



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

Bretislav Jirovec & Gusti Ayu Putu Brahma Devi Nuryanti
(AG2023/4444) & (AG2023/4566)

THE SWANSTON HOTEL, GRAND MERCURE AND MERCURE HOTEL WELCOME CERTIFIED AGREEMENT 2007

Hospitality industry

DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN
COMMISSIONER CRAWFORD

SYDNEY, 2 FEBRUARY 2024

Application to extend the default period for The Swanston Hotel, Grand Mercure and Mercure Hotel Welcome Certified Agreement 2007

Introduction

[1] Bretislav Jirovec and Gusti Ayu Putu Brahma Devi Nuryanti have made applications under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for *The Swanston Hotel, Grand Mercure and Mercure Hotel Welcome Certified Agreement 2007* (**Agreement**). Mr Jirovec's application seeks to extend the default period for the Agreement to 6 December 2027. Ms Nuryanti's application seeks to extend the default period for the Agreement to 1 January 2027.

[2] The application was made under Sch 7 of the Transitional Act. That schedule applies to agreements made during the bridging period between the former *Workplace Relations Act 1996* (Cth) (**WR Act**) and the *Fair Work Act 2009* (Cth) (**FW Act**). However, the Agreement is a collective agreement that was made under WR Act and approved under that Act by the Workplace Authority. We propose to treat the application as one made under Sch 3 of the Transitional Act.

[3] 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'.

[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] Mr Jirovec and Ms Nuryanti have made the applications because they are currently paid minimum hourly rates of pay that exceed the minimum rates that they would be entitled to under the *Hospitality Industry General Award 2020* (**Award**). The Award will apply to their employment if the Agreement terminates.

[7] Mr Jirovec has filed a copy of his contract of employment which identifies a rate of \$30.08. Mr Jirovec has submitted his minimum rate under the Award is \$26.18.

[8] Ms Nuryanti has indicated her current rate of pay is \$28.34 and her rate under the Award would be \$24.87.

Opposition to the application

[9] The Agreement applies to Prime Assets Pty Ltd, which operates the Mercure Welcome Hotel and Colivon Pty Ltd, which operates the Pullman Melbourne City Centre. Both entities oppose the applications and say their employees will be better off overall under the Award.

Consideration

[10] We cannot be satisfied for the purpose of subitem 6(a) that subitem (7) applies as bargaining has not commenced for a replacement agreement. As the Agreement is a collective agreement-based instrument subitem (8) does not apply.

[11] We also cannot be satisfied that subitem (9) applies because the relevant employees, viewed as a group, would clearly be better off under the Award than they would be under the Agreement for the following reasons.

[12] We consider the applications are misconceived. The rates of pay that both employees are understandably trying to protect are common law contractual entitlements. The rates of pay are not prescribed in the Agreement. As a result, the termination of the Agreement will not have the effect of reducing the applicants' rate of pay. The common law contractual rate of pay could only be reduced by agreement between both parties to each contract and with practical consideration to both parties.²

[13] We are not satisfied we can extend the default period pursuant to subitem 20A(6)(a) and (9) of Sch 3 because the relevant employees, viewed as a group, would clearly be better off under the Award than they would be under the Agreement. The higher contractual rate of pay is the only condition relied upon by the applicants to argue employees would be better off under the Agreement. In contrast, there is a wide range of conditions in the Award that are superior to those in the Agreement.

[14] After reviewing the terms of the Agreement and the Award, we have determined that it is likely that the relevant employees, viewed as a group, would not be better off under the Agreement than they would be if the Award applied. As a result, the default period for the Agreement cannot be extended under subitem 20A(6)(a) and (9) of Sch 3.

[15] We are also not satisfied that it is "reasonable in the circumstances" to extend the default period in accordance with subitem 20A(6)(b) of Sch 3.

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

[17] 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.

[17] We consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The explanatory memorandum expressed the purpose of the provisions relating to extending the default period in this way:⁴

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.

[18] Full Benches of the Commission have said a number of times that the purpose of the sunseting arrangements introduced in the SJBPA Act⁵ is that zombie agreements are to be replaced by contemporary instruments made under the *Fair Work Act 2009 (FW Act)*.

[19] We are not satisfied that in the circumstances of this case 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 overall under the Award.

[20] We consider that an extension of the default period for the Agreement would not result in the ongoing protection of the applicants' current hourly rates. These are protected by their employment contracts. If the applicants do not agree to sign new employment contracts or variations, they will remain entitled to their current rate of pay. The higher contractual rate, and any other contractual conditions that are superior to the Award, will continue operating in addition to the other minimum conditions in the Award.

[21] As our decision is to refuse to extend the default period under subitem 20A(6) of Sch 3 and 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 the parties to make the necessary administrative arrangements to give effect to the sunset of the Agreement the default period is extended to 16 February 2024.

[22] The application is dismissed.



DEPUTY PRESIDENT

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

² *Hill v Forteng Pty Ltd* [2019] FCAFC 105.

³ [\[2023\] FWCFB 105](#).

⁴ Explanatory Memorandum *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [670].

⁵ See for example *Quinn Transport Pty Ltd Enterprise Agreement 2009* [\[2023\] FWCFB 195](#) at [23] and *One HPA Certified Agreement 2004-2007* [\[2023\] FWCFB 137](#), at [32].