[2016] FWCFB 2887
FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Duncan Hart
v
Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo
(C2015/4999)
Australasian Meat Industry Employees Union, The
v
Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo
(C2015/6084)

VICE PRESIDENT WATSON
DEPUTY PRESIDENT KOVACIC
COMMISSIONER ROE MELBOURNE, 31 MAY 2016

Appeal against decision [2015] FWCA 4136 *of Commissioner Bull at Sydney on 10 July 2015 in matter number AG2015/1164 – Whether agreement passes the better off overall test – Fair Work Act 2009, ss. 193 and 604.*

Introduction

[1] On 10 July 2015, Commissioner Bull issued a decision arising from an application by Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo (Coles) pursuant to s.185 of the *Fair Work Act 2009* (the Act). 1 In his decision, the Commissioner approved the *Coles Store Team Enterprise Agreement 2014-17* (the Agreement). This decision deals with two appeals arising from that decision.

[2] In a decision issued by the Full Bench on 27 October 2015 2, Coles' application to dismiss Duncan Hart's appeal pursuant to s.587 was dismissed and permission to appeal was granted to Mr Hart on the grounds set out in paragraphs 1-3 of his appeal. In the same decision, the Australasian Meat Industry Employees Union (AMIEU) was granted an extension of time to lodge its application outside the 21 day time limit, and also permission to appeal on the grounds set out in paragraphs 1-3 and 5 of its appeal.

[3] The matters were referred to Commissioner Roe to issue directions and convene a hearing to receive additional evidence led by the parties in relation to whether the Agreement passed the Better Off Overall Test (BOOT). The Full Bench heard final submissions in relation to the appeals on 27 and 28 April 2016.

[4] At the hearing of the matters on 27 and 28 April 2016, Ms S. Kelly, of counsel, appeared for Mr Hart and the AMIEU. Mr S. Wood QC appeared for Coles, with Mr M. Felman of counsel and Mr N. Burmeister of counsel. Mr W. Friend QC appeared for the Shop Distributive and Allied Employees' Association (SDA), with Mr C. Dowling of counsel.

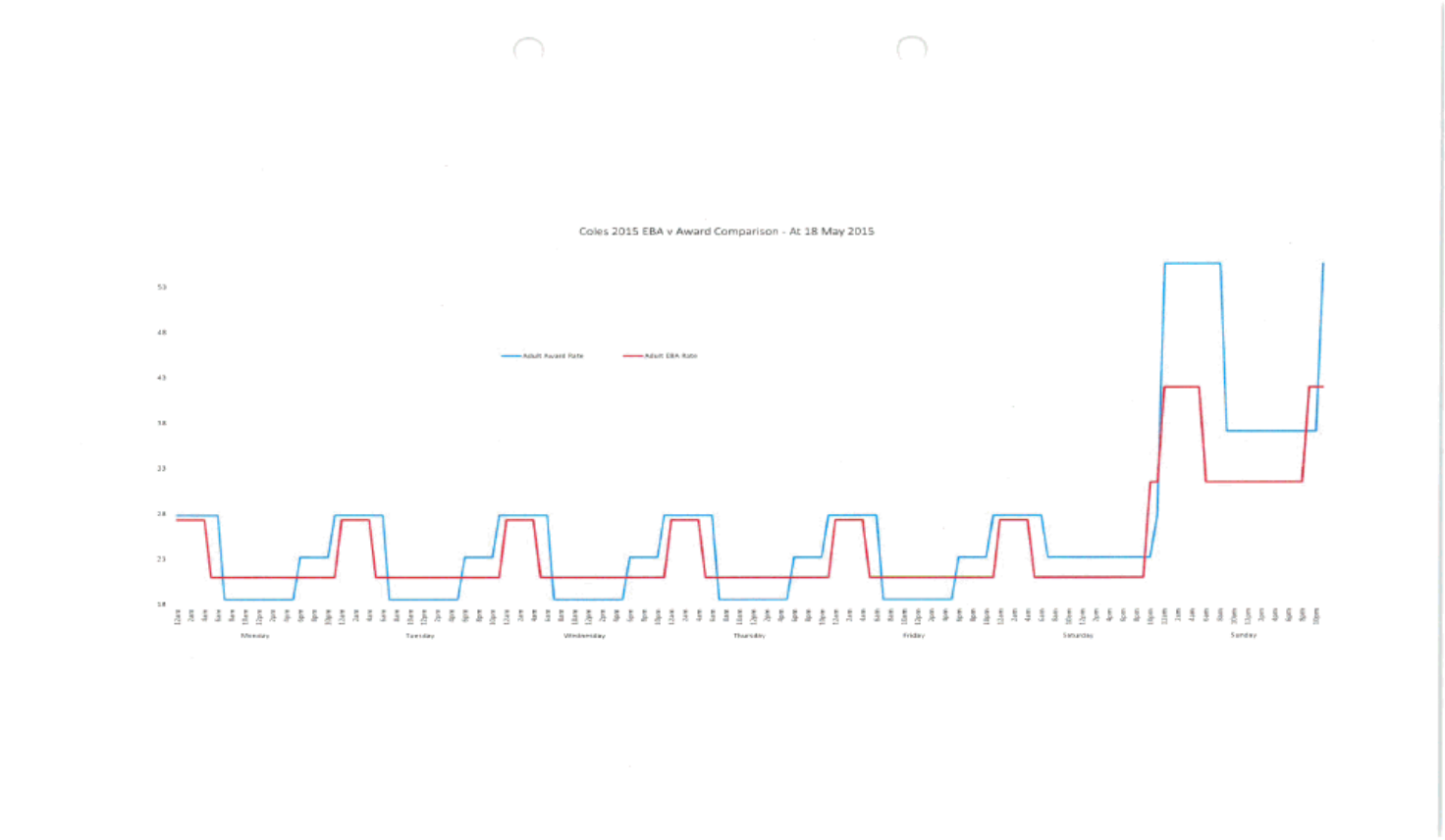
[5] The further evidence led by the parties was as follows:

