FairWork 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

SYDNEY, 27 OCTOBER 2015

Appeal against decision [[2015] FWCA 4136] of Commissioner Bull at Sydney on 10 July 2015 in matter number AG2015/1164 – Application for permission to appeal – Whether arguable case of appealable error – Whether in public interest to grant permission to appeal – Whether circumstances mitigate against granting permission to appeal - Application to dismiss appeal – Extension of time for filing appeal – Fair Work Act 2009, ss. 185, 587 and 604.

Introduction

[1] On 10 July 2015, Commissioner Bull issued a decision arising from an application pursuant to s.185 of the *Fair Work Act 2009* (the Act). The Commissioner approved the *Coles Store Team Enterprise Agreement 2014-2017* (the Agreement). This decision deals with three overlapping applications arising from that decision.

[2] The first application is an application for permission to appeal by Mr Duncan Hart filed on 31 July 2015.

[3] The second is an application pursuant to s.587 of the Act to dismiss Mr Hart's appeal by Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi-Lo (Coles) filed on 1 September 2015.

[4] The third is an application made on 15 September 2015 by the Australian Meat Industry Employees Union (the AMIEU) for an extension of time to lodge an appeal on grounds identical to that of Mr Hart's appeal. The AMIEU's appeal was lodged 46 days after the statutory time limit for lodging appeals against decisions of the Commission had expired.

[5] The applications are overlapping because Coles submits that as an alternative to dismissing the appeal the Commission should not grant permission to appeal in the matter on substantially the same grounds as the grounds to dismiss the matter. Mr Hart opposes the application to dismiss his appeal. The AMIEU also seek permission to appeal if an extension of time is granted to it.

[6] The matter was listed for hearing before Deputy President Kovacic on 10 September 2015 to determine the procedure to address the various applications and to deal with various applications for Orders to Produce. On 10 September 2015, the Deputy President directed that the s.587 application and the issue of whether the Commission ought to grant permission to appeal in the matter be heard initially and that the substantive appeal be deferred pending a determination of the respective applications. The AMIEU application for an extension of time was lodged subsequently.

[7] At the hearing of the matter on 13 October 2015, Ms S. Kelly, of counsel and Mr J. Cullinan appeared for Mr Hart, Mr A. Muller appeared for the AMIEU, Mr S. Wood QC and Mr M. Felman of counsel appeared for Coles. Mr W. Friend QC appeared for the Shop Distributive and Allied Employees' Association (the SDA).

Background

[8] The Agreement approved by Commissioner Bull covers 77,507 employees and replaces six different enterprise agreements. During negotiations there were six bargaining representatives: the SDA, the AMIEU, the Transport Workers' Union (the TWU), the Australian Workers' Union (the AWU) and two employee bargaining representatives.

[9] The union bargaining representatives each filed Statutory Declarations in relation to the Agreement. The SDA, TWU and AWU supported the approval of the proposed Agreement. The AMIEU supported the approval of the proposed Agreement subject to the Commission being satisfied that it passed the "better off overall" test (the BOOT).

[10] On 26 May 2015, Mr Cullinan, who Mr Hart has appointed as his representative in this appeal proceeding, wrote to the Commissioner in a personal capacity and set out various concerns that he had in relation to the proposed Agreement passing the BOOT. He did not provide a copy of this email to Coles and the email does not appear to have been provided to any of the bargaining representatives. During the approval process, Mr Cullinan also made a number of comments on social media about the SDA's involvement in the agreement approval process and the nature of the leadership in that union.

[11] On 9 June 2015, an email was sent by the Commission to Coles and the union bargaining representatives setting out concerns that the Commissioner had in relation to the proposed Agreement passing the BOOT. The correspondence proposed various undertakings to be provided by Coles to ensure that the proposed Agreement passed the BOOT. On 17 June 2015, Coles provided undertakings, in an amended form, to the Commission. The AMIEU

also corresponded with the Commission raising some concerns in respect to the BOOT and with the undertakings provided by Coles.

