

NOTICE OF FILING

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Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: NSD542/2020
File Title: MARIA PABALAN v COLES SUPERMARKETS AUSTRALIA PTY LTD
ABN 45 004 189 708
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagoos".

Dated: 15/02/2021 2:48:01 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Defence to Further Amended Statement of Claim

No. NSD542/2020

Federal Court of Australia

District Registry: New South Wales

Division: Fair Work

MARIA PABALAN

Applicant

COLES SUPERMARKETS AUSTRALIA PTY LTD (ABN 45 004 189 708)

Respondent

In answer to the Further Amended Statement of Claim filed 24 July 23 December 2020 (FASOC), the Respondent pleads as follows.

1. As to paragraph 1, it:

- (1) admits that the Applicant purports to bring this proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) on her own behalf and on behalf of the persons described in paragraph 1(2); and
- (2) otherwise does not know and therefore cannot admit the paragraph.

2. It admits paragraph 2.

3. As to paragraph 3, it:

- (1) as to paragraph 3(1):

Filed on behalf of Coles Supermarkets Australia Pty Ltd (ABN 45 004 189 708) (Respondent)
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- (a) admits that, pursuant to cl 4.1 of the *General Retail Industry Award 2010* (as it was called in the Relevant Period) (**Award**) and s 48(1) of the *Fair Work Act 2009* (Cth) (**FW Act**), the Award covered:
- (i) employers throughout Australia in the general retail industry (as defined in cl 3.1) (except employers covered by the other awards listed in cl 4.1); and
 - (ii) employees of such employers in the classifications listed in cl 16 (except employees excluded pursuant to cl 4.2, 4.3, 4.4 or 4.7);
- (b) otherwise denies paragraph 3(1); and
- (2) admits paragraph 3(2).
4. As to paragraph 4, it:
- (1) admits that the Applicant commenced full-time employment with the Respondent at its supermarket at Miranda, New South Wales;
 - (2) says that:
 - (a) the Applicant commenced that employment:
 - (i) on 14 June 2016;
 - (ii) in a position titled Caretaking Customer Service Manager;
 - (iii) pursuant to a written employment agreement dated 1 June 2016, signed by the Applicant on 14 June 2016;
 - (iv) for a Total Fixed Compensation (**TFC**) package of \$66,000 per annum, including salary and superannuation;

(b) the employment agreement relevantly provided that:

- (i) the cash salary component of the Applicant's TFC included compensation for all entitlements, benefits or payments that might otherwise be due under any industrial instrument;

PARTICULARS

Employment agreement, page 1, section headed "Cash Salary".

- (ii) the Applicant's TFC package was paid in full satisfaction of all hours worked;

PARTICULARS

Employment agreement, page 2, section headed "Hours of Work".

- (c) cl 2.2 of the Award provided that the monetary obligations imposed on employers by the Award may be absorbed into overaward payments; and
- (3) by reason of the matters pleaded in subparagraphs (b) and/or (c) above, payments provided for in the Award were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and
- (4) otherwise denies paragraph 4.

5. As to paragraph 5, it:

- (1) says that:

- (a) cl 23.3 of the Award permitted the Respondent to pay the Applicant on a monthly pay cycle;

- (b) the employment agreement relevantly provided that the cash salary component of the Applicant's TFC would be paid monthly;

PARTICULARS

Employment Agreement, page 1, section headed "Cash Salary".

- (2) says that in practice it paid the Applicant the cash salary component of her TFC on or about the 15th day of each month; and
 - (3) otherwise denies paragraph 5.
6. It denies paragraph 6 and says that the first pay period to conclude after the Applicant commenced employment on 14 June 2016 concluded on 30 June 2016.
7. As to paragraph 7, it:
- (1) admits that the Applicant resigned from her employment with the Respondent with effect on 23 September 2019;
 - (2) says that:
 - (a) the Applicant remained in the position of Caretaking Customer Service Manager at Miranda until about 10 November 2016;
 - (b) thereafter, the Applicant held the following further positions, at the following supermarkets, between the following approximate dates:
 - (i) Customer Service Manager at Miranda between 11 November 2016 and 6 August 2017;
 - (ii) Customer Service Manager at Roselands between 7 August 2017 and 4 November 2018;

