



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

Pace Farm Distribution Pty Ltd
(AG2023/4986)

PACE FARM DRIVERS ENTERPRISE AGREEMENT 2009

Postal services

DEPUTY PRESIDENT SLEVIN
COMMISSIONER CRAWFORD
COMMISSIONER PERICA

SYDNEY, 23 FEBRUARY 2024

Application to extend the default period for the Pace Farm Drivers Enterprise Agreement 2009

[1] Pursuant to subitem 20A(4) of Sch 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**), Pace Farm Pty Ltd (**Pace Farm**) has applied to extend the default period for the *Pace Farm Drivers Enterprise Agreement 2009* (**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 Agreement covers full time, part time and casual employees. The Agreement covers employees who would otherwise be covered by the *Road Transport and Distribution Award 2020* (**Road Transport Award**) and the *Road Transport (Long Distance Operations) Award 2020* (**Long Distance Award**). The Awards are expressly excluded from the Agreement.

[4] 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

[5] 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 agreement 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

[6] The Applicant makes submissions with respect to its workforce and the operation of its business. The agreement covers 16 employees, all of whom are engaged full time; 14 employees are engaged as Metro Drivers and would otherwise be classified at a Level 4 of the *Road Transport Award*. Two employees are nominally engaged in the Linehaul classification; however, these employees are currently on workers compensation and not working. The employer no longer operates the linehaul arm of the business and the two employees, if they able to return to work would be re-engaged as Metro Drivers. But for the leave and sale of this arm of the business, these two employees were engaged in the equivalent of a Level 7 under the *Long-Distance Award*.

[7] Employees may be rostered between 2:00 AM and 6:00 PM, Monday to Friday, however standard hours are generally commenced between 2:00 AM and 6:00 AM and conclude by 2:00 PM. Shift lengths vary between 7 and 11 hours in total, not including meal breaks.

[8] The Agreement provides rates of pay at least equal to the Awards. However, it contains provisions that are less beneficial than the *Road Transport Award*, including: a wider span of hours, with averaging of hours over a greater period; reduced minimum engagements; no weekend and shift penalties; reduced public holiday penalties in some instances; and reduced casual loading. Under the Agreement, overtime only applies where an employee works in excess of 50 hours per week and is paid at a reduced penalty rate. It also does not provide for some allowances that are payable under the Award.

[9] On the basis of the Applicant's submission that it no longer operates a long haul part of its business, and, if the two employees on workers compensation return to work they will be employed as Metro Drivers under the *Road Transport Award*, it is not necessary to consider whether or not employees are better off under that Award than the Agreement.

[10] Following its examination of the Commission analysis, the Applicant provided further submissions and a witness statement from the Payroll Manager of the Applicant, Ms. Dianne Cassells (**the Cassells Statement**)

[11] The Applicant concedes there are "certain terms and conditions in the Agreement which contain modifications, differences or reductions when compared to the relevant corresponding terms in the *Road Transport Award*". It argues, however "when the actual take home pay outcomes under current roster arrangements for the majority of employees covered by the Agreement are considered against the take home pay outcomes that would apply under the Road Transport Award employees in the majority of circumstances are better off under the

Agreement.” It provided a sample analysis of a four-week roster cycle in support of this submission.

[12] The Applicant also bases its claim to an extension of the default period on circumstances of the employer. Those submissions follow.

[13] In August 2023, the Applicant was acquired by a private equity firm, Roc Partners. Since that time, the Applicant has experienced significant management staff turnover. In September 2023, Pace Farm’s Human Resources Manager responsible for the Award transition and payroll system projects left the business. The payroll department was reduced with the loss of the previous Payroll Administrator on 4 January 2024.

[14] The Applicant has also experienced turnover in senior executive roles responsible for management decisions affecting their implementation of systems and process to transition to Award arrangements with the previous Chief Operating Officer leaving the business on 4 December 2023 and the previous Chief Financial Officer ceasing working on 1 December 2023.

[15] The Applicant has continued to work with its payroll system provider, Employment Hero, to complete the integration of the Award rules and conditions into the payroll system. This process has been taking place for approximately 6 months. In that time, 4 consultants employed by Employment Hero and assigned to complete the Applicant’s Award integration have left Employment Hero’s business. This has caused a delay in the Applicant having the appropriate support in being able to “set up the Award rules and conditions and ensure Award compliance”.

[16] The Applicant argues once the payroll system is appropriately integrated and set up, the Applicant is required to create and complete pay runs on both the old and new integrated payroll systems and undertake to conduct a detailed analysis to ensure no inadvertent underpayments or overpayments are evident. This process takes approximately 1 month. The Applicant argues that in order to ensure payments to employees are compliant with all Award terms and conditions, it estimates a further period will be required until the Applicant’s payroll system is fully set up in compliance with Award terms and conditions.

Consideration

[17] We cannot be satisfied that the requirements of subitem 6(a) have been met. Subitem (7) does not apply because there is no evidence that the application was made at or after the notification time for a proposed agreement. As the Agreement is a collective agreement-based instrument subitem (8) does not apply.

[18] After reviewing the terms of the Agreement and the relevant Awards, as well as the analysis provided by the employer, we cannot be satisfied the employees, viewed as a group, are likely to be better off under the Agreement than they would be if the relevant Awards applied. We do accept the take-home pay of the majority of employees on a normal roster cycle are likely to be better under the Agreement. The actual payments received by the employees are not the relevant comparator under subitem 9, which compares the terms of the Agreement against the modern Awards. Therefore, subitem 9 does not apply here.

[19] We are, however, satisfied that it is “reasonable in the circumstances” to extend the default period in accordance with subitem 20A(6)(b) of Sch 3 based on the particular circumstances of the employer and the employees described in this decision.

[20] 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:

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.

[21] We also consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The Explanatory Memorandum of the SJBPA Act expressed the purpose of the provisions relating to extending the default period in this way³:

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.

[22] We accept that, due to no fault of its own, the Applicant is not presently in a position to ensure that its pay roll systems are able to accommodate to transition from payment under the Agreement to the *Road Transport Award*. We accept the argument that an extension of the default period is necessary to enable it to successfully manage that transition.

[23] We also accept that the actual take-home pay of the majority of workers working a standard roster are likely to be better off than under the *Road Transport Award*. In all those circumstances, it is reasonable to extend the default period.

[24] We are of the view that a short extension is adequate for the Applicant to ensure sure its pay roll systems can accommodate payments being made under the *Road Transport Award* rather than the Agreement. Pursuant to item 20A(6) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), we order that the default period for the Agreement is extended until 30 May 2024.

[25] The Agreement is published, in accordance with subitem 20A(10A)(c), on the Fair Work Commission's website.



DEPUTY PRESIDENT

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<AC328491 PR771772>

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

² [\[2023\] FWCFB 105](#) at [17].

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