[12] The Commissioner accepted the undertakings offered by Coles and did not respond directly to the correspondence of the AMIEU.

[13] Mr Hart is an employee of Coles. He was, and remains, a member of the SDA. He was not a bargaining representative during the negotiation processes and did not appoint anyone to be his bargaining representative. Therefore, by virtue of the provisions of the Act, the SDA was his bargaining representative. Mr Hart did not provide any submissions to the Commission in relation to the approval of the Agreement and did not correspond with Coles during the negotiation or approval stages.

The issues for determination

[14] We propose to determine the issues in the following manner. First, we will consider whether a case has been established for permission to appeal based on the grounds of appeal. Secondly, in the event that we are satisfied that there is basis for granting permission to appeal we will consider whether the application should nevertheless be dismissed, or permission be denied because of the circumstances of the Hart appeal. Thirdly, we propose to consider the application for an extension of time in the light of our conclusions on the other matters.

Is there a basis for granting permission to appeal?

[15] Mr Hart submits that it is in the public interest that permission to appeal be granted based on an arguable case of error in relation to an important element of the statutory agreement approval process. He submits that the Commission should exercise its discretion to grant permission to appeal as a substantial injustice would result if the decision on satisfaction of the BOOT is not reconsidered.

[16] Mr Hart submits that the following three reasons establish that permission to appeal is in the public interest:

- The Agreement did not, at the test time, pass the BOOT and this undermines the Act's emphasis on the prescription and enforcement of minimum entitlements of employees;
- A significant issue arises as to the procedural mechanisms by which the Commission conducts its assessment of whether or not a proposed agreement meets the statutory requirements; and
- If Mr Hart's contentions are correct, substantial injustice would accrue to the employees who are covered by the Agreement.

[17] Mr Hart also submits that that there is an arguable case of error in the Commissioner's decision on five grounds. He has foreshadowed leading further evidence on these matters and tendered statements of evidence containing the evidence on which he intends to rely.

[18] First, Mr Hart submits that the Agreement does not meet the requirements of the BOOT contained in s.193 of the Act. He contends that, using an arithmetical assessment of rosters in place at the test times, workers are not better off overall than they would be under the terms of the *General Retail Award 2010* (the Award). Material was filed by Mr Hart alleging that employees are financially worse off under the Agreement than they would be

under the Award. He also submits that there is nothing in the non-pecuniary benefits contained in the Agreement that could counterbalance the negative wage outcome.

[19] Secondly, Mr Hart submits that the Agreement does not meet the BOOT by reason of the operation of clause 4.4.9 of the Agreement, and that the terms and effect of the clause were not drawn to the attention of the Commission at first instance. The clause operates to provide part-time employees who voluntarily accept additional hours to be paid for such hours at the casual rate, with the casual loading applying instead of overtime rates. By operation of clause 4.5.2, overtime rates are paid to part-time employees only after an employee has worked more than 38 hours per week or 144 in a four-week work cycle. Mr Hart contends that the operation of the clauses constitutes a clear detriment to part-time employees under the Agreement. He submits that this detriment was not drawn to the attention of the Commission and there is nothing in the decision of the Commissioner to suggest that the effect of these clauses was considered as part of the assessment of the BOOT.

[20] Thirdly, Mr Hart submits that the Agreement does not meet the BOOT by reason that the undertaking as to the reconciliation process is not capable of satisfying the concern held by the Commission under s.190(1) of the Act. An undertaking was sought by the Commission, and given by Coles, in a modified form, for the provision of a reconciliation process to ensure that the take home pay for any four-week roster cycle under the Agreement is greater than what the employee would otherwise be entitled to receive under the Award. The reconciliation process accepted by the Commissioner applies to non-trades casual and junior employees. The clause requires the request for reconciliation to be made within 28 days of the expiry of the reconciliation period. Mr Hart contends that the undertaking provided does not create any enforceable pay entitlement for the employees, the extent to which the take-home pay must be greater is not specified, and no method of calculation is provided. He further contends that the obligation imposed on Coles is triggered only by the request of an employee and it is difficult to see how Coles will ensure that the take-home pay of affected workers under the Agreement is greater than under the Award. It is for these reasons that Mr Hart submits that a remedial clause that places an onus on the employee to trigger the audit process does not, and cannot, meet a concern that the Agreement does not pass the BOOT. Rather, it provides a remedial framework that is only engaged if invoked by an employee.