- (iii) Customer Service Manager at Kirrawee between 5 November 2018 and 18 August 2019;
 - (iv) Caretaking Dairy Manager at Sutherland between 19 August 2019 and 23 September 2019;
- (c) during her employment with the Respondent, the Applicant's TFC increased as follows:
- (i) on 7 August 2017, from \$66,000 to \$70,000;
 - (ii) on 5 November 2018, from \$70,000 to \$71,925;
 - (iii) on 1 April 2019, from \$71,925 to \$75,500; and
- (3) otherwise denies paragraph 7.
8. As to paragraph 8, it:
- (1) admits that each of the positions referred to in paragraph 7(2)(a) and (b) above was:
 - (a) in a supermarket in the general retail industry as defined in the Award;
 - (b) a position, the title of which included the word "manager"; and
 - (c) within the Award classification of Retail Employee Level 6; and
 - (2) otherwise denies paragraph 8.
9. As to paragraph 9, it:
- (1) admits that the Award as amended from time to time applied to the Applicant in respect of her employment with the Respondent;

(2) says that:

- (a) whether the Award applied to a Group Member (as that term is defined in paragraph 1(2) of the ASOC) in respect of their employment with the Respondent at a particular time is an individual issue, not a common issue;
- (b) pursuant to s 57 of the FW Act, the Award did not apply to a Group Member at a time when the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011* or the *Coles Supermarkets Enterprise Agreement 2017* applied to that Group Member; and

(3) otherwise denies paragraph 9.

10. As to paragraph 10, it:

- (1) says that the Applicant was rostered for the hours recorded in the schedule data produced by the Respondent's solicitors to the Applicant's solicitors on 31 August 2020 (**Schedule Data**), save for any agreed variations to those hours from time to time; and
- (2) otherwise denies paragraph 10.

11. As to paragraph 11, it:

- (1) admits that the Applicant was, throughout the period of her employment with the Respondent, a full-time employee within the meaning of cl 11 of the Award; and
- (2) otherwise denies paragraph 11.

12. It denies paragraph 12 and says that from time to time the Applicant chose to work different hours from her rostered hours.

13. It denies paragraph 13 and says further that "ordinary hours" of work were as prescribed by Part 5 of the Award.

14. As to paragraph 14, it:

- (1) admits that during the period in which the Applicant was employed by the Respondent, cl 29.4(a) of the Award provided for a penalty payment of an additional 25% loading to apply for ordinary hours worked by a full-time employee after 6.00pm;
- (2) says that, on a proper construction of cl 29.4(a), that loading applied to minimum hourly rates of pay under the Award;
- (3) says that, by reason of the matters pleaded in paragraphs 17(1)(a), (b) and (c) below, the finishing time for ordinary hours on all days of the week was 11.00pm;
- (4) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the loading referred to in cl 29.4(a) was absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and
- (5) otherwise denies paragraph 14.

15. It denies paragraph 15 and repeats paragraphs 4, 5, 7 and 14 above.

16. It denies paragraph 16 and repeats paragraphs 4, 5, 7 and 14 above.

17. As to paragraph 17, it:

- (1) admits that during the period in which the Applicant was employed by the Respondent:
 - (a) cl 27.2(a) of the Award provided that except as provided in cl 27.2(b), ordinary hours may be worked within the following spread of hours:
 - (i) Monday to Friday, inclusive: 7.00am to 9.00pm;

- (ii) Saturday, 7.00am to 6.00pm;
 - (iii) Sunday, 9.00am to 6.00pm;
- (b) cl 27.2(b)(iii) provided that in the case of retailers whose trading hours extend beyond 9.00pm Monday to Friday or 6.00pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00pm;
- (c) the Respondent was a retailer to which cl 27.2(b)(iii) applied;
- (d) cl 29.2(a) relevantly provided that hours worked outside the span of hours (excluding shiftwork) prescribed in cl 27 are to be paid at time and a half for the first three hours and double time thereafter;
- (2) says that, on a proper construction of cl 29.2(a), the references to time and a half and double time were to 1.5 and 2.0 times the minimum hourly rates of pay under the Award;
- (3) says that, by reason of, initially cl 29.2(d), later cl 29.2(f), overtime was to be calculated on a daily basis;
- (4) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the payments referred to in cl 29.2(a) were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and
- (5) otherwise denies paragraph 17.
18. It denies paragraph 18 and repeats paragraphs 4, 5, 7 and 17 above.
19. It denies paragraph 19 and repeats paragraphs 4, 5, 7 and 17 above.
20. As to paragraph 20, it:

