DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Sleeper Pty Ltd T/A Oporto Melbourne Central
(AG2024/1716)

DEPUTY PRESIDENT ROBERTS SYDNEY, 12 AUGUST 2024

Application for approval of the Sleeper Pty Ltd - Single Enterprise Agreement 2024

[1] An application has been made for approval of an enterprise agreement known as the *Sleeper Pty Ltd - Single Enterprise Agreement 2024* (**Agreement** or **proposed agreement**). The Application was made pursuant to s.185 of the *Fair Work Act 2009* (**the Act**). It has been made by Sleeper Pty Ltd t/a Oporto Melbourne Central (**the Applicant**). The Agreement is a single enterprise agreement.

[2] After the filing of the application, the Shop Distributive and Allied Employees Association (**SDA**) made an application to be heard in relation to the application, but only insofar as the question of whether or not the Agreement passed the "better off overall test" (BOOT) in s.193 of the Act was concerned. The Applicant ultimately did not oppose the SDA being heard on that issue and directions were made for the filing of material by both parties. The Applicant was required to file further material in support of the application and in response to various concerns that had been identified by the Commission, set out below, including concerns as to whether the Agreement passed the BOOT. The SDA filed material dealing with the BOOT issue only.

[3] The Commission raised the following initial concerns about the application, based on the material originally filed in support of the application:

(a) The Agreement had been made on 14 March 2024 but was not filed for approval until 21 May 2024, that is, a period beyond the 14-day period for lodgement prescribed by s.185(3)(a) of the Act.

(b) There were two meetings held in November 2023 between the Applicant's representative and the employees to be covered by the Agreement where the terms of the proposed agreement were explained and discussed. There were further 'bargaining committee meetings' in January 2024 at which the terms of the Agreement were finalised. There did not appear to be any evidence to show that any further steps were taken to explain the terms of the Agreement after those terms had been finalised and before the vote to approve the Agreement was conducted. This raised the issue of whether the pre-approval requirements in s.180(5) and (6) relating to whether all reasonable steps had been taken by the employer to explain the terms of the Agreement and their effect to employees had been met. It also raised the issue

of whether the Commission could be satisfied that the Agreement had been genuinely agreed to by the employees as is required by s186(2)(a) and ss.188.

(c) The explanation that was provided to employees did not include or did not sufficiently include an explanation in relation to a number of less beneficial entitlements provided for in the Agreement. This raises the issue of whether the Agreement had been genuinely agreed to by the employees as required by s.186(2)(a) and s.188 of the Act and having regard to the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* (Statement).

(d) The Agreement included provisions which may be inconsistent with the National Employment Standards (NES), contrary to s.186(2)(c) and s.55 of the Act.

(e) The Agreement did not pass the BOOT.

[4] The matter was heard on 9 July 2024. Witness evidence was received on that date and further written submissions were received after the hearing.

[5] The terms and conditions of employees covered by the proposed agreement are currently governed by an agreement called *Sleeper Pty Certified Agreement 2004-2007* (current agreement). That agreement was made and approved under the former *Workplace Relations Act* 1996.

[6] As a result of amendments to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act* 2022, such agreements were to automatically sunset at the end of a default period, being 6 December 2023, unless the term of the agreement was extended by the Commission upon application. The applicant applied for an extension of the current agreement on the basis that bargaining was occurring for an agreement that would cover the same or substantially the same group of employees as the current agreement and that it was appropriate to do so. On 15 March 2024 a Full Bench of the Commission extended the term of the current agreement until 6 June 2024.[1]

[7] A further application has been made to extend the current agreement and that application is currently the matter of consideration by a Full Bench.

Late Lodgement

[8] Section 185 provides, relevantly, as follows:

Application for approval

(1) If an enterprise agreement is made, a bargaining representative for the agreement must apply to the FWC for approval of the agreement.

…

(3) If the agreement is not a greenfields agreement, the application must be made:

(a) within 14 days after the agreement is made; or
(b) if in all the circumstances the FWC considers it fair to extend that period--within such further period as the FWC allows.

