

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 23/12/2020 11:09:19 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
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 Lagos'.

Dated: 23/12/2020 12:05:13 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.



Federal Court of Australia
New South Wales District Registry
Fair Work Division

No. 542 of 2020

Maria Pabalan

Applicant

Coles Supermarkets Australia Pty Ltd
(ABN 45 004 189 708)

Respondent

Further Amended Statement of claim

1. The Applicant ("**Ms Pabalan**") brings this proceeding pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth)
 - (1) for herself, and
 - (2) as the representative of a group constituted by all persons;
 - (a) employed by the Respondent ("**Coles**") at any time within the period of 6 years ending on the date of the filing of the Originating Application herein (the "**Relevant Period**"),
 - (b) in a position
 - (i) in a supermarket in the "general retail industry" within the meaning of that phrase in the General Retail Industry Award 2010 (the "**Award**"),

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- (ii) the title of which was, or the title of which included the word, “manager”, “Coles Services Team Leader” or “Coles Services Team Leader Area Support” (a “**Manager Position**”), and
 - (iii) which was undertaken as a “full time employee” or “part time employee” as those terms are defined in the Award.
- (c) who in any Pay Period in the Relevant Period worked a rostered hour:
- (i) which was on a Monday to Friday on what was for the purposes of the Award an evening,
 - (ii) outside the spread of hours from time to time prescribed in the Award for undertaking ordinary hours, or
 - (iii) on a Saturday, Sunday or Public Holiday; and
- (d) to whom the Award applied in relation to their employment with the Respondent during the Relevant Period,
- (the “**Group**” and a/the “**Group Member/s**”).

2. Coles was at every time material to any claim herein (“**at all material times**”):
- (1) a corporation under the Corporations Act 2001 (Cth), able to sue, and liable to be sued in its corporate name and style;
 - (2) a constitutional corporation within the meaning of s 12 and s 14 of the Fair Work Act 2009 (the “**FWA**”), and
 - (3) a national system employer within the meaning of s 12 and s 14 of the FWA.
3. The Award
- (1) covered throughout Australia any employer engaged in the general retail industry and employees of any such employer,
 - (2) commenced on 1 January 2010, was from time to time thereafter varied and remained in force throughout the Relevant Period,
4. Pursuant to an offer in writing

- (1) from Coles dated 1 June 2016,
- (2) accepted by the Applicant in writing on 14 June 2016,

Ms Pabalan, on 13 June 2016, commenced full-time employment with Coles at its supermarket at Miranda, New South Wales, in a position entitled “Customer Service Manager” (the “**Position**”) at a salary of \$60,274 per annum (the “**Contract**”).

5. The Award permitted, and the Contract required, that Ms Pabalan’s salary and any other monetary entitlements to which she might become entitled to under either the Award or Contract be paid to her on the 15th day of each month (“a **Pay Period**”).
6. The first pay period to conclude after 13 June 2016 concluded on 14 July 2016.
7. Ms Pabalan remained in the Position until the end of the shift commenced by her on 23 September 2019 whereupon she ceased to be employed with Coles (the “**Termination**”).
8. The Position was
 - (1) in a supermarket in the general retail industry as defined in the Award,
 - (2) a Manager Position, and
 - (3) within the Award classification of “Retail Employee Level 6”.
9. The Award as amended from time to time applied to, among others, Ms Pabalan and all Group Members in respect of her or their employment with Coles.
10. On and from 13 June 2016, Ms Pabalan was rostered to work 80 hours on various days from Monday to Sunday, and for varying hours on such days, over a two week roster cycle (the “**Roster**”).
11. In the premises pleaded in 2 to 10 above Ms Pabalan’s was, throughout the period of her employment with Coles a “full time employee” as defined in the Award.

12. Other than when she was for any reason on leave, Ms Pabalan for so long as she was employed by Coles worked the days and hours specified in the Roster as was from time to time operative, including any day that was for the purposes of the Award a "Public Holiday".
13. Throughout the periods in which the Roster operated the hours worked by Ms Pabalan on a day in accordance with the Roster were for the purpose of the Award her "ordinary hours" of work for that day.
14. **The Evening Work Contraventions.** For each Pay Period in the period in which the Roster operated, it was a term of the Award applicable to Ms Pabalan's employment in the Position that for any "ordinary hour" worked by her after 18.00 on any Monday to Friday she would be paid an additional loading of 25% (the "**Evening Work Term/Loading**").

