



DECISION

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

Robern Menz (MFG) Pty Ltd
(AG2023/3966)

ROBERN MENZ MANUFACTURING EMPLOYEES ENTERPRISE AGREEMENT 2009

Food, beverage and tobacco manufacturing industry

DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN

SYDNEY, 15 FEBRUARY 2024

Application to extend the default period for Robern Menz Manufacturing Employees Enterprise Agreement 2009

[1] Robern Menz (MFG) Pty Ltd (**the Applicant**) has applied under item 30(4) of Schedule 7 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for the *Robern Menz Manufacturing Employees Enterprise Agreement 2009* (**Agreement, or the zombie agreement**) until 31 July 2024.

[2] The Agreement was made during the ‘bridging period’ as defined Schedule 1 of the Transitional Act and approved under the *Fair Work Act 2009* (Cth) (**FW Act**) on 2 February 2010¹. Agreements of this kind are a species of what are commonly referred to as ‘zombie agreements’.

[3] The Agreement applies to the Applicant and its employees who are engaged to perform production, warehousing and logistics work at the Applicant’s manufacturing operations in South Australia.

[4] The main aspects of the statutory framework for applications for the extension of zombie agreements were detailed in the Full Bench decision in *Suncoast Scaffold Pty Ltd*.² The Full Bench there dealt with an application to extend a ‘WR Act agreement’ under item 20A of Sch 3 to the Transitional Act. The terms of item 20A of Sch 3 are relevantly the same as item 30 of Sch 7. The Full Bench’s analysis of those provisions applies equally to item 30 of Sch 7 and it is not necessary to repeat it here.

[5] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**) amended the Transitional Act to include item 30 in Sch 7. Item 30 provides for the sunset of remaining enterprise agreements made during the bridging period on 6 December

2023 unless extended by the Commission. Subitem 30(6) provides that where an application is made under subitem 30(4) for the 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) or (8) applies and it is otherwise appropriate in the circumstances to do so; or

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

[6] The Applicant seeks the extension on the basis that it would like time to implement changes to rosters, as it is concerned that the employees may be negatively impacted by the transition to the Award. We take this to be a claim that subitem (8) applies.

[7] Subitem (8) applies if it is likely that at the time the application is made, the relevant employees covered by the Agreement would be better off overall if the Agreement continued to apply than if the relevant modern award referred to in subitem (9) applied to the employees. For the purposes of subitem (9) the relevant modern award in this case is the *Food, Beverage and Tobacco Manufacturing Award 2020 (the Award)*.

Background

[8] The Agreement covers 68 employees. Of those, 32 are full time employees, 3 are part time employees and 33 are casual employees. The Applicant runs three shifts, a day shift (4am – 6am start until 3pm), afternoon shift (2:30pm to 11pm), and a night shift (10:30pm to 6:30am). Employees work an 8.5-hour day which allows them to accumulate RDO hours.

[9] The Agreement contains 8 classifications. The Applicant's employees are currently only engaged in levels 2 through to 7. The Agreement sets rates of pay that applied on commencement of the Agreement, namely December 2009, and wage increases which were payable from 1 December 2010. Thereafter, wages increased following annual reviews in accordance with clause 6.2 of the Agreement. The reviews result in increases to Agreement wages where the Commission has, during the preceding year, granted increases to the classifications of work covered by the Agreement. The increases to Agreement rates were only to the extent of the shortfall between the Agreement and the Award rate. We read this to mean that the wages would not fall below the Award.

[10] The rates, as they are set out in the Agreement, are below those in the Award. Having regard to clause 6.2 of the Agreement, and in accordance with s.206 of the FW Act, base rates of pay under the Agreement will have been maintained so that they are the same as the Award. The Applicant confirmed that employees are paid wages in accordance with the Award. Consequently, the employees are not better off in terms of wages if the Agreement continues to apply.

[11] Employees cannot be considered better off under the Agreement having regard to the following reduced entitlements:

- Ordinary hours are 8.5 ordinary hours per day, compared to 8 hours under the Award.
- There is no requirement equivalent to the Award to agree on a pattern of work for part time employees.

- The Agreement has a lower minimum engagement of 3 hours for part time employees.
- Overtime for part time employees is only payable under the Agreement when engaged in excess of full-time hours, as opposed to in excess of agreed hours.
- There is no minimum engagement for casual employees.
- The Agreement does not contain an early morning shift or morning shift allowance.
- The Agreement does not contain a higher penalty for less than five successive afternoon or night shifts.
- The Agreement does not provide a penalty for ordinary hours worked on Saturdays.
- The Agreement does not provide a higher overtime penalty of 200% as provided under the Award for shift workers.
- The Agreement does not provide a penalty for work engaged in on public holidays.
- Under the Agreement any accrued TOIL is not paid out on termination.
- The Agreement provides less beneficial higher duties allowances.
- The Agreement does not provide for a number of other allowances otherwise contained within the Award.

[12] The Agreement does contain some terms which are more beneficial than the Award, such as casual employees' entitlement to annual leave and snack breaks. The majority of the more beneficial terms are conditional benefits, for example, greater redundancy pay entitlements for employees with 10 years' service, will only apply if employees are made redundant.

Consideration

[13] In *Suncoast Scaffolding* the Full Bench observed that the application of the better off overall Assessment in the Transitional Act required a broad evaluative judgment based upon an overall comparison of the terms of the transitional instrument and the relevant award(s) in their application to the cohort of award covered employees. We apply the same approach here.

[14] Given the above analysis, we are not satisfied that the award covered employees, viewed as a group, would be likely to be better off overall if the Agreement continued to apply to them rather than if the Award applied. The rates of pay provided for in the Agreement are not superior to the Award and there are many conditions of employment that are in inferior terms.

[15] Consequently, we conclude that subitem 8 of item 30 does not apply and the default period of the Agreement cannot be extended under subitem (6)(a).

[16] The Commission may also extend the default period under subitem 30(6)(b) if it is reasonable in the circumstances to do so.

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

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 to the SJBPA Act expressed the purpose of the provisions relating to extending the default period in this way:

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 Act is that zombie agreements are to be replaced by contemporary instruments made under the FW Act.

[20] We are not satisfied that in the circumstances of this application it is reasonable to extend the default period for the Agreement. The Applicant acknowledges that the employees currently work additional hours to achieve better remuneration and the Award provides less flexibility to allow this to occur. It appears this flexibility is achieved because Agreement allows those additional hours to be worked without attracting penalties or overtime. Those circumstances do not justify an extension of the Agreement.

[21] The continuation of an Agreement such as this, made in 2009 with inferior conditions, would be unfair to the employees who are covered by it. There was no independent evidence as to the views of the Applicant’s employees to suggest that they were supportive of its continued operation. Nor was there anything to suggest that the continued operation of the Agreement was important for the ongoing operation of the business. We conclude that it is not reasonable in the circumstance to extend the default period for this agreement.

[22] 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(9B) 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 29 February 2024.

[23] For the above reasons, the application is dismissed.



DEPUTY PRESIDENT

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¹ [\[2010\] FWAA 670](#)

² [\[2023\] FWCFB 105](#) at [3]-[18].