[9] It was accepted by the applicant that the application for approval of the Agreement was not filed within the 14-day time period referred to in s.185(3)(a). The application was out of time by 54 days. There was no formal application for an extension, however, as the application for approval was pressed, I proceed on the basis that an extension is sought under s.185(3)(b).

[10] There was very little provided to support an extension of time on fairness grounds. The applicant's legal representative provided an email setting out the circumstances which he said accounted for the delay. Those circumstances related to what was described as the serious personal situation of the representative. It is unnecessary to set out the details of that situation. I have no reason not to accept the explanation as to how those circumstances caused or contributed to the delay, but the explanation is of limited value for present purposes. The issue here is the potential effect of the delay and whether I consider that it is fair to extend the time period for a period of 54 days. That assessment necessitates a consideration of all of the circumstances, including the respective positions of the parties and the impact a decision to extend or not extend may have on them.

[11] In support of the proposition that such an extension would be fair, the applicant simply submitted that there was no "significant" change to in the workforce from the time the agreement was made to the date of filing[2] and that there is no "significant" prejudice to the parties caused by the delay. No further evidence or submissions were provided on the point.

[12] There were no employee organisations involved in the agreement-making process as bargaining representatives. There were two employee bargaining representatives identified. They made no submission on the point.

[13] The purpose of s.185(3) is to ensure that approval applications are lodged in a timely way once the agreement is made and that any departure from that requirement would not unfairly impact on one or other, or all, of the parties. Where an application has been delayed, it is in my view incumbent on an applicant to provide some evidence on which the Commission can conclude that it would be fair to extend the statutory time period.

[14] A delay of 54 days in the making of the application is a significant period in the scheme of the pre-approval steps prescribed by the Act. Any delay in the making of an application for approval has the potential to cause unfairness and that potential may increase as the period of the delay extends. Employees voting on an agreement vote with an expectation that if a majority endorse the agreement, an application for approval will be made in accordance with the Act. If an application for approval is not made in a timely way, employees are left in a state of uncertainty as to whether the agreement will be approved and if so, when any changes might take effect. The personal circumstances of employees may change in the intervening period as might the workplace itself, including the composition of the workforce. I note that in course of providing evidence in relation to the BOOT issue, the applicant confirmed that the turnover of staff in the 12 months preceding June 2024 was 23% and that this was a representative figure for any given 12-month period.

[15] I also observe that as a result of the decision of the Full Bench to extend the default period of the current agreement until 6 June 2024, the applicant was on notice that any delay with the filing of an application may have had implications in terms of the relevant instrument that would apply after that date. Notwithstanding this knowledge and the apparent inability of their representative to attend to the filing of the application in a timely way, there is no evidence that any other steps were taken to file the application for approval to avoid any unfairness caused by delay.

[16] I conclude that there is insufficient evidence for me to be satisfied that it would be fair to extend the 14-day time period under s.185(3)(b) and decline to do so. I conclude that the application is not one that has been made in accordance with the Act and accordingly I propose to dismiss the application under s.587(1)(a).

[17] Whilst it is not strictly necessary for me to do so having regard to my conclusion above, I propose to also briefly consider the issue of whether the employer took all reasonable steps to ensure that the terms of the Agreement and the effect of the terms were explained to the employees employed at the time who would be covered and whether the Agreement has been genuinely agreed to by the employees covered by the Agreement.

Explanation and Genuine Agreement

[18] The applicant contended that the terms of the Agreement were explained to employees at meetings on 22 and 23 November 2023. They said that employees were provided with a copy of the proposed agreement and a PowerPoint presentation used by the employer representative to explain the terms. They said a comparison document setting out the differences between the current agreement, the relevant award and the Agreement was also provided to employees on 23 November 2023. Ms. Slonimski, a director of the applicant, gave evidence that the comparison document was on the company noticeboard and emailed to staff, although there was no further information about the dates when that occurred.

[19] The Form F17B filed in support of the application said that there were "bargaining committee negotiations" conducted between bargaining representatives and the applicant's representative by telephone on 10 January 2024. The Form also said that there was a "final bargaining committee meeting and finalisation of the terms of the proposed agreement" by telephone discussion between those parties on 24 January 2024.

