



HIGH COURT OF AUSTRALIA

6 December 2017

ALDI FOODS PTY LTD v SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION
& ANOR
[2017] HCA 53

Today the High Court unanimously allowed, in part, an appeal from the Full Court of the Federal Court of Australia. The High Court held that the Full Court erred in holding that the Fair Work Commission ("the Commission") cannot approve an enterprise agreement under s 186(2)(a) of the *Fair Work Act 2009* (Cth) ("the Act") for a new enterprise where the agreement is made with existing employees of an employer who have agreed, but have not yet started, to work as employees in the new enterprise. The High Court further held, however, that the Full Court was correct to hold that the Commission fell into jurisdictional error in being satisfied that the enterprise agreement in this case passed the "better off overall test" ("the BOOT") for the purposes of s 186(2)(d) of the Act.

In early 2015, ALDI Foods Pty Ltd ("ALDI") was in the process of establishing a new undertaking in Regency Park in South Australia. It sought from its existing employees in its stores in other regions expressions of interest to work in the Regency Park region. Seventeen employees subsequently accepted offers of employment in the new undertaking. ALDI then commenced a process of bargaining with those employees, without the involvement of any union. That process culminated in the making, under s 172(2)(a) of the Act, of the ALDI Regency Park Agreement ("the Agreement"), in favour of which 15 employees voted. At the time the vote was conducted, the Distribution Centre at Regency Park was still under construction, and trading in the region had not commenced. ALDI applied to the Commission for approval of the Agreement, and the Agreement was approved.

Both the Shop, Distributive & Allied Employees Association ("the SDA") and the Transport Workers' Union of Australia filed notices of appeal to the Full Bench of the Commission, contending that the Agreement should have been made as a "greenfields agreement" under s 172(2)(b) of the Act, because ALDI was establishing a new enterprise and had not employed in that new enterprise any of the persons who would be necessary for the normal conduct of that enterprise. It was also argued that the Agreement did not pass the BOOT. The Full Bench rejected both contentions, and dismissed the appeal. The SDA applied to the Full Court for judicial review. Granting the relief sought, the Full Court held by majority, first, that it was not open for the Commission to be satisfied that the Agreement had been genuinely agreed to by the employees "covered by" the agreement in accordance with s 186(2)(a) of the Act, as no employee could be covered until the Agreement came into operation, and second, that the Commission had erred in considering whether the employees were "no worse off", rather than applying the BOOT. By grant of special leave, ALDI appealed to the High Court.

The High Court held that the Full Court's reasoning on the coverage issue could not accommodate the distinction expressly drawn by ss 52 and 53 of the Act between coverage and application, and could not stand with the plain and ordinary meaning of s 172(2) and (4), which contemplate the making of non-greenfields agreements with persons already employed. It was held that, once the Agreement was made, the employees were accurately described as being covered by it, even though it did not yet apply to them in the sense of being in operation so as to create rights and liabilities in relation to work actually performed under it. On the BOOT issue, the High Court upheld the Full Court's conclusion, holding that the Full Bench did not engage in any comparison between the Agreement and the modern award, but rather treated a clause in the Agreement granting employees a right to payment of any shortfall in what they would be entitled to under the modern award as showing that the Agreement

passed the BOOT. The High Court accordingly allowed the appeal in part, and issued a writ of mandamus requiring the Full Bench to determine the appeal against the Commission's decision according to law.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*