[21] Fourthly, Mr Hart submits that the Agreement was not explained to employees and, as a consequence, did not meet the statutory requirement in s.180(5) of the Act. He contends that, while some steps may have been taken by Coles to explain an earlier draft of the proposed Agreement to employees, there is no evidence that the proposed Agreement itself and the comparison to award entitlements was explained to employees. Any evidence that the proposed Agreement was explained to employees is limited to a distribution of a copy of the proposed Agreement with a new cover attached that identified the amendments between the earlier draft and the proposed Agreement. Mr Hart submits that this factor is particularly relevant in circumstances such as these where there is a large diverse workforce and many of Coles' employees are low paid and engaged in semi-skilled work.

[22] Fifthly, Mr Hart submits that the Commission erred by denying procedural fairness to interested persons by failing to hold a public hearing and/or failing to give notice that any person wishing to be heard in relation to the application could be heard by contacting chambers.

[23] The AMIEU supports Mr Hart's submissions.

[24] Coles concedes for the purposes of the hearing on whether the Commission ought to grant permission to appeal that the decision discloses an arguable case of appealable error. Its real grounds for opposing permission to appeal relate to the circumstances of Mr Hart and are dealt with under the next heading below. The SDA does not concede that there is an arguable case of appealable error but otherwise advances similar arguments to Coles which are dealt with further below.

[25] In our view, an arguable case of appealable error has been made out in relation to the first three grounds of appeal. These relate to the application of the BOOT to the Agreement. This is an important test in the approval process and needs to be applied in the correct manner. We are mindful of the large number of employees covered by the Agreement and the evidence foreshadowed in relation to different categories of employees. While the evidence is capable of raising serious questions as to the application of the BOOT, we note that it is as yet untested, it involves various assumptions which may not be correct, and Coles and the SDA have not provided a response to the alleged deficiencies. Further, to the extent that any deficiencies are ultimately established, we note that these matters are likely to be capable of rectification through appropriate undertakings as conceded by Mr Hart and the AMIEU in the proceedings.

[26] We are not persuaded that the fourth ground of appeal establish a case of appealable error. Given our finding in respect to the first three grounds of appeal it is not necessary to consider the fifth ground of appeal.

[27] We turn to consider whether the view we have formed should give rise to a grant of permission to appeal in the light of Mr Hart's circumstances.

Mr Hart's circumstances

[28] Section 587 of the Act relevantly provides that:

> **"587 Dismissing applications**
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> (1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:
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> (a) the application is not made in accordance with this Act; or
>
> (b) the application is frivolous or vexatious; or
>
> (c) the application has no reasonable prospects of success.
>
> Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3-2, see section 399A.
>
> (2) Despite paragraphs (1)(b) and (c), the FWC must not dismiss an application under section 365 or 773 on the ground that the application:
>
> (a) is frivolous or vexatious; or

(b) has no reasonable prospects of success.

(3) The FWC may dismiss an application:

(a) on its own initiative; or

(b) on application."

[29] The application by Coles under this provision of the Act contends that Mr Hart is not the true appellant in this matter but rather that the real appellant is his representative, Mr Cullinan. Coles argues that Mr Cullinan is not a "person aggrieved" by the decision under s.604 and so has no standing to appeal against the decision himself. Coles submits Mr Cullinan is using Mr Hart to pursue a personal agenda in relation to his opposition to the approval of the Agreement, and that in these circumstances the appeal is an abuse of process.

