NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 1/04/2022 4:03:24 PM 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:	Reply - Form 34 - Rule 16.33
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

Dated: 6/04/2022 9:49:02 AM AEST 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.

Form 34
Rule 16.33

Amended Reply

No. NSD542 of 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

1. In reply to paragraphs 4(2)(b) and (c) and (3), 14(4), 17(4), 20(3), 23(3), 26(3), ~~and~~ 29(4), 32A(5), 32D(4), 32H(1)(d), 32.JC(3)(a)(ii) and (b)(ii), 32K(3), and 35(3)(b) of the Defence filed ~~7 October 2020~~25 March 2022, the Applicant:

   (1) says that ~~at all material times~~ clause 2.2 of the Award[1]:

      (a) at all material times was not a term permitted or required by, and therefore contravened, s 136 of the ~~*Fair Work Act 2009* (Cth) (~~**FW Act**~~)~~ and by virtue of s 137 of the FW Act had no effect~~.~~; or

      (b) in the alternative to paragraph 1(1)(a) above, from 1 July 2014 had no effect;

   (2) says further that:

      (a) to the extent that clause 2.2 of the Award and the terms of the Contract are inconsistent with the Payment Term at paragraph 32K of the 3FASOC or s 323 of the FW Act, they have no effect; and

[1] The Applicant adopts the terms defined in her 3FASOC and Respondent's Defence.

Filed on behalf of (name & role of party) Maria Pabalan, Applicant
Prepared by (name of person/lawyer) Rory Markham
Law firm (if applicable) Adero Law
Tel (02) ~~6152 9185~~ 6189 1022 Fax
Email rory.markham@aderolaw.com.au
Address for service ~~5 Torrens Street~~ 3 Hobart Place
(include state and postcode) ~~Braddon ACT 2612~~ City ACT 2601

(b) to the extent that any payment of the cash salary component of her TFC in any month exceeded the minimum Award entitlements which were payable in that month, denies that the Respondent was permitted to set off that excess amount against any shortfall of the minimum Award entitlement in any other month; and

(3) In the alternative to paragraph 1(2)(b) above, to the extent that any payment of the cash salary component of her TFC in any month exceeded the minimum Award entitlements which were payable in that month, denies that the Respondent was permitted to set off that excess amount against any shortfall of the minimum Award entitlement in a previous month.

~~**Particulars**~~

~~Clause 2.2 of the Award contravened s 136 of the FW Act because it was not permitted or required by any of the provisions of the FW Act referred to in s 136(1)(a) – (d).~~

2. In reply to paragraph 9(2), the Applicant:

(1) denies subparagraph (a); and

(2) says in respect of subparagraph (b) that, by operation of 1(2)(d) of the 3FASOC and s 57 of the FW Act, the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011* and the *Coles Supermarkets Enterprise Agreement 2017* did not apply to any person who is a Group Member.

3. In reply to paragraph 10, the Applicant denies subparagraph (1) and says that the Schedule Data do not include every hour that she was rostered to work for the period prior to 4 July 2016.

4. In reply to paragraph 12, the Applicant says that the hours she worked were necessary for her to complete the full and proper performance of the duties that the Respondent required her to complete.

5. In reply to paragraph 26(1)(b), the Applicant says that:

(1) the Public Holiday Work Term/Loading at paragraph 26 of the 3FASOC applied when:

(a) no agreement was reached between her and the Respondent on the method of compensation; or

Award cl. 29.4(f)(iv)

(b) time of was not taken within four weeks of the public holiday occurring; and

Award cl. 29.4(f)(ii)(A)

(2) the Respondent bears the onus of proving in each instance that such an agreement was reached freely, expressly, and with a clear understanding by the Applicant that the agreement would reduce her minimum Award entitlements.