- Witness statements of Mr Joshua Cullinan dated 15 December 2015 and 1 February 2016;
- Witness statement of Mr Bruno Cecchini, Partner at Ernst & Young, dated 21 January 2016;
- Witness statement of Ms Louise Rolland, Executive Director at Ernst & Young, dated 22 January 2016;
- Witness statement of Ms Kimberley Di Scala, Human Resources Manager – Human Resources and Policy at Coles, dated 21 January 2016;
- Witness statement of Mr David Baker, Executive Manager – Fire & Emergency Management at the Country Fire Authority, dated 20 January 2016; and
- Witness statement of Mr Matthew Gailbraith, National Industrial Officer at the SDA, dated 22 January 2016.

The BOOT

[6] The determination of this appeal requires us to consider, on all of the evidence before the Commission, whether the Agreement passes the BOOT. Section 193(1) of the Act provides that an enterprise agreement passes the BOOT if the Commission is satisfied, at the test time, that each award covered employee, and each prospective award covered employee would be better off if the agreement covered the employee than if the relevant modern award covered the employee. In this case the relevant modern award is the *General Retail Industry Award 2010* 3 (the Award). It is well established that the test requires the identification of terms which are more beneficial for an employee, terms which are less beneficial for an employee, and an overall assessment of whether an employee would be better off under the agreement.4

[7] The parties understandably commenced their analysis with a consideration of the monetary benefits under the respective instruments for working at particular times of the day. The evidence deals with the comparison of payments under the instruments in isolation, as well as the impact of these comparisons on actual employee rosters over the period of the roster. Much of this evidence is non-contentious. In essence, the Agreement provides for a higher hourly rate than the relevant award rate, but applies lower penalty payments for evenings, weekends and public holidays. An example of these differences, considered in dollar terms, is illustrated in the evidence of Mr Cullinan as follows:



[8] For the most part this comparative material is not in dispute except for the calculation of Sunday penalties and the relevant casual loading. In our view, the proper analysis involves considering the award Sunday rate as 200% of the normal rate rather than 300% as assumed by Mr Cullinan. It is appropriate to have regard to the undertakings made by Coles as part of the agreement approval process, and therefore utilise the enhanced casual loading of 25% which Coles has undertaken to pay and now forms part of the Agreement.

[9] For the purposes of the analysis the parties led evidence regarding rosters and earnings comparisons for employees working actual rosters at the Coles Northcote and Benalla stores. Neither of these stores operates on a 24 hour basis, as some other stores do, but they can be regarded as generally representative of operating circumstances and rostering practices at most Coles stores. The data in relation to these stores is therefore a convenient basis on which to apply the BOOT and assess the relative entitlements under the Award and the Agreement from a practical perspective. It would only be necessary to consider other rosters which may be worked under the Agreement in the event that we consider that employees working under the Northcote and Benalla store rosters all pass the BOOT.