[30] There are a number of bases on which Coles asserts that the true appellant is Mr Cullinan. Coles submits that Mr Hart was not in any way involved in the negotiation for, or approval process of, the Agreement. Coles contends that this occurred in circumstances where Mr Hart knew that negotiations were taking place for the Agreement, had discussions with work colleagues in relation to submitting a log of claims, campaigned for a no-vote, and knew about the approval process. He also contacted Mr Cullinan about it. Coles further notes that notwithstanding these circumstances, Mr Hart did not seek to appoint himself or anyone else as a bargaining representative.

[31] Coles submits that contrary to Mr Hart's lack of involvement, Mr Cullinan displayed a significant interest in the approval process. It contends that this is evidenced by Mr Cullinan making submissions in his personal capacity to the effect that the proposed Agreement did not pass the BOOT and also his comments on social media regarding the approval of the Agreement.

[32] Coles contends that it was Mr Cullinan who initiated contact with Mr Hart about appealing the decision by way of Facebook messages. Evidence was given about correspondence that took place on 12 July 2015 whereby Mr Cullinan asked Mr Hart whether he was still an on-going employee at Coles. Later that day, Mr Cullinan sent a further Facebook message to Mr Hart which read as follows:

> " ... I am thinking about whether an appeal is worthwhile. It would need a Coles staff member to be the Applicant I think."

[33] Coles contends that the preservation of public interest in the administration of justice, and the legal systems and structures in which the courts and tribunals make decisions, outweigh the need for a consideration of the underlying issue itself. Coles further submits that the factors and circumstances which surround the way in which the appeal has been brought to the Commission, and the way in which proceedings before the Commission have transpired, are in favour of the Commission refusing to grant permission to appeal.

[34] Coles submits that the above circumstances warrant either the matter being dismissed or the denial of permission to appeal even assuming an arguable case of error. It submits that the appeal has not been instigated by any of the bargaining representatives. It notes that neither Mr Hart, nor Mr Cullinan, were bargaining representatives for the Agreement and that

no bargaining representative has appealed the decision. In making that submission, it contends that the AMIEU appeal is both out of time and opportunistic. Coles submits that, while an appeal of the decision is not required to be brought by a bargaining representative, in the circumstances of this appeal it is a significant factor. Coles notes that this is particularly significant having regard to the lengthy and difficult negotiations for the Agreement which were punctuated by numerous legal proceedings and protected industrial action. Further reasons it provides in relation to this are: the primacy of the role of the bargaining representative by way of the operation of the objects of the Act (s.171), and the lack of Mr Hart's involvement in the negotiations for the Agreement or the approval processes before the Commission in contrast to Mr Cullinan's significant interest in the matter.

[35] Coles submits that Mr Hart was not in any way involved in the proceedings before the Commissioner that led to the approval of the Agreement and therefore none of the issues raised in the appeal were raised by him below. Coles notes that it is well established that there is public interest in significantly limiting the ability of an appellant to raise issues on appeal that were not properly ventilated at the hearing at first instance. It submits that the actions that Mr Hart has taken during the course of his appeal could have been done before the Commissioner in the matter below. For example, the issues raised in his Notice of Appeal could have been raised before the Commissioner by way of submissions and a hearing before the Commissioner could have been requested.

[36] Coles also submits that the appeal matter raises issues which were not raised by any of the bargaining representatives at first instance and that the hearing of Mr Hart's appeal will require the admission of a significant amount of additional evidence that was not led before the Commissioner at first instance, but was nevertheless available. While the AMIEU had raised some issues regarding the application of the BOOT in the proceedings before the Commissioner, its concerns were limited to loading, penalty rates and overtime rates paid to casual employees, the percentage pay rate for junior employees, and penalty rates for Sunday work. Undertakings were sought from, and provided by, Coles on these matters. The AMIEU responded to the proposed undertakings and claimed that they did not satisfy the Commission's concerns. However, they did not seek to agitate the issues in relation to the BOOT any further and did not seek to tender any evidence or request a formal hearing in relation to its concerns.