Award cl. 29.4(a)

15. In contravention of the Evening Work Term Coles did not in any Pay Period pleaded in 14 above, in respect of any hour worked by Ms Pabalan after 18:00 on any Monday to Friday, pay her the Evening Work Loading or any part thereof (collectively the "**Evening Work Contraventions**").
16. In respect of each Evening Work Contravention Ms Pabalan suffered loss; the difference between
- (1) what she was paid for each Evening Work hour undertaken by her, and
 - (2) the hourly rate that the Evening Work Term required be paid to her for that hour.
17. **The Night Work Contraventions.** For each Pay Period in the period in which the Roster operated, it was a term of the Award applicable to Ms Pabalan's employment in the Position that ordinary hours worked after 23.00 on any day were to be paid at
- (1) time and a half for the first three hours so worked, and

(2) double time thereafter until the end of the shift that had commenced before or at 23.00,

(the “**Night Work Term/Loading**”).

Award cl. 28.2, cl. 29(2)(a)

18. In contravention of the Night Work Term Coles did not in any Pay Period referred to in 17 above

(1) in respect of any hour worked by Ms Pabalan after 23.00 on any day,

(2) pay her the applicable Night Work Loading or any part thereof,

(collectively the “**Night Work Contraventions**”).

19. In respect of each Night Work Contravention, Ms Pabalan suffered loss; the difference

(1) between what she was paid for each Night Work hour undertaken by her, and

(2) the hourly rate that the Night Work Term required be paid for that hour.

20. **The Saturday Work Contraventions.** For each Pay Period in which the Roster operated it was a term of the Award applicable to Ms Pabalan’s employment as a full-time employee that “an additional 25% loading” would apply for “ordinary hours” worked at any time on a Saturday (the “**Saturday Work Term/Loading**”).

Award cl. 29.4(c)

21. In contravention of the Saturday Work Term, Coles did not in any Pay Period pleaded in 20 above, in respect of any hours worked by Ms Pabalan on a Saturday, pay her the Saturday Work Loading or any part thereof (collectively the “**Saturday Work Contraventions**”).

22. In respect of each Saturday Work Contravention Ms Pabalan suffered loss; the difference between

- (1) what she was paid for each Saturday Work hour undertaken by her, and
- (2) the hourly rate that the Saturday Work Term required be paid for that hour.

23. **The Sunday Work Contraventions.** For each Pay Period in which the Roster operated it was a term of the Award that “ordinary hours” worked at any time on a Sunday

- (1) between 01.01.2010 and 30.06.2017 would be paid an additional 100% loading,
- (2) between 01.07.2017 and 30.06.2018 would be paid an additional 95% loading,
- (3) between 01.07.2018 and the Termination would be paid an additional 80% loading,

(the “**Sunday Work Term/Loading**”).

Award cl. 28.4, cl. 29.4(e)

24. In contravention of the Sunday Work Term Coles did not in any Pay Period pleaded in 23 above pay Ms Pabalan for any hours worked by her on a Sunday the applicable Sunday Work Loading (collectively the “**Sunday Work Contraventions**”).

25. In respect of each Sunday Work Contravention, Ms Pabalan suffered loss; the difference between

- (1) what she was paid for each Sunday Work hour undertaken by her, and
- (2) the hourly rate that the Sunday Work Term required she be paid for that hour.

26. **The Public Holiday Work Contraventions.** For each Pay Period in which the Roster operated it was a term of the Award applicable to Ms Pabalan as a full-time employee that hours worked by her on a Public Holiday

- (1) between 01.01.2010 and 30.06.2017 be compensated by payment at the rate of an additional 150%,
- (2) between 01.07.2017 and the Termination be compensated by payment of an additional 125%,

(the "**Public Holiday Work Term/Loading**").