[10] Mr Hart and his representatives have selected seven employees from these stores for the purposes of more detailed analysis. It appears that these are the employees who are most disadvantaged on a wages basis because of the particular hours that they are rostered to work. In addition, Mr Hart has subjected his own rosters to the same detailed analysis – a roster issued in May 2015 and a new roster issued in September 2015. Coles had the relevant calculations checked by Mr Bruno Cecchini, a Partner with Ernst & Young. Mr Cecchini prepared a report and gave evidence on those calculations to the Commission. Apart from rounding differences, minor differences in annualising and the limited interpretive differences for Sundays and casuals, there is little difference in the outcomes from the respective analyses.

[11] As one would expect as a matter of simple logic, the more hours that are worked during times when the Agreement rates are higher, the better off an employee will be. Conversely, the more hours worked when the Award rates are higher, the worse off the employee will be compared to the Award. In other words, if an employee works predominantly at nights or on weekends, the higher base rate under the Agreement will be counterbalanced by lower penalties payable under the Agreement at these times.

[12] Utilising the calculations of Mr Cecchini relied upon by Coles, the resultant impact for base wages alone for the seven employees and the two rosters for Mr Hart is as an annual loss of the following amounts:

T	$2,854
JJ	$2,018
U	$3,506
G	$782
Q	$1,476
AA	$3,465
EE	$3,067
DHM	$142
DHS	$2,504

[13] The differential impact can be explained by a more detailed consideration of the particular rosters. The roster worked by employee U was as follows:

Employee U - weekly hours

Days	Award					Agreement				
	100%	125%	200%	OT1*	OT2*	100%	125%	130%	150%	200%
Wednesday 5am-11:30am	4.0			2.0		6.0				
Thursday 5am - 2pm	6.0			2.0		8.0				
Friday 5am-11:30am	4.0			2.0		6.0				
Saturday 5am - 2pm		6.0		2.0		8.0				
Sunday 5am -2pm			4.0		4.0				7.0	1.0

[14] The two rosters worked by Mr Hart show the impact of working more evening and Sunday hours:

Data sourced from the Cullinan Statement.

Duncan Hart - May roster

Days	Award					Agreement				
	100%	125%	200%	OT1*	OT2*	100%	125%	130%	150%	200%
Friday 8:30am to 5:30pm	8.0					8.0				
Sunday 9am to 1pm			4.0						4.0	

Duncan Hart - September roster

Days	Award					Agreement				
	100%	125%	200%	OT1*	OT2*	100%	125%	130%	150%	200%
Thursday 7pm to 11pm		4.0				4.0				
Friday 7pm to 11pm		4.0				4.0				
Sunday 12pm to 6pm			5.5						5.5	

* Under the Award hours worked by part-time employees in excess of the agreed hours, or outside of ordinary hours, will be paid at time and a half for the first 3 hours and double time thereafter (see Clause 29.2). The clause also covers payment on Sundays and public holidays.

[15] It should not be assumed that all employees suffer a disadvantage or that disadvantages are limited to these examples. However the application of the BOOT requires satisfaction, as at the test time, that each Award covered employee and each prospective employee would be

better off overall under the Agreement. Much of the evidence before the Commission focused, appropriately in our view, on those employees who are likely to be among those most adversely affected.

[16] The direct wages comparisons are only part of the necessary analysis. There are other benefits under the Agreement. These include the following benefits which have been termed non-contingent benefits by Mr Cecchini:

- Additional penalties for ordinary hours (clause 4.2.1),
- Rest and meal breaks (clause 4.11.1),
- Payment while on annual leave (clause 5.3.10).

[17] In our view, these benefits can be quantified and should be taken into account. There is a need for some caution however in making the comparisons. For example, the rest and meal break provisions of the Agreement provide for a 15 minute rest break compared to 10 minutes under the Award. This can be seen as an advantage. However, the rest break under the Agreement is only available for shifts of more than four hours, whereas under the Award the rest break is available for shifts of four hours or more. Four of the six shifts worked by Mr Hart under his September roster were of exactly four hours. It is therefore unlikely that the net effect of the differences is a monetary advantage to Mr Hart.