[37] Therefore, Coles submits that, in contrast to the limited issues raised in the matter before the Commissioner below, the issues and evidence that would be raised by Mr Hart's appeal are all new, broad-ranging and voluminous. It contends that the matter is an appeal that would bear little, if any, resemblance to the process applied at first instance.

[38] Coles submits that there would be significant prejudice to it in overturning the approval of the Agreement having regard to the surrounding circumstances and the factual matrix that led to its approval. Coles submits that because it immediately commenced to implement changes to the industrial landscape at Coles that resulted from the approval of the Agreement, it would suffer significant prejudice if it was now required to unwind these changes.

[39] The SDA also objects to the granting of permission to appeal to Mr Hart on substantially similar grounds and contends that the allegations of non-compliance with the BOOT are based on erroneous assumption.

[40] Mr Hart concedes that he was not involved in the negotiations for the Agreement. However, he contends that this does not mean that he cannot be a person aggrieved by the decision, nor does it follow that that he is not the true appellant. He submits that given the established system of default bargaining representation contained in the statutory scheme, an overwhelming majority of workers accept their union as their default bargaining representative and that it is unremarkable that he also took this course. Mr Hart further submits that while he was aware of the approval process and its alleged deficiencies, he did not involve himself in the process because he was aware that Mr Cullinan was making submissions in relation to these issues. He contends that he had no reason to consider that these submissions would not be given due consideration by the Commission and that he also believed that the AMIEU would ensure that the Agreement passed the BOOT.

[41] It is readily accepted that Mr Cullinan displayed a significant interest in the approval process of the Agreement. However, Mr Hart submits that this does not support Coles' argument that Mr Cullinan is the true appellant in the matter when considered in light of evidence given by Mr Hart in relation to his purpose and motivation in lodging the appeal.

[42] Mr Hart further contends that substantive contact with Mr Cullinan was initiated by him on each occasion. For example, it was Mr Hart who first initiated contact with Mr Cullinan on 24 May 2015 about a newspaper article that Mr Cullinan had written regarding how Coles employees may be worse off under the proposed Agreement. Further, it was Mr Hart who made contact with Mr Cullinan on 11 July 2015 and posted the words "Well done Josh" on Facebook in response to a newspaper article which quoted Mr Cullinan with respect to the decision.

[43] The Act provides for a right of appeal against any decision of the Commission by a person aggrieved by a decision: s.604. An employee concerned about the effect of an enterprise agreement approved by the Commission has a legitimate interest in exercising that right. Employees have every right to seek guidance and assistance from any person in relation to such matters. We do not consider that there is a basis to strike out the application on the ground that Mr Cullinan, who is not a person aggrieved is a sponsor, supporter or originator of the appeal. Ultimately Mr Hart made the decision to appeal and in doing so he was exercising a right available to him.

[44] We are more concerned about other aspects of the matter. Ordinarily, a party who seeks to exercise a right of appeal should raise issues in the matter before a single member and seek to have those issues considered. A failure to do so may disqualify a person from seeking to advance new arguments in an appeal. There are many policy reasons for this general proposition. These policy considerations may also have application to enterprise agreement approvals. Enterprise agreement making is a difficult and time consuming exercise. In this case, the agreement covers approximately 77,000 employees employed at diverse locations throughout Australia. The processes of commencing bargaining, negotiating an agreement, seeking approval of employees and then seeking approval of the Commission are bound to occur over an extended period. In this case the process took in the order of 18 months. The processes could become unworkable if a person who had a reasonable opportunity to engage in the process, does not engage in the process until the appeal stage, and seeks to overturn the approval of an agreement after it has been approved by employees and the Commission. Permitting an appeal in those circumstances is a public interest consideration.

