DECISION

Fair Work Act 2009
s.185 - Application for approval of a single-enterprise agreement

NSW Electricity Networks Operations Pty Limited T/A TransGrid
(AG2017/6323)

COMMISSIONER MCKINNON MELBOURNE, 24 APRIL 2018

Application for approval of the TransGrid Employees Agreement 2016.

Introduction

[1] Application has been made for approval of a single enterprise agreement known as the *TransGrid Employees Agreement 2016* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act) by NSW Electricity Networks Operations Pty Limited T/A TransGrid (Transgrid).

[2] The application is supported by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), the Australian Municipal, Administrative, Clerical and Services Union (ASU) and the Association of Professional Engineers, Scientists and Managers, Australia (APESMA). The Community and Public Sector Union (CPSU) does not support the application and has concerns about the validity of Schedules B and C to the Agreement.

[3] The relevant award for the purposes of the better off overall test is the *Electrical Power Industry Award 2010*[1] (the Award). The Award is not incorporated into the Agreement.

National Employment Standards

[4] The Agreement contains a term at clause 16.5 dealing with abandonment of employment, which may be inconsistent with the National Employment Standards (NES) in relation to notice of termination of employment. No other terms of the Agreement appear to contravene section 55 of the Act. Transgrid has given an undertaking to address the concern.[2]

[1] MA000088

[2] Applicant's Response filed with the Commission on 4 April 2018, Schedule 1

[5] The Agreement does not appear to define employees as shiftworkers for the purposes of the NES as required by section 196(2). Transgrid will be given an opportunity to address the concern by way of submissions and/or undertakings.

Better off overall test

[6] The Agreement contains a range of more beneficial terms than the Award, including reduced ordinary hours of work, rates of pay that are higher than the Award by 30.34% (salary point 2) to 180.85% (salary point 40), superannuation (15%), redundancy and outplacement services, allowances, leave entitlements and access to training.[3]

[7] There are also less beneficial terms including in relation to redundancy, breaks, span of hours and certain allowances, excessive leave, leave for training and the supported wage system. The benefits of the Agreement for Occupational Health Nurses appeared limited but Transgrid has since clarified that the relevant terms are in the nature of a higher duties allowance. The Agreement provides for time off in lieu of overtime but it is not clear whether there is an entitlement to payment on termination if accrued time off has not been taken.

[8] Except for the issues in relation to Schedule B and C to the Agreement discussed below, I am satisfied on balance that employees under the Agreement will be better off overall compared to the Award.

Other approval requirements

[9] Other matters about which I must be satisfied are set out in Divisions 4 and 5 of Part 2-4 of the Act. Those are dealt with in turn.

[10] On the material before me, and except in relation to Schedules B and C to the Agreement, I am satisfied that the various requirements of section 188 have been met and that the Agreement was genuinely agreed.

[11] No issue as to the group of employees who will be covered by the Agreement has been raised or identified. On the material before me, I am satisfied that while the Agreement does not cover all employees of Transgrid, the group of employees it will cover were fairly chosen.

[12] There is no suggestion that the Agreement contains any designated outworker terms and I am satisfied that it does not.

[13] The Agreement contains a nominal expiry date that is no more than 4 years from approval.

[14] The Agreement contains a dispute settlement term that meets the requirements of the Act. However, Schedules B and C to the Agreement narrow the operation of the dispute settlement term for particular groups of employees to matters arising under the "EA" which I read as a reference to the Agreement. This does not meet the requirements of the Act, which

[3] Form F17 filed with the Commission on 14 December 2017, Annexure E

requires dispute settlement terms to deal with matters arising under both the Agreement and the NES. Transgrid has provided an undertaking to address the concern.

[15] No scope order is in operation in relation to the Agreement and the question of whether approval of the Agreement would be inconsistent with, or undermine, good faith bargaining is not relevant to the application.

[16] The Agreement contains a flexibility term at clause 10 as required by section 202 of the Act.

[17] The consultation term does not invite employee views in relation to changes of rosters and hours of work. The model consultation term will be taken to apply as a term of the Agreement under section 205(2) if the Agreement is approved.

