



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

Windsor Hotel South Perth Pty Ltd
(AG2023/4738)

THE WINDSOR HOTEL EMPLOYEE COLLECTIVE AGREEMENT 2008

Hospitality industry

DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT SLEVIN
COMMISSIONER ALLISON

SYDNEY, 16 FEBRUARY 2024

Application to extend the default period for The Windsor Hotel Employee Collective Agreement 2008

[1] Pursuant to item 20A(4) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Windsor Hotel South Perth Pty Ltd (the Applicant) has applied to extend the default period for the *The Windsor Hotel Employee Collective Agreement 2008* (the **2008 Agreement**).

[2] The application is made in accordance with subitem (6)(a) and subitem (7) on the grounds that bargaining is occurring for a proposed enterprise agreement and that ‘it is otherwise appropriate in the circumstances’ to extend the default period.

[3] The Full Bench in *ISS Health Services Pty Ltd*¹ described the three requirements that must be met for subitem (7) to apply. We are satisfied on the material provided, including a statutory declaration by Mr Max Fox-Andrew, Hotel General Manager, that the requirements of subitem (7) have been met and bargaining is occurring.

[4] The second limb of the test under subitem (6)(a) is whether the Commission is satisfied that ‘it is otherwise appropriate in the circumstances’ to extend the default period.

¹ [2023] FWCFB 122

[5] The Applicant employs approximately 92 employees under the 2008 Agreement. Were it not for the 2008 Agreement, which expressly excludes all awards, employees would be covered by the *Hospitality Industry (General) Award 2020* (the **Award**).

[6] The Agreement provides a rates of pay table with minimum hourly rates for permanent and casual employees. In accordance with clause 1(d), Part B of the 2008 Agreement the rates of pay in the Agreement are to be increased each year in line with national CPI increases. In relation to permanent employees, such CPI increases would mean the current rates under the 2008 Agreement are between approximately 0.6% and 24% above the Award. The Applicant submits that the current rates for full-time/part time salaried staff are approximately 25% above the Award. In relation to casual employees, such CPI increases would mean the current range of rates under the 2008 Agreement are either below the Award or slightly above the Award. Item 13 of Schedule 9 of the Transitional Act also operates to ensure base rates of pay payable under agreement-based instruments do not fall below the relevant modern award. The Applicant submits that casuals are currently paid 'equivalent to the Award Monday to Friday and Saturday hourly rates'.

[7] The 2008 Agreement contains a number of reduced terms and conditions when compared to the Award. These include (but are not limited to) the following:

- The 2008 Agreement does not contain shift penalties, unlike the Award which provides for penalties for work engaged in between 7pm and 7am. The 2008 Agreement contains a span of hours (6am – 3am the next day) that envisages employees working at times that would attract shift penalties under the Award;
- The 2008 Agreement offers reduced weekend penalties of 20%, compared to the Award which provides penalties for permanent employees of 25% and 50% for Saturdays and Sundays respectively, or for casual employees of 50% and 75% for Saturdays and Sundays respectively;
- The 2008 Agreement offers a reduced public holiday penalty of 50% compared to 125% under the Award for permanent employees and 150% under the Award for casual employees;
- The 2008 Agreement permits employees to work voluntary overtime hours at ordinary rates, rather than overtime penalties;
- Under the 2008 Agreement casual employees are not entitled to overtime penalties;
- Other than a meal allowance which is below the Award rate, the 2008 Agreement does not contain any other allowances set out in the Award.

[8] In a number of recent Full Bench decisions, the Commission has expressed a reluctance to extend the default period of transitional instruments that contain inferior conditions to those in the relevant modern award. In *Peter Frick*,² the Full Bench considered that the default position of the statute to automatically terminate transitional instruments on 6 December 2023

² *Peter Michael Frick* [2023] FWCFB 137.

suggests a policy preference for employees covered by transitional instruments to be regulated by contemporary instruments.³ In *Kalfresh Management Services Pty Ltd*,⁴ 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.⁵ In *Surf Hogs Pty Ltd T/A Hog's Breath Café Surfers Paradise*,⁶ the Full Bench found that it was not appropriate to extend the default period of an Agreement on the basis that bargaining was occurring as '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 finalisation of the new agreement'.