6. In reply to paragraph 32A, the Applicant:

(1) denies subparagraph (2), and says that the proper construction of "double the rate" at clause 31.2(b) of the Award is to:

(a) double the rate she was entitled to under the Award for each hour worked, inclusive of penalties and overtime; or

(b) in the alternative to paragraph 6(1)(a) above, double the minimum hourly rate she was entitled to under the Award, in addition to penalties and overtime;

(2) denies subparagraph (3), and says that:

(a) an agreement pursuant to clause 31.2(c) of the Award cannot be evidenced by her accepting a roster prepared by the Respondent, submitting a roster to the Respondent, or working hours inconsistent with clause 31.2(a);

(b) the rosters she prepared for herself were subject to restrictions set by the Respondent with respect to the hours she could be rostered to work; and

(c) repeats paragraph 5(2) above;

(3) denies subparagraph (4), and says that the obligation of the Respondent to make payments under clause 31.2(b) of the Award arose when an agreement between the employee and employer under clause 31.2(c) of the Award was:

(a) reached and the break between shifts was less than the number of hours agreed or less than 10 hours; or

(b) not reached and the break between shifts was less than 12 hours; and

(4) says further that the obligation of the Respondent to make payments for the minimum Award entitlements applicable to each hour worked arose:

(a) when an employee worked hours necessary for them to complete the full and proper performance of the duties that the Respondent required them to complete, regardless of whether that employee was expressly directed to work:

(i) the hours that they worked; or

(ii) in a manner enlivening an entitlement within, or inconsistent with a proscription of, a clause of the Award; or

(b) in the alternative to paragraph 6(4)(a) above, when an employee worked hours necessary for them to complete the full and proper performance of the duties that the Respondent required them to complete, with such a requirement being an implied direction by the Respondent to work the hours that they worked.

7. In reply to paragraph 32D, the Applicant:

(1) denies subparagraph (2), and repeats paragraph 6(4) above; and

(2) denies subparagraph (3), repeats paragraph 6(2)(b) above, and says that the proper construction of her "ordinary time of ending work" each shift under clause 20.1(a) of the Award was the rostered finish time of that shift.

8. In reply to paragraph 32.JB(2)(a), the Applicant:

(1) admits that the Respondent deducted amounts from her pay for the cost of certain clothing items she ordered through the Respondent's intranet;

(2) denies that the clothes she purchased were "discretionary items"; and

(3) says that the clothes she purchased were necessary items.

9. In reply to paragraph 32.JC, the Applicant denies subparagraph (3)(b)(i).

10. In reply to paragraph 32.JD, the Applicant denies subparagraph (2).

11. In reply to paragraph 32K, the Applicant denies subparagraph (2) and says further that, the Respondent was required by section 323 of the FW Act and the Contract, to pay her in each pay period the greater of either the cash salary component of her TFC applicable to that pay period or the minimum Award entitlements applicable to the hours she worked during that pay period.

12. In reply to paragraph 33, the Applicant denies subparagraphs (2)-(4) and says further that the payment of an "all-inclusive salary" did not excuse the Respondent's obligation to record her overtime hours on a proper construction of reg 3.34 of the *Fair Work Regulations 2009* (Cth).

13. In reply to paragraph 34, the Applicant:

    (1) denies subparagraph (1);

    (2) in respect of subparagraph (2)(a), repeats paragraph 3 above; and

    (3) in respect of subparagraph 2(b), says that the Kronos Data do not include every overtime hour that she worked.

14. In reply to paragraph 34C(2), the Applicant:

    (1) admits that she received the unique code to record her hours worked in the Kronos system before November 2017; and

    (2) says that she received the unique code shortly prior to the first time she recorded her hours worked in the Kronos system on 31 October 2017.

15. In reply to paragraph 35, the Applicant denies subparagraph (4).

16. In reply to paragraph 36, the Applicant denies subparagraphs (1) and (2).

17. In reply to paragraphs 39A-39C, the Applicant denies these paragraphs.

18. The Applicant admits paragraphs 4(2)(a), 4A(1)-(2) and (4)-(6), 5(1) and (2), 6(1), 14(2) and (3), 17(2) and (3), 20(2), 23(2), 26(2), 29(2) and (3), 32.JC(1), 32.JD(1), 32K(1), 34E(1), and 35C(1) and (2).

19. Save for the admissions made by the Respondent in the Defence and by the Applicant in this Amended Reply, the Applicant joins issue with the allegations in the Defence.

Date: 1 April 2022

Signed by Rory Markham
Lawyer for the Applicant

Certificate of lawyer

I, Rory Markham, certify to the Court that, in relation to the reply filed on behalf of the Applicant, 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: 1 April 2022

Signed by Rory Markham
Lawyer for the Applicant