FAIR WORK COMMISSION

MATTER NO: U2023/1608

CAMBRIDGE CLOTHING PTY LTD ACN 613 716 635

(Applicant)

APPLICANT'S OUTLINE OF SUBMISSIONS – APPLICATION FOR TERMINATION OF AN ENTERPRISE AGREEMENT AFTER THE NOMINAL EXPIRY DATE

Introduction

1. The Applicant has made an application to terminate the *Cambridge Clothing Company Enterprise Agreement* (2014) (AG2015/1943) (**2014 EA**) after its nominal expiry date in matter number U2023/1608 (**Application**) filed in the Fair Work Commission (**Commission**).

2. The Applicant, as the employer covered by the 2014 EA, has made the Application to terminate the 2014 EA pursuant to section 225 of the *Fair Work Act 2009* (Cth) (**FWA**).

3. In making the Application to terminate the 2014 EA, the Applicant relies on the following material:

   (a) Form 24B – Application for termination of an enterprise agreement after the nominal expiry date (**F24B Application**) dated 26 May 2023;

   (b) Form 24C – Declaration in relation to termination of an enterprise agreement after the nominal expiry date, and the annexures thereto declared by Mr David Willett, Managing Director of the Applicant (**F24C Declaration**) dated 25 May 2023; and

   (c) Further declaration in relation to termination of an enterprise agreement after the nominal expiry date declared by Mr David Willett (**Further Declaration**) dated 15 June 2023.

4. The Applicant submits, for the reasons outlined in these submissions, that the Commission should terminate the 2014 EA because:

   (a) the Commission should be satisfied that the continued operation of the 2014 EA would be unfair to the employees covered by the 2014 EA pursuant to section 226(1)(a) of the FWA;

   (b) it is appropriate in all the circumstances to terminate the 2014 EA pursuant to section 226(1A) of the FWA; and

   (c) the Applicant has complied with the directions dated 8 June 2023 and the varied directions dated 16 June 2023 issued by Deputy President Gostencnik in all respects.

5. The Applicant further submits that the 2014 EA should be terminated with immediate effect given it does not require time to transition to paying its employees in accordance with the *General Retail Industry Award 2020* (**Retail Award**).

Provisions of the *Fair Work Act 2009* (Cth)

6. In considering the Application to terminate the 2014 EA, the relevant provisions of the FWA are set out as follows.

7. Pursuant to section 225 of the FWA, 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.

8. Pursuant to section 226 of the FWA:

   (1) 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 the continued operation of the agreement would be unfair for the employees covered by the agreement; or

   …

   (1A) However, the FWC must terminate the enterprise agreement under subsection (1) only if the FWC is satisfied that it is appropriate in all the circumstances to do so.

   …

   (2) In deciding whether to terminate the agreement, the FWC must consider the views of the following covered by the agreement:

      (a) the employees (unless there are no employees covered by the agreement);

      (b) each employer;

      (c) each employee organisation (if any).

   Note: The President may be required to direct a Full Bench to perform a function or exercise a power in relation to the matter if any of the employers, employees, or employee

organisations, covered by the agreement oppose the termination (see subsection 615A(3)).

(3) …

(4) In deciding whether to terminate the agreement (the ***existing agreement***), the FWC must have regard to:

(a) whether the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as the existing agreement; and

(b) whether bargaining for the proposed enterprise agreement is occurring; and

(c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.

(5) In deciding whether to terminate the agreement, the FWC may also have regard to any other relevant matter.

9. Pursuant to section 227 of the FWA, if an enterprise agreement is terminated under section 226, the termination operates from the day specified in the decision to terminate the agreement.

10. The Applicant submits that sections 225 and 226 of the FWA are satisfied such that the Commission should grant the Application to terminate the 2014 EA.

Background

The Applicant's operations

11. The Applicant is a leading provider of men's tailored clothing which was originally formed and operated in New Zealand and later expanded to Australia, where it is now operated by the Applicant (**Business**).

12. At the time of entering the Australian market, the Business was operated by Cambridge Clothing Company Limited (company number 43234) (**CCCL**).

13. CCCL bargained the enterprise agreement the subject of this Application, being the 2014 EA.

14. The 2014 EA was approved by Commissioner Bull on 1 April 2015. Accordingly, the 2014 EA has passed its nominal expiry date of 8 April 2019.

15. The extended corporate history of the Business is provided at section 2.4 of the F24B Application. It is noted for the purpose of these submissions that on 2 September 2016, the Commission approved an application to expand the coverage of the 2014 EA to all (i.e. transferring and new) employees employed by the Applicant and covered by the classifications set out in Schedule 1 of the 2014 EA.[1]

Mistaken position in relation to continued application of the 2014 EA

16. The Applicant had mistakenly concluded that the 2014 EA did not cover and apply to the Applicant in respect of its employees employed in the classifications set out in Schedule 1 of the 2014 EA (**Retail Employees**) beyond the nominal expiry date of the 2014 EA, being after 8 April 2019.[2]

17. The Applicant did not take steps to terminate the 2014 EA after 8 April 2019 and the 2014 EA has not been replaced.[3]

18. From about 8 April 2019 onwards, the Applicant considered that it was covered by the Retail Award and applied the same to its Retail Employees.[4]

Section 225 of the FWA – Standing to make application

19. As the 2014 EA has passed its nominal expiry date, and the Applicant is an employer covered by the 2014 EA, the Applicant has standing to make the Application pursuant to section 225(a) of the FWA.