[18] The wage increases available under the Agreement during the period of the Agreement are also a relevant consideration. However, limited account should be taken of this because not all employees at test time will remain in employment during the entire period of the Agreement and the level of future Award increases is unknown. Increases under the Agreement in the period since the Agreement was made have exceeded the increases under the Award.

[19] Further, some other benefits under the Agreement are not necessarily received by all employees. Some are contingent on the choice of the employee such as:

- Pre-approved leave arrangements (clause 2.4.1.b),
- Blood donor leave (clause 5.4.5),
- Defence service leave (clause 5.7.3).

[20] It would not be appropriate to attribute a value to these benefits on the assumption that all employees would access these benefits. Coles submits that it is reasonable to assume that 50% of the benefit of accessing each form of leave once per year is a reasonable basis to value these benefits but provided no probative evidence to substantiate that assumption. In our view, this percentage is too high and overvalues the likely benefit to most employees. There are some groups of employees who will receive no benefit from these provisions; for example those who cannot give blood or who choose not to give blood or those who are not permitted to join the defence reserve or who choose not to join the defence reserve.

[21] Other benefits can be described as contingent on the circumstances that may occur. These include:

- Accident makeup pay (clauses 3.12.1-3.12.2),
- Carer’s leave (clause 5.5.3),
- Compassionate leave (clause 5.6.1),
- Emergency services leave (clauses 5.9.3 and 5.9.6),
- Natural disaster leave (clause 5.13.3),
- Redundancy pay (appendix G1.4.1).

[22] There was no evidence before us of the actual incidence of use of these provisions by Coles employees. Nor was there any evidence of the overall incidence in Australia of matters such as blood donation, joining the defence reserve, or utilising more that the NES standard in respect of carer’s leave. We do not accept that we should value these benefits on the basis that all employees will access them every year.

[23] While we consider it appropriate to have regard to these benefits, we have some reservations about attributing a financial value to them because their take up is highly unlikely to be universal or uniform. However, were a value to be attributed, we consider that the assessment should be based on an assumption of much less than a 10% access to each benefit in each year. Again this is because the benefits will be greater for some groups of employees than others depending upon matters such as age and family circumstances. The scale of the benefits provided by the particular provisions in respect of these matters, with the exception of accident makeup pay, in the Agreement when compared to the Award is generally small.

[24] Various other benefits are almost impossible to quantify but nevertheless should be taken into account. These include the four benefits identified by Ms Louise Rolland, an Executive Director at Ernst & Young in her report arising from various provisions of the Agreement. Those benefits were described by her as follows:

> "i. Support to individual wellbeing (through the provision of entitlements that support work flexibility and surety) reducing the probability of unplanned and premature exit from the workforce ('Enhancing Wellbeing')
>
> ii. Support to undertake activities away from work (such as study) that may lead to increased earning potential ('Supporting Non-Work Activities')
>
> iii. Support to manage incidence of domestic and family violence reducing the likelihood of job loss ('Domestic Violence Support')
>
> iv. Support to manage care responsibilities while maintaining employment, reducing the likelihood of foregoing work hours to fulfill those care responsibilities ('Care Responsibility Support')."

[25] When the capacity to determine and secure working hours and leave to meet study and caring responsibilities provided by the Agreement is compared with the relevant provisions in the Award, there are some aspects of the Award which provide greater flexibility and security for the employee than in the Agreement. Overall we consider the provisions in the Agreement to be beneficial for employees but the level of benefit is not large. We consider that the capacity to use personal leave for domestic violence leave is a benefit in the Agreement.

[26] Coles sought to rely on the quantification of these benefits by Ms Rolland. The values assessed by Ms Rolland amounted to the following amounts with respect to the 7 employees and Mr Hart:

T	$5,727
JJ	$1,429
U	$6,936
G	$7,238
Q	$2,447
AA	$4,310
EE	$2,034
DHM	$3,129
DHS	$3,430

[27] In our view, these values are excessive and overvalue the benefits under the Agreement. We do not accept the assumptions which underpin the calculations. For example, we consider that relative benefits in the Agreement compared to the Award in respect to control of working hours and leave would probably only make a minor difference to the likelihood of:

- a Coles student employee competing a qualification; or
- a Coles employee being able to remain in employment whilst being a carer for others; or
- a Coles employee who is a victim of domestic violence remaining in employment; or
- an older Coles employee avoiding premature exit from employment.