[45] In this case the public interest criterion is not the only basis for granting permission to appeal. Permission can also be granted if a decision is attended by sufficient doubt to warrant its reconsideration, or whether substantial injustice may result if permission is refused.

[46] The appeal grounds we consider are arguable relate to satisfaction of the BOOT. This is a matter of fundamental importance for an agreement of this nature. It is apparent that the Agreement adopts a different approach to pay and penalties compared to the Award. There are many elements that are more favourable to employees and some which are not. The application of the BOOT requires a consideration of the terms of the agreement in relation to all employees and prospective employees to be covered by it. It appears that material going to this question was sent to the Commissioner by Mr Cullinan, but the Commissioner chose not to consider it. He did of course consider the BOOT in considerable detail, sought the assistance of the internal support Research team and addressed the concerns raised by the parties and sought undertakings from Coles in relation to his concerns. No public hearing was offered or convened prior to the approval of the Agreement.

[47] In the circumstances of this matter, we are of the view that confidence in the agreement approval process would be enhanced if all of the material intended to be relied upon by Mr Hart is considered. This Agreement affects a very large number of employees who could be disadvantaged if the BOOT is not properly satisfied. Although we have assumed that an arguable case of error exists, we cannot form a view about such matters without considering the evidence all parties wish to adduce and allowing it to be tested. To enable such a process to occur we propose to grant permission to appeal and allow the parties to lead such additional evidence as they see fit. A member of this Bench will give directions and convene a hearing to receive that evidence. We would then convene a hearing to determine whether the appeal should be allowed and determine any consequential measures arising from our analysis of the evidence.

Extension of time concerning the AMIEU's application

[48] The AMIEU lodged a Notice of Appeal at the Commission on 15 September 2015, more than 6 weeks outside of the 21 day period prescribed by the *Fair Work Commission Rules 2013* (the Rules). It is first necessary to determine whether the Commission will allow the AMIEU's appeal application to be filed outside of the prescribed 21 day period.

[49] Rule 56(2) provides as follows in relation to appeals against decisions of the Commission:

> "(2) The notice of appeal must be lodged:
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> (a) within 21 calendar days after the date of the decision being appealed against; or
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> (b) if the decision was issued in the form of an order—within 21 calendar days after the date of the order; or
>
> (c) within such further time allowed by the Commission on application by the appellant.
>
> Note: Subsection 598(4) of the Act provides that a decision may be made as an order."

[50] A Full Bench of this Commission said the following in relation to the predecessor to Rule 56:[1]

> "[3] Time limits of the kind in Rule 12 should not simply be extended as a matter of course. There are sound administrative and industrial reasons for setting a limit to the time for bringing an appeal and it should only be extended where there are good reasons for doing so. The authorities[2] indicate that the following matters are relevant to the exercise of the Tribunal's discretion under Rule 12.3(b):
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> - whether there is a satisfactory reason for the delay;
> - the length of the delay;
> - the nature of the grounds of appeal and the likelihood that one or more of those grounds being upheld if time was extended; and
> - any prejudice to the respondent if time were extended.
>
> [4] In broad terms the issue for the Tribunal is whether, in all the circumstances and having regard to the matters set out above, the interests of justice favour an extension of the time within which to lodge the appeal."

[51] This approach has been applied in other Full Bench decisions and we apply it in this matter also.

[52] The AMIEU submits that while the delay is not insignificant, their reasons for the delay and the absence of prejudice are in favour of granting it an extension of time for filing the appeal. The reasons that the AMIEU has relied upon in seeking an extension of time in which to file its appeal are that:

- The AMIEU raised concerns about the Agreement during the course of negotiations and the approval process;
- No public hearing was held at which the AMIEU could continue to press its concerns;
- The AMIEU was unable to adequately resource the appeal during the appeal period because of a pending change in its industrial team;
- The AMIEU was aware that Mr Hart had lodged an appeal;
- The AMIEU resolved to support Mr Hart's appeal but refrain from commencing its own appeal; and
- On 10 September 2015, the AMIEU became aware of the prospect that Mr Hart's appeal would not continue and that an adverse inference might be drawn from their failure to commence a separate appeal and so lodged a separate appeal shortly after to ensure that the areas of concern were put before the Bench.

