



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

Chat Pak Pty Ltd as trustee for the Rocky Ponds Produce Unit Trust
(AG2023/4563)

ROCKY PONDS PRODUCE COLLECTIVE AGREEMENT 2008

Agricultural industry

DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN
COMMISSIONER CRAWFORD

SYDNEY, 6 FEBRUARY 2024

Application to extend the default period for the Rocky Ponds Produce Collective Agreement 2008

Introduction

[1] Chat Pak Pty Ltd as the trustee for the Rocky Ponds Produce Unit Trust (**Chat Pak**) has made an application under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for the *Rocky Ponds Produce Collective Agreement 2008* (**Agreement**). The application seeks to extend the default period for the Agreement to 6 December 2024.

[2] The Agreement is a collective agreement that was made under the *Workplace Relations Act 1996* (Cth) (**WR Act**) and approved under that Act by the Workplace Authority. The Agreement is a ‘WR Act instrument’ within the meaning of item 2(2) of Sch 3 of the Transitional Act. It is classified by item 2(5)(c)(i) of Sch 3 as a ‘collective agreement-based transitional instrument’. Agreements of this kind are commonly referred to as ‘zombie agreements’.

[3] The Transitional Act was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP 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 would have terminated on 6 December 2023 (the end of the default period) unless extended by the Commission. The main features of item 20A of Schedule 3 to the Transitional Act are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd*.¹

[4] 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 if bargaining for a replacement agreement is occurring. Subitem (8) relates to individual agreement-based transitional instruments. Subitem (9) applies if the application relates to a collective agreement-based transitional agreements and it is likely that as at the time the application is made the award covered employees, viewed as a group, would be better off overall if the agreement continued to apply than if the relevant modern award applied.

Grounds relied upon

[5] Chat Pak's application submits that it is reasonable in the circumstances to extend the default period for the Agreement. Chat Pak cites the ability for employees to work additional hours without the payment of overtime as the primary reason for its extension request. Chat Pak says it is not economically viable for it to pay overtime rates in accordance with the *Horticulture Award 2020 (Award)* and that it would instead choose to limit the working hours of employees to ensure overtime rates are not payable. According to the Applicant many of the workers are engaged under the Pacific Australia Labour Mobility (PALM) Scheme and these workers want to work as many hours as possible when they are in Australia. The PALM workers will leave and move to other farms if they are limited to 38 hours of work per week.

[6] Chat Pak also submits it intends to negotiate an enterprise agreement with employees during 2024 to replace the Agreement. Chat Pak anticipates it will commence the bargaining process in March 2024.

Consideration

[7] We cannot be satisfied for the purpose of subitem 6(a) that subitem (7) applies as bargaining has not commenced for a replacement agreement. As the Agreement is a collective agreement-based instrument subitem (8) does not apply.

[8] We also cannot be satisfied that subitem (9) applies because the relevant employees, viewed as a group, would not be better off overall if the Agreement continued to apply than if the Award applied. We have come to that view for the reasons that follow.

[9] The Agreement contains only one classification in clause 3.1. The rate for this level is \$14.51 per hour, although that rate could not be paid because it is below the base rate in the Award. Subitem 13 of Sch 9 ensures the minimum award base rate is paid where an agreement-based transitional instrument has a lower base rate. The Agreement permits any employee in the horticulture industry to be classified at the same level. In contrast, the Award contains five classifications with minimum rates ranging from \$22.61 per hour to \$26.18 per hour.

[10] The casual loading prescribed in clause 2.2.1 of the Agreement is 23%. The Award prescribes a higher casual loading of 25% in clause 11.2. Although Chat Pak has indicated it actually pays a casual loading of 25%, that is not relevant to the comparison between the terms of the Agreement and the Award. The Agreement also does not contain a minimum engagement period for casual employees. Clause 11.3 of the Award prescribes a two-hour minimum

engagement for casual employees. Chat Pak has indicated many of its employees are engaged as casuals.

[11] There is no span of ordinary hours in the Agreement and no shift work conditions. The Award contains detailed ordinary hours of work conditions in clause 13, including for casual employees, and contains shift work conditions in clause 13.3.

[12] Although the overtime penalty rates in the Agreement are higher than the Award if the base rates in the Award are used for the penalty rate calculations, the Agreement allows employees to request to work additional hours without the payment of overtime rates. The effect of this provision is that employees would not receive overtime entitlements when they request and work additional hours to increase their overall earnings. Although employees may request to work overtime at ordinary rates if the alternative is not working the additional hours, they would be better off if they were to receive overtime rates for working the additional hours as provided for in the Award.

[13] Chat Pak has identified the following conditions in the Agreement as being superior to the Award:

- a. Casual public holiday rates.
- b. Frequency of wage payments.
- c. Work in the rain conditions.
- d. Overtime rates.
- e. Rest pauses.

[14] We do not consider the superior conditions identified above are sufficient to outweigh the detrimental conditions in the Agreement.

[15] After reviewing the terms of the Agreement and the Award, we have determined the relevant employees, viewed as a group, would not be better off under the Agreement than they would be if the Award applied. As a result, the default period for the Agreement cannot be extended under subitem 20A(6)(a) and (9) of Sch 3.

[16] We are also not satisfied that it is “reasonable in the circumstances” to extend the default period in accordance with subitem 20A(6)(b) of Sch 3.

[17] In *Suncoast Scaffold Pty Ltd*,² the Full Bench described the ‘reasonable’ criterion in item 20A(6)(b) of Sch 3 to the Transitional Act in this way:

“[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.”

[18] We also consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The explanatory memorandum expressed the purpose of the provisions relating to extending the default period in this way:³

“Provision would be made for the FWC to (upon application) extend the default period to ensure the automatic sunseting of zombie agreements does not operate harshly, including by leaving employees worse off.”

[19] Full Benches of the Commission have said a number of times that the purpose of the sunseting arrangements introduced in the SJBPA Act⁴ is that zombie agreements are to be replaced by contemporary instruments made under the *Fair Work Act 2009* (FW Act).

[20] We are not satisfied that in the circumstances of this case it is reasonable to extend the default period for the Agreement. The Agreement does not contain contemporary terms and the employees covered by the Agreement would clearly be better off overall under the Award. We consider the Agreement is precisely the type of instrument that the SJBPA Act was intended to address because its continued operation would disadvantage employees and the conditions are outdated.

[21] As our decision is to refuse to extend the default period under subitem 20A(6) of Sch 3 and our decision is made after the sunset date in the Transitional Act, subitem 20A(11) 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 20 February 2024.

[22] The application is dismissed.



DEPUTY PRESIDENT

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¹ [\[2023\] FWCFB 105](#) at [3] to [18].

² [\[2023\] FWCFB 105](#).

³ Explanatory Memorandum *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [670].

⁴ See for example *Quinn Transport Pty Ltd Enterprise Agreement 2009* [\[2023\] FWCFB 195](#) at [23] and *One HPA Certified Agreement 2004-2007* [\[2023\] FWCFB 137](#), at [32].