



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

Belgradan Pty Ltd T/A Hog's Breath Cafe Wagga
(AG2023/4996)

BELGRADAN PTY LIMITED EMPLOYEE COLLECTIVE AGREEMENT 2006 - 2011

DEPUTY PRESIDENT SLEVIN
COMMISSIONER CRAWFORD
COMMISSIONER THORNTON

SYDNEY, 24 JANUARY 2024

Application to extend the default period for the Belgradan Pty Limited Employee Collective Agreement 2006 - 2011

[1] Belgradan Pty Ltd (**Belgradan**) has applied, pursuant to item 20A(4) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**), to extend the default period for the *Belgradan Pty Ltd - Employee Collective Agreement 2007-2011* (**Agreement**). The application seeks to extend the Agreement for a period of 12 months until 1 December 2024.

[2] The Agreement was made in 2007 and approved under the *Workplace Relations Act 1996* (Cth) (WR Act). The Agreement is a 'WR Act Instrument' within the meaning of item 2(2) of Sch. 3 to the Transitional Act. It is classified by item 2(5)(c)(i) of Sch. 3 as a 'collective agreement-based transitional instrument'.

[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, subject to the capacity to apply to the Commission for an extension of that period for up to four years in prescribed circumstances. The agreements to which these provisions apply are known as zombie agreements. The main features of item 20A of Sch 3 are described in detail in the Full Bench decision in *Suncoast Scaffold Pty Ltd (Suncoast)*¹ and we rely upon what is said in that decision.

[4] The application is made under subitem (4) of item 20A of Sch 3 to the Transitional Act, on two bases. First, that the Commission can be satisfied under subitem (6)(a) that subitem (7), applies and it is otherwise appropriate in the circumstances to extend the default period for the Agreement. Subitem (7) applies if bargaining for an enterprise agreement to replace the zombie

agreement is occurring. The second basis for the application is that the Commission can be satisfied that it is otherwise reasonable to extend the Agreement.

Background

[5] Belgradan operates a Hogs Breath Cafe restaurant franchise in Wagga Wagga in New South Wales. It employs 13 employees under the Agreement. If the Agreement did not apply the *Restaurant Industry Award 2020* (Award) would apply to the employees. Belgradan submits that it requires an extension of the Agreement to enable it to finalise a replacement enterprise agreement, and to prepare and lodge the replacement agreement with the Commission for approval.

[6] Belgradan lodged its application to extend the default period for the Agreement on 6 December 2023, the last day available to make an application. The application attached a copy of a Notice of Representational Rights (NERR) that had been provided to employees by email on 6 December 2023. The application states that the applicant was yet to establish a bargaining committee to negotiate the new agreement but intended to do so. We were told that it proposed to conduct a group information session to explain the process of implementing a new agreement on 11 December 2023. It proposes to conduct the first bargaining committee meeting on 24 January 2024.

[7] As the Agreement was made in 2007 the base rates of pay under the Agreement have fallen behind the Award. Item 13 to Schedule 9 of the Transition Act provides that the base rates in the relevant Award must apply so base rates of pay under the Agreement would be deemed equal to the Award.

[8] The Agreement contains the following terms which are less beneficial than the Award:

- Casual employees receive a 20% casual loading, which is less than compared to the Award under which a 25% loading is payable.
- The rates of pay contained within the Agreement are loaded rates of pay that compensate employees for working weekends, shift work, public holidays, overtime and allowances.
- Hours of work are broader than compared to the Award.
- A part time employee's hours can be varied during any roster, with no penalty payable for additional hours worked.
- The Agreement provides less beneficial break provisions than the Award.
- Some leave entitlements are expressed in hours rather than days/weeks.

[9] In response to questions posed by the Commission Belgradan drew our attention to the following matters which are said to be more beneficial to employees than the Award:

- Belgradan is currently paying hourly staff between 6-9% additional on the current legal base rate of pay for all full-time/part-time or casual and salaried staff have been paid at least 25% above the relevant legal base rate of pay.
- The Applicant has been ensuring that the National Employment Standards have been applied instead of a term of the Agreement that is less than the NES term.