- (1) admits that during the period in which the Applicant was employed by the Respondent, initially cl 29.4(b), later cl 29.4(c), of the Award provided for a penalty payment of an additional 25% loading to apply for ordinary hours worked by a full-time employee on a Saturday;
 - (2) says that on a proper construction of that clause, that loading applied to minimum hourly rates of pay under the Award;
 - (3) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the loading referred to in, initially cl 29.4(b), later cl 29.4(c), was absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and
 - (4) otherwise denies paragraph 20.
21. It denies paragraph 21 and repeats paragraphs 4, 5, 7 and 20 above.
22. It denies paragraph 22 and repeats paragraphs 4, 5, 7 and 20 above.
23. As to paragraph 23, it:
- (1) admits that during the period in which the Applicant was employed by the Respondent, there were clauses of the Award that provided for a penalty payment of the percentage loading set out below for ordinary hours worked by a full-time employee on a Sunday:
 - (a) from the commencement of her employment to 30 June 2017, pursuant to cl 29.4(c): 100%;
 - (b) from 1 July 2017 to 30 June 2018, pursuant to cl 29.4(c): 95%;
 - (c) from 1 July 2018 to 30 June 2019, initially pursuant to cl 29.4(c), later pursuant to cl 29.4(e): 80%;

- (d) from 1 July 2019 to the cessation of her employment, pursuant to cl 29.4(e): 65%;
- (2) says that, on a proper construction of these clauses, that loading applied to minimum hourly rates of pay under the Award;
- (3) repeats paragraphs 4(2)(b) and (c) above and (3) and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the loading referred to in these clauses was absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and
- (4) otherwise denies paragraph 23.
24. It denies paragraph 24 and repeats paragraphs 4, 5, 7 and 23 above.
25. It denies paragraph 25 and repeats paragraphs 4, 5, 7 and 23 above.
26. As to paragraph 26, it:
- (1) admits that during the period in which the Applicant was employed by the Respondent, there were clauses of the Award that provided that:
- (a) work on a public holiday must be compensated by payment of the additional percentage loading set out below for ordinary hours worked by a full-time employee:
- (i) from the commencement of her employment to 30 June 2017, pursuant to cl 29.4(d)(i): 150%;
- (ii) from 1 July 2017 to the cessation of her employment, initially pursuant to cl 29.4(d)(i), then pursuant to cl 29.4(f)(i): 125%;

- (b) alternatively, initially pursuant to cl 29.4(d)(ii), then pursuant to cl 29.4(f)(ii), by mutual agreement of the employee and the employer, the employee may be compensated for a particular public holiday by either:
- (i) an equivalent day or equivalent time off instead without loss of pay, to be taken within four weeks of the public holiday occurring; or
- (ii) an additional day or equivalent time as annual leave;
- (2) says that, on a proper construction of these clauses, that loading applied to minimum hourly rates of pay under the Award;
- (3) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the loading referred to in these clauses was absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and
- (4) otherwise denies paragraph 26.
27. It denies paragraph 27 and repeats paragraphs 4, 5, 7 and 26 above.
28. It denies paragraph 28 and repeats paragraphs 4, 5, 7 and 26 above.
29. As to paragraph 29, it:
- (1) admits that during the period in which the Applicant was employed by the Respondent:
- (a) cl 29.2(a) provided that hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in cl 27 and 28, are to be paid at time and a half for the first three hours and double time thereafter;