Award cl. 28.4(d), cl. 29.4(a)

27. In contravention of the Public Holiday Work Term Coles did not in any Pay Period pleaded in 26 above, pay Ms Pabalan for any hours worked by her on a Public Holiday the applicable Public Holiday Loading or any part thereof (collectively the "**Public Holiday Contraventions**").
28. In respect of each Public Holiday Contravention Ms Pabalan suffered loss; the difference between
 - (1) what she was paid for each Public Holiday hour undertaken by her, and
 - (2) the hourly rate that the Public Holiday Term required be paid for that hour.
29. **The Overtime Contraventions.** In each pay period in which her Roster operated it was a term of the Award applicable to Ms Pabalan that any hours worked by her
 - (1) in excess of ordinary hours,
 - (2) outside the space of hours (excluding shift work), or
 - (3) outside the roster conditions prescribed in cll. 27 and 28 of the Award,as required by Coles were overtime to be paid at time and a half for the first three such hours and double time thereafter (the "**Overtime Term/Rate**").
30. Throughout the period in which she was employed, Ms Pabalan was from time to time required by Coles to work hours:

- (1) contiguous to but prior to the commencement of her rostered shift on any day,
 - (2) contiguous to but after the scheduled end of her rostered shift on any day, and
 - (3) after the end of a single contiguous period of work of any day and before the commencement of her next rostered shift (and discontinuously from either period).
31. In contravention of the Overtime Term Coles did not in any Pay Period pleaded in 5 above, pay Ms Pabalan the Overtime Rate or any part thereof for any hour worked by her as overtime (collectively the “**Overtime Contraventions**”).
32. In respect of each Overtime Contravention Ms Pabalan suffered loss; the difference between
- (1) what she was paid for each Overtime hour worked by her, and
 - (2) the hourly rate that the Overtime Term required be paid for that hour.
33. **The Record Keeping Contraventions.** It was a requirement of the FWA in respect of Ms Pabalan as an employee of Coles, that Coles make and retain records of the following:
- (1) the number of overtime hours worked by Ms Pabalan during each day; or
 - (2) when Ms Pabalan started and ceased working overtime hours.
- (the “**Record Keeping Obligation**”)

FWA s 535

Fair Work Regulations

2009 (Cth) cl 3.34

34. Throughout the period in which she was employed by Coles, Ms Pabalan was from time to time required to and did work hours prior to the commencement of and after her rostered shift on any day. In contravention of the Record Keeping Obligation Coles did not in respect of any pay period in which Ms Pabalan worked

time before the commencement or after the end of a rostered shift record the number of overtime hours worked by Ms Pabalan during each day or when Ms Pabalan started and ceased working overtime hours. (collectively the “(the **Record Keeping Contraventions**)”).

35. The conduct of Coles constituting each
- (1) Evening Work Contravention;
 - (2) Night Time Work Contravention;
 - (3) Saturday Work Contravention;
 - (4) Sunday Work Contravention; and
 - (5) Overtime Rate Contravention; and
 - (6) Public Holiday Contravention,

was prohibited by s.45 FWA and, together with the Record Keeping Contraventions, each was by operation of s.539 FWA a civil remedy provision for the purposes of ss. 545 and 546 FWA.

Group Members and their claims

36. Each Group Member was, by reason of

- (1) working a Pay Period
- (2) in the Relevant Period,

one or more hours as described in 1(2)(c) above entitled in respect of any such hour to a payment of one or more of the following

- (3) the Evening Work Loading;
- (4) the Night Time Work Loading;
- (5) the Saturday Work Loading;
- (6) the Sunday Work Loading;

- (7) the Overtime Rate Contravention; and
 - (8) the Public Holiday Loading.
37. Coles did not pay to any Group Member in respect of any hour referred to in 36 any, or any part of any, applicable Loading referred to in 36(3) to (7) above.
38. The omissions of Coles referred to in 36 above was a contravention by Coles of a term of the Award and conduct prohibited by s.45 FWA which has to the extent of the non-payment caused the Group Member loss.

Particulars

Particulars in relation to Group Members' loss or damage will be provided if and when it is necessary for a determination to be made of the individual claims of those Group Members.

Date: ~~23 July 2020~~ 23 December 2020



Signed by Rory Markham
Lawyer for the Applicant

Certificate of lawyer

I, Rory Markham, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 23 December 2020

A handwritten signature in black ink, appearing to be the initials 'RM' followed by a horizontal line.

Signed by Rory Markham
Lawyer for the Applicant