

3 December 2021

UPDATE ON THE COLES UNDERPAYMENT CLASS ACTION
Pabalan v Coles Supermarkets Australia Pty Ltd | NSD 542 of 2020

1. Fair Works Ombudsman Proceeding

What has happened?

- 1.1 On 1 December 2021, the Fair Work Ombudsman (**FWO**) sued Coles Supermarkets Australia Pty Ltd (**Coles**) alleging salaried managers employed by Coles who were covered by the *General Retail Industry Award 2010* were underpaid between 1 January 2017 and 31 March 2020 (**FWO Proceeding**).
- 1.2 The claims made in the FWO Proceeding are almost the same as the claims made in the class action, but there are some differences. We have summarised the key differences in the table below.

	Coles Class Action	FWO Proceeding
Claim Period	6 years (18 May 2014 to 18 May 2020)	3.3 years (1 January 2017 to 31 March 2020)
Penalties Recipient	Seeks that Coles pay penalties to group members who were underpaid	Seeks that Coles pay penalties to the Commonwealth government
Legal Fees	Legal fees will be distributed fairly (and limited under the Court's supervision) across group members who receive money compensation	The FWO is a government organisation and pays its own legal fees
Unrecorded Hours	Seeks compensation for all hours recorded in Kronos, plus all hours not recorded in Kronos that were worked before shifts, after shifts, during lunch breaks, and during days off for the entire 6-year period starting in May 2014	Seeks compensation for all hours recorded in Kronos, plus a flat 1.06 hours in addition to rostered hours for each shift not recorded in Kronos for the 2.5-year period starting in October 2017

What does this mean for the class action?

- 1.3 The Coles Class Action will continue. We welcome the FWO's involvement, and we are glad the FWO has come to the same conclusion that the Applicant and Adero Law did in early 2020 – that Coles has underpaid its salaried managers millions of dollars.
- 1.4 The FWO Proceeding does not directly affect the class action, but we advise that any money you are paid in compensation for specific underpayments in one legal proceeding cannot be claimed again in another legal proceeding. This basically means that you cannot 'double dip' on compensation for the same claim.
- 1.5 For example, imagine that you receive \$600 as compensation for unpaid meal allowances as a part of the class action. Later, the Court in the FWO Proceeding decides that you were underpaid by \$500 – not \$600 – for meal allowances. If that were to happen, Coles would not have to pay you an additional \$500 for unpaid meal allowances, but you would not have to pay back Coles the extra \$100 you received from the class action.

2. Coles Class Action

- 2.1 The class action was scheduled for a case management hearing on 7 December 2021. A case management hearing is when the parties can ask the judge to make orders that move the class action forward.
- 2.2 The Applicant and Coles agreed on what those orders should be before the hearing and the judge made those orders 'in chambers', which means the orders were made without a hearing.
- 2.3 The orders allow us to amend the statement of claim to allege additional underpayment claims, including:
 - (a) unpaid meal allowances;
 - (b) unpaid penalty rates where there was a short break between shifts; and
 - (c) more penalties payable to group members for Coles' alleged failure to accurately record overtime hours.
- 2.4 The orders also allow us to ask the judge (at a later date) to appoint a 'referee', which is essentially a qualified third party, to help work out how much compensation each group member should get based on their individual claim and hours worked.
- 2.5 Finally, the orders direct us and Coles to prepare for a trial by identifying the questions we would like the judge to answer. A trial may not happen until 2023, but there is still plenty of work to do in 2022.

3. Next Steps

- 3.1 Adero Law is committed to getting every group member fair compensation for every hour they worked. We have several plans to help us achieve this goal in the Coles Class Action and beyond, and we are grateful for your continued support and patience.
- 3.2 We will have more information for you in the new year, so keep an eye on our [website](#) for further updates.
- 3.3 If you have any questions, please email us at coles@aderolaw.com.au and let us know how we can help. Please be aware that our office is closed from 17 December 2021 to 16 January 2022.
- 3.4 We wish you a safe and happy holiday season.

Signed

The Coles Class Action Team



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