1st of July 2022, to allow us enough time for this transition. I am currently doing all the book keeping by myself and the work load is already too much and due to short staffing issues, I had to work in the business a lot and getting only little time for accounting/book keeping. Hence I would like to request you to allow us enough time so in winter months, when the business slows down, I will*

have enough time for this transition. I hope you would consider my request and allow us enough time."

[8] Given the failure of the Employers other than Beecham Nominees Pty Ltd to comply with the Direction that proof of provision of material to employees be provided, and the absence of any engagement from the Employers as to the substantive merits of the Application, and to ensure that employees and Employers had a full opportunity to express any views as to the Application, on Wednesday, 18 May 2022 I conducted a mention/directions hearing (Mention) following which the further following directions were issued:

- Any Employer or Employee currently covered by the Agreement who wishes to be heard as to the Application is to advise the Commission by 1 June 2022.

- By 19 May 2022 IPCA is to send a bulletin containing these directions to all Employers via email.

- By 19 May 2022 SSA is to place these directions on the SSA's internal communications platform, 'The Feed'.

[9] At the Mention it was determined that if no Employer or employee wished to be heard, the matter would be determined on the papers.

[10] On 1 June 2022 an email in the following terms was received from Mr Brennan of Six Quid Pty Ltd (Employer Two):

"I would like the following comments to be considered when deciding whether or not to terminate the agreement.

1. *the agreement has been in place for over 10 years, as such covering potentially 1,000's of staff & yet nobody has challenged it until now. This would indicate a level of satisfaction with the agreement.*

2. *with businesses still feeling the effects of COVID & facing the challenges of spiraling food/ packaging costs, energy costs rising etc to change such a large input cost could be the final nail in some businesses viability. If it is the feeling this Agreement should be cancelled delaying so would at least allow business to plan especially in light of the above factors changing so rapidly.*

3. *business tends to run on %'s, a business can only afford to spend a certain % of sales on certain items, eg wages. An increase in wages with currently flat sales will result in a reduction of hours.*

4. *potentially any changes to the agreement will more adversely effect day staff who are predominantly young mothers, any reduction in their hours may result in the balance between working & paying child care tip the way of not working & ending up on welfare.*

5. *Ultimately the market usually will indicate the suitability/ fairness of most things including this agreement. In a tight labour market if staff felt this was an unfair agreement they would be a high staff turnover, this is not the case."*

[11] As no request from any Employer or employee to be heard has been made, I will determine the matter on the papers.

Legislation

[12] Subdivision D of Division 7 of Part 2-4 of the Act sets out the mechanism by which an enterprise agreement may be terminated after the agreement has passed its nominal expiry date.

[13] Section 225 of the Act provides:

> "**225 Application for termination of an enterprise agreement after its nominal expiry date**
>
> If an enterprise agreement has passed its nominal expiry date, any of the following may apply to the FWC for the termination of the agreement:
>
> (a) one or more of the employers covered by the agreement;
>
> (b) an employee covered by the agreement;
>
> (c) an employee organisation covered by the agreement."

[14] Section 226 of the Act provides:

> "**226 When the FWC must terminate an enterprise agreement**
>
> If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:
>
> (a) the FWC is satisfied that it is not contrary to the public interest to do so; and
>
> (b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:
>
> (i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and
>
> (ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them."

Consideration

Section 225 of the Act

[15] I am satisfied that the two threshold requirements set out in s.225 of the Act have been met.

[16] Firstly, the Agreement has passed its nominal expiry date of 21 July 2015. Secondly, Ms Zentveld was an employee covered by the Agreement at the time the application was made.

Not contrary to the public interest – s226(a)

[17] The Full Bench in *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australian Eastern Railroad Pty Ltd* (Aurizon) cited various passages from the Full Bench of the Australian Industrial Relations Commission's decision in *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000* (Kellogg) which had concerned the corresponding, but not identical, provision from the Workplace Relations Act 1996. Relevantly, these passages included:

> *"The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards. An example of something in the last category may be a case in which there was no applicable award and the termination of the agreement would lead to an absence of award coverage for the employees. While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them"*

[18] It is also relevant to highlight the Full Bench in Aurizon concluded that it cannot be expected that the terms and conditions of an agreement will continue unaltered in perpetuity after it has passed its expiry date. This is because the Act contemplates the terms and conditions of an agreement may be altered by making a new agreement or by terminating the existing agreement.

