



# DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 3A, Item 26A(4) - Application to extend default period for Division 2B State  
employment agreements

**Sunlong Fresh Foods Pty Ltd**  
(AG2023/4922)

## **SUNLONG FRESH FOOD PTY LTD EMPLOYER EMPLOYEE AGREEMENT**

Food, Beverage and Tobacco Manufacturing Industry

DEPUTY PRESIDENT ROBERTS  
COMMISSIONER CONNOLLY  
COMMISSIONER PERICA

SYDNEY, 26 FEBRUARY 2024

*Application to extend the default period for the Sunlong Fresh Food Pty Ltd Employer  
Employee Agreement*

[1] Sunlong Fresh Food Pty Ltd (Applicant) has applied under Item 26A(4) of Sch 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (*Transitional Act*) to extend the default period for the *Sunlong Fresh Food Pty Ltd Employer Employee Agreement* (Agreement).

[2] The Form F81 submitted by the Applicant indicated the application was made to extend the default period for a Division 2B State employment agreement. However, the agreement attached to the application is an agreement lodged with and approved by the Australian Industrial Relations Commission (AIRC). The Agreement is a collective agreement-based transitional instrument under item 2(5)(c) of Sch 3 of the *Transitional Act*. We propose to treat the application as if it were made under item 20A of Sch 3 to the *Transitional Act*. The application seeks to extend the default period of the Agreement to 6 December 2027.

[3] Item 20A of Sch 3 to the *Transitional Act* provides for the automatic sunset of agreement-based transitional instruments by the end of the default period on 6 December 2023. Specified parties may apply to the Commission for an extension of that period for up to four years in prescribed circumstances. The main features of item 20A of Sch 3 are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd*.<sup>1</sup> We rely on that decision.

[4] Sunlong Fresh Foods Pty Ltd lodged its application with the Fair Work Commission on 5 December 2023. In its Form F81, the Applicant indicated the reason it was seeking an extension was because bargaining is occurring for a new enterprise agreement that would cover the same or substantially the same group of employees as covered under the existing

agreement. No additional information was provided. A copy of the existing agreement was included with the application.

[5] An extension of the default period must be granted under Subitem (6)(a) if the Commission is satisfied that subitem (7) applies and it is otherwise appropriate in the circumstances to extend the default period for the Agreement.

[6] In the matter of *ISS Health Services Pty Ltd*,<sup>2</sup> the Full Bench stated that in order for subitem (7) to apply, three requirements must be satisfied:

1. The application must be made at or after the notification time for a proposed enterprise agreement; and
2. The proposed enterprise agreement must cover the same or substantially the same group of employees covered by the Agreement; and
3. Bargaining for the proposed enterprise agreement must be occurring.

[7] *ISS Health Services Pty Ltd* concerned an application under item 26A(4) of Sch 3A, which relates to Division 2B State employment agreements. The relevant wording in item 26A is similar to the wording in item 20A and we apply the above requirements to the present matter.

## **Background**

[8] On 19 December 2023 further information was sought from the Applicant in relation to the bargaining process. This included a copy of a Notice of Representational Rights issued, details of bargaining representatives, a chronology of negotiations to date and any further proposed negotiations, the Applicant's views on the relevant modern award and whether or not employees under the Agreement would be better off under the Award or the existing Agreement and whether a 6-month extension to the default period would be sufficient.

[9] In reply, the Applicant advised there were no other bargaining representatives for the proposed agreement other than a Director of the Company who had made the application and was in support of the extension being granted.

[10] The information provided regarding details of the chronology of bargaining was as follows:

*"We have hold the agreement for more than 15 years. We want to extend the Agreement to 1/12/2026."*

[11] The Applicant further submitted that employees would better off under the Agreement than the modern award due to the fact *"our Zombie award allows staff work past their ordinary hours at the normal rate. Otherwise, overtime is not offered, we would just employ more staff to keep the rates balanced. The majority of staff really prefer to earn extra money this way instead of finding another job."*

[12] In terms of whether a 6-month extension would allow sufficient time for bargaining to be completed, the Applicant said that this was the case indicating however, that “*12 months would be better as it is not easy to find staff these days.*”

[13] On Thursday 8 February 2024, we sought further information from the Applicant to demonstrate that bargaining for the replacement agreement had commenced and was occurring. The Applicant was requested to provide this and any additional information it sought to be considered by the Commission with regard to its application by close of business Monday 12 February 2024. The Applicant failed to reply.

[14] On Tuesday 13 February 2024, we provided the Applicant with another opportunity to provide any further information, including a copy of the NERR that had yet to be provided. The Applicant replied indicating it had to consult its advisor to finalise a proposed replacement agreement and sought a further 6 weeks to complete a draft new agreement.

