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Bench reserves on Coles Supermarkets appeal

Tuesday, October 13, 2015, 4:58pm

An FWC full bench today reserved its decision on a challenge to the approval of the Coles/Bi-Lo supermarkets agreement, after hearing that up to 50,000 employees could be financially disadvantaged under the deal, which covers more than 77,000 workers.

Counsel for a part-time Coles worker in Queensland, Duncan Hart, told a full bench hearing today that these workers could be up to 15% to 20% worse off under the new agreement, as its benefits did not make up for the shortfall.

The written submissions by Hart's barrister, Siobhan Kelly, argued that one clause provided that part-time workers who voluntarily accepted overtime would be paid at the casual rate.

However, the submissions argued that another clause said the overtime rates for part-time employees were only paid after the employee had worked more than 38 hours per week.

Taken together, the clauses provided a "clear detriment" to part-time employees, but they were not drawn to the Commission's attention.

Kelly argued that there was nothing in Commissioner Geoff Bull's decision to approve the agreement to indicate he considered the effect of these clauses when assessing whether it passed the BOOT.

She said that Coles had provided sample rosters for Commissioner Bull during the approval process but they were not representative of typical work patterns.

The AMIEU also raised concerns about the agreement, which was approved after undertakings from Coles.

But there was evidence the agreement would disadvantage about 40% of employees at the Coles supermarket in Benalla in central Victoria and about 66% in suburban Northcote, according to Hart.

Hart told the tribunal he had read media reports of an analysis of the Coles agreement by an official with the NTEU, John Cullinan, who is now working on his appeal.

The tribunal heard today that Cullinan took annual leave for today's hearing.

Kelly argued that the full bench — Vice President Graeme Watson, Vice President John Kovacic and Commissioner Julius Roe — should grant leave to appeal Commissioner Bull's ruling on the grounds of public interest, because the agreement was not properly explained to employees nor the tribunal.

She said that analysing the agreement was complex, with some 16 possible combinations of overtime and allowances.

She rejected Coles and the SDA questioning of the role being played by Cullinan.

"That's a matter some might say ought to be commended, not criticised."

However the barrister for Coles, Stuart Wood QC, argued that the application for permission to appeal should be struck out as an abuse of process.

Wood argued that the "true appellant" was a "stranger" in the proceedings, Cullinan, who was "piggybacking" on Hart because he did not have legal standing.

He quoted from Facebook message between the two men, in which Cullinan asked if Hart would come "on board" with an appeal.

Wood said the Commissioner Bull had correctly made his decision based on the evidence before him, but Hart's case was seeking to introduce substantial new evidence.

He said Coles was "very unlikely" to agree to further undertakings, meaning that perhaps 90% of Coles employees would be covered by a 2011 enterprise agreement which had the same penalty rate structures but lower rates of pay.

While Coles conceded there was an arguable case that the new agreement did not meet the BOOT, the SDA made no such concession.

Counsel for the SDA, Warren Friend QC, argued that Hart had not identified any demonstrable fault in the original decision.

He said Commissioner Bull applied "orthodox procedure" in approving the agreement, while the analysis was based on many assumptions, while failing to take into account other benefits.

In a statement tendered to the hearing, Hart says he is a former SDA delegate who founded a group called SDA members for gay equality.

Hart also says he is a member of Socialist Alternative who writes for the publication *Red Flag*.

The AMEIU is represented and has sought more time to lodge an appeal against the decision.

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