[28] While it is appropriate to take into account these benefits, in our view, the value is not easily quantifiable and is much lower than Ms Rolland has estimated.

[29] Other benefits under the Agreement should be taken into account based on a realistic comparison with the terms of the Award. We have considered the tables of these matters which were provided by Coles, the SDA, and by Mr Hart. There are some benefits and some detriments, but overall the net benefit of matters not otherwise dealt with is small. We also note that provisions of the Agreement, such as payment to part-timers for additional hours worked could amount to a detriment.

[30] We accept the evidence of Mr David Baker that those employees who are volunteers with the Country Fire Authority would value the capacity to access leave which is provided for in the Agreement. However, there is no evidence about the incidence of access to the leave provisions at Coles. There is also no evidence that the leave provisions will affect the number of Coles employees who will remain or become volunteers with the Country Fire Authority.

[31] Much of the evidence of Ms Kimberley Di Scala relates to the policies and practices of Coles rather than to the obligations under the Agreement. However, her evidence does reinforce our view that the Agreement provisions in respect to training leave and expense reimbursement for apprentices should not be interpreted as being less beneficial than the Award.

[32] We accept the evidence of the SDA, through Mr Matthew Gailbraith, as the bargaining representative as to the views of employees is relevant. His evidence was that employees valued the leave and working time control matters which were reflected in the Agreement. However, we also accept that the level of income is also critical for access to study, caring and other life choices.

[33] Taking into account all of these matters we are not satisfied that the Agreement passes the BOOT. For some employees, particularly those who work primarily at times which attract lower penalty rates under the Agreement when compared to the Award, the loss in monetary terms is potentially significant. The potential loss is likely to be of significance for part-time and casual employees. We have considered whether or not the other benefits of the Agreement when compared to the Award can make up for this deficit. We are not satisfied that a consideration of all benefits and detriments under the Agreement results in each employee and each prospective employee being better off overall under the Agreement compared to the Award. It follows that we are not satisfied that the Agreement passes the BOOT.

Consequences of our Conclusion

[34] The parties made submissions about the consequences of a finding that the Agreement did not pass the BOOT. In our view, the failure to pass the BOOT could be remedied by an undertaking that provided for an adjustment in payments to employees who work a sufficiently high proportion of penalty shifts as to suffer a financial disadvantage of the type demonstrated in the selected Northcote and Benalla employees. Such an undertaking would ensure that those employees who are rostered for a proportionately high number of penalty hours have their wages adjusted to ensure that they will not be paid less than the Award in a relevant pay period. Alternatively, an undertaking which limits that number of penalty hours worked by employees, could potentially also address our concerns. It is likely that the undertaking provided by Coles which provides for a reconciliation in certain circumstances can be replaced by the type of undertaking we now propose.

[35] It is not clear that Coles would be agreeable to formulating and giving an undertaking along either of the lines canvassed above, or an alternative approach which addresses our concerns. If Coles is prepared to give such an undertaking it should advise the Commission by 10 June 2016 and a conference before a Member of this Full Bench will be convened. In the absence of an indication that such an undertaking is proposed to be given we will make an order allowing the appeal and quashing the decision approving of the Agreement.

VICE PRESIDENT

Appearances:

Ms S. Kelly, of counsel, on behalf of Mr Hart and the AMIEU.

Mr S. Wood QC, with Mr M. Felman of counsel and Mr N. Burmeister of counsel, on behalf of Coles.

Mr W. Friend QC, with Mr C. Dowling of counsel, on behalf of the SDA.

Hearing details:

2015.

Melbourne.

6 and 13 November.

2016.

Melbourne.

2 February, 27 and 28 April.

Final written submissions:

Mr Hart on 16 February 2016.

AMIEU on 17 February 2016.

Coles on 25 February 2016.

SDA on 25 February 2016.

1 [2015] FWCA 4136.

2 [2015] FWCFB 7090; PR577497.

3 MA000004.

4 *AKN Pty Ltd t/a Aitkin Crane Services* [2015] FWCFB 1833; *Armacell Australia Pty Ltd and others* [2010] FWAFB 9985; *National Tertiary Education Union v University of New South Wales* [2011] FWAFB 5163; *Solar Systems Pty Ltd* [2012] FWAFB 6397.

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<Price code C, PR580134>