[19] As was also recognised in Aurizon, s.226 of the Act is not limited to circumstances in which an agreement no longer applies to any employee. The Act clearly contemplates the termination of an agreement that still applies to employees and prescribes a safety net upon termination in such circumstances. The prescribed safety net is not a prior agreement and nor are undertakings mandatory. Rather, the prescribed safety net is the relevant modern award created during the Award Modernisation process and the National Employment Standards (NES). In this case, as set out above, the relevant modern award is the Fast Food Industry Award 2010.

[20] Having regard to the Application, the termination of the Agreement would not lead to an absence of award coverage for the employees. The Award provides for "proper industrial standards" within the meaning given to that term by Kellogg and in circumstances where there was no material before me suggesting otherwise, I am satisfied it is not contrary to the public interest to terminate the Agreement.

Appropriate to terminate the Agreement - s226(b)

[21] I am required to consider whether it is 'appropriate' to terminate the Agreement, taking into account all the circumstances, including the views of the employees, each employer and each employee organisation covered by the Agreement, and the circumstances of those employees, employers and organisations, including the likely effect that the termination will have on them.

[22] The approach to assessing appropriateness by taking into account all the circumstances, as enunciated by the Full Bench in Aurizon, is to have reference to the construction of s.226 and the contextual matters that bear upon that construction, as well as giving specific consideration to the matters identified in ss. 226(b)(i) and (ii):

> *"All of the circumstances also need to be taken into account in considering whether termination of the agreements is appropriate. In particular the views of employers and employees covered by the agreement, their circumstances, and the impact of termination need to be taken into account. The requirement in s. 226(b) to take into account all of the circumstances including those set out in s. 226(b)(i) and (ii) is a requirement to take the matters into account and to give them due weight in assessing whether it is appropriate to terminate an enterprise agreement. In assessing appropriateness by taking into account all of the circumstances, we approached the task by reference to the construction of s. 226 and the contextual matters that bear upon that construction dealt with earlier as well as giving specific consideration to the matters identified in s. 226(b)(i) and (ii)."*

[23] Ms Zentveld contends that the Agreement should be terminated. The views of other employees is not known. There are no organisations covered by the Agreement.

[24] Ms Zentveld contends that the terms and conditions of the Agreement have fallen below the minimum terms of the Award. She contends that increases in pay under the Agreement have not kept up with the Award so that over time the buy-out penalty rates in the Agreement have been absorbed and the base rate of pay no longer compensates for a lack of allowances, annual leave loading and penalty rates, leaving employees working evenings, Saturday, Sunday and Public Holidays worse off than under the Award.[1] Accordingly, Ms Zentveld contends that termination of the Agreement and the 'return' of employees to the Award would confer a material advantage to employees that weighs in favour of the termination of the Agreement.[2] As set out above, Ms Zentveld filed a detailed comparative analysis of the terms and conditions of employment under the Agreement with those under the Award. She submits that this analysis supports termination of the Agreement.[3]

[25] I note that the Award provides:

- a range of allowances that are not contained in the Agreement which may be relevant to the workplaces of the employees, for example, meal allowance and laundry allowance;

- a 25% loading for casual employees, whereas the Agreement provides for a loading of 20%;

- a right to request casual conversion, whereas the Agreement does not;

- for accident pay, whereas the Agreement does not;
- for standard penalty rates for evening work on a Monday to Friday, work on a Saturday and work on a Sunday, whereas the Agreement provides for different penalty rates depending on which 'Minimum Wage Rate Schedule' is nominated by the employer, the majority of which are less than the penalty rates payable under the Award;

- for standard penalty rates for work on Public Holidays, whereas the Agreement provides for different penalty rates depending on which 'Minimum Wage Rate Schedule' is nominated by the employer, the majority of which are less than the penalty rates payable under the Award;

- for standard penalty rates for overtime to be payable after five consecutive days of work (or six days in one week and four days in the subsequent week), whereas the Agreement provides for overtime to be payable after seven consecutive days of work;

- for a minimum annual leave loading of 17.5%, whereas the Agreement does not; and

- leave for Family and Domestic Violence, whereas the Agreement does not.

[26] In her statutory declaration Ms Zentveld says that she felt taken advantage of and unappreciated being employed under the terms of the Agreement.[4] She says that termination of the Agreement will have a positive impact on her.[5]

[27] Few conditions of the Agreement are superior to those of the Award. In my view, the terms of the Award are overall more favourable to employees that those of the Agreement. This is relevant to the consideration of the 'circumstances' of employees covered by the Agreement and the 'likely effect that the termination will have' on them, for the purpose of section 266(b)(ii). I also accept Ms Zentveld's evidence that termination of the Agreement will have a positive impact on her. I consider these matters support a conclusion that it is appropriate to terminate the Agreement.