[53] The AMIEU also relies on the materials filed in Mr Hart's appeal to demonstrate that there is an arguable error in relation to a jurisdictional fact in this matter. It also submits that there is no prejudice to Coles in this matter given the existence of Mr Hart's appeal which is an appeal on substantially similar grounds.

[54] Coles strongly opposes an extension of time being granted. It submits that the reasons for delay provided by the AMIEU are not a satisfactory explanation for the delay and that the AMIEU's appeal is an opportunistic one designed to bolster or replace Mr Hart's appeal. It

states the length of the delay is a significant one and submits that the nature and strength of the grounds of appeal weigh heavily against the Commission extending the time for the AMIEU to lodge its appeal. Coles submits that this is because the Full Bench will be required to consider arguments which were not raised by any of the bargaining representatives below and that the grounds of appeal would also require the Full Bench to admit substantial evidentiary evidence that was not before the Commissioner below. It further submits that Coles will suffer prejudice by reason of the delay in lodging the appeal for reasons outlined above.

[55] The SDA also strongly opposes the granting of an extension of time. It submits that the AMIEU has provided no explanation for the delay other than the fact that it decided not to prosecute the appeal at the time when it could have. It notes that the length of extension required is substantial in circumstances where the AMIEU knew that time was running and had expired. It also notes that the same issues are being agitated in the AMIEU appeal as in Mr Hart's appeal and relies on its submissions made in Mr Hart's appeal as to lack of merit. The SDA further submits that its members would be potentially disadvantaged if the appeal were allowed to proceed and found to be successful. This is because significant wages rises may be found to have been paid wrongly and it is possible that this money may be recouped by the employer. It contends that this uncertainty is a strong factor against granting the extension of time.

[56] A crucial circumstance in this matter is our decision to grant permission to appeal to Mr Hart and provide for a process of considering further evidence relating to the appeal grounds concerning the BOOT. Given that circumstance, there is little prejudice to the parties from granting an extension of time. For these reasons, we allow the Notice of Appeal to be filed outside the 21 day time limit required by Rule 56. The application to extend the time for filing the appeal is granted. We also grant permission to appeal on the same grounds as granted in Mr Hart's appeal.

Conclusions

[57] For the reasons advanced above we grant an extension to the AMIEU to lodge its appeal outside the 21 day time limit. We grant permission to appeal to Mr Hart and the AMIEU on the grounds set out in paragraphs 1-7 of Mr Hart's appeal and paragraphs 1-7 of the AMIEU appeal.

VICE PRESIDENT

Appearances:

Ms S. Kelly, of counsel and Mr J. Cullinan for Mr D. Hart.
Mr A. Muller for the AMIEU.
Mr S. Wood QC and Mr M. Felman of counsel for Coles.
Mr W. Friend QC for the SDA.

Hearing details:

2015.
Melbourne.
13 October.

Final written submissions:

Mr D. Hart on 25 September 2015 and 6 October 2015.
AMIEU on 7 October 2015
Coles on 25 September 2015, 6 October 2015 and 9 October 2015.
SDA on 6 October 2015.

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[1] *Tokoda v Westpac Banking Corporation* [2012] FWAFB 3995.

[2] *Stevenson-Helmer v Epworth Hospital*, Print T2277, 19 October 2000 per Ross VP, Acton SDP and Simmonds C; *Dundovich v P&O Ports*, Print PR923358, 8 October 2002 per Ross VP, Hamilton DP and Eaves C; *SPC Ardmona Operations Ltd v Esam and Organ* (2005) 141 IR 338.