[18] No other issue in relation to the Agreement has been raised or identified. Except in relation to Schedules B and C to the Agreement, on the material before me I am satisfied that each of the relevant matters set out in s.186 and s.187 of the Act which condition the exercise of the power to approve the Agreement have been satisfied.

IEAs - Schedules B and C to the Agreement

[19] Schedules B and C to the Agreement deal with Individual Employment Agreements (IEAs).

[20] A Schedule B IEA is an agreement entered into between Transgrid and an employee employed between salary points 30-34. The IEA changes the way the Agreement applies to a particular employee. It is optional for existing employees and any offer of an IEA must be without duress or undue influence, but new employees can be required to enter into an IEA. An employee can elect to cancel an IEA and revert to the Agreement if the IEA has been in force for a period of between 3 and 18 months, but not otherwise. Two weeks' notice of reversion is required. An IEA cannot be cancelled with retrospective effect.

[21] A Schedule C IEA is similar to a Schedule B IEA but is mandatory for employees on salary points 35-40 who were not on an IEA at the time the Agreement was made. There is no ability to cancel or opt-out of an IEA once made.

[22] An IEA under both Schedules B and C:

- must be in writing and signed by the parties, with a copy provided to the employee;
- is read and interpreted in conjunction with the Agreement but prevails to the extent of inconsistency;
- must leave an employee better off on an overall basis when compared to the Award;
- provides for no more than 35 ordinary hours per week averaged over four weeks and worked between Monday and Friday;
- provides for remuneration that is no less than the relevant Agreement salary point, inclusive of fixed allowance and compensation for up to 6 hours overtime per week;
- promises an annual market review of remuneration, but not so as to result in remuneration that is less than the relevant Agreement salary point;
- does not attract the pay increases under the Agreement; and

- terminates and is replaced (by agreement under Schedule B) when an employee moves from one job to another in a relevant salary point.

[23] Employees who agree to an IEA remain covered by the Agreement but its terms apply in a more limited way.

[24] Terms of the Agreement that apply to an employee on an IEA are terms dealing with parties, application and operation, objectives, consultation, work health and safety, environment, no extra claims, voluntary redeployment/redundancy, individual flexibility agreements, calculation of service, leave entitlements and accident pay, disputes relating to matters arising under the IEA and Christmas shutdown.

[25] Terms of the Agreement that are not intended to apply to employees on an IEA include terms dealing with salaries and allowances, classifications, forms of employment, alternative forms of engagement, terms of employment, hours and work patterns, shift work and overtime, meal breaks, higher grade work and pay, clothing and tools, standby and on call, travelling time and fares and public holidays and picnic day.

[26] The CPSU says IEAs are unlawful and repugnant to the Act because:

1. IEAs are contrary to the objects of the Act and in particular, objects 3(c) and (f) which emphasise collective, rather than individual, bargaining;
2. Transgrid has no authority or legal capacity to create a type of industrial instrument that is not within the scope of the law;
3. The Agreement can only be varied in accordance with the Act (either under a flexibility term; in the case of incorporated material which applies "as varied from time to time"; or under Division 7 of Part 2-4 of the Act if the Commission approves a variation of an enterprise agreement).[4] Transgrid cannot create a mechanism such as the IEA which provides for variation other than in accordance with the Act;
4. IEAs are not consistent with flexibility terms required under section 202 of the Act;
5. The Agreement was not genuinely agreed because employees were not given a copy of the IEA during the access period as required by section 180(2) of the Act.

[27] The CPSU relies on legal advice identifying concerns about the validity of IEAs and whether the Commission could assess the better off overall test in relation to the Agreement in circumstances where IEAs take precedence over the Agreement to the extent of inconsistency.[5]

[28] In response, Transgrid says that Schedules B and C are valid but if they are not, that is not an impediment to approval of the Agreement. It says the Agreement contains a flexibility term at clause 10 that meets the requirements of the Act and that enterprise agreements can also provide for different forms of flexibility by individual agreement, such as common terms

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[4] *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2016] FCAFC 122; *Toyota Motor Corporation Australia Ltd v Marmara* [2014] FCAFC 84

[5] *Commonwealth Bank of Australia v Finance Sector Union* [2007] FCAFC 18

providing for substitution of public holidays. It says IEAs are not incorporated into the Agreement and did not need to be provided to employees during the access period. Finally, it says the Agreement passes the better off overall test including when Schedules B and C to the Agreement are taken into account.