- The Agreement provides for staff discounts on meals and beverage of 50% whilst on duty and 25% whilst not on duty.

[10] Employees cannot be considered better off under the Agreement on the basis that the rates of pay can be considered loaded rates of pay that compensate employees for all hours worked, including weekends, shifts work, public holidays, and all overtime is paid at the ordinary hourly rate. While Belgradan pays base rates above the Award rates the additional amount is unlikely to compensate for the penalty rates, overtime and allowances that are not otherwise payable under the Agreement. These payments are no doubt applicable to the employees given the nature of the business which would require work in the evenings and on weekends.

Consideration

[11] The Full Bench in *ISS Health Services Pty Ltd*² described the three requirements for subitem (7) to apply. The first is the requirement that the application is made at or after the 'notification time' for the proposed replacement agreement. Notification time is defined in s.173(2) of the *Fair Work Act 2009* (FW Act). The definition includes the time when the employer agrees to or initiates bargaining. A NERR indicates the employer has agreed to bargain for the purpose of s173(2). The second is that the proposed agreement must cover the same or substantially the same group of employees as the zombie agreement. The Full Bench stated that this could be established by comparing the NERR for the proposed agreement to the coverage clause of the zombie agreement. The NERR here meets this requirement. Relevantly, the third is that bargaining for the proposed agreement is occurring.

[12] We are of the view that the application satisfies the first two requirements for subitem (7) but does not satisfy the third. Since the application was filed Belgradan has taken some steps towards commencing bargaining. It relies upon those steps to establish that bargaining is occurring. However, given it has yet to establish a bargaining committee and that negotiations are not to commence until 24 January 2024 we cannot be satisfied that bargaining is occurring. The default period for the Agreement therefore cannot be extended in accordance with subitem (6)(a).

[13] Even if it could be said that the issuing of a NERR combined with the steps taken by Belgradan since 6 December 2023 to prepare for bargaining could be said to satisfy the third requirement under subitem (7), we would not extend the agreement under subitem (6)(a) because it is not appropriate to do so.

[14] The employees will continue to be denied the penalty rates they would otherwise be entitled to under the Award should the Agreement continue. Belgradan's workforce is small and negotiating a replacement agreement would not be onerous. The Applicant has had 12 months to do so but waited until the final moment before proposing negotiations towards a replacement agreement. The application to extend the Agreement a further 12 months is also excessive. We do not consider negotiating a new enterprise agreement would take the twelve months that the Applicant seeks.

[15] Belgradan also applies to have the default period extended pursuant to subitem 30(6)(b). The 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 judgment.

[16] In *Suncoast*,³ 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.”

[17] In *Peter Frick*,⁴ 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.⁵ In *Kalfresh Management Services Pty Ltd*,⁶ 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.⁷

[18] The Agreement is old, having been negotiated around 16 years ago. It has inferior and outdated terms and conditions. It should be replaced by a modern instrument. We have taken into account that the Applicant has taken some steps to commence bargaining for a new enterprise agreement. This fact however does not convince us that we should extend the life of a zombie agreement that provides for terms and conditions that are inferior to the Award.

[19] As we are not satisfied that it is reasonable in the circumstances to extend the default period of the Agreement the Application is dismissed.

[20] 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 (11)(e) 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 7 February 2024.



DEPUTY PRESIDENT

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¹ [\[2023\] FWCFB 105](#).

² [\[2023\] FWCFB 122](#) at [4].

³ [\[2023\] FWCFB 105](#).

⁴ [\[2023\] FWCFB 137](#).

⁵ *Ibid*, [32].

⁶ *Kallium Management Services Pty Ltd As Trustee For The Kalium Labour Trust T/A Kalfresh Pty Ltd* [\[2023\] FWCFB 217](#).

⁷ *Ibid*, [14].