



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

Aircon Rentals Pty Ltd T/A Aircon Rentals
(AG2023/4787)

AIRCON RENTALS COLLECTIVE AGREEMENT (2007)

Retail industry

DEPUTY PRESIDENT ROBERTS
COMMISSIONER CRAWFORD
COMMISSIONER PERICA

SYDNEY, 16 FEBRUARY 2024

Application to extend the default period for the Aircon Rentals Collective Agreement (2007)

[1] Pursuant to subitem 20A(4) of Sch 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**), Aircon Rentals Pty Ltd (**Aircon Rentals**) has applied to extend the default period for the *Aircon Rentals Collective Agreement 2008* (**Agreement**). The application seeks to extend the default period for the Agreement to 6 December 2024.

[2] The Agreement is a collective agreement that was made under the *Workplace Relations Act 1996* (Cth) (**WR Act**) and approved under that Act by the Workplace Authority. 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’.

[3] 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

[4] 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

[5] Aircon Rentals submits it is reasonable in the circumstances to extend the default period for the Agreement.

[6] It argues employees bound by the Agreement are paid at higher rates than the relevant Modern Awards. For example, administrative employees are paid at higher rates than under the *Clerks Private Sector Award 2020*. Refrigeration Mechanics are paid at a higher hourly higher than under the *Manufacturing and Associated Industries and Occupations Award 2020 (C10)*. Electricians are paid at an hourly rate higher than under the *Electrical, Electronic and Communications Contracting Award* and van drivers/installers are paid better rates under the Agreement, as compared to the *Amusement, Events and Recreation Award*.

[7] It also argues employees are paid superior first aid allowances under the Agreement compared to the relevant Modern Award including for employees who would be covered by either the *Road Transport and Distribution Award*, *Amusement, the Events and Recreation Award*, the *Manufacturing and Associated Industries and Occupations Award* and the *Electrical, Electronic and Communications Contracting Award*. It also claims that employees under the Agreement are paid a superior living away from home and on-call allowance compared to *Electrical, Electronic and Communications Contracting Award*.

[8] The application notes the Applicant “pays an annual wage increase to employees on 15 September each year. This means that with the benefit of these increases, the wage rates provided for in the Agreement have been updated and kept pace with inflation and provide fair and reasonable remuneration for work performed by the employees.”

[9] The Applicant also bases its claim to an extension of the default period on particular circumstances of the employer. Those submissions follow.

[10] It is a relatively small company with a nationwide workforce. It does not have the benefit of a dedicated Human Resources or Legal section that it can call upon for advice. In this instance, the Applicant has acted as soon as it became aware of the sunset of the Agreement on 6 December 2023, and sought urgent legal advice to address the issue.

[11] It is responsible for supporting a large number of important and critical industries, in both the private and public sectors. These critical clients include Services Australia, AMPOL, Commonwealth Bank of Australia, Coles Petroleum, Airservices Australia, Department of Defence and the Department of Health. It submits “Any impediment to the continuation of servicing of these priority clients would generate risks, losses and potential damage to services provided to aged care homes, hospitals, defence industries, banking and financial services, oil and government clientele including the vulnerable, aged and those requiring government support.”

[12] It carries out work and provides services to critical infrastructure in a variety of industries including hospitals, defence facilities, aged care and education facilities. The Applicant also provides services to natural disaster sites, including those affected by bushfires, floods and storms. It argues “a distraction from the natural course of business could result in services being compromised and further supports extending the operation of the Agreement.”

[13] The Applicant submits it has a workforce of long-term employees who have been employed by the company for a number of years. It argues this demonstrates that employees are happy with the current employment arrangements.

[14] It intends to commence bargaining with its employees in early 2024 for a new enterprise agreement. To support this intention, “the Applicant has sought legal advice for an urgent review of the Agreement so as to update its conditions in readiness to provide to employees as the first step for bargaining in 2024. The Applicant would not have incurred these legal costs unless it had a genuine intention and commitment to commence bargaining with its workforce in 2024, and it is now in a position to do so. In the Applicant's submission, this is a factor that supports a conclusion that it is otherwise appropriate in the circumstances to extend the operation of the Agreement.

[15] On 23 January 2024, Mr. David Loombs, the Managing Director of the Applicant, sent an e-mail to the Commission. In the e-mail, he noted “the notice of employees representational rights (NERR) has been distributed to the Applicant’s employees” and made the following submission: “Due to the current progress of the new 2024 Agreement, we would be happy to compromise on the application and reduce this to a 6-month extension should the Commission find that more favourable”.

Consideration

[16] We cannot be satisfied that the requirements of subitem 6(a) have been met. Subitem (7) does not apply because there is no evidence that the application was made at or after the notification time for a proposed agreement. As the Agreement is a collective agreement-based instrument subitem (8) does not apply.

[17] After reviewing the terms of the Agreement and the relevant Awards, as well as the analysis provided by the employer, we cannot be satisfied the employees, viewed as a group, are likely to be better off under the Agreement than they would be if the relevant Awards applied. We note the employer pays yearly wage increases above those required by the Agreement, but the actual payments received by the employees are not the relevant comparator under sub-item 9 which compares the terms of the Agreement against the modern Awards. Sub-item 9 does not apply here.

[18] We are, however, satisfied that it is “reasonable in the circumstances” to extend the default period in accordance with subitem 20A(6)(b) of Sch 3 based on the particular circumstances of the employer and the employees described in this decision.

[19] In *Suncoast Scaffold Pty Ltd*,² 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.

[20] We also consider the purpose of the provisions to be relevant to the broad evaluative judgment we are required to make. The Explanatory Memorandum of the SJPB Act expressed the purpose of the provisions relating to extending the default period in this way³:

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.

[21] We are satisfied it is reasonable in the circumstances to extend the default period given the particular circumstances of the employer and the commitment to engage in a bargaining process for a new agreement. We are of the view that a short extension is reasonable to allow the parties to conclude a replacement agreement. Pursuant to item 20A(6) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), we order that the default period for the Agreement is extended until 30 June 2024.

[22] The Agreement is published, in accordance with subitem 20A(10A)(c), on the Fair Work Commission’s website.



DEPUTY PRESIDENT

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¹ [2023] FWCFB 105 at [3] to [18].

² [2023] FWCFB 105.

³ Explanatory Memorandum *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* at [670].