Validity

[29] It is convenient to deal with the question of validity first. I am not satisfied that it is within power for me to reach a concluded view on the validity or enforceability of Schedules B and C to the Agreement. In dealing with an application for approval of an enterprise agreement, the various matters about which I must be satisfied are those set out in Divisions 4 and 5 of Part 2-4 of the Act (addressed above). The Agreement will still be an enterprise agreement for the purposes of the Act even if Schedules B and C are invalid and of no effect [6] That being the case, if the requirements for approval of the Agreement are met, I must approve the agreement.[7]

Flexibility term

[30] Schedules B and C are similar in concept to the model flexibility term which is derived from section 202 of the Act and set out at Schedule 2.2 to the *Fair Work Regulations 2009*. However, the Schedules are different to the statutory scheme in the ways identified by the CPSU, including because for some employees they can be made a condition of employment and because the ability to terminate IEAs is constrained.

[31] The Act requires the Commission to be satisfied that the Agreement contains a flexibility term. As noted above, clause 10 is a flexibility term for the purposes of the Act. Whether or not Schedules B and C also meet that description is not necessary to decide.

Genuinely agreed

[32] The CPSU says the Agreement was not genuinely agreed because IEAs are incorporated into the Agreement and were not given to employees during the access period for the Agreement as required by section 180(2).

[33] Transgrid says that IEAs are not incorporated into the Agreement. In my view, that must be the case because the existence of IEAs made under Schedules B and C depends firstly, on the Agreement being approved and secondly, on an IEA being developed for, and offered to, a particular employee. With the exception of future variations to existing documents, for which express provision in the Act has been made[8], one cannot incorporate material that does not exist. I am not satisfied that IEAs are incorporated as terms of the Agreement.

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[6] *Fair Work Act 2009* (Cth), section 253

[7] *Fair Work Act 2009* (Cth), section 186(1)

[8] *Fair Work Act 2009* (Cth), section 257

[34] I have no other reasonable grounds for believing that the Agreement was not genuinely agreed to by the employees. Accordingly, I am satisfied that the Agreement was genuinely agreed to by the employees covered by its terms.

Better off overall test

[35] Transgrid describes IEAs as a form of annualised salary arrangement where an employee's various remuneration components under the Agreement are 'rolled up' into one salary. It says employees must be better off overall under an IEA than under the Award and proposes an undertaking that employees will be better off overall than under the Agreement. By any measure, and with particular regard to rates of pay, Transgrid says I can be satisfied that the Agreement passes the better off overall test.

[36] The difficulty with characterising IEAs as a form of annualised salary arrangement is that the scope of IEAs is potentially much broader than that. An IEA would displace a number of substantive terms in the Agreement including salaries, allowances and classifications as well as terms dealing with forms of employment or engagement, when and how hours of work and breaks are taken and paid for, as well as clothing, tool and travel arrangements.

[37] While ordinary hours are capped at 35 ordinary hours per week, Monday to Friday, over a four week period and remuneration will be no less than the Agreement salary point plus fixed allowances and "up to" 6 hours overtime per week, there is otherwise no limit on the content of an IEA. An employee can be required to work any amount of overtime without additional compensation under the Agreement, because the overtime provisions of the Agreement will not apply. Additional matters can be regulated by the IEA and even those matters that continue to be regulated by the Agreement can be displaced because the IEA prevails to the extent of inconsistency.

[38] IEAs are intended to apply to employees who earn more than $124,290.40 gross (salary point 30) and up to $173,986.80 gross. The highest annual wage under the Award is $74,422.40 gross (Level 11 - $1431.20 per week x 52).[9] Initial modelling suggests that factoring for Award meal, tool, power station and transmission allowances, a salary point 30 employee under the Agreement will earn more under the Award if they work 50 or more hours per week, including 37.5 ordinary hours and 12.5 hours overtime.