- (b) cl 29.3 provided that an employee and an employer may agree to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee;
- (2) says that on a proper construction of cl 29.2(a), the references to time and a half and double time were to 1.5 and 2.0 times the minimum hourly rates of pay under the Award;
- (3) says that, by reason of, initially cl 29.2(d), later cl 29.2(f), overtime was to be calculated on a daily basis;
- (4) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the payments referred to in cl 29.2(a) were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and
- (5) otherwise denies paragraph 29.
30. It denies paragraph 30.
31. It denies paragraph 31 and repeats paragraph 4, 5, 7 and 29 above.
32. It denies paragraph 32 and repeats paragraph 4, 5, 7 and 29 above.
33. As to paragraph 33, it:
- (1) admits that:
- (a) s 535(1) of the FW Act required it to make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees;
- (b) reg 3.34 of the *Fair Work Regulations 2009* (Cth) prescribed that, if a penalty rate or loading (however described) must be paid for overtime

hours actually worked by an employee, a kind of employee record that it must make and keep is a record that specifies:

- (i) the number of overtime hours worked by the employee during each day; or
 - (ii) when the employee started and ceased working overtime hours; and
- (2) otherwise denies paragraph 33.

34. As to paragraph 34, it says that:

- (1) by reason of the matters pleaded in paragraphs 17(4) and 29(4) above, no penalty rate or loading was required to be paid to the Applicant for overtime hours;
 - (2) further, the Respondent made and kept:
 - (a) the Schedule Data; and
 - (b) the data extracted from the Respondent's Kronos system produced by the Respondent's solicitors to the Applicant's solicitors on 31 August 2020 (**Kronos Data**); and
- (3) otherwise denies paragraph 34.

35. As to paragraph 35, it:

- (1) admits that:
 - (a) s 45 of the FW Act prohibited a person from contravening a term of a modern award;

- (b) by operation of s 539, ss 45 and 535(1) were civil remedy provisions for the purposes of ss 545 and 546;
- (2) otherwise denies paragraph 35; and
- (3) says that if, which is denied, it contravened ss 45 or 535(1) as alleged:
 - (a) it intends to rely on ss 556 and 557; and
 - (b) it is entitled to set off the cash salary component of the Applicant's TFC against any liability it has to the Applicant under the FW Act.

36. As to paragraph 36, it:

- (1) says that paragraphs 36, 37 and 38 are liable to be struck out as evasive or ambiguous, as likely to cause prejudice or embarrassment in the proceeding, and as failing to disclose a reasonable cause of action;
- (2) says that:
 - (a) whether a Group Member was entitled to a payment under any of the clauses of the Award referred to in paragraphs 17, 20, 23, 26 or 29 above;
 - (b) whether the Respondent contravened ss 45 or 535(1) of the FW Act in respect of that Group Member; or
 - (c) whether the Respondent is entitled to set off the cash salary component of any Group Member's TFC against any liability it has to that Group Member under the FW Act,

is an individual issue, not a common issue, which cannot be addressed until that Group Member's claims have been properly pleaded and particularised; and

- (3) under cover of that objection, denies paragraph 36.

37. As to paragraph 37, it:

- (1) repeats paragraph 36 above; and
- (2) under cover of that objection, denies paragraph 37.

38. As to paragraph 38, it:

- (1) repeats paragraph 36 above; and
- (2) under cover of that objection, denies paragraph 37.

39. It says further that, to the extent that a person who was a Group Member before the filing of the Further Amended Originating Application (FAOA) and FASOC on 23 December 2020 applies for an order under Part 4-1 Division 2 of the FW Act against the Respondent in relation to an alleged contravention which occurred, or in relation to an alleged underpayment which relates to a period that is, more than 6 years before the filing of the Amended Originating Application and ASOC on 24 July 2020, such a claim is statute barred by operation of ss 544 and 545(5).

40. It says further that, to the extent that a person who became a Group Member upon the filing of the FAOA and FASOC on 23 December 2020 applies for an order under Part 4-1 Division 2 of the FW Act against the Respondent in relation to an alleged contravention which occurred, or in relation to an alleged underpayment which relates to a period that is, more than 6 years before the filing of the FAOA and FASOC on 23 December 2020, such a claim is statute barred by operation of ss 544 and 545(5).

Date: ~~7 October 2020~~ 15 February 2021

Damian Grave

Signed by Damian Grave
Herbert Smith Freehills
Lawyer for the Respondent

This pleading was prepared by Frank Parry QC and Jonathan Kirkwood of counsel

Certificate of lawyer

I, Damian Grave, certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~7 October 2020~~ 15 February 2021

Damian Grave

Signed by Damian Grave
Herbert Smith Freehills
Lawyer for the Respondent