### **Consideration**

[15] We have considered the requirements for subitem 7 to be satisfied as set out by the Full Bench in *ISS Health Services Pty Ltd*. We are not satisfied that those requirements have been satisfied. On that basis, the application to extend the default period cannot be granted pursuant to 20A(6)(a).

[16] For completeness, we have also considered whether subitem 20A(6)(b) might apply. That subitem requires a consideration of whether it is reasonable in the circumstances to extend the default period. This involves the application of a broad evaluative judgement.

[17] In *Suncoast Scaffolding Pty Ltd*,<sup>3</sup> the Full Bench said:

*“[17] 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] The Agreement was made and approved under the terms of the *Workplace Relations Act 1996*. The Applicant contends that employees under the agreement are better off under the existing agreement than the relevant modern award. Apart from their submissions that employees are better off because they can work extra hours at ordinary time rates, as they do not currently pay overtime rates to employees, no further information has been provided by the Applicant to support this contention.

[19] We have considered these submissions and compared the terms of the Agreement to the modern award. The Agreement contains just one provision that is superior to the Award, being more beneficial overtime provisions for day workers and non-continuous shift workers.

[20] The Agreement contains numerous inferior conditions including the following:

- The span of hours under the Agreement for day shift operates between 3:30am to 7pm, Monday to Sunday. This is less beneficial compared to the Award under which

ordinary hours can be worked between 6am to 6pm (which may be altered by 1 hour at either end);

- The Agreement is silent on all part time safeguards provided for in the Award such as being engaged to work a regular pattern of work, ordinary hours of work including the days when work is performed to be specified in writing prior to commencement, overtime paid for working in excess of agreed hours and variation to agreed hours in writing and by agreement.;
- The Agreement does not provide a 25% casual loading and provides a less beneficial minimum engagement period of 3 hours;
- The percentage rates for junior employees is less beneficial than the Award;
- There are less beneficial shift provisions and penalties in the Agreement. The Agreement is also silent on successive shift penalties and the penalty for work on shifts other than rostered shifts;
- The Agreement is silent on a definition of a shiftworker for the purposes of the NES and does not provide an additional week's leave for shiftworkers.
- The Agreement has the less beneficial penalties for working ordinary hours on Saturday and Sunday of 120% for Saturday and 140% for Sunday. The Award provides a penalty of 150% for Saturday and 200% for Sunday;
- The Agreement has a less beneficial public holiday penalty for day workers and non-continuous shift workers of 200%. The Award provides a public holiday penalty of 250%;
- The Agreement has less beneficial overtime triggers compared to the Award as the Agreement only provides overtime penalties for work done beyond the rostered working hours in any one day. The Award provides that overtime is paid for work in excess of ordinary hours, outside the spread of hours and all work in excess of the ordinary hours in any day or shift.
- The Agreement provides that overtime can be worked at ordinary hours by agreement with employees. The Award does not provide for this provision;
- Less beneficial penalty for all overtime hours worked by continuous shiftworkers of 150% (first 2 hours) 200% (thereafter). The Award provides a penalty of 200%;
- Annual leave loading is not payable under the Agreement.
- The Agreement provides a less beneficial supervisory loading (leading hand allowance) compared to the Award and is silent on all other Award allowances.

[21] In *Kalfresh Management Services Pty Ltd*,<sup>4</sup> 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.<sup>5</sup>

[22] We have found this to be the case in the present circumstances. We have also considered the purpose of the provisions to be relevant to the broad evaluative judgement that we are required to make. The Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* expressed the purpose of the provisions relating to extending the default period in this way:<sup>6</sup>

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

[23] In *Peter Frick*,<sup>7</sup> the Full Bench considered that the default position of the statute to automatically terminate transitional instruments on 6 December 2023 suggests a policy preference for employees covered by transitional instruments to be regulated by contemporary instruments made under the Act.<sup>8</sup>

[24] We are not satisfied that in the present circumstances it is reasonable to extend the default period for the Agreement because the Agreement does not contain contemporary terms and the employees covered by the Agreement would be better off under the relevant Award.

[25] As 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 to Applicant to make the necessary administrative arrangements to give effect to the sunsetting of the Agreement that the default period is extended to 11 March 2024.



DEPUTY PRESIDENT

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<sup>1</sup> [2023] FWCFB 105.

<sup>2</sup> [2023] FWCFB 122 at [4].

<sup>3</sup> [2023] FWCFB 105.

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

<sup>5</sup> *Ibid*, [14].

<sup>6</sup> Explanatory Memorandum *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [670].

<sup>7</sup> [2023] FWCFB 137.

<sup>8</sup> *Ibid*, [32].