[39] Whether the prospect of an employee working 50 or more hours per week is realistic in the circumstances, or whether $124,290.40 is indeed the minimum salary to apply to employees under an IEA who may be compensated for up to 6 hours overtime per week is unclear. The point is that as currently expressed, the terms of an IEA are not readily ascertainable and that creates difficulties for how to assess the better off overall test in relation to them.

[40] The concern may not arise for employees on salary point 34 and above who earn at least $142,173.20 gross. At the test time, that amount was above the high income threshold.[10]

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[9] *Power Industry Award 2010* [MA000088], clause 17

[10] *Fair Work Act 2009* (Cth), section 329

While the Award may cover the employees, it will not apply to them.[11] On that basis, my preliminary view is that employees at salary points 34 and above will be better off overall under the Agreement notwithstanding the terms of Schedule B and C. However, as this has not previously been raised with the parties, an opportunity for submissions on the matter will be provided.

[41] For employees on salary points 30 to 33, Transgrid will be given an opportunity to give any undertakings it wishes to make in order to ensure that the content of an IEA can be known with a sufficient degree of certainty, so that the better off overall test can be assessed.[12]

Unlawful terms

[42] Section 194(ba) of the Act makes unlawful a "term that provides a method by which an employee or employer may elect (unilaterally or otherwise) not to be covered by the agreement." Transgrid says Schedules B and C are not 'opt out terms' because employees who enter into an IEA remain covered by the Agreement.

[43] The CPSU did not address the issue other than generally in its submission that Schedules B and C are repugnant to the scheme of the Act.

[44] I accept the submission of Transgrid that the concepts of "covers" and "applies" in relation to enterprise agreements are different and that an enterprise agreement can cover an employee in circumstances where it does not apply. As Transgrid submits, Schedules B and C to the Agreement purport to have the effect that employees who enter into an IEA remain covered by the Agreement although many of its terms will not apply and the IEA will prevail over the Agreement to the extent of inconsistency. The interaction between an IEA and the Agreement conceptually permits an IEA to displace even those Agreement terms that will otherwise apply. The question is to what extent it can do so. If, apart from coverage, none of the Agreement terms apply to a particular employee, is the Agreement actually expressed to cover them?

[45] It may be that undertakings offered in relation to the better off overall test will address the concern by providing greater certainty as to the content of IEAs. In any event, an opportunity will be provided for Transgrid to give any undertakings it considers appropriate to ensure that an IEA cannot operate as an 'opt out' term.

[46] Except for the issue identified above, I am satisfied that the Agreement does not contain unlawful terms.

Conclusion

[47] I am satisfied that the written undertakings provided by Transgrid are necessary to address a number of the concerns identified above. I am also satisfied that they will not cause financial detriment to any employee covered by the Agreement or result in substantial

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[11] *Fair Work Act 2009* (Cth), section 47(2)

[12] *Commonwealth Bank of Australia v Financial Services Union of Australia* [2007] FCAFC 18 at [172]

changes to the Agreement. The views of the bargaining representatives have been sought in relation to the undertakings and while the undertakings did not go far enough to address the CPSU's concerns about Schedules B and C to the Agreement, no other concerns were expressed.

[48] Directions will be issued separately for the filing of final submissions and/or undertakings in relation to the Agreement, dealing with:

- a definition of 'shiftworker' for the purposes of the NES (section 196(2));
- application of the better off overall test for employees on IEAs (salary points 30-33);[13]
- relevance of the better off overall test to employees on IEAs (salary points 34 and above) who earn more than the high income threshold; and
- the ability for IEAs to operate as 'opt out' terms.

COMMISSIONER

Appearances:

M Follett of counsel for the Applicant

B Stephens for the Community and Public Sector Union

Hearing details:

2018.
Melbourne:
April 17.

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[13] *Commonwealth Bank of Australia v Financial Services Union of Australia* [2007] FCAFC 18 at [172]