[20] The applicant submitted that the terms of the Agreement were not changed in any "significant" manner between the date of the meetings in November 2023 and the ballot on 14 March 2024.

[21] The PowerPoint presentation document contains some limited detail on a comparison between the terms of the proposed agreement and the relevant modern award, the *Fast Food Industry Award 2020* (Award). That detail consists only of a single page in which three points of comparison – hourly rates, public holiday rates and annual leave loading - are mentioned. There is a further page in the presentation in which the adult hourly rates under the award, the existing agreement and the proposed agreement are set out. There are no rates set out for those under 21-years of age, which, according to the applicant's evidence, made up 13.6% of the

workforce, at least as at June 2024. There is no other information in that document that explains differences between the existing and proposed agreements. The presentation then provides that:

> *"Remaining differences are set out in the Comparison Document which will be updated if the proposed Agreement is amended and available for you to access."*

[22] The comparison document contains more detail. It is divided into three columns in which various terms of the award, the current agreement and proposed agreement are summarised. It deals with periods of operation, coverage, hours of work, overtime, rates of pay, breaks, termination, redundancy and some forms of leave. It does not deal with other matters contained in the proposed agreement. These include access to the agreement, payment of wages, work levels, trainees, superannuation, rosters and timesheets, long service leave, community service leave, domestic violence leave, stand down, overtime facilitative provisions, flexible hours for part-time employees and parameters of loaded rates. Consequently, there is no written explanation as to how these matters are dealt with in the proposed agreement as opposed to the existing agreement.

[23] In order to approve an Agreement, the Commission must be satisfied that the requirements of ss.186 and 187 of the Act are met.[3] Section 186(2) provides that in the case of an agreement that is not a Greenfields agreement, the Commission must be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement.

[24] Section 188 relevantly provides:

> **Determining whether an enterprise agreement has been genuinely agreed to by employees**
>
> Statement of principles
>
> *(1) The FWC must take into account the statement of principles made under section 188B in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.*
>
> ….
>
> Explanation of terms of the agreement
>
> *(4A) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with subsection 180(5) in relation to the agreement.*

[25] Section 180(5) provides:

> *(5) The employer must take all reasonable steps to ensure that:*
>
> *the terms of the agreement, and the effect of those terms, are explained to the employees employed at the time who will be covered by the agreement; and*

the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

[26] In dealing with the issue of the explanation required under s.180(5)(a), paragraph 8 of the Statement provides, relevantly:

8. Section 180(5)(a) of the Fair Work Act requires the employer to take all reasonable steps to explain the terms of a proposed enterprise agreement, and the effect of those terms, to employees employed at the time who will be covered by the agreement. This should include at a minimum explaining to employees how the proposed agreement will alter their existing minimum entitlements and other terms and conditions of employment. In explaining this, subject to paragraph 9:

(a) where a proposed enterprise agreement will replace an existing enterprise agreement—it will generally be sufficient to explain:

(i) the differences in entitlements and other terms and conditions between the proposed agreement and the existing agreement, and

(ii) the differences in entitlements and other terms and conditions between the proposed agreement and any applicable modern award provisions that have been varied since the existing agreement was made (including award variations that have not yet come into effect)

[27] Paragraph 9 of the Statement provides:

9. In explaining to employees how the proposed enterprise agreement will alter their existing minimum entitlements and other terms and conditions of employment, there is usually no need to explain trivial differences between the proposed agreement and an existing enterprise agreement or modern award that have no effect on employees' entitlements or obligations.

[28] In some cases, there is little or no material difference between the matters in the current and proposed agreements that are not dealt with in the comparison document. For example, the terms of the respective agreements relating to employee access to the agreement are in substantially similar terms. In other instances, the differences are material. The Agreement introduces a three-level classification structure as opposed to the six-level structure in the existing agreement. The current agreement contains a clause dealing with how employees might progress through the classification levels. The proposed agreement does not. The existing agreement includes detailed provisions relating to trainees.[4] The proposed agreement refers to trainee rates of pay (at clause 3.2.1) but does not contain any wage rates or other terms relating to trainees. The loaded rates of pay set out in appendix 1 of the Agreement are to be worked within certain percentage parameters by reference to particular working days, except by mutual agreement, in accordance with appendix 5 of the Agreement. There is no directly equivalent provision in the current agreement although there is a review mechanism provided for in clause 3.2.5 and appendix 2. For part-time employees, under the existing agreement the employer can extend the working hours for part-time employees provided the limitations in clause 4.1.2(a) to (e) are met. The employer is required to first seek volunteers before an extension is

implemented. Under the proposed agreement, the employer can extend (or reduce) the hours of part-time employees on an ongoing basis provided a written agreement is obtained and in which case the restrictions in clause 4.1.2 do not apply.