[28] As set out above, Employer Two expressed views as to the application to terminate the Agreement. Employer One sought a delay in the implementation of any termination of the Agreement. I address this later in this decision. As to the matters raised by Employer Two, it is the case that the Agreement has been operative since 2011. However, contrary to the view expressed by Employer Two, I consider this to be a consideration in favour of termination. The Agreement passed its nominal expiry date in July 2015, almost seven years ago. As has been previously observed, it is not intended by the legislation that agreements should remain in place indefinitely after they have passed their nominal expiry date. I also do not consider, as submitted, the fact that the Agreement has not been 'challenged' to indicate satisfaction with its terms. I consider it more likely to reflect the characteristics of the employees covered by the Agreement and the complexity, difficulty and time involved in making an application to terminate an Agreement which covers a large number of employers across various states and territories. Further, the evidence before the Commission in this matter is that Ms Zentveld is not satisfied with the terms and conditions of employment provided under the Agreement and considers that employees are worse off overall under the Agreement than under the Award.[6] A view with which I concur. Secondly, I accept and have taken into account that Employer Two is experiencing stressors and facing challenges as to the effects of the COVID -19 pandemic. I also accept that there will likely be a higher labour costs associated with the application of the Award. However, the Award is the safety net for the fast food industry. Any contention that the Award imposes unaffordable labour costs is a submission that ought be made in the context of national wage case or modern award review proceedings, or an application to vary the Award. In that context, I note that the Commission observed in the 2021 Annual Wage Review (the

most recent at the time of writing) that "*the fast food businesses are, generally, speaking, less likely to have been adversely affected by the pandemic than cafes and restaurants because the restrictions imposed to contain the virus have generally not prohibited take away food services*."[7] I return below to the question of the day on which termination of the Agreement should take effect. As to the remaining matter advanced by Employer Two, there is no evidence before the Commission as to the asserted 'flat sales', that Employer Two's day staff are 'predominantly young mothers', the consequences of the asserted reduction of hours or the extent of Employer Two's staff turnover. Further, as already set out, the evidence that is before the Commission is that Ms Zentveld, as an employee employed under the Agreement, considers herself to be worse off than if she was employed under the Award.

[29] Taking into account the views of the persons referred to in section 226(b) that are before the Commission, and the circumstances of those persons, as well as the effect the termination will have on each of them, I consider it appropriate to terminate the Agreement.

Operative date of termination

[30] Section 227 of the Act provides as follows:

"**227 When termination comes into operation**

[31] If an enterprise agreement is terminated under section 226, the termination operates from the day specified in the decision to terminate the agreement."

[32] The Applicant submits that in the absence of any demonstrated proper reason why termination should be deferred or delayed, any order that the Agreement be terminated should operate forthwith.[8] Each of the two employers who provided a response to the Application sought that any termination be delayed.

[33] Section 227 of the Act affords the Commission a discretion as to the operative date of termination of an agreement. It is to be expected that new conditions of employment will apply following the termination of an enterprise agreement and it is foreseeable that preparations will need to be made in order to implement them. In my opinion, it is reasonable to allow a period of time for employers to prepare and make adjustments to their businesses to apply the Award. The period needs to be sufficient to allow employers to make changes to payroll systems and administrative arrangements and for consideration of the potential cost implications associated with the application of the Award. As such, I consider a period of four weeks from the date of this decision before the termination of the Agreement commences to operate to be appropriate.

Conclusion

[34] In relation to the application that has been made under section 225, I am satisfied that it is not contrary to the public interest to terminate the Agreement and I consider it is appropriate to do so taking into account all the circumstances. I am therefore required by section 226 to terminate the Agreement.

[35] The Agreement is terminated.

[36] The termination will operate from 13 July 2022.

DEPUTY PRESIDENT

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[1] Form F24C at 2.1

[2] Applicant's submissions at [16]

[3] Applicant's submissions at [16]

[4] Applicant submissions, Annexure 1 at [4], [6], [7]

[5] Applicant submissions, Annexure 1 at [10]

[6] Applicant submissions, Annexure 1 at [11]

[7] Annual Wage Review 2020-21 [2021] FWCFB 3500 at [257]

[8] Applicant's submissions at [25]