



DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 7, Item 30(4) - Application to extend default period for enterprise agreements made during the bridging period

TAF Chatswood Pty Ltd t/a The Athlete's Foot Chatswood
(AG2023/4596)

ATHLETES FOOT CHATSWOOD ENTERPRISE AGREEMENT 2009

Retail industry

DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT ROBERTS
DEPUTY PRESIDENT SLEVIN

SYDNEY, 14 FEBRUARY 2024

Application to extend the default period for Athletes Foot Chatswood Enterprise Agreement 2009

[1] TAF Chatswood Pty Ltd trading as the Athlete's Foot Chatswood (**the Applicant**) has applied under item 30(4) of Schedule 7 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) to extend the default period for the *Athletes Foot Chatswood Enterprise Agreement 2009* (**Agreement, or the zombie agreement**) until 6 December 2027.

[2] The Agreement was made during the 'bridging period' as defined in Schedule 1 of the Transitional Act and was approved under the *Fair Work Act 2009* (Cth) (**FW Act**) on 26 February 2010.¹ Agreements of this kind are a species of what are commonly referred to as 'zombie agreements'.

[3] The Agreement applies to the Applicant and its 35 retail employees who are employed at its Chatswood store, 33 of whom are engaged as casual employees. They work weekdays into the evening and weekends. If the Agreement did not apply, the *General Retail Award 2020* (**the Award**) would apply to the employees.

[4] The main aspects of the statutory framework for applications for the extension of zombie agreements were detailed in the Full Bench decision in *Suncoast Scaffold Pty Ltd*.² In that case, the Full Bench dealt with an application to extend a 'WR Act agreement' under item 20A of Sch 3 to the Transitional Act. The terms of item 20A of Sch 3 are relevantly the same

¹ [2010] FWAA 1455

² [2023] FWCFB 105 at [3]-[18].

as item 30 of Sch 7. The Full Bench's analysis of those provisions applies equally to item 30 of Sch 7 and it is not necessary to repeat it here.

[5] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**) amended the Transitional Act to include item 30 in Sch 7. Item 30 provides for the sunseting of zombie agreements on 6 December 2023, unless extended by the Commission. Applications to extend the default period may be made under subitem 30(4).

[6] The Commission must extend an agreement under subitem 30(6)(a) of Sch 7, where an application is made under subitem 30(4), if either subitem (7), or (8) applies and it is otherwise appropriate in the circumstances to do so. Subitem (7) applies if bargaining for a replacement agreement is occurring. Subitem (8) applies if 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. Under subitem 30(6)(b) of Sch 7 the default period must be extended, if an application is made under subitem 30(4) and the Commission is satisfied that it is reasonable in the circumstances to do so.

[7] The present application is made under subitem 30(4) on the basis that it is reasonable in the circumstances to extend the Agreement.

Grounds for the Application

[8] The Applicant contends it is reasonable in the circumstances to extend the default period to maintain the fairness in relation to remuneration and working conditions of employment. It is said that the following are agreed long-term mutual objectives of the parties:

- To create a safe work environment where all parties take responsibility for promoting safe work practices;
- To create and foster an environment of cooperation, honesty and integrity where all views and opinions are respected regardless of position, gender, race, religious or political belief;
- To create systems where performance of the business can be accurately measured and employee performance is recognized in line with business objectives;
- To ensure a profitable organization that achieves customer objectives and provides job satisfaction and security for all employees; and
- To provide fairness in relation to remuneration and working conditions of employment to the satisfaction of the parties.

[9] The Applicant does not contend that the employees would be better off overall if the Agreement continued to apply than the Award. It does contend that the Agreement provides better benefits to employees because the employees may agree to work hours suitable to both parties and rosters are able to be worked in accordance with employees' wishes.

[10] We have considered the terms of the Agreement and while it does provide for flexible rostering arrangements, it does so at the expense of penalty rates such as shift penalties, weekend penalties, and overtime rates of pay. Under the Agreement employees are paid a single rate of pay for all hours worked. All allowances are rolled into the single rate of pay. The Applicant informs us that it has increased the base rates in the Agreement to ensure they are no less than the Award, in accordance with s.206 of the FW Act. The Agreement reflects this obligation by providing for increases in accordance with the minimum wage. We are of the view, however, that the omission of all penalties and allowances means that employees are worse off under the Agreement.

Consideration

[11] In *Suncoast Scaffold Pty Ltd* 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.

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

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.

[13] Full Benches of the Commission have said a number of times that the purpose of the sunseting arrangements introduced in the SJBPA Act is that zombie agreements are to be replaced by contemporary instruments made under the FW Act.

[14] We are not satisfied, in the circumstances of this application, that it is reasonable to extend the default period for the Agreement.

[15] The matters raised by the Applicant going to a safe work environment, cooperation, honesty and integrity, systems to measure the performance of the business, and meeting customer expectations can all be met if the Award applies to the work performed by the employees. The other issues raised of providing fairness in remuneration and working conditions will not be achieved if the Agreement continues. The employees appear to be currently worse off under the Agreement than if the Award applied to them. This is not fair. Fairness will be achieved by applying the minimum standards in the Award.

[16] We are also 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. We consider the Agreement is precisely the type of instrument that the SJBPA Act was intended to address because its continued operation would disadvantage employees and the conditions are outdated.

[17] As our decision is to refuse to extend the default period under subitem 30(6) of Sch 7 and our decision is made after the sunset date in the Transitional Act, subitem 30(9B) 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 sunsetting of the Agreement the default period is extended to 28 February 2024.

[18] The application is dismissed.



DEPUTY PRESIDENT

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