Section 226(1)(a) of the FWA – Unfair for the Retail Employees to continue to be covered by the 2014 EA

20. The Applicant submits that the continued operation of the 2014 EA would be unfair for the Retail Employees covered by the 2014 EA, and should therefore be terminated on the basis of section 226(1)(a) of the FWA.

Provisions of the 2014 EA

21. Clause 13 of the 2014 EA provides for the payment of an all-inclusive base rate of pay for all ordinary hours of work, which includes all penalties, allowances, and any other payments that

[1] See *Cambridge Clothing Pty Ltd T/A Cambridge Clothing* (AG2016/5229) [2016] FWC 6091.
[2] F24C Declaration at [10].
[3] F24C Declaration at [11].
[4] F24C Declaration at [12].

might otherwise apply, except for those specifically included in the 2014 EA (**2014 EA Loaded Rate**).[5]

22. Pursuant to the 2014 EA, Retail Employees are paid the 2014 EA Loaded Rate for all ordinary hours of work and do not have any entitlement to receive penalty rates for weekend work, public holidays or evenings worked.[6] The F24C Declaration sets out in further detail how Retail Employees covered by the 2014 EA were paid for their rostered hours during the period that the Applicant applied the 2014 EA.[7]

23. Pursuant to clause 13.3 of the 2014 EA, there was no requirement for the Applicant to increase the 2014 EA Loaded Rate during the operation of the 2014 EA, and any wage increase was at the Applicant's discretion.[8]

Unfairness caused by the continued operation of the 2014 EA

24. If the Commission terminates the 2014 EA, the Applicant will be covered by, and will continue to apply, the Retail Award.[9]

25. The Applicant has applied the Retail Award to the Retail Employees since 8 April 2019 as it determined that the Retail Employees would be better off under the Retail Award compared to the 2014 EA and that the continued operation of the 2014 EA would disadvantage the Retail Employees.[10]

26. The Applicant submits that it would be unfair for the Retail Employees to remain covered by the 2014 EA by virtue of the 2014 EA Loaded Rate and that the Retail Employees are better off under the Retail Award due to entitlements to:

    (a) minimum rates of pay under the Retail Award that are better than the 2014 EA Loaded Rate;

    (b) penalty rates for ordinary hours of work performed on weekends, public holidays and evenings;

    (c) overtime rates or time off in lieu in accordance with the Retail Award for additional hours performed in excess of ordinary hours of work; and

[5] F24C Declaration at [15].
[6] F24C Declaration at [18].
[7] See F24C Declaration at [19].
[8] F24C Declaration at [20]-[21].
[9] F24C Declaration at [5].
[10] F24C Declaration at [14], [25]-[31].

(d) allowances in accordance with the Retail Award, or greater entitlements under individual employment contracts.[11]

27. The Applicant's submission that it would be unfair for its employees to remain covered by the 2014 EA is supported by Annexure A to the F24C Declaration, which provides a comparison between the 2014 EA Loaded Rate and the minimum rates and entitlements under the Retail Award.

28. Further, the Applicant relies on the comparison of the terms of the 2014 EA as against the Retail Award and additional benefits provided under individual employment contracts, as set out in Annexure B to the F24C Declaration.

Section 226(1A) of the FWA – Appropriate to terminate the 2014 EA in all circumstances

29. The Applicant submits that it is appropriate to terminate the 2014 EA pursuant to section 226(1A) of the FWA given the unfairness that would be occasioned to the Retail Employees in the event the Application is refused, as set out in paragraphs 20 to 28 above.

Section 226(3) of the FWA – Consideration of views

30. The Applicant submits that in its communications to the Retail Employees with respect to its Application that it has not received any opposition or objection to the termination of the 2014 EA.[12]

Section 226(4) of the FWA – No other enterprise agreements

31. The Applicant does not intend, and has never intended, to replace the 2014 EA.[13] There has been no notification or bargaining of an alternative enterprise agreement to cover the employees of the Applicant who are covered by the 2014 EA.

Section 226(5) of the FWA – Other relevant matters

32. The Applicant submits that it has at all times acted in the best interests of its Retail Employees by applying the Retail Award compared to the 2014 EA since 8 April 2019 onwards.[14]

33. Further, the Retail Employees have at least received minimum rates and entitlements in accordance with the Retail Award since 8 April 2019 onwards, which are significantly greater

[11] Form 24C Declaration at [29].
[12] F24C Declaration at [36]-[38]; Further Declaration at [5]-[11].
[13] F24C Declaration at [40].
[14] F24C Declaration at [32].

than the 2014 EA Loaded Rate as the 2014 EA Loaded Rate only equals the base rate of pay under the Retail Award pursuant to section 206 of the FWA.[15]

Section 227 of the FWA – When termination comes into operation

34. The Applicant submits that if the Commission grants the Application to terminate the 2014 EA, the termination should take effect immediately from the date of the decision granted by the Commission.[16]

Conclusion

35. The Applicant submits that its Retail Employees would be significantly better off if covered by the Retail Award as opposed to remaining covered by the 2014 EA.

36. The Applicant submits that:

    (a) the continued operation of the 2014 EA, specifically in relation to the 2014 EA Loaded Rate, would be unfair to the Retail Employees and the 2014 EA should be terminated pursuant to section 226(1)(a) of the FWA; and

    (b) it is appropriate in all the circumstances set out at paragraphs 29 to 33 above to terminate the 2014 EA pursuant to section 226(1A) of the FWA.

Filed on behalf of the Applicant

Talbot Sayer Lawyers
Solicitor for the Applicant
13 July 2023

[15] Ibid.
[16] F24C Declaration at [7].