[29] In *CFMMEU v. Ditchfield Mining Services*[5] the Full Bench summarised the principles derived from the Federal Court decision in *One Key*[6] in relation to the requirements of s.180(5). The Bench said that whether an employer has complied with the obligation in s.180(5) depends on the circumstances of the case. They said that the focus of the enquiry as to whether an employer has complied involves looking at the steps taken to comply, and then considering whether (a) the steps taken were reasonable in the circumstances; and (b) whether these were all the reasonable steps that should have been taken in the circumstances. The Bench noted that the object of the reasonable steps that are to be taken is to ensure that the terms of the agreement, and their effect, are explained to relevant employees in a manner that considers their particular circumstances and needs. This requires attention to the content of the explanation given.

[30] The oral explanation of the effect of the proposed agreement was given to employees on 22 and 23 November 2023. There was no evidence of a further oral explanation being given after the terms of the Agreement were "finalised" in January 2024 and when the employees ultimately voted to approve the Agreement on 14 March 2024. The written explanation, being the PowerPoint presentation and the comparison document were provided to employees on 23 November 2023. That written explanation did not in my view, adequately explain the terms and the effect of the terms and the evidence as to the oral explanation is not sufficient to conclude that the totality of the explanation was sufficient to satisfy s.180(5).

[31] The circumstances of this matter also involve a departure from the usual situation in which an agreement is being voted on to replace either the terms of a modern award[7] or an existing agreement which would continue to apply unless the proposed agreement is made and approved.[8] The employees are covered by the existing agreement. At the time the Agreement was voted on, there was an application on foot to extend the default period of that agreement. It was not known whether that application would be successful or if so, how long the term of the existing agreement might be extended for. As it turned out, on the day after the vote, the existing agreement was extended until 6 June 2024. In those circumstances I consider that a reasonable explanation for the purposes of s.180(5) would include an explanation as to the effect of the terms of the Agreement on the basis that the Agreement might ultimately displace the terms of the Award rather than the existing agreement. Whilst the comparison document contained information about how the proposed agreement compared with the Award in some respects, the Form F17B acknowledged that there were many terms provided for in the Award that were omitted from the Agreement, a number of which were not dealt with in the comparison document at all.

[32] In *Construction, Forestry, Maritime, Mining and Energy Union v Mechanical Maintenance Solutions Pty Ltd*[9] the Full Court of the Federal Court reinforced the principle that satisfaction about what is "reasonable" does not require that every one of the steps in the "*universe of reasonable steps*" be taken but rather, the exercise involves an evaluative assessment of the steps taken as a whole.[10] Having regard to the evidence, I am not satisfied that all reasonable steps have been taken by the Applicant in accordance with s.180(5) of the Act. I am unable to conclude that the Agreement has been genuinely agreed to by the employees as required by s.186(2)(a).[11]

[33] Given my conclusions in paragraphs [16], and [32] above, it is unnecessary for me to deal with the remaining issues.

[34] The application is dismissed.

DEPUTY PRESIDENT

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[1] [2024] FWCFB 149.

[2] Form F16

[3] Section 186(1).

[4] Clause 3.4.1 and Appendix 1.

[5] [2019] FWCFB 4022. See also *The Australian Workers' Union v Rigforce Pty Ltd* [2019] FWCFB 6960.

[6] *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd* (One Key Workforce (No 1)) (2017) 270 IR 410.

[7] See s.57.

[8] See ss. 52 and 54.

[9] [2022] FCAFC 15.

[10] Ibid at 169].

[11] See s.188(4A).