

Summary of Decision

3 April 2013



G.J.E. Pty Ltd

C2012/6403

SUMMARY

1. In most cases an enterprise agreement will not be approved by the Commission unless it passes the ‘better off overall test’ (the ‘BOOT’) in s.193 of the *Fair Work Act 2009* (Cth) (FW Act).¹ In applying the BOOT the Commission must determine whether the employees covered by the enterprise agreement are covered by a modern award and, if so, which modern award. This decision deals with how the Commission goes about that task.

2. G.J.E. Pty Ltd (GJE) is a small business in South Australia which hires industrial, building and trades equipment to both trade customers, who usually hire the equipment for their own business purposes, and to non-trade, presumably domestic, customers. Between April and September 2012, 71.63% of GJE’s revenue was from identified trade customers and 28.37% was from non-trade customers and unidentified trade customers. GJE has four employees employed in three classifications in the *All Equipment Hire Enterprise Agreement 2012* (the Agreement), namely Hire Serviceperson, Hire Controller and Hire Manager.

3. GJE applied to the Commission for the approval of the Agreement. A statutory declaration accompanying the application said that no modern award covered GJE in relation to any employees covered by the Agreement. In deciding whether to approve the Agreement a Commissioner determined that the *General Retail Award 2010* (Retail Award) was relevant for the purposes of assessing whether the Agreement passed the BOOT. The Commissioner concluded she was not satisfied the Agreement passed the BOOT and rejected GJE’s application for approval of the Agreement. GJE appealed the Commissioner’s decision.

4. On appeal the Full Bench decided that whether the enterprise of an employer is in a particular industry is a question of fact determined by the “substantial character” of the enterprise. The Full Bench also noted that the enterprise of an employer can have more than one character and be in more than one industry. The character of an enterprise must be substantial before it can be concluded that the enterprise is in a particular industry. The Full Bench decided that such an approach was relevant to the determination of whether an employer is covered by a modern industry award.

¹ The Commission may approve an enterprise agreement that does not pass the BOOT if approval would not be contrary to the public interest: see s.189 *Fair Work Act 2009* (Cth).

5. The evidence in this case showed that a substantial proportion of GJE's revenue (nearly 30%) is derived from the hire of its equipment to non-trade, presumably domestic, customers and unidentified trade customers. The evidence did not suggest that the proportion attributable to the unidentified trade customers was significant.

6. On the basis of this evidence the Full Bench concluded that a substantial character of the enterprise of GJE is the "sale or hire of goods...to final consumers for personal or household consumption" and accordingly GJE is in the "general retail industry" as defined in Retail Award. On this basis, the Full Bench concluded that the Retail Award covers GJE.

7. In respect of the BOOT and the Agreement, the FW Act provides that the relevant modern award must also cover the employees covered by the enterprise agreement in relation to the work they are to perform under the enterprise agreement. A comparison of the descriptions of the job classifications in Schedule 1 of the Agreement with the definitions of a Retail Employee in Schedule B of the Retail Award indicated the job classification descriptions fell within the Retail Employee definitions. Accordingly, the Retail Award covered the GJE employees in relation to the work they are to perform under the Agreement.

8. The Full Bench granted permission to appeal but was not satisfied the Agreement passed the BOOT. Since GJE was not prepared to give undertakings pursuant to s.190 of the FW Act to meet that concern, and there was no proper basis on which the Full Bench could be satisfied that the approval of the Agreement would not be contrary to the public interest, the Full Bench confirmed the Commissioner's decision to refuse to approve the Agreement.

[2013] FWCFB 1705

(Acton SDP, Smith DP and Ryan C)

• *This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.*

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