[9] Having regard to the Full Bench authorities and all the material presently before the Commission in this matter, we have determined it is not appropriate to extend the default period of the 2008 Agreement. It is not appropriate to do so because the inferior conditions in the 2008 Agreement mean it is likely that there would be a disadvantage to employees if the 2008 Agreement continues to apply while bargaining is occurring.

[10] In coming to this conclusion, we have recognised that permanent employees are currently paid an above Award rate. However, given the nature of the hospitality industry it is likely that such permanent employees will work weekends, at night and on public holidays, and therefore even taking the above Award rate into account, permanent employees may be disadvantaged by the continued operation of the 2008 Agreement. In any event, if the over Award pay rates result in some permanent employees receiving more than they would under the Award, the termination of the 2008 Agreement will have no impact on the ongoing payment of those above Award rates.

[11] With respect to casual employees, who are currently paid the Award rate, these employees will almost certainly be disadvantaged by the ongoing operation of the 2008 Agreement. The Applicant has not provided any submissions on how casual employees are not disadvantaged by the ongoing operation of the 2008 Agreement.

[12] We have taken into account that the Applicant has taken some steps to commence bargaining for a new enterprise agreement, including an initial meeting with the bargaining committee on 13 February 2024, and that further bargaining meetings are scheduled later in February 2024. However, as noted by the Full Bench in *Karpay*,⁷ the legislation providing for the automatic sunseting of zombie agreements commenced operation in December 2022, and provided a 12-month grace period up to 6 December 2023 for employers to make arrangements to address the sunseting of transitional instruments. The Applicant only provided employees with the Notice of Representational Rights commencing bargaining on 2 November 2023, little over a month before the sunseting provisions came into effect.

³ Ibid, [32].

⁴ *Kallium Management Services Pty Ltd as Trustee For The Kalium Labour Trust T/A Kalfresh Pty Ltd* [2023] FWCFB 217.

⁵ Ibid, [14].

⁶ [2024] FWCFB 12, [16].

⁷ *KarPay Pty Ltd* [2023] FWCFB 240.

[13] In addition, while the Applicant is hopeful that a proposed agreement could be voted on in late February or early March 2024⁸, the current agreement proposed by the Applicant, which has been provided to the Commission, retains a number of conditions that are below Award. We acknowledge that bargaining is currently underway and accordingly the final proposed agreement may look different to the draft agreement provided to the Commission. However, it is noted that where a proposed agreement submitted to the Commission for approval is subject to a number of BOOT⁹ concerns, the agreement approval application may be unsuccessful.

[14] In the circumstances outlined above, we do not think it is appropriate to extend the default period for bargaining when the ongoing operation of the 2008 Agreement is likely to disadvantage employees. We are of the view that the 2008 Agreement should be replaced by a modern instrument that meets the requirements of the *Fair Work Act 2009* (Cth).

[15] The Applicant, in the alternative, has submitted pursuant to subitem 6(b) that the default period should be extended on the grounds that it is 'reasonable in the circumstances to make an order for extension of default period until 1 December 2024'. The reasons given above in relation to it not being appropriate to extend the default period equally apply to our conclusion that it is not reasonable to extend the default period.

[16] As our decision to refuse to extend the default period in accordance with subitem (6) is made after the sunset date in the Transitional Act, subitem 11(e) 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 Applicant to make the necessary administrative arrangements to give effect to the sunset of the 2008 Agreement, the default period is extended to 1 March 2024.



DEPUTY PRESIDENT

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⁸ Statutory Declaration of Max Fox-Andrews at [9].

⁹ Better Off Overall Test contained in section 193 of the *Fair Work Act 2009* (Cth).