



Menu



Coles thwarts TWU claim for online delivery drivers

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In a big win for supermarket giant Coles, the Federal Circuit Court has ruled that its online delivery drivers are covered by the major retail award, throwing out the TWU's long-running claim that they are employed in the transport industry.

Two years ago, the TWU lodged underpayment claims for two drivers, contending they should have been remunerated under the [Road Transport and Distribution Award](#).

The case was delayed pending related FWC proceedings, but went ahead after the tribunal refused to make a recommendation on which award applied (see [Related Article](#)).

Coles calls the drivers "customer service agents", or CSAs, and requires them to carry out in-store duties as well as their principal delivery role.

Judge Rolf Driver held last Friday that the [General Retail Industry Award](#) applied to the CSAs, finding that they performed their driving tasks "primarily in the context of delivering goods to customers and providing customer service at the customer's premises".

The judge heard that Coles set up the online business in 1999, but that prior to 2010 the company outsourced the delivery function to Linfox and other transport businesses.

In February 2010, it decided to employ the drivers in-house, including some who had worked for Linfox on the online deliveries. One of the TWU's claimants had initially been a Linfox employee, and he gave evidence that the work was no different after he transferred to Coles.

Judge Driver said the issue of the relevant industrial instrument coverage was important "because it impacts significantly on the online business of Coles".

The judge said the background evidence on the move by Coles to employ the drivers "lends support to the appropriate award classification being one that can cater to a flexible role encompassing a range of duties both in the store and at the customer's premises which is fundamentally customer-service focused".

Coles told the judge it considered CSAs to be "an extension of the store", noting that their duties included dealing with queries from customers, taking groceries inside when requested, and processing EFTPOS payments. They were also occasionally required to assemble online orders for delivery by gathering the goods from the stores.

Judge Driver said his job was to examine the "major, substantial or principal aspect of the work performed by the employee".

"That will include consideration of the amount of time spent performing particular tasks, but also the circumstances of the employment and what the employee was employed to do. The question is one of fact to be determined by reference to the duties actually attaching to the position, rather than its title," he said.

The judge said he accepted that the Coles Online business involves "the transport by road of goods", but that it was "equally obvious" that the business is about the sale of goods, "in respect of which road transport is no more than ancillary either to the delivery of the goods sold or to the completion of the sale, or both."

He said the "larger question" was whether CSAs' work is performed in the road transport and distribution industry as defined in the road industry modern award.

Judge Driver said Coles is engaged "principally" in the supermarket sector of the retail industry.

"The substantial character of its business is that it sells supermarket products to retail customers. CSAs are the only Coles employees who perform driving tasks as part of their employment, and perform these driving tasks primarily in the context of delivering goods to customers and providing customer service at the customer's premises," he said.

"The transport functions which support Coles' general business (that is, the transport of goods from suppliers to Coles distribution centres, and from Coles distribution centres to Coles stores) are performed by third party transport operators."

Referring to a similar scenario in the AIRC full bench's *Dyno Nobel* ruling (see [Related Article](#)), the judge said the mere fact that a relatively small number of Coles employees deliver supermarket goods to store customers does not give the business an additional "substantial character" in the transport industry.

SDA agreements not applicable either

Although not required to decide the issue given his ruling on award coverage, Judge Driver said two consecutive SDA enterprise agreements did not cover the CSAs.

He said CSAs did not exist when the 2008 agreement was made, and the 2011 agreement had expressly excluded them.

Model coverage clause applied

The judge also went on to hold that if he had been wrong about the Road Transport award not covering the drivers, the General Retail award would have trumped it in any event.

In the first ruling on the modern award model coverage provision dealing with potentially overlapping application, Judge Driver said the "most appropriate" classification for CSAs was "retail employee level 1", although he said it did not follow that they should be paid at that level.

"I would think that the truck driving skills required of CSAs, which are both central to their role and additional to their usual tasks performed in store by them and other employees, ought to be adequately and appropriately recompensed," he said, suggesting that Level 3 might be the correct pay point.

But he said this was beyond the scope of the proceedings, and the point hadn't been argued.

[Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd \[2014\] FCCA 4 \(28 February 2014\)](#)

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